SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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XIAOFENG TU, Index No.: 656368/2018

Plaintiff, **DECISION & ORDER**

-against-

CARILLON TOWER/CHICAGO, LP,

Defendant.

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JENNIFER G. SCHECTER, J.:

Plaintiff Xiaofeng Tu moves for summary judgment in lieu of complaint against defendant Carillon Tower/Chicago, LP (the Partnership). The Partnership opposes the motion. For the reasons that follow, the motion is granted.

CPLR 3213 permits a party to commence an action by motion for summary judgment in lieu of complaint when the action is "based upon an instrument for the payment of money only" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 491 [2015]). A contract that provides for payment of a sum certain upon occurrence of easily verifiable events "is deemed an instrument for the payment of money only" (*Bankers Tr. Co. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 261 AD2d 286 [1st Dept 1999]; *see Torres & Leonard, P.C. v Select Professional Realties*, 118 AD2d 467, 468 [1st Dept 1986] ["The application of the statute is not affected by the circumstance that the instrument in question was part of a larger transaction, such as the sale of business, as long as the instrument ***requires the defendant to make certain payments and nothing else***"] [emphasis added]). "To establish prima

facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of an [agreement] executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the [agreement's] terms" (*Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). "Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*id.*).

The material facts are not in dispute. In September 2015, plaintiff, a Chinese national and Canadian resident, invested $550,050 in the Partnership. Plaintiff's investment qualified as an "EB-5 investment" and, accordingly, plaintiff filed an immigration petition (Dkt. 6 [the Petition]) with the U.S. Citizenship and Immigration Services (USCIS). In early 2018, plaintiff requested that his investment in the Partnership be refunded. The parties reached an agreement that they memorialized in the Settlement Agreement and Release dated September 23, 2018 (Dkt. 4 [the Agreement]). Paragraph one of the Agreement sets forth that within 10 days of plaintiff providing the Partnership with proof that he withdrew the Petition, the Partnership was to pay him $590,000 (*see id.* at 2). Paragraph two requires plaintiff to withdraw the petition by email and Federal Express to USCIS (*see id.* at 3). Paragraph 17 provides that notice to the Partnership must be made either by hand delivery, registered or certified mail, or overnight express courier, to: (1) the Partnership's Manhattan office and (2) the Partnership's attorney (*see id.* at 6-7).

Plaintiff properly withdrew the Petition, in accordance with paragraph two, by email and Federal Express (*see* Dkts. 8, 9, 10, 33). But he only provided proof by email to the Partnership's attorney (*see* Dkt. 11 at 2-3). He never provided proof in the manner set forth in paragraph 17, nor did he provide proof directly to the Partnership. This failure is the sole substantive basis on which the Partnership opposes the motion.*

The Partnership does not deny that it was aware of the notice provided to its attorney, nor does it articulate any prejudice from only having received notice through its attorney (especially since paragraph 17 requires that the attorney was to be served). Consequently, plaintiff's failure to strictly comply with the Agreement's notice requirements is not a basis to deny summary judgment in lieu of complaint (*Mlcoch v Smith*, 173 AD2d 443, 445 [2d Dept 1991]; *see Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [1st Dept 2006] ["strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation"]). Because notice was first provided to the Partnership's attorney on October 9, 2018, pre-judgment interest accrues

* The Partnership's argument that the Agreement cannot be enforced under CPLR 3213 is based on a somewhat misleading citation to a trial court case (*see* Dkt. 26 at 3-4) that was overturned by the Appellate Division, which granted summary judgment after converting the case to a plenary action (*see JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 421 [1st Dept 2018]). Regardless, the relevant inquiry is whether the Agreement sets forth a sum certain to be paid by defendant upon a clear condition whose occurrence, as here, is easily verifiable (*Bankers Tr.*, 261 AD2d at 286; *see First Interstate Credit All., Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992] ["The existence of various clauses contained in a contractual agreement in addition to the unconditional promise to pay money does not necessarily disqualify the agreement as an instrument for the payment of money only"]).

from October 19, 2018 (10 days afterward when payment was required by paragraph one).

Accordingly, it is ORDERED that plaintiff's motion for summary judgment in lieu of complaint against the Partnership is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against the Partnership in the amount of $590,000, plus 9% pre-judgment interest from October 19, 2018 to the date judgment is entered.

Dated: May 1, 2019

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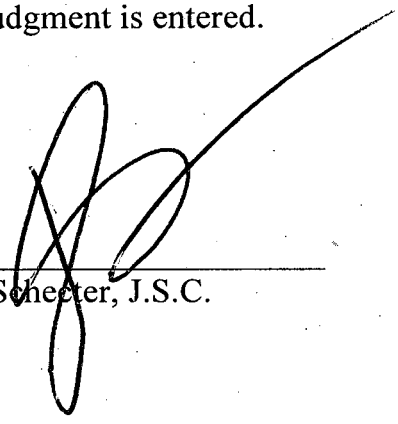

Jennifer G. Schecter, J.S.C.