

Groman v Fleishmakher
2019 NY Slip Op 31689(U)
May 13, 2019
Supreme Court, Kings County
Docket Number: 523164/18
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----x
ELLIOT GROMAN AND POLINA GROMAN,

Plaintiff,

Decision and order

- against -

Index No. 523164/18

ALEX FLEYSHMAKHER,

Defendant,

May 13, 2019

-----x
PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The defendant executed two promissory notes to the plaintiff totaling \$1,425,000, one on January 13, 2014 and another on January 1, 2015. The maturity dates for the notes were January 1, 2016 and January 1, 2017 respectively. The plaintiffs allege the defendant failed to repay any of the amounts due and thus with interest the current amount due is approximately \$1,905,000. The plaintiffs have sued and have filed the instant motion seeking summary judgement arguing there are no questions of fact the defendant owes the money to plaintiffs. The defendant counters the notes are ambiguous since the terms of each note are contradictory. Moreover, the defendant asserts these two notes have been extinguished by a

third note executed by the defendant, thus, these notes are no longer outstanding.

Conclusions of Law

It is well settled that in order to be entitled to judgement as a matter of law pursuant to CPLR §3213 the movant must demonstrate that the other party executed an instrument that contains an unequivocal and unconditional promise to repay the party upon demand or at a definite time and the party failed to pay according to the terms of the instrument (Mirham v. Awad, 131 AD3d 1211, 17 NYS3d 473 [2d Dept., 2015]). A promissory note is an instrument for the payment of money only and when sufficient evidence is presented concerning the circumstances upon which it was given then a §3213 motion is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). Thus, the movant must establish the instrument is "facially incontestable" (J. Juhn Associates, Inc., v. 3625 Oxford Avenue Associates L.P., 8 Misc3d 1009(A), 801 NYS2d 778 [Supreme Court Nassau County 2005]). Therefore, where a defendant can raise questions of fact the notes were not instruments for the payment of money only then summary judgement must be denied (Farca v. Farca, 216 AD2d 520, 628 NYS2d 782 [2d Dept., 1995]).

In this case the defendant has not presented any evidence raising questions of fact whether the promissory notes were for the payment of money only. Specifically, there is no evidence presented the second note was intended to replace the first note. The defendant argues the second note was really a loan of an extra \$100,000 not an extra \$775,000. However, the face of the note does not support that contention. The note dated January 1, 2015 states that the defendant promises to pay a principal amount of \$775,000 "from the date hereof" (see, Promissory Note dated January 1, 2015). There is no evidence at all to support the argument this note was meant to incorporate an earlier note and that the plain language of the note should not be followed. Similarly, there is no evidence supporting the argument that a subsequent note executed on December 31, 2017 incorporated and consolidated the two notes that is the subject of this lawsuit. Without evidence the notes were consolidated no such legal consolidation can be said to exist creating any question of fact (Wells Fargo Bank N.A. v. Lawson Ho-Shing, 168 AD3d 126, 92 NYS3d 194 [1st Dept., 2019]).

Uniform Commercial Code §3-118(c) states that regarding every instrument "words control figures except that if the words are ambiguous figures control" (id). In this case the

words of the notes differ from the numerical amounts of both notes and thus the words should govern. The plaintiff asserts the defendant admitted the amount of the notes when he submitted an affidavit wherein he stated that "in 2014, I borrowed from Mr. Groman approximately six hundred thousand dollars" and that such loan "was memorialized in the January 13, 2014 Promissory Note" (see, Affidavit of Alex Fleyshmakher, ¶8). However, that cannot serve as some sort of an admission that the true amount borrowed was \$650,000 because the words of the Note say "five hundred and fifty thousand dollars" while the numerical amount states "\$650,000" both of which are equally approximate to the \$600,000 to which the defendant admitted. Concerning the second note the defendant never admitted he borrowed \$775,000, rather he admitted he borrowed an additional \$100,000 which brought his total to "approximately seven hundred thousand dollars" (*id* at ¶9). Therefore, the plaintiff has failed to present sufficient evidence that the court should not decide the discrepancy pursuant to the Uniform Commercial Code or that the discrepancy can be attributed to a scrivener's error. Further, the defendant has not presented any independent evidence that any payments were made pursuant to the notes.


Therefore, based on the foregoing the motion seeking summary judgement in lieu of a complaint is granted. The amount owed

shall be the amounts contained in the written words of both notes, namely \$400,000 and \$550,000 plus any interest owed.

So ordered.

ENTER:

DATED: May 13, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC