

Birnbach v DuMouchelle
2019 NY Slip Op 32013(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 651563/2019
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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JONATHAN BIRNBACH and J. B. INTERNATIONAL, LLC,
Plaintiffs,

INDEX NO. 651563/2019

- v -

MOTION DATE 03/15/2019

JOSEPH DUMOUCHELLE,

MOTION SEQ. NO. 001

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT

HON. BARRY R. OSTRAGER:

Plaintiffs J.B. International, LLC (“J.B.”) and its managing member, Jonathan Birnbach, seek recovery of \$3,279,785 (the “settlement amount”) from Defendant Joseph DuMouchelle for breach of a March 1, 2019 settlement agreement. (Jonathan Birnbach Aff. ¶¶ 1-2 [NYSCEF Doc. No. 3]). Plaintiffs filed a motion for summary judgment in lieu of complaint, supported by the affidavit of Jonathan Birnbach, which, for the reasons stated below, is granted.

Background

In the Fall of 2018, Plaintiffs acquired a fifty percent interest in a number of pieces of estate jewelry in DuMouchelle’s possession. Plaintiffs allege that DuMouchelle was required to sell the jewelry at auction and remit half of the proceeds to Plaintiffs. DuMouchelle allegedly sold the jewelry at auction but failed to remit half the proceeds to Plaintiffs. In February 2019, Plaintiffs demanded payment and threatened to take legal action. (Birnbach Aff. ¶ 8-11).

On March 1, 2019, DuMouchelle purportedly proposed a payment schedule by which he would pay J.B. International, LLC the settlement amount in full in five equal installments through its principal, Jonathan Birnbach. (Birnbach Aff. ¶¶ 9, 12). The payment schedule was memorialized in a settlement agreement between the parties whereby DuMouchelle would pay Birnbach five weekly installment payments of \$657,957 commencing on March 8, 2019 and ending on April 5, 2019. (See Ex. 1 to Birnbach Aff, NYSCEF Doc. 4). The settlement agreement provides that DuMouchelle’s failure to make any of the five payments on the date and time required is a material breach entitling Plaintiffs to accelerate all unpaid installments and seek immediate recovery of the entire balance due. (Birnbach Aff. ¶ 14). Plaintiffs contend that the settlement agreement is an instrument for the payment of money only and accordingly initiated this action on March 15, 2019 by motion for summary judgment in lieu of complaint pursuant to CPLR § 3213.

DuMouchelle was served personally at the process server’s place of business in Michigan on March 26, 2019 (NYSCEF Doc. No. 8), followed by mailings to DuMouchelle’s places of business in New York and Michigan, as well as an alternate residential address in Florida (NYSCEF Doc. Nos. 9, 14). The notice of motion provided for a return date of May 21, 2019 and required answering papers ten days prior, on May 11, 2019. (Supp. Aff. of Jeffrey Mitchell ¶ 3 [NYSCEF Doc. No. 12]). Plaintiffs’ attorney represents that DuMouchelle never served or filed any papers in response. *Id.*

Plaintiffs also allege that this Court has jurisdiction over DuMouchelle, in that he is doing business in the State of New York and transacted business with Plaintiffs within the State of New York out of which Plaintiffs’ cause of action arises. (Birnbach Aff. ¶ 6).

Discussion

When a defendant fails to appear—as is the case here—the defendant is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.” *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). Therefore, Plaintiffs

assert that the Court has jurisdiction pursuant to CPLR § 302(a)(1), which allows a court to “exercise personal jurisdiction over any non-domiciliary . . . who transacts any business within the state.” Specifically, Plaintiffs allege in the Complaint (at ¶¶ 5-6) that: “At all times relevant hereto DuMouchelle has had a New York place of business located at 580 Fifth Avenue, Suite 333, New York, New York” for the business of buying, selling and appraising jewelry, and that DuMouchelle transacted business with plaintiffs, who are in the business of cutting diamonds and creating fine handmade jewelry and whose offices are located at 576 Fifth Avenue in New York City. The transaction at issue in this case arose from that business. Therefore, Plaintiffs have established a basis for jurisdiction under CPLR § 302(a)(1).

Moreover, “there is no procedural requirement under CPLR § 3213 that the plaintiff affirmatively plead and prove facts sufficient to establish long-arm jurisdiction over an out-of-state defendant.” *Candle Co. v. Ayala*, 47 A.D.3d 919, 920 (2d Dep’t 2008), citing CLPR § 302. “Rather, lack of long-arm jurisdiction must be raised by the defendant in opposition to the motion.” *Id.*, citing *Buckeye Retirement Co. v. Lee*, 41 A.D.3d 183 (1st Dep’t 2007). Thus, Plaintiff’s uncontested jurisdictional allegations—taken as true for purposes of this motion—are sufficient for the Court to find jurisdiction and proceed to consider Plaintiff’s motion for summary judgment in lieu of complaint on the merits.

The purpose of CPLR § 3213 is “to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless.” *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443 (1996). CPLR § 3213 provides in pertinent part:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment, and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service.

The defendant must answer as provided by Rule 320(a), which affords the defendant twenty days after service of the summons, subject to several exceptions. *See* CPLR § 3213. Notably, if defendant is served without the state having jurisdiction pursuant to CPLR § 313, the time required to make an appearance extends to thirty days.

Here, service was properly completed under CPLR § 313 on March 26, and DuMouchelle was given an appropriate amount of time to answer Plaintiff's motion. The notice provided for a return date of May 21, 2019—well in excess of the required thirty days—and DuMouchelle never served or filed any papers in response, despite having personally appeared before the process server on March 26, 2019 in Michigan to receive the case initiating papers. In light of Plaintiffs' adherence to the procedural requirements of § 3213 and DuMouchelle's subsequent default, the Court may proceed to determine the merits of Plaintiffs' motion.

To prevail on the merits of a motion for summary judgement in lieu of a complaint, Plaintiffs must provide proof of an instrument for the payment of money only and the Defendant's failure to pay. *Weissman*, 88 N.Y.2d at 444. If extrinsic proof is needed, other than proof of nonpayment, the instrument does not qualify as one for the payment of money only. *Id.* “[I]f a prima facie case would be made out by the instrument and a failure to make the payments . . . the moving party would be entitled to summary judgment unless the other party came forward with evidentiary proof sufficient to raise an issue as to the defenses to the instrument.” *Interman Indus. Prod., Ltd. v. R.S.M. Electron Power, Inc.*, 37 N.Y.2d 151, 155 (1975). Thus, the burden is on the defendant to adduce additional evidence or affirmative defenses that raise factual issues to be resolved at trial. *Allied Irish Banks PLC v. Young Men's Christian Ass'n of Greenwich*, 36 Misc. 3d 216, 222 (Sup. Ct. NY Co. 2012).

In *JD Structures v. Waldbaum*, the court held that a nearly identical settlement agreement to the agreement at issue in this case was a valid instrument for the purposes of CPLR § 3213. 282 A.D.2d 434, 436 (2d Dep't, 2001). There, the settlement agreement called for weekly payments on a

specific debt of \$280,918 and contained an acceleration clause that would be triggered in the event of default. *Id.* at 435. The court found in favor of appellants based on proof—such as a principal’s affidavit—of the indebted party’s failure to make payments pursuant to the terms of the settlement agreement. *Id.*

Here, the March 1, 2019 settlement agreement is virtually identical. It contains the exact sum owed, a weekly payment schedule, and an acceleration clause triggered in the event of default. The basis for the obligation to pay is set forth in the February 26, 2019 letter, incorporated into the agreement by reference (NYSCEF Doc. No. 15). Plaintiffs asserts that DuMouchelle failed to pay the first installment due on March 8, 2019 and therefore the entire payment is now due and owing. (Birnbach Aff. ¶ 14). Plaintiffs have thus established a prima facie entitlement to payment under the settlement agreement. As DuMouchelle did not file opposition to the motion, there is no issue of fact as to nonpayment that necessitates discovery. Plaintiffs have also established their right to attorneys’ fees pursuant to ¶4 of the settlement agreement, which provides that: “In the event of a breach of the foregoing, you also agree to pay all of our clients’ reasonable costs and attorneys’ fees.”

Accordingly, it is hereby

ORDERED that the plaintiffs’ motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of Jonathan Birnbach and J. B. International, LLC jointly, and severally, and against defendant Joseph DuMouchelle in the amount of \$3,279,785.00, together with interest at the rate of 9% per annum from the date of March 8, 2019, when Defendant breached the settlement agreement, through the date of entry of judgment and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. Upon Plaintiffs’ filing of a letter agreeing to accept \$2,500 in reasonable attorneys’ fees, the Clerk shall add such amount to the

total judgment. If Plaintiffs do not agree to accept \$2,500 in attorneys' fees, they shall file and fax a letter to the Court requesting an inquest to determine the amount of reasonable attorneys' fees.

7/8/2019
DATE

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE