

Spivakov v Levitas
2019 NY Slip Op 33035(U)
October 9, 2019
Supreme Court, New York County
Docket Number: 654446/2016
Judge: Anthony Cannataro
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

-----X

IGOR SPIVAKOV

Plaintiff,

- v -

YURI LEVITAS,

Defendant.

-----X

INDEX NO. 654446/2016

MOTION DATE 07/10/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this action to enforce terms of a promissory note, plaintiff, Igor Spivakov, moves, pursuant to CPLR 3212, for summary judgment dismissing defendant's defenses and awarding plaintiff a money judgment of \$100,000 with interest; and for such other and further relief as is just and proper.

Plaintiff and defendant, Yuri Levitas, are former friends who became co-investors in a foreign business venture that sold fashion items in Russia. Their principal contact in the venture was Maksim Lyudinovskiy. In October 2014, Maksim issued a capital call in order to expand operations, which required plaintiff and defendant to each make additional investments of approximately \$150,000. At that time, defendant did not have sufficient liquid assets to fully satisfy the capital call. Not wanting to lose the investment, he asked plaintiff for a loan in the amount of \$100,000.

Plaintiff agreed to loan defendant the money, conditioned upon defendant's execution of a promissory note. The promissory note was created on December 18, 2014 and provided that defendant must pay the principal sum of \$100,000 by December 1, 2015 in the form of a personal check payable to plaintiff. Failure to pay by that

date would result in default on behalf of the defendant. The promissory note further provided that in the event of a default, defendant would be required to pay all costs and expenses that plaintiff may incur by reason of any default.

Plaintiff alleges that, at the request of the defendant, he made the loan in two payments. The first payment was made directly to defendant by check, dated December 18, 2014, in the amount of \$56,700. The check was deposited into defendants account when plaintiff received the promissory note on December 19, 2014. The second payment was made by wire transfer directly to Maksim's company in the amount of \$43,300.

Thereafter, in 2016, Maksim ceased operations and returned to the investors, including plaintiff and defendant, a very small portion of what they had invested. From 2014 to 2016, Maksim made four payments to plaintiff by wire transfer. The first payment, which occurred prior to the signing of the promissory note, was wired to plaintiff on September 11, 2014 from Maksim in the amount of \$14,453. Three more payments were wired from Maksim in 2016 on April 8th, April 21st, and April 26th totaling \$30,190.42. Plaintiff also received two payments from Elena Koyranskaya, Maksim's wife, totaling \$9,739.64. When defendant first learned that plaintiff intended to collect on the promissory note, he claims to have contacted Maksim who confirmed in a letter written on August 27, 2016 that he "...completely paid off this money..."

Plaintiff argues he is entitled to summary judgment on his breach of promissory note cause of action because defendant defaulted on his obligations under the note, and therefore, under the express terms of the note, is required to pay the entire principal amount due plus prejudgment interest and all costs and expenses incurred by plaintiff in collecting this amount. Further, plaintiff claims that the three payments he received from Maksim in April 2016 represent an incomplete return of the capital that he invested in the venture and are not related to the promissory note.

Defendant opposes the motion on the basis that plaintiff has failed to make a *prima facie* showing required for summary judgment and, as such, his causes of action should be dismissed. Defendant denies that he is in breach and contends that plaintiff was fully repaid by Maksim. Defendant further claims that the promissory note was not made with the intention to obligate him personally to repay the investment but rather for the purpose of documenting his additional investment which would ultimately be repaid by the company in the form of dividends or other returns. In addition, he argues that the promissory note lacked consideration and that he was fraudulently induced into signing it.

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

The court in *Gateway State Bank v Shangri-La Private Club for Women, Inc.* (113 AD 2d 791, 493 [2d Dept 1985]) held that, in an action to recover upon a promissory note for the payment of money, plaintiff establishes a *prima facie* case by submitting proof of the note and defendant’s failure to make payments called for by its terms. Further, courts have repeatedly held that the party opposing the motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of

material questions of fact on which it rests its claim or demonstrate an acceptable excuse for its failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (*Zuckerman v New York*, 49 NY2d 557, 557 [1980] citing *Alvord v Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]; *Fired v Bower & Hardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Constr. Corp v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973].)

It is undisputed that defendant signed a promissory note which set forth terms requiring the repayment of the \$100,000 loan by December 1, 2015 in the form of a personal check to plaintiff. Further, defendant has failed to produce evidence in admissible form to show that he made any payments to plaintiff. Defendant claims that Maksim repaid plaintiff in full, however, that is not the payment method that was dictated in the terms of the promissory note. Furthermore, to support summary judgment, affidavits must cite material facts from affiants having knowledge; however, if that knowledge is based on unidentified and unproduced work records, the affidavit lacks any probative value and fails to fulfill such requirement (*Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 479 [1st Dept 1987] citing *Republic Natl. Bank v Luis Winston, Inc.*, 107 AD2d 581 [1st Dept 1985].) Here, defendant is solely relying on Maksim's letter which is not in proper evidentiary and therefore lacks probative value as the original is hearsay-laden and not even notarized.

The motion for summary judgment in lieu of the complaint made in 2016 was previously denied because no discovery had taken place. However, now, almost two years of discovery has taken place and defendant has been unable to produce any admissible evidence to support the unsubstantiated claim. Further, defendant offers no excuse for his failure to meet the requirement to tender proof in admissible form. He claims that more discovery is needed, and that plaintiff's testimony will shed light

on disputed payments sent from Maksim to plaintiff and the purpose of the promissory note. However, this is insufficient. The promissory note required defendant to tender payment in the form of a personal check to plaintiff. Here, there is no proof, that the payments from Maksim were on behalf of defendant and to the contrary, all evidence suggests otherwise.

The four payments sent by Maksim to plaintiff from September 2014 to April 2016 are consistent with defendant's statements in his affidavit that return on investments were expected from Maksim. The return on investment payments from Maksim start on September 11, 2014, almost three months before defendant signed the promissory note, and continue until April 26, 2016.

Defendant also claims that the motion should be denied because there was no consideration given to him in exchange for the promissory note. However, defendant states in his affidavit that plaintiff gave him \$100,000 to advance his investment. Therefore, adequate consideration was given.

Further, defendant claims that he was fraudulently induced into signing the promissory note. In order to sustain a claim for fraud, there must be a knowing misrepresentation of material fact, which was intended to deceive another party and induce them to act upon it (*Sokolow, Dunaud, Mercadier & Carrera, LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Here, the promissory note is clear and unambiguous as to the repayment of the loan.

Lastly, defendant argues that in a conversation prior to the signing of the promissory note, plaintiff stated that he would not seek to collect any funds from defendant. However, it is well settled that, extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face (*Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 279 [1969]).

Defendant has not met his burden of demonstrating the existence of any triable issues of fact with respect to his defense that the loan specified in the promissory note was repaid. Therefore, pursuant to the default section of the promissory note, defendant is required to pay all costs and expenses that plaintiff may have incurred as a result of defendant's default. Therefore, plaintiff is entitled to recover reasonable attorney's fees and a hearing is necessary to determine the amount plaintiff is entitled to recover.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment dismissing defendant's defenses and awarding plaintiff a money judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$100,000, together with interest at the rate of 9% per annum from the date of January 1, 2016 until the date of the decision on this motion, 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; and it is further

ORDERED that a Referee shall be designated to hear and determine the issue of attorneys' fees; and it is further

ORDERED that the above issues are hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

10/9/2019

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

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DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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ANTHONY CANNATARO, J.S.C.

NON-FINAL DISPOSITION

☐ GRANTED IN PART

☐

OTHER

☐ SUBMIT ORDER

☐ FIDUCIARY APPOINTMENT

☐

REFERENCE