

Pension Invs. 99, LLC v Broad St. Plaza Assoc. LLC

2019 NY Slip Op 33673(U)

December 12, 2019

Supreme Court, New York County

Docket Number: 654830/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART I AS MOTION 3EFM

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PENSION INVESTORS 99, LLC

INDEX NO. 654830/2019

Plaintiff,

MOTION DATE 10/04/2019

- v -

MOTION SEQ. NO. 001

BROAD STREET PLAZA ASSOCIATES LLC,

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17
were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Pension Investors 99, LLC (“Plaintiff”) seeks an award of Summary Judgment in Lieu of a Complaint under CPLR 3213, based on two Promissory Notes entered with Defendant Broad Street Plaza Associate LLC (“Defendant”). Plaintiff filed the instant motion on August 22, 2019. Defendant has not opposed the motion. For the following reasons, Plaintiff’s motion is Granted.

CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” This provision “was enacted 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.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 491-92 (2015) (internal quotation marks and citation omitted). “To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must

show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms." *Zyskind v. FaceCake Mktg. Techs., Inc.*, 101 A.D.3d 550, 551 (1st Dep't 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.*; see *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 137 (1st Dep't 1968).

Here, there is no question that this action is based on an instrument for the payment of money only. *LaBoeuf v. Saide*, 134 A.D.3d 515, 516 (1st Dep't 2015) (granting summary judgment in lieu of complaint "as there is no basis to conclude that the promissory note was anything other than an instrument for the payment of money only"). On August 31, 1999, Defendant made two Promissory Notes – the "Pa. Promissory Note" and the "W. Va. Promissory Note" – payable to Plaintiff in the principal amounts of \$650,000 and \$50,000, respectively. Affidavit of Carl Christensen ("Christensen Aff."), ¶2 (NYSCEF Doc. No. 3). Both Promissory Notes provided that interest would accrue at the rate of 10.5% per annum compounded monthly until March 31, 2019 when "[t]he entire principal balance, together with all accrued and unpaid interest" was due and owing. *Id.*

Initially, Defendant failed to pay any portion of the principal or interest due on the Promissory Notes. *Id.*, ¶19. On May 8, 2019, Plaintiff sent a Notice of Default to Defendant, "demand[ing] payment of all amounts due on the Promissory Notes," and stating that failure "to pay such amounts within thirty days following receipt of this Notice of Default will constitute an Event of Default under the Promissory Notes." *Id.*, Ex. F (NYSCEF Doc. No. 9). In subsequent email correspondence, Defendant acknowledged that the Promissory Notes were due and owing,

but advised Plaintiff that it was working to raise money to pay off the Promissory Notes. *Id.*, ¶¶21-23; *id.*, Exs. G, H (NYSCEF Doc. Nos. 10-11).

Then on September 10, 2019 – about a month after Plaintiff filed the instant motion – Defendant paid Plaintiff \$410,000, which was confirmed as representing the full amount of principal and interest due on the W. Va. Promissory Note, plus a portion of the legal fees incurred in collecting on that Note. Affirmation of Jonathan K. Cooperman (“Cooperman Aff.”), ¶¶3-4 (NYSCEF Doc. No. 16). To date, however, Defendant has failed to pay the Pa. Promissory Note. *Id.*, ¶7. Consequently, Plaintiff now seeks to collect the full amount on the Pa. Promissory Note, which comprises: (1) the principal and accrued interest through March 31, 2019, which totals \$5,035,551.86; (2) additional interest, accruing at the contractually-defined default rate of interest, beginning on April 1, 2019, which equaled \$219,887.51 as of October 4, 2019, and continues to accrue; and (3) legal fees and costs incurred in collecting on the Pa. Promissory Note. *Id.*, ¶8.

These allegations establish a prima facie case for summary judgment in lieu of complaint. As noted above, Defendant has not submitted any opposition to the motion and thus have failed to suggest any material issues of fact that would preclude awarding summary judgment in favor of Plaintiff. Indeed, Defendant’s repeated acknowledgement of the debt it owes to Plaintiff, and its partial payment thereof, reinforce Plaintiff’s case. *Mitsubishi Trust & Banking Corp. v. Housing Servs. Assocs.*, 227 A.D.2d 305, 305 (1st Dep’t 1996) (plaintiff entitled to summary judgment in lieu of complaint because proof that notes were duly executed and defendant defaulted in its payment obligations was sufficient); *Tongkook America, Inc. v. Bates*, 295 A.D.2d 202 (1st Dep’t 2002) (defendants’ failed to raise a triable issue of fact to avoid summary

judgment in lieu of complaint where agreement was clear on its face that they owed sums certain to plaintiff, despite the defendants' obligations having been partially satisfied).

Therefore, Plaintiff's motion for Summary Judgment in Lieu of a Complaint is Granted. The matter will be referred to a Judicial Hearing Officer for a determination as to the amount of collection costs and fees.

Accordingly, it is:

ORDERED that Plaintiff's unopposed Motion for Summary Judgment in Lieu of Complaint is Granted; it is further

ORDERED that the Court clerk is directed to enter judgment against Defendant in the amount of \$5,255,439.37, together with pre-judgment interest at the contractual rate of 8.25% per annum from October 4, 2019; it is further

ORDERED Plaintiff's request for collection costs and fees is Granted and is referred to a JHO to hear and determine; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) 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 (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within five days and that counsel for Plaintiff shall, after thirty days from service

of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that Plaintiff shall serve this Order with Notice of Entry on Defendant within 5 days of the date of this Order.

This constitutes the Decision and Order of the Court.

12/12/2019
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE