

Navon v Zackson

2020 NY Slip Op 30036(U)

January 7, 2020

Supreme Court, New York County

Docket Number: 151062/2019

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

ELI NAVON,

Plaintiff,

- v -

BRAD ZACKSON,

Defendant.

-----X

INDEX NO. 151062/2019
MOTION DATE 08/06/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall answer or otherwise respond to the complaint within 20 days after service thereof; and it is further

ORDERED that counsel are directed to appear in IAS Part 59, Room 331, 60 Centre Street for a preliminary conference on April 21, 2020, 9:30 AM.

DECISION

Plaintiff Eli Navon (plaintiff) moves, pursuant to CPLR 3213, for summary judgment in lieu of a complaint in the amount of \$262,500, based on a promissory note he signed with defendant Brad Zackson (defendant) on March 1, 2017 (see NY St Cts Elec Filing [NYSCEF] Doc No. 4, exhibit 1, promissory note at 1).¹ The note recites that defendant, "for value received," promised to pay plaintiff "the principal sum of \$262,950.00, together with interest," on or before June 1, 2017. The note is signed by both parties. For the reasons set forth below, plaintiff's motion must be denied.

The note is signed by defendant as Manager of Dynamic-Hakim, LLC, Dynamic Worldwide Group LLC, a real estate agency, and by plaintiff as Payee (see NYSCEF Doc No. 4 at 2). It appears, from the contents of the exhibit itself, that the parties may have actually signed two notes with the same first page (the first page of the second document is not included as part of the exhibit); the presumed second page of the second note is signed by defendant in his individual capacity, and by plaintiff as Payee (see NYSCEF Doc No. 4). Both documents indicate that defendant "waives presentment, demand, protest and

¹The notice of motion seeks only \$262,500 with interest, without explanation (compare NYSCEF Doc No. 2, notice of motion ¶ 1, with Doc No. 4, promissory note at 1).

all other notices of any kind," that any litigation to enforce the action will be brought in New York, and that defendant "agrees that this Note shall be subject to enforcement under expedited summary judgment pursuant to Civil Practice Law & Rules (CPLR) § 3213."

Plaintiff's affidavit alleges that "[o]ver the course of several years," he lent defendant "a substantial amount of money cumulating in smaller increments" (NYSCEF Doc No. 3, plaintiff affidavit, ¶ 5). He avers that defendant often requested money, claiming desperate situations including being unable to pay his rent or buy food (see NYSCEF Doc No. 3, ¶ 5). Plaintiff "frequently wired funds to a New York account at JP Morgan Chase Bank" (NYSCEF Doc No. 3, ¶ 5). By early 2017, "the principal and interest on these loans accumulated to \$262,500, and was overdue despite repeated unfulfilled promises of payment" (NYSCEF Doc No. 3, ¶ 6). Finally, in response to defendant's request that he be given yet additional time to satisfy his debt, plaintiff agreed to an extension on the condition that defendant sign the March 1, 2017 promissory note (see NYSCEF Doc No. 3, ¶ 6). Plaintiff avers he has received no payment from defendant whatsoever (see NYSCEF Doc No. 3, ¶ 7).

Defendant denies that loans were made and asserts that plaintiff's claims are false, fail to show any consideration, and are not supported by documentary evidence (see NYSCEF Doc

No. 9, defendant affidavit in opposition, ¶¶ 3-4, 6). Defendant gives two explanations for the note's existence: first that plaintiff claimed, "that he was entitled to a real estate broker commission involving a property defendant was attempting to sell" in 2010, although plaintiff was not a licensed broker and his "work was incomplete" (see NYSCEF Doc No. 9, ¶¶ 5-6); and that defendant signed the March 2017 promissory note after plaintiff pleaded that "he needed it for his matrimonial proceedings, and it would never be regarded as real" (NYSCEF Doc No. 9, ¶ 7).

In reply, plaintiff attaches copies of emails he exchanged with defendant that show repeated requests throughout 2010 by defendant to plaintiff for various needed sums of money, and plaintiff's agreement to provide the monies, and then beginning in about 2011 and continuing into 2018, plaintiff's apparently ineffectual requests for repayment (see NYSCEF Doc No. 14, exhibit 1, emails). Plaintiff also attaches copies of undated wire transfers, all from a redacted account, payable to Judith Drenzner Zackson through JPMorgan Chase, as well as some confirmations of wire transfers by date which indicate that the particular wire payments were "set up" by plaintiff to transfer funds to Ms. Zackson (see NYSCEF Doc No. 14, exhibit 1, emails; Doc No. 15, exhibit 2, wire transfers). To establish the sum of \$262,950, plaintiff has attached a sheet showing the calculation

of interest from 2010 through part of 2017, based on a principal amount of \$175,000 (see NYSCEF Doc No. 14, exhibit 4, loan interest calculator as of March 24, 2010). Plaintiff acknowledges that he is not a real estate broker and states he does not seek a commission, contrary to defendant's claims, and further avers that defendant's claim that plaintiff needed defendant to sign the promissory note for a "matrimonial proceeding" is without substance as he has never been in a matrimonial proceeding with his wife, whom he married in 2013 (see NYSCEF Doc No. 13, reply affidavit, ¶¶ 11-12).

CPLR 3213 provides that where a plaintiff's claim is based on "an instrument for the payment of money only," that plaintiff need only move for summary judgment in lieu of complaint by filing and serving a summons with a motion for summary judgment and the supporting papers. The statute is intended "to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous" (Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro, 25 NY3d 485, 491-492 [2015] [internal quotation marks and citation omitted]). The instrument will not qualify for disposition under CPLR 3213 if outside proof is needed, "other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (Weissman v Sinorm Deli, 88 NY2d 437, 444 [1996]).

A promissory note falls within the category of documents that can be considered instruments for the payment of money only (see Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136, 137 [1st Dept 1968], affd 29 NY2d 617 [1971]). Here, however, the note is not legally sufficient to be considered under CPLR 3213 for several reasons. There seems actually to be two promissory notes, with the first page of the second note missing any signature of defendant in his individual capacity (although the litigation was commenced as against defendant in his individual capacity), which muddies the claim of an unambiguous instrument for the payment of money only. The note or notes are not notarized, although defendant has conceded in his affidavit that he signed the note, only disputing the reason for his signature or signatures. Although the note is evidence that defendant admitted that he owed a particular amount of money to plaintiff, on which seven percent interest would annually accrue, it lacks a description of the history of the loans made, and when they were made, and defendant's promises to repay, that would establish the underlying basis for the amount claimed by the promissory note. In response to defendant's arguments, plaintiff has produced copies of emails and wire transfers that show he was repeatedly asked by and loaned money to defendant, at least over the course of about a year, and emails that show plaintiff repeatedly asked for repayment over the course of

several years and that defendant has not repaid him, although there appears to be no actual document, other than the promissory note, showing that defendant agreed to repay.² To the extent this supporting documentation bolsters plaintiff's claims, such cannot be termed "de minimis" (see Weissman v Sinorm Deli, 88 NY2d at 444).

Under CPLR 3213, where the motion is denied, "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." Here, the promissory note and supplemental papers do not qualify for treatment under CPLR 3213, with plaintiff supplementing his motion papers with evidence as discussed above, and therefore the court shall direct plaintiff to interpose a formal complaint within 20 days after service upon him of a copy of this decision and order.

1/7/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input 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 type="checkbox"/> REFERENCE

²Plaintiff makes no attempt to link email requests with copies of the wire transfers and/or the statements showing the completed wires that would help establish the actual request and payment of any of the loans.