

Nathanson v Franco
2020 NY Slip Op 31568(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 656618/2019
Judge: Joel M. Cohen
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
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

-----X

JOSEPH NATHANSON,

Plaintiff,

- v -

VICTOR FRANCO, ALICE FRANCO

Defendants.

-----X

INDEX NO. 656618/2019

MOTION DATE 12/11/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

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

Plaintiff Joseph Nathanson (Plaintiff) seeks summary judgment in lieu of complaint under CPLR § 3213 against Defendants Victor Franco and Alice Franco (Defendants), based on a document dated November 16, 2018, signed by both Defendants, entitled "Understanding" (NYSCEF 8 [Browser Aff. Ex. D]). In the first sentence of the Understanding, Defendants acknowledge that "[they] owe Joseph Nathanson the principal sum of \$2,400,000.00, which sum is currently due and payable in its entirety" (id.). In the next sentence, Defendants add that "[they] owe Joseph Nathanson various sums of unpaid interest" (id.). It is undisputed that Defendants failed to pay Nathanson any principal or interest after signing the Understanding.

Now, Nathanson seeks an order "awarding [him] the principal amount due in the sum of \$2,400,000, plus accrued interest in the amount of \$319,324.66 as of October 31, 2019, along with interest at the rate of sixteen (16%) percent per annum thereafter, together with late fees, costs and disbursements and reasonable attorney's fees, and granting plaintiff such other and further relief as to the Court may seem just and proper" (NYSCEF 4 [Browser Aff.]). For the

reasons set forth below, the motion is granted, and the matter referred to a Judicial Hearing Officer to hear and determine the amount of interest and collection fees owed to Nathanson in addition to the \$2,400,000 in principal.

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.” “The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). “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 AD3d 550, 551 [1st Dept. 2012]). “[A] document comes within CPLR 3213 ‘if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms’ . . . [but] [t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document” (*Weissman*, 88 NY2d at 444, citing *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1st Dept 1968], affd 29 NY2d 617).

The Understanding qualifies as an “instrument for the payment of money only” under CPLR 3213 because it evinces, on its face, Defendants’ unequivocal and unconditional obligation to repay Nathanson a certain principal amount, plus additional fees. In that document, Defendants plainly state “[they] owe Joseph Nathanson the principal sum of \$2,400,000.00,

which sum is currently due and payable in its entirety” (NYSCEF 8). The payment schedule attached to the Understanding shows that the principal amount was due by June 30, 2019 (*id.*; *see also* NYSCEF 8 [“Pursuant to the Understanding, you were required to re-pay Mr. Nathanson the principal amount of \$2,400,000.00 on or before June 30, 2019.”] [Ltr. to Defs. dated October 8, 2019]). “In addition,” Defendants state in the Understanding, “[they] owe Joseph Nathanson various sums of unpaid interest,” and “[t]here may be due Joseph additional sums for the applicable related deferred interest non-payments, late payment fees, if any, default interest charges, etc.” (NYSCEF 8). The Understanding is signed by “Victor Franco” and “Alice Franco (his wife)” (*id.*).

“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” (*Zyskind*, 101 AD3d at 551; *see Seaman-Andwall Corp.*, 31 AD2d at 137). Defendants fail to meet that burden. Indeed, the bulk of Defendants’ opposition is aimed at discrediting a chart that Nathanson attached to his motion, which purportedly summarizes the fifty-odd loans that Mr. Franco executed with Nathanson over the years. But this chart is not the basis for Nathanson’s motion. And the Understanding, which *is*, goes mostly ignored by Defendants, other than a conclusory argument that “[t]he document . . . is not a proper instrument for a CPLR 3213 proceeding” (NYSCEF 17). Defendants do not dispute that they executed the Understanding, or that certain payments were due thereunder, or that they subsequently failed to make them.

The only remaining issue in this case is calculating the amount of interest, “together with late fees, costs and disbursements and reasonable attorney’s fees” owed to Nathanson. These amounts are broadly referenced in the Understanding, which is the source of Defendants’

obligation, but are not explicitly calculated in the document.¹ Therefore, the matter will be referred to a Judicial Hearing Officer (JHO) for a determination as to the amount of additional fees – including interest and collection costs – that Nathanson is owed in addition to the \$2,400,000 in principal.

Accordingly, it is:

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

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

ORDERED that, unless the parties are unable to do so due to current coronavirus-related conditions, 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

¹ For example, the schedule attached to the Understanding shows total accrued interest on principal through June 30, 2019 as \$215,408.22. The schedule implies an annualized interest rate of 12% running from October 1, 2018. On this motion, Nathanson is seeking \$319,324.66 in accrued interest as of October 31, 2019, plus additional interest thereafter.

(which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/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

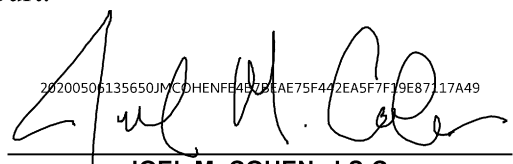
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses 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, subject to coronavirus-related restrictions, 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.

5/6/2020
DATE


JOEL M. COHEN, J.S.C.

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