

<b>Herschmann v Genger</b>
2020 NY Slip Op 31572(U)
April 30, 2020
Supreme Court, New York County
Docket Number: 657020/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ERIC HERSCHMANN

Plaintiff,

- v -

ARIE GENGER,

Defendant.

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INDEX NO. 657020/2019
MOTION DATE 12/03/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT .

Plaintiff Eric D. Herschmann (Plaintiff) seeks Summary Judgment in Lieu of a Complaint under CPLR 3213, based on a Promissory Note entered with Defendant Arie Genger (Defendant). For the reasons set forth below, the unopposed motion is granted.

Under the Promissory Note, Plaintiff loaned Defendant and a non-party, Orly Genger, \$2 million in late 2016 and held both borrowers jointly and severally liable for the repayment obligations. Interest on the \$2 million loan accrued at a rate of 2.75% per annum, with unpaid interest being added to the principal at the end of each year (Herschmann Aff. Ex. A § 1). The Note matures in March 2020 or, as relevant here, immediately upon the occurrence of an Event of Default. One designated Event of Default is the existence of an unpaid judgment for more than \$100,000 that remains unsatisfied for more than 30 days without being vacated or bonded pending appeal (id. § 6). Upon an Event of Default, all principal and interest then outstanding becomes immediately due and payable, and until those amounts are paid, default interest begins to accrue at the increased rate of 12% per annum (id. §§ 1, 2). In addition, the Promissory Note provides that in the event of an enforcement action, the borrowers "agree[d] to pay . . . all costs

relating thereto, including, without limitation, reasonable attorneys' fees and expenses" incurred in collecting the debt (*id.* § 13).

On August 17, 2018, the United States District Court for the Southern District of New York entered a judgment against Genger for more than \$3 million (the Judgment), in a case captioned *Dalia Genger v. Sagi Genger*, Case No. 17-cv-8181 (S.D.N.Y.) (*see* Herschmann Aff. Ex. B). Ms. Genger appealed the Judgment but it was not bonded pending appeal, and the Second Circuit affirmed the Judgment on June 28, 2019 (*see Genger v. Genger*, 771 F. Appx 99 [2d Cir 2019]). On September 16, 2018, Plaintiff sent a notice of the Event of Default to Defendant (Herschmann Aff. Ex. C). To date, however, Defendant has failed to pay any principal or interest payments under the Note (Herschmann Aff. ¶ 5).

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 NY3d 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 AD3d 550, 551 [1st Dept 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 AD2d 136, 137 [1st Dept 1968]).

The allegations here establish a prima facie case for summary judgment in lieu of complaint. There is no question that this action is based on an instrument for the payment of money only (*LaBoeuf v Saide*, 134 AD3d 515, 516 [1st Dept 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”]). And it is undisputed that Defendant defaulted under the terms of the Note, as a result of the outstanding Judgment against his co-borrower, and that Defendant has failed to make any payments under the Note despite notice and demand. Finally, as noted above, Defendant has not submitted any opposition to the motion and thus fails to suggest any material issues of fact that would preclude awarding summary judgment in favor of Plaintiff.

As for the costs and expenses that Plaintiff is entitled to collect under the Note in connection with this action, the Court will refer the matter to a Judicial Hearing Officer (JHO) for a determination as to the amount of those costs and expenses.

Therefore, it is:

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

**ORDERED** that Plaintiff shall have judgment in the amount of \$2 million, plus interest at the contractual rate of 2.75% per annum from December 30, 2016, and default interest at the contractual rate of 12% per annum from September 16, 2018; it is further

**ORDERED** Plaintiff’s request for collection costs and 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; 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/suptmanh](http://www.nycourts.gov/suptmanh) at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; 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/suptmanh/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; it is further

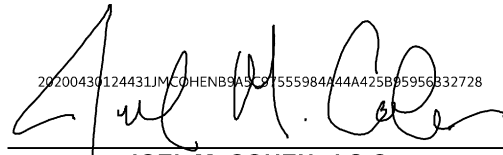
**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses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

**ORDDERED** 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.

4/30/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE