

**City Safety Compliance Corp. v Harrison**

2020 NY Slip Op 32587(U)

August 4, 2020

Supreme Court, New York County

Docket Number: 654311/2019

Judge: Debra A. James

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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*

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INDEX NO. 654311/2019

CITY SAFETY COMPLIANCE CORP.

MOTION DATE 02/25/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

MALIK HARRISON,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff City Safety Compliance Corp.'s motion for summary judgment (motion sequence 001) is granted in its entirety; and it is further

ORDERED and the Clerk is hereby directed to enter judgment in favor of plaintiff City Safety Compliance Corp and against defendant Malik Harrison, in the amount of \$60,000.00, plus interest at the yearly rate of 2.07% from April 30, 2018, until entry of judgment, in the amount of \_\_\_\_\_, for a total of \$ \_\_\_\_\_, together with costs and disbursements, as taxed by the Clerk upon the submission of an appropriate bill of costs.

DECISION

In this action, plaintiff City Safety Compliance Corp. to seeks to recover the principal sum of \$60,000.00, plus interest, from defendant Malik Harrison, based upon an alleged promissory note. Plaintiff moves, pursuant to CPLR 3212, for an order granting it summary judgment.

Arguments of Each Party

Plaintiff states that on April 6, 2018, the defendant and plaintiff signed a promissory note/agreement, that states in part,

1. "The Lender promises to loan \$60,000.00 USD to the Borrower and the Borrower promises to repay this principal amount to the Lender, with interest payable on the unpaid principal at the rate of 2.07 percent per annum, calculated yearly not in advance, beginning on or before April 30, 2018. The period between Date of Loan issued i.e., 11/11/2016 through 03/31/2018 is considered as a Grace period.

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7. "This Agreement may only be amended or modified by a written instrument executed by the both Borrower and the Lender.

10. "This Agreement constitutes the entire agreement between the parties and there are no further items or provisions, either oral or otherwise."

(promissory note, NYSCEF Doc No. 9).

Plaintiff alleges that the defendant has defaulted and has failed to pay any portion of the note. In support of its motion, plaintiff annexed the promissory note and an affidavit from Andrey Vishev, President of City Safety Compliance Corp. (id.; Vishev aff, NYSCEF Doc No. 6).

Defendant states that he was employed by plaintiff until November 2018 (Harrison aff, NYSCEF Doc No. 19 ¶ 3). At some point between 2012 and 2014, his business relationship with the principals of City Safety Compliance Corp. soured and he resigned (*id.* ¶ 3). Defendant alleges that the sum of \$60,000.00 was given to him by the plaintiff as a "merit bonus," and "a reward for work well done and as a sign of remorse and good will for excluding me from the business they created" (*id.* ¶ 5). At no point was he told that the money was a loan (*id.*). The check for \$60,000.00 is dated November 11, 2016, two years before the promissory note was signed. Defendant states that he never signed the promissory note and has never seen it before and alleges that it was forged (*id.* ¶¶ 6-7; affirmation in opposition, NYSCEF Doc No. 18 ¶ 3). Defendant argues that there are various triable issues of fact that preclude summary judgment, including: (1) whether a contract was ever formed as he alleges forgery of the promissory note, (2) ambiguity of the contract language, (3) whether consideration was provided by the plaintiff in the form of \$60,000.00, and (4) the unconscionability of the contract terms.

#### Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Casper v Cushman & Wakefield, 74 AD3d 669, 669 [1st Dept 2010], lv dismissed 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). On a motion for summary judgment, the role of the court is that of issue-finding, not issue-determination (Insurance Corp. of N. Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [1st Dept 2008]).

To establish a prima facie entitlement to judgment as a matter of law in an action to recover on a promissory note, 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 by the defendant to pay in accordance with the note's terms" (Ocean View Realty Co. v. Ziss, 90 AD3d 872, 873 [2d Dept 2011] [internal quotation marks and citations omitted]). Here, plaintiff has fulfilled the above elements, having submitted a copy of the promissory note, signed by defendant, that contains his unconditional obligation to repay and payee Vishev's affidavit, stating that defendant has defaulted (see Takeuchi v Silberman, 41 AD3d 336, 336-337 [1st Dept 2007] ["plaintiffs

established a prima facie right for recovery [on promissory notes] with proof of defendant's execution of the notes and default in payment").

Once the plaintiff submits evidence establishing the above elements, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (Ocean View Realty Co., 90 AD3d at 873). While a court will deny summary judgment on a promissory note where questions of fact exist as to whether the holder of the note procured it fraudulently, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (Banco Popular N. Am. v Victory Taxi Mgt., 1 NY3d 381, 383-384 [2004]; see Coleman v Norton, 289 AD2d 130, 130 [1st Dept 2001]). Thus, defendant's argument that the signature was forged or inappropriately notarized, without more, is insufficient.

Defendant argues that the promissory note is invalid because "plaintiff cannot establish that it performed under the contract in question since it cannot show that it provided any consideration" (NYSCEF Doc No. 18 ¶14). However, a "promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have

been given or performed and would be a valid consideration but for the time when it was given or performed" (General Obligations Law § 5-1105; see Kreuter v Tsucalas, 287 AD2d 50, 54 [2d Dept 2001]). The contract at bar states the date the loan was issued and sufficiently expresses the consideration which plaintiff provided in exchange for the promised payment.

Defendant contends that the contract is unconscionable because "the purported 'loan agreement' requires that alleged repayments of the purported 'loan' begin 15 months prior to the effective date of the agreement" (NYSCEF Doc No. 18 ¶16). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made- i.e., some showing of an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'" (Gillman v Chase Manhattan Bank, 73 NY2d 1, 10 [1988] [internal quotations and citations omitted]). Defendant has not argued either procedural or substantive unconscionability, instead choosing to argue that discovery is still needed. However, "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment" (Hariri v Amper, 51 AD3d 146, 152 [1st Dept 2008]). Nevertheless, a review of the evidence presented does not tend

to show either procedural or substantive unconscionability, and therefore raises no triable issue of fact.

As for Defendant's statement that there was an oral agreement by which plaintiff, as his employer, paid him \$60,000, and verbally agreed that such payment was a "merit" pay bonus, and not a loan does not raise an issue of fact. As stated by the First Department, "[A]ny prior oral condition or agreement was necessarily extinguished at the moment the written contract [that contains a broad merger clause] became fully executed by both parties" (Torres v D'Alesso, 80 AD3d 46, 53-54 (2010)). The promissory note/agreement at bar contains a merger clause, which states that its terms "constitute[s] the entire agreement between the parties and there are no further items or provisions, either oral or otherwise." Therefore, defendant is precluded from relying upon the alleged prior oral agreement to undermine the promissory note/agreement, as such agreement contains a broad merger clause.

8/4/2020  
DATE

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

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: