

**Cappelli v Schuster**

2020 NY Slip Op 33493(U)

October 21, 2020

Supreme Court, New York County

Docket Number: 652129/2020

Judge: Barry Ostrager

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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. BARRY R. OSTRAGER, PART IAS 61EF**

*Justice*

-----X Louis R. Cappelli, <p style="text-align: center;">Plaintiff,</p> <hr/> <p style="text-align: center;">- v -</p> <hr/> Joshua A. Schuster, <p style="text-align: center;">Defendant.</p>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">INDEX NO.</td> <td style="width: 40%;">652129/2020</td> </tr> <tr> <td>MOTION DATE</td> <td>_____</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td>001</td> </tr> </table>	INDEX NO.	652129/2020	MOTION DATE	_____	MOTION SEQ. NO.	001
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**DECISION AND ORDER  
ON MOTION**

-----X  
 HON. BARRY R. OSTRAGER

Before the Court is a motion by plaintiff for summary judgment in lieu of complaint pursuant to CPLR § 3213. Plaintiff Louis R. Cappelli seeks an order directing the entry of judgment in favor of the plaintiff and against defendant Joshua A. Schuster in the aggregate amount \$1,801,626.96 plus interest. Defendant has not appeared in this case and has not submitted any opposition to this motion which was returnable on August 21, 2020.

On or about November 16, 2018, Plaintiff loaned Borrower \$2,000,000.00 evidenced by a promissory note (“Note 1”) (NYSCEF Doc. No. 3). On or about February 4, 2019, the accrued interest and a portion of the principal balance of Note 1 in the aggregate amount of \$1,000,000 was paid. On or about December 19, 2019, a portion of the accrued interest of Note 1 in the amount of \$54,931.51 was paid. Note 1 matured on April 30, 2019.

On or about June 21, 2019, Plaintiff loaned Borrower \$650,000.00 evidenced by a promissory note (“Note 2” and collectively, the “Notes”) (NYSCEF Doc. No. 4). Note 2 matured on July 26, 2019. On or about December 19, 2019, a portion of the principal balance and accrued interest on Note 2 in the amount of \$63,839.58 was paid.

Pursuant to the Notes, interest was to accrue at the rate of 5% per annum, compounded annually. *See* NYSCEF Doc. Nos. 3 and 4 Defined Terms, “Interest Rate”. Borrower was to pay the entire balance of each Note and the interest due on the Note's maturity date. *See id.* at Article 4.1, Repayment. Borrower's failure to repay the entire loan on the maturity date under each Note is an Event of Default (*see id.* at Article 5.1, Events of Default) resulting in interest accruing at the "Default Rate: (defined as 15%, compounding monthly; *see id.* at Defined Terms, “Default Rate”) and entitling Lender to, without notice, demand the Note immediately due and payable, or to pursue any other remedy “available at law or in equity without first exhausting the rights and remedies” in the Note. *See id.* at Article 5.2, Remedies.

Borrower defaulted by virtue of the fact that he has only paid back a portion of the principal balances of each Note, despite demands by Lender to be paid in full.

In addition, each Note provides that Borrower “agrees to pay all costs and expenses of collection incurred by [Lender] ... including without limitation, reasonable attorneys' fees and disbursements.” *See id.* at Article 5.3, Costs of Collection.

Plaintiff has established through an affirmation based on personal knowledge by Louis Cappelli, that: Plaintiff is the Lender under the notes and defendant is the Borrower under the notes. Defendant failed to make full repayment on the notes by their respective maturity dates. The balance after partial payment on both Notes is \$1,801,626.96 as of May 12, 2020. *See* Affirmation of Louis R. Cappelli (NYSCEF Doc. No. 2) and NYSCEF Doc. 5.

Defendant was properly served pursuant to CPLR §308 (b). *See* NYSCEF Doc. No. 11. Further, at the direction of the Court, plaintiff's counsel confirmed that plaintiff has not had any contact with the defendant related to this action. *See* NYSCEF Doc. No. 14.

On a CPLR § 3213 motion for summary judgment in lieu of complaint, the movant must show that the action is based upon an instrument for the payment of money only. To qualify as a § CPLR 3213 "money instrument," two things must be shown: (1) the instrument itself, and (2) proof of non-payment. *See Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 137 (1st Dept. 1968), *aff'd* 29 N.Y.2d 617 (1971). The instrument does not qualify as a "money instrument" within the meaning of CPLR § 3213 if it calls for something in addition to the payment of money, or if outside proof is needed to prove a plaintiff's claim. *See Maglich v. Saxe, Bacon & Bolan, P.C.*, 97 A.D.2d 19, 21 (1st Dept. 1983).

Here, the Promissory Notes constitute instruments for the payment of money only, as no additional conditions other than the payment of money are called for under the Notes. Plaintiff has established that he is the Lender under the Notes and provided proof of defendants' default.

Accordingly, it is hereby,

ORDERED that plaintiff's motion for summary judgment in lieu of the complaint is granted. The Clerk of Court is directed to enter judgment in favor of plaintiff Louis R. Cappelli and against defendant Joshua A. Schuster in the amount of \$1,801,626.96, together with contractual interest at the rate of 15 % compounded monthly from May 12, 2020, until the date of entry of the decision and order on this motion, and thereafter at the statutory rate of 9% per annum, as calculated by the Clerk; and it further

ORDERED that Plaintiff may make a further motion setting forth the amount of attorney's fees expended in bringing this action by presenting an affirmation of services rendered and invoices, or plaintiff may efile a letter withdrawing the attorney's fees claim. A status conference is set for December 22, 2020, by which time the filing shall be completed.

October 21, 2020  
DATE

  
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BARRY R. OSTRAGER, J.S.C.

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