

Red Sparrow LLC v Primelerner Cos. LLC

2020 NY Slip Op 33729(U)

November 6, 2020

Supreme Court, New York County

Docket Number: 654280/2020

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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RED SPARROW LLC,

Plaintiff,

- v -

PRIMELERNER COMPANIES LLC, BRICK CITY BUILDERS LLC PARK STREET DEVELOPMENT LLC, WEST STREET DEVELOPMENT LLC, WILLIAM STREET DEVELOPMENT LLC and GERARD BARRETT

Defendants.

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INDEX NO. 654280/2020
MOTION DATE 11/06/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

In this action to recover \$444,624.00 upon four promissory notes and guarantees, the plaintiff, Red Sparrow, LLC, moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against the defendants. No opposition is submitted. The motion is granted.

A plaintiff may seek relief under CPLR 3213 "[w]hen [the] action is based upon an instrument for the payment of money only." See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013); Allied Irish Banks, P.L.C. v Young Men's Christian Assn. of Greenwich, 105 AD3d 516 (1st Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1st Dept. 2013). The purpose of the statute "is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself." G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d at 517 (1st Dept. 1992). Thus, in order to establish a prima facie entitlement to summary judgment in lieu of a complaint, a plaintiff must produce an instrument containing an "unequivocal and unconditional obligation to repay" (Zyskind v FaceCake Mktg. Tech., Inc., 101 AD3d 550, 551 [1st Dept. 2012]), one which by its terms is for the payment of money only over a stated period of time (see Bloom v Lugli, 81 AD3d 579,580 [2nd Dept. 2011]), and establish that the defendant failed to pay in accordance

with those terms. See Zyskind v FaceCake Mktg. Tech., Inc., supra; Rhee v Meyers, 162 AD2d 397 (1st Dept. 1990). Under these guidelines, a promissory note may qualify as such an instrument, so long as the plaintiff submits proof of the existence of the note and of the defendant's failure to make payment. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008); Seaman-Andwall Corp. v Wright Machine Corp., 31 AD2d 136 (1st Dept. 1968).

The plaintiff has met this burden by submitting, *inter alia*, the four subject promissory notes, all issued to the plaintiff by defendant PrimeLerner Companies LLC together with another entity on each – (1) note dated September 6, 2013, with defendant Brick City Builders LLC in the amount of \$44,000.00, with a maturity date of September 6, 2014, (2) note dated March 28, 2014, with defendant William Street Development LLC in the amount of \$30,000.00, with a maturity date of September 28, 2014; (3) note dated April 22, 2014, with defendant Park Street Development LLC in the amount of \$51,670.00, with a maturity date of April 22, 2015; and (4) note dated July 3, 2014, with defendant West Street Development LLC in the amount of \$54,000.00, with a maturity date of July 2, 2015. Each note is guaranteed by defendant Gerard Barrett, as sole shareholder and managing member of PrimeLerner. The plaintiff also submits the affidavit of Russell Dinstein, a member of the plaintiff LLC and signatory on the notes for the plaintiff, who states that the defendants failed to pay any amount, principal or interest, on any of the notes.

By this proof, the plaintiff has established an “unequivocal and unconditional obligation to repay” (Zyskind v FaceCake Mktg. Tech., Inc., supra) a sum over a stated period of time (see Bloom v Lugli, supra) and the defendant's failure to pay in accordance with the terms of the agreement. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008); Zyskind v FaceCake Mktg. Tech., Inc., supra. The plaintiff further establishes a clear and unambiguous guaranty signed by defendant Barrett with language that conclusively binds the guarantor to its terms (see Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 [1st Dept. 2012]) such that enforcement of the guaranty is warranted.

The plaintiff also seeks attorney's fees. Attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). Here, there is a contractual provision. The promissory notes contain a provision requiring that the

defendants pay the plaintiff's attorneys fees in any action brought to collect on the notes. Thus, the application is granted as to liability and the plaintiff may submit an additional attorney's affirmation, billing records or invoices, and any other supplement proof to establish the proper amount of fees, within 30 days of the date of this order.

Generally, interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). Therefore, interest is awarded on each note from the date of maturity.

Accordingly, it is,

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213) is granted, without opposition, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendants PrimeLerner Companies LLC, Brick City Builders and Gerard Barrett, jointly and severally, in the sum of of \$44,000.00, plus costs and statutory interest from September 6, 2014, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendants PrimeLerner Companies LLC, William Street Development LLC and Gerard Barrett, jointly and severally, in the sum of \$30,000.00, plus costs and statutory interest from September 28, 2014 and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendants PrimeLerner Companies LLC, Park Street Development LLC and Gerard Barrett, jointly and severally, in the sum of \$51,670.00, plus costs and statutory interest from April 22, 2015; and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendants PrimeLerner Companies LLC, West Street Development LLC and Gerard Barrett,


jointly and severally, in the sum of \$54,000.00, plus costs and statutory interest from July 2, 2015, and it is further,

ORDERED that the plaintiff's application for attorney's fees is granted on liability and the plaintiff may submit an additional attorney's affirmation, billing records or invoices, and any other supplement proof to establish the proper amount of fees, within 30 days of the date of this order and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

11/6/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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