

Cappelli v Schuster
2021 NY Slip Op 30657(U)
March 3, 2021
Supreme Court, New York County
Docket Number: 652129/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS 61EFM

Justice

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LOUIS R. CAPPELLI,	Plaintiff,	INDEX NO.	652129/2020
- v -		MOTION DATE	
JOSHUA A. SCHUSTER,	Defendant.	MOTION SEQ. NO.	002
-----X		DECISION & ORDER ON MOTION	

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 \$1,976,116.99, plus interest. The Court previously granted Motion 001 for the same relief, which was submitted without opposition, on October 21, 2021 (NYSCEF Doc. No. 15). Thereafter, defendant appeared and there was a dispute about whether defendant had been properly notified of this action. As a result, the parties agreed to allow the Court to withdraw the Court’s prior decision and resubmit the motion, so that the defendant could file opposition (NYSCEF Doc. No. 19). The Court heard oral argument by counsel for all parties on March 2, 2021 via Microsoft Teams. For the reasons set forth below, plaintiff’s motion is granted.

Facts

The parties entered into two Notes with plaintiff Cappelli as Lender and defendant Schuster as Borrower.

On or about November 16, 2018, plaintiff loaned the defendant Borrower \$2,000,000.00 evidenced by a promissory note (“Note 1”) (NYSCEF Doc. No. 29). In accordance with the

terms of the Note, \$1,000,000.00 was advanced to defendant on November 16, 2018 and a second \$1,000,000.00 was advanced to defendant on November 21, 2018. On or about February 4, 2019, the accrued interest and a portion of the principal balance of Note 1 in the aggregate amount of \$1,000,000.00 was paid to plaintiff by defendant. On or about December 19, 2019, a portion of the accrued interest of Note 1 in the amount of \$54,931.51 was paid to plaintiff by defendant. 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. 30). 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 to plaintiff by defendant.

Pursuant to the Notes, interest was to accrue at the rate of 5% per annum, compounded annually. See NYSCEF Doc. Nos. 29 and 30 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.

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 aggregate balance after partial payment on both Notes is \$1,976,116.99, as of December 10, 2020. *See* Affirmation of Louis R. Cappelli (NYSCEF Doc. No. 28) and NYSCEF Doc. 31.

Standard

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).

Discussion

The Promissory Notes constitute instruments for the payment of money only. Plaintiff has established that he is the Lender under the Notes and provided proof of defendant's default. The burden now shifts to defendant to raise a defense, or issues of fact, to bar summary judgment.

Defendant raises no meritorious defense with respect to Note 1. Defendant's affirmation admits to receiving the first \$1,000,000.00 disbursement under Note 1 but states that "[a] search of the records for the Project did not locate any evidence that the 'Additional Disbursement' of \$1,000,000.00 was ever deposited into any Project account or to my personal account at or about November of 2018." *See* Schuster Aff. at ¶ 14. Defendant does not specifically deny that defendant received the second \$1,000,000.00 disbursement. Nor does defendant dispute that

defendant signed a Pledge Agreement acknowledging that Note 1 is for \$2,000,000.00 (NYSCEF Doc. No. 41). Moreover, in reply, plaintiff provided proof that the second \$1,000,000.00 was wired to defendant's company on November 21, 2018 in accordance with Note 1 (NYSCEF Doc. No. 40).

Defendant also fails to raise a meritorious defense with respect to Note 2. Defendant argues that after Note 2 was executed, it was modified by oral agreement. Defendant states that plaintiff agreed that in lieu of defendant's obligation to repay Note 2, plaintiff would convert that obligation into an additional \$600,000.00 capital contribution to the Project for the benefit of a company called Blue Line, which apparently belongs to plaintiff's son. *See* Schuster Aff. at ¶ 17. Defendant argues that a K-1 showing an increase in Blue Line's investment in the Project from \$500,000.00 to \$1,100,000 evidences this alleged agreement. The Court disagrees.

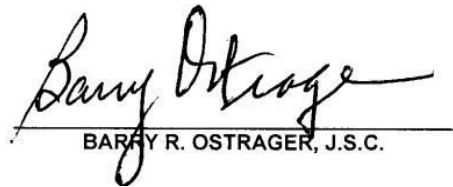
First, plaintiff affirms that plaintiff has no ownership interest Blue Line. *See* Cappelli Reply Aff. at ¶ 15. Second, Note 2 is not a convertible Note on its face and there is no evidence of a written modification of Note 2 as required. Third, the K-1 shows an increase of \$600,000, whereas Note 2 is for \$650,000. Finally, it worth noting that the parties did have another note – not at issue in this action – that was a \$600,000 convertible note, so it is clear the parties knew how to draft a convertible note if desired. Accordingly, defendant has failed to raise competent evidence to defeat plaintiff's motion for summary judgment in lieu of Complaint.

Finally, the Notes do provide that Borrower “agrees to pay all costs and expenses of collection incurred by [Lender] ... including without limitation, reasonable attorneys' fees and disbursements.” *See* Notes at Article 5.3, Costs of Collection. However, the Court, in its discretion, declines to award attorney's fees because of the plaintiff's wrongful claim that the

defendant defaulted on Motion 001 which caused the Court to issue a decision on the merits and a further decision withdrawing that order.

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 \$1,976,116.99, together with contractual interest at the rate of 15 % compounded monthly from December 10, 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.

Dated: March 3, 2021


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE