

Nesenoff & Miltenberg, LLP v West
2022 NY Slip Op 30321(U)
February 2, 2022
Supreme Court, New York County
Docket Number: Index No. 156165/2020
Judge: Lisa S. Headley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HON. LISA S. HEADLEY

NESENOFF & MILTENBERG, LLP,

Plaintiff,

-against-

BLAIR A. WEST and ANN M. WEST,

Defendants.

Index No.: 156165/2020

ORDER

Motion Sequence No. 3

The following papers were read on this motion:

- Notice of Motion
- Affirmations/Affidavits/Exhibits
- _____
- _____

DISCUSSION/ RATIONALE:

Plaintiff Nesenoff & Miltenberg LLP (“Plaintiff”) previously filed a motion for summary judgment in lieu of Complaint under CPLR § 3213, based on a Promissory Note entered with Defendants Blair A. West and Ann W. West (collectively, “Defendants”) (Motion Sequence 001, NYSCEF Docs. 1-6). Plaintiff’s partner Ira S. Nesenoff submitted a supporting affirmation that annexed a copy of the Note. There was no opposition. The basis for summary judgment was as follows:

On February 29, 2020, Defendants executed the Note in favor of Plaintiff for the payment of a principal sum of \$28,000.00 plus interest accruing at certain rates as set forth in the Note. Pursuant to the terms of the Note, an initial payment of \$10,000.00 was to be made upon execution

of the Note, with ten subsequent monthly payments. Each monthly payment was comprised of a principal amount of \$1,800.00, plus interest at the rate of 4%, for a total payment amount each month of \$1,872.00. Any late payments would be subject to a 5% late fee. Upon an Event of Default, interest on any unpaid principal was to be calculated at a rate of 15% per annum.

The monthly payments were due and owing on the first day of the month of each consecutive month, from April 1, 2020 through and including January 1, 2021. The Note further provides: "It is further agreed that should this Note become due or being declared due and upon the same being placed in the hands of attorneys for collection, collected by suit, or through a Court of Bankruptcy or by any other legal, judicial, non-judicial or equitable proceeding, the undersigned agrees to pay all reasonable costs and expenses of the Holder incurred in connection with the collection of the Note, including, without limitation, reasonable attorneys' fees."

Mr. Nesenoff stated that Defendants made the \$10,000 initial payment, but failed to make payment on April 1, 2020, and failed to make the subsequent monthly payments due and owing under the Note. CPLR § 3213 provides that, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). To prevail on a motion for summary judgment in lieu of complaint arising out of 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 of the defendant to pay in accordance with the note's terms." (*Zyskind v. FaceCake Mktg. Tech., Inc.*, 101 A.D.3d 550, 551 [1st Dep't 2012]; *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d

327, 328 [1st Dep't 2000]). "It is well settled that when a contract provides for interest to be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the legal rate set forth in CPLR 5004, governs until payment of the principal or until the contract is merged in a judgment." *Citibank, N.A. v Liebowitz*, 110 AD2d 615 [2d Dept 1985].

As Plaintiff produced the Note and evidence of Defendants' failure to pay, and there being no opposition, Plaintiff's motion for summary judgment was granted on October 8, 2020 (NYSCEF Doc. 9).

Subsequent to this court's decision and order on the motion for summary judgment, Plaintiff Nesenoff & Miltenberg submitted a motion for revised order, seeking to dismiss the claims as against Defendant Ann M. West only, and to otherwise reaffirm the summary judgment in all other material respects as to Defendant Blair A. West. (Motion Sequence No. 002) (NYSCEF Docs. 10-13). Defendants were duly served with the motion papers and did not file a response.

On February 2, 2021, this court granted the motion for a revised order, dismissing the claims against Ann M. West, and ordering:

ORDERED that the Clerk enter judgment in favor of Plaintiff Nesenoff & Miltenberg, LLC, and against Defendant Blair A. West on the principal sum of \$18,000.00, plus interest at a rate of 15% per annum on all principal amounts due and owing running through the date of payment, plus late fees of 5% for each missed monthly payment of \$1,872.00 due from April 1, 2020 through the date of payment, pursuant to the terms of the Promissory Note; and it is further

ORDERED that Plaintiff Nesenoff & Miltenberg LLP shall bring its application for reasonable attorneys' fees directly to this Court (as opposed to a Special Referee).

On March 29, 2021, counsel for the Plaintiff, Adrienne Levy, Esquire, duly submitted an affirmation in support of costs and reasonable attorneys' fees, which totaled \$3,000.00. (NYSCEF

Docs. 17-18). On August 26, 2021, this court granted Plaintiff's request and issued an order as follows:

ORDERED that Plaintiffs application for attorneys' fees in the amount of \$3,000.00 is granted; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff, and against Defendants, in the amount of \$3,000.00, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate.

(NYSCEF Doc. 21).

On September 10, 2021, Plaintiff Nesenoff & Miltenberg submitted a proposed judgment to the Clerk of the Court, which proposed judgment recited the relief granted in the order of February 2, 2021 and the order of August 26, 2021, and included copies of both orders, and set forth sums certain for late fees and interest under the Note, along with spaces for the Clerk of the Court to calculate interest. (NYSCEF Doc. 25).

The Clerk of the Court returned the proposed judgment to Plaintiff, advising that: (i) separate judgments must be submitted for each separate Order, and (ii) the precise late fees, interest rates, and relevant dates must be set forth in the Order(s) in order to be calculated and reduced to a Judgment by the Clerk. (Affirmation of Adrienne Levy, Esq., dated December 27, 2021).

CPLR § 2221(a) provides that "A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order." Plaintiff submits the instant motion, on notice, to modify this court's February 2, 2021 and August 26, 2021 Orders, to comply with the Clerk of the Court's instructions/requirements for an Order capable of being rendered into a Judgment.

Upon review of the relevant pleadings, motion papers, affirmations, and exhibits, this court finds that Plaintiff's motion for modification of prior orders does not alter the merits or substance

of the Court's prior orders, but rather, clarifies the relief previously granted, in such a manner as necessary for entry into judgment by the Clerk of the Court, and this court further finds the fee and interest calculations submitted in the affirmation of Ira S. Nesenoff, Esq., to be an accurate reflection of the relief previously granted and the terms of the Note. Accordingly, this Court hereby **GRANTS** Plaintiff's motion and modifies its prior orders dated February 2, 2021 and August 26, 2021, respectively, as follows:

It is hereby **ORDERED** that the Clerk enter Judgment in favor of Plaintiff, Nesenoff & Miltenberg LLP, and against Defendant Blair A. West, on the principal sum of \$18,000.00, plus interest at a rate of 15% per annum on all principal amounts due and owing running through the date of payment, plus late fees of 5% for each missed monthly payment, pursuant to the terms of the Promissory Note, calculated as follows:

- Principal: \$18,000.00
- Late Fees: \$450.00
- Contract Daily Rate of Interest on unpaid principal: \$7.40
- Contract Daily Rate of Interest to be calculated by Clerk from August 6, 2020 through date of judgment.
- Post-Judgment Interest shall accrue at the Contract rate of 15% per annum

and

It is further **ORDERED** that the clerk enter Judgment in favor of Plaintiff, Nesenoff & Miltenberg, LLP, and against Defendant Blair A. West, for costs and reasonable attorney's fees in the amount of \$3,000.00, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, calculated as follows:

- Principal: \$3,000.00
- Statutory Daily Rate of Interest on unpaid principal: \$0.74
- Statutory Daily Rate of Interest to be calculated by Clerk from August 26, 2021 through date of judgment
- Post-judgment interest shall accrue at the statutory rate of 9% per annum.

This constitutes the decision and order of the court.

Dated: 2/2/2022

Lisa S Headley 2/2/2022
HON. LISA S. HEADLEY

FINAL DISPOSITION