

Asness v TPR Holdings LLC
2022 NY Slip Op 32600(U)
August 1, 2022
Supreme Court, New York County
Docket Number: Index No. 651243/2022
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 MOTION 61EFM

Justice

Table with columns for Plaintiff (BRADLEY D. ASNESS), Defendants (TPR HOLDINGS LLC and BRIAN E. ROBINSON), and Motion details (INDEX NO. 651243/2022, MOTION DATE, MOTION SEQ. NO. 001). Includes 'DECISION + ORDER ON MOTION' label.

HON. BARRY R. OSTRAGER

Before the Court is a motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, by plaintiff Bradley D. Asness against defendants TPR Holdings LLC ("TPR") and Brian E. Robinson to recover unpaid principal and interest allegedly due on two promissory notes and an alleged guarantee of a portion of the loan monies. For the reasons that follow, the motion is denied based on issues of fact, and the proceeding is converted to a plenary action.

In his Affidavit in support of the motion (NYSCEF Doc. No. 3), plaintiff Asness alleges the following facts related to the transactions between the parties. On or about May 6, 2019, TPR, as Borrower, executed a one-page Promissory Note ("First Note") in favor of Asness, as Lender, in exchange for a loan of \$1,000,000.00, with 10% interest payable in 36 monthly installments and the full principal plus interest due on May 6, 2022 (NYSCEF Doc. No. 4). On or about May 16, 2019, TPR, as Borrower, executed another one-page Promissory Note (the "Second Note") in favor of Lender in exchange for a loan of \$500,000.00, with 10% interest payable in 36 monthly installments and the full principal plus interest due on May 16, 2022 (NYSCEF Doc. No. 5). Both Notes were signed on behalf of the Borrower by Stuart Litman in his capacity as Chief Operating Officer ("COO"). In the event of a default, both Notes provided for a ten-day cure period, an interest rate of 24%, and the payment of reasonable attorney's fees.

Thereafter, non-party Litman and defendant Robinson both allegedly signed an Addendum to each Note, dated December 24, 2019, that included a personal Guaranty for each individual (NYSCEF Doc. Nos. 6 and 7). Robinson purportedly guaranteed payment of 54% of the debt due on the Notes, and Litman purportedly guaranteed 46% of the debt due on the Notes. The Addenda confirmed the terms of the original Notes, including the Borrower's obligation to make monthly interest payments, and stated that no interest payments had been made as of the date of the Addenda. In exchange for the Addenda and Guarantees, the Lender waived the existing default and cancelled the requirement of monthly interest payments, providing instead that all principal and interest would be due for both Notes at the end of the Term in May of 2022. The Addenda also allegedly granted the Borrower the right to call the entire amount of principal and any interest due on 120 days prior notice to the Borrower.

According to Asness, the Lender exercised its option to call the Notes by Notice to the Borrower dated September 7, 2021, demanding full payment of principal plus interest on January 6, 2022 (NYSCEF Doc. No. 8). The Call Notice was purportedly sent to the Borrower TPR at its New York Office by federal express and email. The amount demanded on the First Note was \$1,267,320.00, and the amount due on the Second Note was \$632,865.00, both as of January 6, 2022. When the monies were allegedly not paid, Asness as Lender commenced this proceeding against the Borrower TPR and against Robinson, as a 54% Guarantor. The second 46% alleged Guarantor, Stuart Litman, has not been joined as a defendant here. The Lender seeks entry of judgment against Defendants in the total amount of \$1,900,185.00, plus Default Interest from January 7, 2022 through the date on which judgment is entered and thereafter at the legal rate until the judgment is satisfied, with such judgment against Borrower in full and jointly with Robinson only up to his share of 54%.

Defendant Robinson, on behalf of himself and TPR, has submitted an Affidavit in opposition to the motion asserting a number of defenses (NYSCEF Doc. No. 20). First, he disputes his signature on the Addenda, describing it as a “forgery” that he believes was “created for the litigation.” Defendant correctly notes that the signature is not notarized.

In counsel’s Memorandum of Law submitted in opposition on behalf of both Defendants TPR and Robinson, Defendants dispute that Litman had the authority under the TPR Operating Agreement to sign the Notes and bind TPR in the first instance, which would allegedly render both Notes and Robinson’s Guaranty unenforceable. Defendants further object to the Lender’s failure to join Litman as a defendant, claiming that Litman is a “necessary party” within the meaning of CPLR 1001 and 1003. Defendants argue that, pursuant to CPLR 1001(a), a necessary party is one whose nonjoinder will jeopardize the outcome of the action in either of two ways: (1) complete relief cannot be accorded to the existing parties to the action; or (2) the absent party may be inequitably affected by the judgment. Counsel asserts that the failure to join Litman renders this proceeding subject to dismissal.

In reply, Asness offers other examples of Robinson’s signature in other cases and alleges that Robinson authenticated those signatures, despite the lack of a notarization (NYSCEF Doc. No. 22). Counsel urges this Court to compare the signatures and find Robinson’s signature on the Addenda authentic. Asness further disputes that Litman is a necessary party, as Litman’s joinder as a defendant is not needed for the Lender to obtain a judgment against the Borrower or against Robinson as a Guarantor, which would afford plaintiff complete relief,

The Court agrees with plaintiff that Litman is not a necessary party. Although Litman certainly has relevant information, either party can seek to obtain that information and potential testimony during discovery and/or by calling Litman as a witness at trial. Further, Litman would not be inequitably affected by any judgment here as he could still assert his defenses if sued.

However, Defendants have successfully created issues of fact as to both the enforceability of the Notes and the genuineness of Robinson’s signature on the Addenda. *See, Diplacidi v Gruder*, 135 AD2d 395 (1st Dept. 1987) (defendant’s claim that his signature on the loan documents had been forged created an issue of fact that precluded relief under CPLR 3213, notwithstanding the absence of a handwriting expert). A plaintiff is entitled to relief via the expedited procedure of summary judgment in lieu of complaint only when the plaintiff has established the existence of “an instrument for the payment of money only” where liability and damages can be ascertained from the face of the document. But where, as here, Defendants have created an issue of fact in opposition, summary judgment in lieu of complaint must be denied.

Accordingly, plaintiff’s motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied, and the proceeding is converted to a plenary action with the moving papers and opposition serving as the pleadings, unless counsel agree to formal pleadings. The August 22, 2022 oral argument is cancelled, but the date shall be maintained for a Preliminary Conference. Counsel shall confer and agree upon a Proposed Preliminary Conference Order using the form available on the Part 61 website and efile it with a cover letter with a dial-in number by August 16, 2022. Counsel shall continue efforts to resolve the dispute, particularly in light of the 24% default interest claimed.

Dated: August 1, 2022


 BARRY R. OSTRAGER, J.S.C.

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