

Pinelli v Shorestein
2022 NY Slip Op 32909(U)
August 22, 2022
Supreme Court, New York County
Docket Number: Index No. 656680/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

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MICHAEL PINELLI and CHARLOTTE PINELLI,

Plaintiff,

- v -

DAVID SHORENSTEIN, JASON SILVERSTEIN,
SILVERSHORE PROPERTIES 89 LLC, SILVERSHORE
PROPERTIES 118 LLC, SILVERSHORE PROPERTIES 28
LLC, SILVERSHORE PROPERTIES 92 LLC, 1576 EP LLC

Defendants.

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INDEX NO. 656680/2021

MOTION DATE 5-20-22

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In this action to recover \$100,326.10 allegedly due upon a promissory note, the plaintiffs, Michael and Charlotte Pinelli, move pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendants David Shorenstein and Jason Silverstein. The defendants oppose the motion and cross-move, in effect, to dismiss the action as to defendant Jason Silverstein pursuant to CPLR 3211(a)(8). The motion is denied and the cross-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). 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). However, “[w]here the instrument

requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable." Weissman v Sinorm Deli, 88 NY2d 437, 444 (1996). A plaintiff's prima facie proof "cannot be drawn from sources outside the agreement itself." Rhee v Meyers, 162 AD2d 397, 398 (1st Dept. 1990); see Ian Woodner Family Collection, Inc. v Abaris Brooks, LTD, 284 AD2d 163 (1st Dept. 2001).

Furthermore, on a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*.

The plaintiffs submit, *inter alia*, the promissory note and guaranty agreement with defendants, both signed and dated July 15, 2017, as well as affidavits of service for the defendants Shorenstein and Silvershore Properties 118 LLC. The note, in the principal sum of \$127,500.00, indicates that "all sums payable" in connection with the note shall be "due and payable in full...in no event later than July 14, 2018." The guaranty agreement states that the guarantors guarantee payment "of fifty percent (50%) of all amounts then owed to Lender", including principal, interest, and any other outstanding amounts. However, the note does not provide the sum that the defendant guarantors were to pay on that maturity date but required proof outside the agreement itself. The parties disagree as to the import of the terms of the note and the amount, if any, currently owed by defendants Shorenstein and Silverstein. Therefore, the plaintiffs have not 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 defendants' 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*. Thus, the plaintiffs have not demonstrated entitlement to summary relief by means of CPLR 3213.

In any event, the motion must be denied as the plaintiffs have not submitted proof that defendant Jason Silverstein was effectively served with the motion papers. Indeed, no affidavit

of service is submitted. In support of the cross-motion to dismiss pursuant to CPLR 3211(a)(8), the defendants submit Silverstein's affidavit in which he alleges that he had "not been served with any papers at all in this case." The plaintiffs failed to submit an affidavit of service in response. This is tantamount to conceding that the court lacks personal jurisdiction over that defendant. Dismissal of the action as against defendant Silverstein is without prejudice.

The plaintiffs are reminded that, pursuant to CPLR 308(2), service upon a "natural person" can be made by delivering the summons to a person of suitable age and discretion at the person's "actual place of business, dwelling place or usual place of abode" and by either mailing the summons to the person's last known residence or by mailing the summons by first class mail to the person's actual place of business "in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served."

Although the plaintiffs may not avail themselves of CPLR 3213, their claims are not extinguished as the moving papers are now deemed the complaint, and the answering papers are deemed the answer. See CPLR 3213.

Any relief not expressly granted herein is denied.

Accordingly, and upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiffs' motion pursuant to CPLR 3213 for summary judgment in lieu of a complaint is denied, and it is further,


ORDERED that the plaintiffs' moving papers and the defendants' answering papers are deemed the complaint and answer, respectively, pursuant to CPLR 3213, and it is further,

ORDERED that the defendants' cross-motion to dismiss the action pursuant to CPLR 3211(a)(8) as against defendant Jason Silverstein is granted, and the action is dismissed as against that defendant, without prejudice, and it is further

ORDERED that the parties shall appear for a preliminary conference on November 17, 2022, at 12:30 p.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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

8/22/2022
 DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE