SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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DOV JUNIK and DSJ HOLDINGS, LLC,

Plaintiff, Decision and order

- against - Index No. 513092/2024

61 NORTH 11 LLC, CHESKIE WEISZ, PERL WEISZ, YAAKOV KLEIN and JOSEPH BANDA,

Defendants, October 1, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1 & #2

The plaintiff has moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendant has cross-moved seeking to dismiss the action. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On May 23, 2017, the defendant 61 North 11 LLC, as borrower executed a promissory note, via the authorized signature of defendant Cheskie Weisz, to the plaintiffs in the amount of $1,000,000. The defendants Cheskie Weisz, Perl Weisz, Yaakov Klein and Joseph Banda guaranteed the debt. The defendants have not made any payments since March 2021. The plaintiffs now move seeking summary judgement concerning the note in the amount of $918,750. The defendants have cross-moved seeking to dismiss the action on the grounds there is another document executed by some of the parties which raise questions concerning the actual note itself.

Conclusions of Law

Preliminarily, on May 23, 2017 the plaintiff Dov Junik and defendant Cheskie Weisz entered into a Heter Iska, a religious document utilized to circumvent the Jewish prohibition against interest by treating all loans as partnerships or business ventures (see, In re Venture Mortgage Fund L.P., 245 BR 460 [S.D.N.Y. 2000]). That document contains different terms than the promissory note and therefore the defendants argue there are questions of fact which foreclose a summary determination at this time. However, the promissory note clearly evidences a loan and obligations pursuant to that note is unaffected by a Heter Iska (8430985 Canada Inc., v. United Realty Advisors LP, 148 AD3d 428, 48 NYS3d 402 [1st Dept., 2017]). Thus, a Heter Iska is "merely a compliance in form with Hebraic law" and does not actually create any partnership, joint venture, or some other profit sharing agreement (see, Kirzner v. Plasticware LLC, 47 Misc3d 1209(A), 16 NYS3d 792 [Supreme Court Kings County 2015]). Therefore, the existence of the Iska does not create any questions of fact concerning the contents of the note at all. Any motion seeking to oppose the granting of summary judgement based upon the Heter Iska or the request to dismiss the lawsuit based upon the Heter Iska are all denied.

Next, it is well settled that in order to be entitled to judgement as a matter of law pursuant to CPLR §3213 the movant

must demonstrate that the other party executed an instrument that contains an unequivocal and unconditional promise to repay the party upon demand or at a definite time and the party failed to pay according to the terms of the instrument (Mirham v. Awad, 131 AD3d 1211, 17 NYS3d 473 [2d Dept., 2015]). A promissory note is an instrument for the payment of money only and when sufficient evidence is presented concerning the circumstances upon which it was given then a §3213 motion is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). Thus, the movant must establish the instrument is "facially incontestable" (J. Juhn Associates, Inc., v. 3625 Oxford Avenue Associates L.P., 8 Misc3d 1009(A), 801 NYS2d 778 [Supreme Court Nassau County 2005]). Where a defendant can raise questions of fact the notes were not instruments for the payment of money only then summary judgement must be denied (Farca v. Farca, 216 AD2d 520, 628 NYS2d 782 [2d Dept., 1995]).

In this case the only argument presented in opposition, other than the Iska argument that has been rejected above, is the fact the plaintiff Junik's affidavit does not contain information he was aware of the record keeping practices of the plaintiff lender. However, to succeed upon summary judgement in lieu of a complaint the plaintiff need only submit an affidavit "asserting that the defendant failed to repay the loan in accordance with the terms of the note" (Lugli v. Johnston, 78 AD3d 1133, 912

NYS2d 108 [2d Dept., 2010]). In 27 West 782nd Street Note Buyer LLC v. Turzi, 194 AD3d 360, 150 NYS3d 34 [1st Dept., 2021] the court rejected the very arguments raised here, namely that an affidavit of non-payment is insufficient without an affidavit affirming the business practices of the lender. The court explained that "defendants cannot establish that plaintiffs failed to make out their prima facie case as they do not dispute the existence of the guaranties, the underlying debts or their failure to perform under the guaranties" (id). Thus, the affidavit of the lender asserting there has been no payment is sufficient to establish a prima facie entitlement to summary judgement.

In opposition, the defendants assert there are questions of fact whether the defendants received the full sum. However, in Federal Deposit Insurance Corp., v. Silvers, 177 AD2d 266, 576 NYS2d 10 [1st Dept., 1991] the court held a bald assertion the signatory of a promissory note did not receive all the funds was insufficient to raise any question of fact. Specifically, the court held that "said defendant merely asserts the note was unenforceable because he had never received any money or other kind of consideration for the note. This assertion, barren of any elaboration of the circumstances under which said defendant executed the $100,000 promissory note, is a mere conclusion, insufficient to defeat plaintiff's summary judgment motion" (id).

Thus, the conclusory assertions by the defendants that they did not receive all of the sums contained in the promissory note is insufficient to raise any question of fact. Further, the evidence sufficiently demonstrates all the funds available were borrowed.

In this case the plaintiffs have surely presented prima facie evidence they are entitled to summary judgement since they have presented uncontroverted evidence of the note, an obligation to pay and evidence of non-payment (Loewenberg v. Basnight, 172 AD3d 1356, 99 NYS3d 661 [2d Dept., 2019]).

Therefore, based on the foregoing, the plainitff's motion seeking summary judgement is granted. The defendant's cross-motion is denied.

So ordered.

ENTER:

DATED: October 1, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC