

Morrow Equip. Co., LLC v Seventh Floor Servs., Inc.

2023 NY Slip Op 31657(U)

May 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 525031/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May 2023

HONORABLE FRANCOIS A. RIVERA
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MORROW EQUIPMENT COMPANY, LLC,

Plaintiff

-against-

SEVENTH FLOOR SERVICES, INC.,

Defendant(s).
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DECISION AND ORDER

Index No: 525031/2022

Oral Argument: 4/13/23

Cal. No.: 49, Ms. No.: 1

By Notice of Motion, (**Dkt. 2**) filed August 29, 2022, under *Motion Sequence #1*, Plaintiff, **MORROW EQUIPMENT COMPANY, LLC**, sought an Order pursuant to **CPLR §3213** for:

1) Granting Plaintiff Summary Judgment in the full amount of **TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS**, due and owing under the INTERIM PAYMENT SETTLEMENT AGREEMENT, together with interest from February 6, 2020, the date of the breach, at the statutory rate of NINE (9%) per annum; and

2) Directing the Clerk of the Court to enter Judgment in favor of the Plaintiff MORROW EQUIPMENT COMPANY, LLC and against Defendant SEVENTH FLOOR SERVICES, INC., in the amount of **TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS**, together with interest from February 6, 2020, the date of the breach, at the statutory rate of NINE (9%) per annum, pursuant to **CPLR § 5001**, together with Costs and disbursement of this action; and

3) such other and further relief as this Court shall deem just, fair, and equitable.

The following filed papers numbered 1 to 26 were read on this Motion:

Notice of Motion, Affidavits and Affirmation annexed as **2 thru 4**; Plaintiff's Memo of Law in Support of Motion as **5**;

Answering Affidavit and Affirmation annexed as **17 and 18**; Memo of Law in Opposition to Motion as **18**, and no Exhibits were attached in Opposition;

Movant's Exhibits annexed as **6 thru 11**;

Movant's Reply Affirmation annexed as **20**, with Reply Exhibits **21 thru 25**, and Reply Memo of Law as **26**.

After oral argument, as set forth in the published **IAS Part 52 Rules**, wherein Plaintiff's counsel having appeared and, in part, Defendant's counsel failure to appear, the Order of the Court is as follows:

Pursuant to **CPLR § 3213**, a motion for summary judgment in lieu of complaint may only be granted when the action is based on an instrument for the payment of money. A Settlement Agreement qualifies as such an instrument for the payment of money only. See: *Torres & Leonard, P.C. v. Select Professional Realties, Ltd*, 118 AD2d 467, 468 (1st Dept 1986); *Wilkins Media, LLC v Oxigen Beverages, Inc.*, 2021 N.Y. Slip Op 30847 (New York Supreme 2021); *J.D. Structures, Inc. v. Waldbaum*, 282 AD2d 434, 436 (2nd Dept 2001).

One of the most often cited cases setting forth the standards in determining whether a document is "an instrument for the payment of money only", is *Seaman-Andwall Corp. v. Wright Machine Corp*, 31 AD2d 136 (1st Dept 1968); *Lenox Insurance Co. v. Sanare Energy Partners, LLC*, NY Slip Op 30692, NY Co. Supreme Court, 2021; *Capelli v. Schuster*, NY Slip

Op 30657, NY Co. Supreme Court, 2021; which holds that if a *prima facie* case would be made out by proof of the instrument and a demonstration of failure to make payments called for by its terms, it satisfies CPLR § 3213. The fact that defenses may be asserted against it does not deprive it of §3213 treatment.

The Court of Appeals in *Weissman v. Sinorm Deli, Inc.* 88 NY 2d 437 (1996); *Arbor Myrtle Beach PE, LLC v. Frydman*, NY Slip Op 30223; NY Co. Supreme Court, 2021; *Granite State Ins. v. Veliz Logistics*, NY Slip Op 30522, NY Co. Supreme Court, 2022; the question of whether the dispute involves an instrument for the payment of money only, is determined by whether any extrinsic evidence, beyond the proof of non-payment and the instrument itself, is required to establish a *prima facie* case for liability.

In holding that CPLR § 3213 applied, the Court noted that an instrument qualifies, (for such treatment), if a *prima facie* case would be made out by the instrument itself and a failure to make the payments called for by its terms, citing *Interman Industrial Products, Ltd. V R.S.M. Electron Power, Inc.* 37 N.Y. 2d 151, 155 (NY Court of Appeals 1975) and that settlement agreements can properly be considered as instruments for the payment of money by a party seeking summary judgment in lieu of complaint, citing *Krape v. PDK Labs, Inc.*, 34 AD2D 751 (2d Dept 2006); *J.D Structures, Inc. v. Waldbaum, supra*; *Nemiroff v. Sullivan*, 2012 NY Slip Op 31492 [U] Supreme Nassau 2012).

Plaintiff's application meets the test as set forth above.

Having satisfied the aforementioned criteria, Plaintiff's application for summary judgment is granted in its entirety; in that the Interim Payment Settlement Agreement (IPSA), **Exhibit 1, A**) "is an instrument of payment of money only, and that "the four corners of the agreement tell me this is for payment, it's unconditional, it's specific, it's for a certain date and

certain manner.” And B) the supporting Affidavit of Ronald A. Yakin, Vice-President of Morrow Equipment, attached to Movant’s papers, stating that “Defendant has not complied with the terms of the Agreement”, submitted by Plaintiff, is sufficient to establish and does in fact satisfy all the conditions and requisites necessary for the Court to find that the Plaintiff has presented to this Court an instrument for payment of money;

That the opposition submitted by Defendant was disregarded, in part, in view of the fact that Defendant’s counsel “was not here to argue the motion”; and

Further, “that if the Court were to consider the opposition, if the Court were to consider it, it wouldn’t raise an issue of fact” sufficient to sustain Defendant’s burden of proof.

To defeat such an application, the non-movant must show the existence of a genuine issue of material fact that is “real, not feigned since a sham or frivolous issue will not preclude summary relief.” *Kornfeld v. NRX Tech. Inc.*, 93 A.D.2d 772, 773, 461 N.Y.S.2d 342 (1st Dep’t 1983) (*citation omitted*).

The Appellate Division, First Department, held that when the evidence submitted in opposition to a summary-judgment motion is incredible, such opposition must be deemed legally insufficient, and disregarded. See *Espinal v. Trezechahn 11065 Ave. of the Americas. LLC*. 2012 NY Slip Op 03083 (1st Dept; April 24, 2012).

Bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment. See *Capelin Assoc. v. Globe Mfg. Corp.*, 34 NY2d 338, 342 (1974), but rather it is essential that the defendant disclose their proof in evidentiary form. Further, affidavit submissions which consist largely of non-probative allegations and irrelevant frivolous issues do not suffice to meet the non-moving party’s burden. See *Hansel Gretel Brand, Inc. v Allstates*

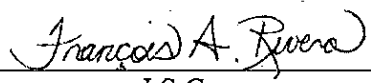
Food, 86 AD2d 858 (2nd Dept 1982).

IT IS HEREBY ORDERED, that Plaintiff, MORROW EQUIPMENT COMPANY, LLC, be awarded: 1) the sum of **\$200,00.00**, together with interest from February 6th, 2020 at the statutory rate of Nine Percent (9%) per annum, together with costs and disbursements, as set forth in an accompanying Bill of Costs, against Defendant SEVENTH FLOOR SERVICES, INC, located at 2002 McDonald Avenue, 2nd Floor, Brooklyn, NY 11223 and

2) that the Clerk of the Court to enter Judgment in favor of the Plaintiff MORROW EQUIPMENT COMPANY, LLC and against Defendant SEVENTH FLOOR SERVICES, INC., in the amount of **TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS**, together with interest from February 6, 2020, the date of the breach, at the statutory rate of NINE (9%) per annum, pursuant to **CPLR § 5001**, together with Costs and disbursement of this action; as set forth herein, and that the Plaintiff have execution therefore.

Judgment signed this _____ day of _____, 2023.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.