

**Kahn v Nash**

2023 NY Slip Op 31871(U)

June 2, 2023

Supreme Court, New York County

Docket Number: Index No. 653736/2022

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. BARRY R. OSTRAGER, PART IAS MOTION 61EFM**

*Justice*

-----X  
ANDREW KAHN,

Plaintiff,

- v -

BEN CHAIM NASH a/k/a CHAIM TZVI NASH, ZVI  
BEN NASH and CHAIM BEN NASH,

Defendants.

INDEX NO.	653736/2022
MOTION DATE	
MOTION SEQ. NO.	001

**DECISION + ORDER ON MOTION**

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HON. BARRY R. OSTRAGER

On May 31, 2023, the Court heard oral argument on plaintiff's Motion Sequence 001 for summary judgment in lieu of complaint. Notwithstanding any indication to the contrary on the Transcript of Proceedings of May 31, 2023, the motion is granted.

Plaintiff seeks to recover amounts allegedly due to him under two Amended and Restated Promissory Notes dated September 1, 2021, in the original amounts of \$4,000,000.00 (the "\$4M Note") and \$1,520,000.00 (the "\$1.52M Note"). The two Amended Notes essentially replaced a prior Promissory Note that the parties had originally entered into in 2015 (the "2015 Note"). Under the terms of the \$4M Note, defendant Ben (Chaim) Nash<sup>1</sup> was required to make monthly principal payments of \$250,000.00 on the first business day of each month commencing February 1, 2022. Defendant was also required to pay interest "at the rate of two percent (2%) per month compounded monthly until this Note is paid in full" beginning October 1, 2021.

<sup>1</sup> The Caption of this action erroneously suggests that there are multiple defendants in this case but appears only to provide alternative names for defendant Ben Chaim Nash. The notice of motion also seeks relief "jointly and severally" but appears to acknowledge that defendant Ben Chaim Nash is the only defendant in this Action and the only individual whose name is on the Amended Notes that are the subject of the motion for summary judgment in lieu of complaint.

NYSEF Doc. No. 7 at §3. Plaintiff alleges that, under the terms of the \$4M Note, plaintiff could issue a demand for payment at any time and upon such demand 50% of any outstanding amount would be due within 60 days and the remainder due within 120 days. Further, plaintiff alleges that defendant would also be responsible for costs of collection (including reasonable attorney's fees) upon a default. Plaintiff alleges that defendant has failed to pay any of the principal payments and has failed to pay interest due since March of 2022.

Under the terms of the \$1.52M Note, defendant was required to make monthly payments of \$100,000.00 commencing on October 1, 2021. The other terms of the \$1.52M Note were substantially the same as the terms of the \$4M Note, except that interest would not begin to accrue under the \$1.52M Note until the occurrence of an event of default. Under the terms of the \$1.52M Note, upon an Event of Default as defined, "the unpaid amount due shall bear default interest at the rate of two percent per month on the unpaid principal balance until this Note is paid in full." NYSCEF Doc. No. 8 at §3. Plaintiff alleges that defendant has failed to make the monthly payment since April 1, 2022 and failed to make any interest payments due thereafter.

On August 1, 2022, plaintiff sent a written notice of default to defendant for failure to pay the monthly principal payments on both of the Amended Notes, as well as for failure to pay interest on the \$4M Note. Plaintiff also made demand for payment on that date. Plaintiff alleges that defendant failed to cure the various defaults under the Notes. Plaintiff also alleges that, as of October 1, 2022, the current outstanding amount under the \$4M note is \$4,000,000 in principal, while the \$1.52M Note has \$820,000 in outstanding principal.<sup>2</sup>

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<sup>2</sup> Plaintiff's papers seek a judgment in the amount of \$5,271,225.49, which includes the \$4,000,000.00 in principal due under the \$4M Note and \$820,000.00 in principal due under the \$1.52M Note, as well as \$434,825.49 in accrued interest under the \$4M Note (calculated from the date the interest was due through the filing of the motion) and \$16,400.00 in interest due under the \$1.52M Note (calculated from the date of the default through to the filing of the instant

Defendant opposes plaintiff's motion and asserts that plaintiff abused his position as a fiduciary to fraudulently induce the execution of the Amended Notes. Defendant also disputes plaintiff's claim that he has made no payment towards the Amended Notes; Defendant claims in his affirmation that he has already paid upwards of \$7,000,000.00 to plaintiff in satisfaction of his indebtedness, but does not specify either when these payments were made or provide any documentation establishing that such payments were made. NYSCEF Doc. No. 14.

To make a prima facie showing of entitlement to summary judgment in lieu of complaint, plaintiff must establish the existence of an instrument for the payment of money only containing an unequivocal and unconditional obligation to repay, as well as defendant's failure to repay. *See Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 137–38 (1<sup>st</sup> Dept. 1968). The burden then shifts to the defendant to rebut the plaintiff's prima facie showing of plaintiff's entitlement to summary judgment.

Plaintiff has made a prima facie showing of his entitlement to summary judgment. Defendant does not dispute that the Amended Notes are instruments for the payment of money only. Defendant does, however, dispute the amount plaintiff alleges is owed under the Amended Notes. In defendant's affidavit in opposition to the motion, defendant makes the conclusory assertion that he has paid \$7,000,000.00 in satisfaction of his indebtedness. NYSCEF Doc. No. 14. Defendant does not offer any facts regarding when these purported payments were made, nor does defendant dispute plaintiff's claim that no payments have been made towards the Amended Notes since the alleged dates of default. In fact, the Amended Notes each acknowledge that defendant made prior payments in satisfaction of the prior 2015 Note, which payments were

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motion). It is the responsibility of the Clerk of the Court to calculate the interest due. Thus the Court will disregard the additional amounts sought which consist of plaintiff's interest calculations.

credited to the balance of the Amended Notes. NYSCEF Doc. Nos. 7, 8. This is corroborated in plaintiff's reply affirmation, where plaintiff acknowledges that defendant has made prior payments towards various loans made by plaintiff over the course of several years, which loans had been "rolled over into new notes before their term expired." NYSCEF Doc. No. 18. Plaintiff's affidavit, together with the Amended Notes and notice of default, are sufficient to establish defendant's failure to repay the Amended Notes.

In short, defendant has failed to submit evidence establishing the existence of a triable issue with respect to a bonafide defense. Defendant does not dispute that he signed the Notes. Defendant is a sophisticated businessman who claims he failed to read the Amended Notes and the related Letter Agreement (NYSCEF Doc. No. 6) because he trusted plaintiff. NYSCEF Doc. No. 14. Defendant's affirmation in opposition does not allege any facts establishing that plaintiff urged or otherwise coerced defendant to sign the Amended Notes and the Letter Agreement without reading the documents. Defendant's affirmation merely states that defendant trusted plaintiff and for that reason did not review the terms of the Amended Notes. NYSCEF Doc. No. 14 ("I relied upon Plaintiff's representations and the faith and confidence that I placed in Plaintiff as a paid advisor and close friend, and I signed the 2021 Notes without reviewing the terms thereof or retaining an independent attorney to review them."). The facts alleged by defendant in his affirmation in opposition to the motion for summary judgment in lieu of complaint do not create any triable issue.

The Court awards to plaintiff judgment in the amount of \$4,000,000.00 for the outstanding principal due under the \$4M Note and \$820,000.00 for the outstanding principal due under the \$1.52M Note.

In addition, both the \$4M Note and the \$1.52M Note permit plaintiff to recover reasonable attorney’s fees. NYSCEF Doc. Nos. 6, 7. The Court deems \$10,000.00 to be a reasonable amount of attorneys’ fees to be taxed against defendants.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is granted. The Clerk is directed to enter judgment in favor of plaintiff Andrew Kahn against defendant Ben Chaim Nash pursuant to the \$4M Note in the principal amount of \$4,000,000.00 plus interest “at the rate of two percent (2%) per month compounded monthly until this Note is paid in full” from March 1, 2022 through the date of entry of judgment, in an amount to be calculated by the Clerk of the Court, plus the principal amount of \$820,000.00 pursuant to the \$1.52M Note plus interest at the contractual rate of 2% per month from May 1, 2022 through the date of entry of judgment in an amount calculated by the Clerk of the Court, plus \$10,000.00 in attorney’s fees, upon plaintiff’s e-filing of a Proposed Judgment and Bill of Costs directed to the County Clerk; and it is further

ORDERED that this action is dismissed against defendants Zvi Ben Nash and Chaim Ben Nash as they are not named parties to the Amended Notes.

Dated: June 2, 2023

  
BARRY R. OSTRAGER, J.S.C.

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