

Lowy v WebsterNT, LLC

2023 NY Slip Op 32575(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 160233/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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ALLEN LOWY

Plaintiff,

- v -

WEBSTERNT, LLC,

Defendant.

INDEX NO. 160233/2022

MOTION DATE 12/01/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

In this breach of contract action, plaintiff Allen Lowy moves, pursuant to CPLR 3213, for summary judgment in lieu of a complaint granting an entry of judgment against defendant WebsterNT LLC (“Defendant”) in the amount of \$150,000, with interest at the statutory rate of 9 percent per annum from August 15, 2022, and for costs and attorneys’ fees in connection with the instant motion. Defendant opposes the motion and cross moves for an order pursuant to CPLR 3211(4) and (5) and 22 NYCRR § 130-1.1 denying Lowy’s motion in its entirety, dismissing Lowy’s Summons with Notice with prejudice, and awarding Defendant fees and costs, including reasonable attorneys’ fees, in the amount of \$1,500.

Lowy is one of two members of Defendant, a New York limited liability company. A company resolution dated May 16, 2022 provided that Lowy would provide Defendant with an interest-free loan in the amount of \$150,000, repayable on or before August 15, 2022 (NYSCEF Doc. No. 4). The resolution does not specify the loan’s purpose. The resolution was signed and executed by Lowy and Defendant’s other member, nonparty Ralph Dailey.

In an affidavit in support of his motion dated November 29, 2022, Lowy asserts that Defendant has failed to repay the loan (NYSCEF Doc. No. 3, Affidavit in Support). Defendant argues, in support of its cross motion and in opposition to Lowy's motion, that Lowy has already obtained a judgment against Defendant in another action that is inclusive of the relief he seeks here. That judgment, in the amount of \$1,455,718, was entered in Erie County pursuant to a Judgment by Confession dated November 29, 2022 in the action captioned *Allen M. Lowy v WebsterNT, LLC*, Index No. 814518/2022 (NYSCEF Doc. No. 11). Lowy submitted an Affidavit of Confession of Judgment in the Erie County action on behalf of Defendant in which he represented that the confession of judgment was "for a debt justly due to [Lowy] arising from loans and capital provided to [Defendant] for the purchase and renovation of the property commonly known as 54-60 Webster Street, North Tonawanda, New York 14120, owned by the defendant, which sum is justly due and owing as of this date" (NYSCEF Doc. No. 10, Lowy Affidavit ¶ 2).

CPLR 3213 provides, in relevant part, that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." A plaintiff is entitled to summary judgment if it makes a prima facie case by presenting proof of the instrument and of the defendant's "failure to make the payments called for by its terms" (*Interman Industrial Products, Ltd v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 155-156 [1975]). A defendant may defeat a motion for summary judgment in lieu of a complaint by "offering evidentiary proof sufficient to raise a triable issue of fact" (*Banco Popular N. Am. v Victory Taxi Mgmt., Inc.*, 1 NY3d 381, 383 [2004]; *Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, 291 AD2d 342 [1st Dept 2002]).

On a motion for summary judgment pursuant to CPLR 3212, a movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After the movant makes this showing, “the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” such that trial of the action is required (*id.*). The Court must view the facts “in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Both the motion and the cross motion are denied. Although Lowy makes a prima facie case by submitting proof of the instrument and an affidavit stating that Defendant has failed to repay the \$150,000 loan, Defendant creates an issue of fact by submitting the Judgment by Confession and Lowy’s Affidavit of Confession of Judgment in the Erie County action to support its assertion that the loan has already been repaid. However, Defendant fails to demonstrate an absence of issues of material fact such that it would be entitled to summary judgment dismissing the action, as the documentation it presents with respect to the Erie County action do not specify the instruments for which Defendant confessed liability. Lowy fails to tender additional evidence in opposition to Defendant’s contentions; he merely annexes to his reply papers the same documents from the Erie County action furnished by Defendants in their papers.

Accordingly, it is hereby:

ORDERED that the motion and cross motion are denied; and it is further

ORDERED that counsel for all parties shall appear for a preliminary conference on September 5, 2023 at 9:30 a.m., at 60 Centre Street, Room 212.

This constitutes the Decision and Order of the Court.

7/26/2023

DATE



LORI S. SATTLER, 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