

**26 N. Prop. Group, LLC v
Property Servs. Group, LLC**

2024 NY Slip Op 35086(U)

September 19, 2024

Supreme Court, Westchester County

Docket Number: Index No. 63504/2024

Judge: Gretchen J. Walsh

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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26 NORTH PROPERTY GROUP, LLC,

Index No. 63504/2024
Motion Seq. No. 1

Plaintiff,

Motion Date: 7/19/24
DECISION & ORDER

-against-

PROPERTY SERVICES GROUP, LLC

Defendant.

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WALSH, J:

The following e-filed documents, listed in NYSCEF by document numbers 1-7, were read on this motion by Plaintiff 26 North Property Group, LLC (“Plaintiff”) for an order granting summary judgment in lieu of complaint against Property Services Group, LLC (“Defendant”). Defendant submits no opposition to the motion.

Upon the foregoing papers and for the reasons stated herein, Plaintiff’s motion shall be granted.

FACTUAL AND PROCEDURAL BACKGROUND

In this action seeking summary judgment in lieu of complaint, Plaintiff seeks an order pursuant to CPLR 3213: (1) directing the entry of a judgment against Defendant for \$100,000.00 with interest thereon from February 9, 2022, together with attorney’s fees and costs; and (2) such other and further relief as this Court may deem just and proper (NYSCEF Doc. No. 2). Defendant has not offered any opposition, nor otherwise appeared in this action.

In support of their motion, Plaintiff submits: (1) the affidavit of Shade Zahn (“Zahn”), a member of Plaintiff 26 North Property Group, LLC, sworn to June 5, 2024 (NYSCEF Doc. No. 3 [“Zahn Aff.”]), along with a copy of the underlying promissory note dated February 9, 2022 (NYSCEF Doc. No. 4 [the “Note”]).

The merits of Plaintiff's claim on the promissory note is set forth in the Zahn Affidavit, which supports the parties' entry into the promissory note and Defendant's failure to make requisite payment under the note (Zahn Aff. at ¶ 2). Zahn asserts that "[t]he Note was not an installment loan, but rather was due and payable in full on December 16, 2022 [the 'Maturity Date'] with interest accruing at 12% per annum" (*id.*). Zahn avers that "[n]o part of the \$100,000 principal amount owed . . . has been paid[,] the Defendant is now in default . . . [and] no extension of the maturity date of December 16, 2022 has been given" (*id.* at ¶¶ 2-3). Zahn explains that Paragraph 3 of the Note provides for 13% rate of interest accrual per annum in the event of a default, and that Paragraph 9 provides that the Borrower "shall pay all costs incurred by Lender in collecting sums due under this Note after a default, including reasonable attorneys' fees" (*id.* at ¶¶ 4-5, quoting the Note at ¶ 9). Zahn contends that it is "beyond well-settled that a promissory note qualifies as an instrument for the payment of money only," and thus qualifies for the CPLR 3213 provision that "a motion for summary judgment in lieu of complaint [is only viable] when the action is based upon an instrument for the payment of money only" (*id.* at ¶ 6). According to Zahn, a plaintiff moving for summary judgment in lieu of complaint may demonstrate its prima facie entitlement as a matter of law is it can demonstrate "the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" (*id.*, quoting *Lugli v Johnston*, 78 AD3d 1133, 1135 [2d Dept 2010]). Zahn states that the existence of the underlying Note in this action is indisputable, and, accordingly, "[t]he obligation to repay the borrowed sum of \$100,000 was clear and unequivocal and the failure by the Defendant to pay in accordance with the terms of the Note cannot be disputed" (*id.* at ¶ 7).

Zahn explains that the amount owed to Plaintiff by Defendant, inclusive of interest, was \$110,225.68 on December 16, 2022 and \$132,878.70 as of the return date of July 15, 2024 (*id.* at ¶¶ 8-9). Zahn "further request[s] an award of costs and reasonable attorney's fees as permitted under the Note" as he has "paid [his] attorney an initial retainer fee of \$3,500 to pay for this application" and other miscellaneous fees, and that he "will file an additional submission if the Defendant opposes the motion and the filing of Reply papers is warranted" (*id.* at ¶ 10). Accordingly, Zahn reiterates the request for "summary judgment in lieu of complaint [to] be awarded to Plaintiff for the amount of \$100,000 plus interest as detailed herein together with an award of costs and reasonable counsel fees" (*id.* at ¶ 11).

DISCUSSION

CPLR 3213 allows an action based upon an instrument for the payment of money only to be commenced with a motion for summary judgment, rather than a complaint. This procedure is intended to provide a speedy and effective means for resolving a presumptively meritorious claim. (*see, e.g., Banco Popular N. Am. v Victory Taxi Mgt., Inc.* 1 NY3d 381 [2004]). The proponent of a CPLR 3213 motion establishes a prima facie entitlement to judgment by offering proof, in evidentiary form, of the instrument for payment of money in question and of the failure of the defendant to pay in accordance with the terms of the instrument. If this showing is made, the burden then shifts to the defendant(s) to come forward with evidentiary facts demonstrating the

existence of a material issue of fact which would defeat a motion for summary judgment (*see, e.g., Fleet Bank v. M & Z Handwear, Inc.*, 308 AD2d 507 [2d Dept 2003]; *Moezina v Baroukhian*, 247 AD2d 452 [2d Dept 1998]; *DeVito v Benjamin*, 243 AD2d 600 [2d Dept 1997]; *Alicanto v Woolverton*, 142 AD2d 703 [2d Dept 1988], *lv denied* 73 NY2d 702 [1988]; *accord Banco Popular*, 1 NY3d at 383; *Mastro v Carroll*, 296 AD2d 802 [3d Dept 2002]). In order to qualify for CPLR 3213 treatment it is “incumbent upon the [movant] to show that the accounts stated, on which [the] action is based, [is] for the payment of money only” (*Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975] [internal quotations omitted]). It is well settled that a Promissory Note is considered an instrument for the payment of money only and, therefore, is the proper subject of a CPLR 3213 motion (*Bank of Am., N.A. v Solow* 59 AD3d 304 [1st Dept 2009], *lv dismissed* 12 NY3d 877 [2009]; *DDS Partners LLC v Celenza*, 6 AD3d 347 [1st Dept 2004]; *European Am. Bank & Trust Co. v Schirripa*, 108 AD2d 684 [1st Dept 1985]).

Here, Plaintiff has met its prima facie burden regarding its entitlement to summary judgment by: (1) demonstrating that Defendant was served with the Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, and the supporting papers thereto (NYSCEF Doc Nos. 1, 2 and 7); (2) establishing the existence of the underlying Note, which is an instrument for the payment of money only (*see* NYSCEF Doc. No. 4); and (3) establishing Defendant’s failure to make the payment owed as of the Maturation Date (*see* NYSCEF Doc. No. 3; *see also* *BBM3, LLC v Vosotas*, 2023 NY Slip Op 02279 at *1 [1st Dept 2023] [holding that “[p]laintiff satisfied its prima facie burden on its CPLR 3213 motion for summary judgment in lieu of complaint by demonstrating the existence of the guaranties and underlying debts, as well as defendant guarantor’s failure to perform under the guaranties”]; *27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630, 630-631 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021] [stating that “[i]n both cases, the motion courts properly found that plaintiffs established their prima facie right to summary judgment in lieu of complaint based on the existence of the guaranties, the underlying debt and the guarantor’s failure to perform under the guaranties”]; *Ahmad v Luce*, 147 AD3d 888, 888 [2d Dept 2017] [holding that “[i]n this action to recover on a promissory note, commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law by submitting the promissory note, which contained an unequivocal and unconditional obligation to pay, and proof of the defendants’ failure to make payments on the note according to its terms”]).

With respect to the second showing (i.e. Plaintiff’s establishment of the existence of the underlying Note), there can be no credible dispute that the Note constitutes “an instrument for the payment of money only” as set forth in CPLR 3213. As annexed to the Zahn affidavit, the Note, dated February 8, 2022, includes an unambiguous promise by Defendant to pay Plaintiff a fixed sum of money by the Maturation Date of December 16, 2022 (*see* NYSCEF Doc. No. 4; *see also* *Perlbinder Holdings LLC v Patel*, 202 AD3d 578, 578 [1st Dept 2022], *lv denied* 39 NY3d 905 [2022] [holding that “[t]his case, which is based on an instrument for the payment of money only, i.e., a promissory note, was properly brought pursuant to CPLR 3213”]; *Intermax Eco, LLC v Eco Family Food Mart Corp.*, 172 AD3d 1040, 1041 [2d Dept 2019] [noting that “[a] promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time”])).

Finally, the Court shall award Plaintiff its request for \$3,500 in attorneys' fees because this amount is inherently reasonable and Zahn has attested to Plaintiff's payment of same.

Accordingly, in addition to awarding Plaintiff summary judgment in the principal sum of \$100,000, with statutory interest, the Court shall grant Plaintiff its reasonable attorneys' fees and its costs and disbursements (to be taxed by the Clerk of the Court) as reflected in a bill of costs to be submitted by Plaintiff's counsel.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that the motion by Plaintiff for an order granting it summary judgment in lieu of complaint is granted to the extent that Plaintiff is awarded summary judgment against Defendant in the principal amount of \$100,000.00, together with: (1) interest at a rate of 13% per annum from December 17, 2022 to the date of the entry of the judgment (to be calculated by the Clerk of the Court); (2) its costs and disbursements as reflected in a bill of costs (to be taxed by the Clerk of the Court); and (3) \$3,500.00 in attorneys' fees; and it is further

ORDERED that counsel for Plaintiff shall serve by overnight mail a copy of this Decision and Order upon Defendants, with notice of entry, by not later than September 25, 2024 and shall provide proof of service by not later than October 11, 2024.

ORDERED that counsel for Plaintiff shall, by September 25, 2024 serve and file a proposed judgment, with the amounts to be awarded for interest, attorneys' fees, costs and disbursements left blank, noticed for settlement before this Court (and not the Clerk of the Court) on October 11, 2024 (**no appearances required**), together with a bill of costs.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 19, 2024
White Plains, New York


HON. GRETCHEN J. WALSH, J.S.C.

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