

Leo Kayser III, P.C. v EH Realty Ventures, Inc.

2025 NY Slip Op 32951(U)

July 31, 2025

Supreme Court, New York County

Docket Number: Index No. 651583/2025

Judge: Lyle E. Frank

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

LEO KAYSER III, P.C.,

Plaintiff,

- v -

EH REALTY VENTURES, INC., EDWARD W. HAYES

Defendant.

-----X

INDEX NO. 651583/2025

MOTION DATE 03/24/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, the motion is denied.

Background

Mr. Edward W. Hayes (the “Individual Defendant” or “Hayes”) leased an office space for use in his law practice in 2011 from his long-standing acquaintance, plaintiff Leo Kayser III, P.C. (“Plaintiff”). In 2019, Plaintiff alleges that rent payments had ceased to be made and that after discussing matters with the Individual Defendant, Plaintiff agreed to accept a promissory note in exchange for a rent write-off. In January of 2020, the Individual Defendant along with his investment business entity EH Realty Ventures, Inc. (the “Business Defendant”, collectively with Mr. Hayes the “Defendants”) allegedly executed a promissory note for the amount of \$200,000. Throughout 2022, further promissory notes followed as a result of more failures to pay rent. Plaintiff alleges that by March of 2025, there is an outstanding balance owed on the promissory notes of \$666,536.59. They bring the present motion for summary judgment in lieu of complaint pursuant to CPLR § 3213. Defendant opposes.

Standard of Review

CPLR § 3213 permits a party to move for summary judgment in lieu of complaint when the “action is based upon an instrument for the payment of money only or upon any judgment.” To meet their prima facie burden, a plaintiff must establish the existence of the instrument and the failure to perform under the instrument by the defendant. *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.”, N.Y. Branch v. Navarro*, 25 N.Y.3d 485, 492 [2015]. At that point, the “burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense.” *Id.*

Discussion

Defendants’ argument in opposition to the motion is that his signature was forged on the promissory notes in question. In support of this argument, they have submitted a sworn affidavit from Mr. Hayes stating that the promissory notes are “forgeries” and that he never signed them. He claims that Plaintiff told him that he could pay rent “what you can whenever you can” and denies that he owes back-rent. They have also produced a sworn affidavit from handwriting expert John F. Breslin stating that it was his opinion “with a degree of scientific certainty that the signatures attributed to Edward W. Hayes exhibited certain differences indicating that the signatures were suggestive of multiple authors”, and that “the author of the known Edward W. Hayes signatures has been eliminated as the author of the questioned signatures” on the three promissory notes. It is their position that this suffices to raise an issue of fact that would defeat the 3213 motion.

The Expert Affidavit Is Admissible

Plaintiff raises several arguments in opposition to Defendants’ forgery defense. First, they argue that the Breslin report failed to authenticate the documents that were relied upon in order to make his determination. Breslin states that “[r]eproductions of certain bank documents

bearing Mr. Edward's known signatures were provided to me" and attaches the samples to his affidavit. Mr. Hayes in his affidavit states that he was asked by Mr. Breslin to "produce documents bearing my signature around the same time frame that the promissory notes were alleged to be executed by me. Mr. Breslin needed contemporaneous documents for comparison analysis." He then later states that the expert "reviewed signatures on my bank checks known to be mine and compared them" with the promissory note signatures. Plaintiff argues that Mr. Hayes does not explicitly affirm that the documents provided bear true and accurate copies of his actual signature, and therefore that the documents the expert affidavit is based upon are unauthenticated and inadmissible.

CPLR § 4536 states that "[c]omparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted." Plaintiff cites to *Kanterakis*, where the Second Department held that the testimony of a handwriting expert should not have been considered because the exemplars the expert relied on were not authenticated. *Kanterakis v. Minos Realty I, LLC*, 151 A.D.3d 950, 952 [2nd Dept. 2017]. The also cite to *Al-Kabyalle*, where the expert did not describe the exemplars nor include them in the record. *Al-Kabyalle v. Ali*, 159 A.D.3d 477, 477 [1st Dept. 2018]. These cases are distinguishable. Here, the Defendants have put forth testimony regarding the exemplars and provided copies of the documents themselves. The statement from Mr. Hayes that the bank checks in question were his, suffices to authenticate the exemplars.

The Mortgage Cannot Rebut an Issue of Fact Raised on a 3213 Motion

Plaintiff also argues that there is "essentially undeniable" evidence refuting the forgery theory. They have provided in their reply what purports to be a mortgage that refers to a promissory note signed by Defendants in favor of Plaintiff and cite to *1424 Millstone*. There, the

First Department held that where an affidavit attesting to forgery raised an issue of fact, emails provided by the other party were “essentially undeniable evidence refuting” the claim of forgery. *1424 Millstone Rd., LLC v. James B. Fairchild, LLC*, 136 A.D.3d 556, 557 [1st Dept. 2016]. But that case involved a standard summary judgment motion. As the court noted there, the affidavit was “sufficient to raise an issue of fact” but that issue was further rebutted by the additional evidence. *Id.* Here, the motion is a 3213 motion, and Plaintiff is asking the Court to turn to outside documentation to refute the issue of fact raised by Defendants. While the mortgage may or may not suffice to carry the day on a CPLR § 3212 summary judgment motion, it cannot bolster a CPLR § 3213 motion after the non-moving party has raised an issue of fact.

Banco Is Distinguishable from the Present Case

Plaintiff cites to *Banco* for the proposition that in order to defeat a 3213 motion with a forgery defense, the defendant must demonstrate prelitigation conduct that is consistent with the denial of the genuineness of the signature. But this position somewhat misinterprets the holding of *Banco*. There, a party opposing a 3213 motion submitted an affidavit claiming that the signatures were not hers, and a report of a handwriting examiner. The Court of Appeals noted that “[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” *Banco Popular N. Am. V. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 [2004]. Factors that the court listed when holding that the defendant’s affidavit “was alone inadequate” to raise an issue of fact were that there was “an absence of factual assertions supporting a claim of forgery and [the defendant] has not demonstrated that her prelitigation conduct was consistent with a denial of genuineness.” *Id.* Moving on to the handwriting expert, the court noted that the letter report was unsworn and the expert stated that “he was not able to determine whether [defendant] was the signatory on the documents.” *Id.*

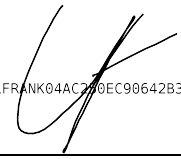
The facts here are different. Mr. Hayes makes certain factual allegations regarding the signatures that would require the Court to weigh the credibility of his statements compared to those of Plaintiff. The handwriting expert affidavit here is a sworn statement, and the expert stated that he was able to reasonably determine that the promissory note signatures were not from Mr. Hayes. The prelitigation conduct of the defendant is simply one among several factors that the court weighed in *Banco* and that case does not impose an affirmative duty upon the defendant to make a showing of pre-litigation conduct in order to use a forgery defense.

Furthermore, there is a body of case law that supports denying a motion for summary judgment in lieu of complaint on the grounds of issues of fact going to forgery, even without an expert affidavit. *See, e.g., Diplacidi v. Gruder*, 135 A.D.2d 395, 396 [1st Dept. 1987] (holding that a defendant who set forth three purported signature differences sufficed even without expert testimony); *Cicale v. Wachovia Bank N.A.*, 56 A.D.3d 392, 392 [1st Dept. 2008] (holding that a plaintiff who submitted documents to the court for comparison raised an issue of fact); *Martinez v. Moroldo*, 160 A.D.2d 387, 389 [1st Dept. 1990] (holding that “the validity of a signature is generally a question of fact to be determined at trial”); *All State Flooring Distribs., L.P. v. MD Floors, LLC*, 131 A.D.3d 834, 836 [1st Dept. 2015] (where an affidavit disputing the signature and an exemplar showing differences defeated a summary judgment motion). Accordingly, it is hereby

ADJUDGED that the motion for summary judgment in lieu of complaint is denied; and it is further

DECLARED that the plaintiff’s moving papers are hereby deemed the complaint in this action and the defendants’ answering papers are hereby deemed the answer.

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7/31/2025

DATE

LYLE E. FRANK, 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