

Reitler Kailas & Rosenblatt LLP v Serface Care, Inc.

2025 NY Slip Op 33372(U)

September 3, 2025

Supreme Court, New York County

Docket Number: Index No. 659548/2024

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

instrument for the payment of money only may be brought by service of a summons with notice of motion for summary judgment in lieu of a complaint. “The statute allows a plaintiff an expedited procedure for entry of a judgment by filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment” (*Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 484 [1st Dept 2013] [internal citations omitted]). “The prototypical example of an instrument within the ambit of [CPLR 3213] is ... a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time” (*PI Finance v Evergreen Builders & Construction Services, Inc.*, 232 AD3d 549, 550 [1st Dept 2024], quoting *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996] [internal quotations omitted]).

In CPLR § 3213 actions involving a promissory note, the First Department has stated that to “establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms” (*Zyskind v FaceCake Marketing Technologies, Inc.*, 101 AD3d 550, 551 [1st Dept 2012]; see also *Fiore Financial Corporation v Gaea North America, LLC*, 179 AD3d 621, 621 [1st Dept 2020] [affirming lower court’s granting of plaintiff’s motion for summary judgment in lieu of complaint where plaintiff “properly showed that the promissory note . . . contained an unconditional promise to pay, [] defendant executed the note, and [] defendant failed to pay in accordance with the note’s terms”]). To establish prima facie entitlement to judgment as a matter of law, a plaintiff should produce the promissory note allegedly executed and an affidavit asserting, or proof demonstrating, that the defendant failed to pay according to its terms (*Frydco Capital Group, LLC v Park Rio East, LLC*, 226 AD3d 474, 474 [1st Dept

2024]; *Navon v Jackson*, 191 AD3d 578, 578 [1st Dept 2021]; *Wachovia Bank, N.A. v Silverman*, 84 AD3d 611, 612 [1st Dept 2011]). Once a plaintiff satisfies this initial burden, the burden then shifts to the defendant to establish “the existence of a triable issue [of fact] with respect to a bona fide defense” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015] [internal citation omitted]).

Here, plaintiff’s motion is denied because the plaintiff has failed to submit evidentiary proof or supporting documentation in admissible form to establish any of the required elements to meet its burden of demonstrating prima facie entitlement to summary judgment under CPLR § 3213 (*see 27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630, 631 [1st Dept 2021]). Specifically, plaintiff has failed to provide any evidence relating to, let alone proof of, the executed promissory note or terms therein, and the motion papers do not contain enough evidentiary detail for the plaintiff to establish said elements (*Fixy 33 LLC v Deutsch*, 237 AD3d 611, 612 [1st Dept 2025]; *Sea Trade Mar. Corp. v Coutsoodontis*, 111 AD3d 483, 484 [1st Dept 2013]). While plaintiff has offered the affirmation of Christopher Edwards, Esq., a Partner of the plaintiff and supposedly a party with personal knowledge of the underlying facts of this matter (NYSCEF Doc. No. 4),² this document alone is insufficient to satisfy the plaintiff’s evidentiary burden under CPLR § 3213 (*Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004]; *Hakim v Hakim*, 179 AD3d 423, 424 [1st Dept 2020]). Therefore, the motion must be denied.

² The court notes that although the document was labeled as an “affirmation”, it does not conform with the required language of CPLR 2106, as amended; however, the document having been sworn to and notarized, satisfies the requirements for an affidavit (*Fifth Partners LLC v Foley*, 227 AD3d 543, 544 [1st Dept 2024]; *Grandsard v Hutchison* [Sup Ct, NY County 2024], *affd.*, 2024 NY Slip Op 02613 [1st Dept 2024]).

“Ordinarily, the proper course would be to convert this proceeding into a plenary action... [b]ut CPLR 3213 confers discretion on the motion court to ‘order[] otherwise’ in an appropriate case... [therefore,] [t]he appropriate course is to deny the CPLR § 3213 motion without prejudice to its renewal with proper documentary support (*United Teletech Fin. Fed. Credit Union v Lau*, 75 Misc 3d 1218[A] [Sup Ct 2022] [internal citation omitted]).

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is DENIED, without prejudice to renewal upon the submission of proper documentary support; and it is further

ORDERED that if no renewal is sought within 40 days of entry of this order, the action may be subject to dismissal; and it is further

ORDERED that a copy of this order with notice of its entry be served on defendant at a last-known address by certified mail, return receipt requested.

This constitutes the decision and order of this court.


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09/03/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE