

<b>Ruda v Kyung Sook Lee</b>
2012 NY Slip Op 33627(U)
February 3, 2012
Sup Ct, Queens County
Docket Number: 21833/2011
Judge: Robert J. McDonald
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SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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PABLO RUDA, as Property Guardian of  
EDWIN RUDA, an Incapacitated Person,

Plaintiff,

- against -

Index No.: 21833/2011  
Motion Date: 01/26/2012  
Motion No.: 25  
Motion Seq.: 1

KYUNG SOOK LEE,

Defendant.

- - - - - X

The following papers numbered 1 to 12 were read on this motion by the plaintiff for summary judgment in lieu of complaint pursuant to CPLR 3213 and the cross-motion by the defendant for an order dismissing the action as barred by the applicable statute of limitations:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 5
Cross-Motion to Dismiss-Affirmation in Opposition.....	6 - 9
Reply Affirmation.....	10 - 12
Plaintiff's Affidavit in Support of Newly Discovered Evidence.....	13 - 15
Affidavits in Opposition to Newly Discovered Evidence.....	16 - 20

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Plaintiff Pablo Ruda, the Property Guardian of his father, Edwin Ruda, moves pursuant to CPLR 3213 for summary judgment in lieu of complaint with regard to a Promissory Note dated June 25, 1997. Pursuant to the terms of the note, Kyung Sook Lee agreed to pay to Edwin Ruda, on demand, the sum of \$50,000 with interest at the rate of 7.2% per year commencing on the date of issuance of the note and continuing until payment. The note, signed by Lee, states that it is evidence of a loan made by Edwin Ruda to Kyung Sook Lee in connection with the purchase by Ms. Lee of residential condominium Unit 14B, 376 Broadway, New York, New York which Ms. Lee maintains as her residence.

In support of the motion, the plaintiff, Pablo Ruda submits an affidavit dated September 19, 2011, stating that pursuant to the terms of the promissory note dated June 25, 1997, Ms. Lee was obligated to pay Edwin Ruda, on demand, the sum of \$50,000 with interest at the rate of 7.2 percent per year. Plaintiff states that on July 1, 2011 he sent a letter to the defendant in which he demanded full repayment within 30 days. As a result of the defendant's refusal to make payment on the note, plaintiff now requests an order pursuant to CPLR 3213, granting a money judgment for the full amount of the note plus prejudgment interest.

In opposition, the defendant moves to dismiss the action on the ground that the plaintiff's action is barred by CPLR 213 which provides that there is a six year statute of limitations on actions to recover on promissory notes and the cause of action on the demand note accrued on June 25, 1997, the date of execution. Defendant claims that as this action was not commenced until 2011 it is time barred as the six year statute ran out in June 2003. In addition, defendant claims that this action should be dismissed on the grounds of res judicata as the note was considered and argued at trial and that this debt was discharged as part of the memorandum decision of Justice Thomas dated December 9, 2010 and the order of Justice Mayersohn dated March 25, 2011. Defendant's counsel also contends that the transaction at issue was a gift and not a loan. In her affidavit dated October 13, 2011, Ms. Lee states that the transaction in issue was forgiven both orally and in a signed letter of forgiveness which she claims is in the plaintiff's custody and control.

In reply, plaintiff claims that the promissory note in issue was not addressed in the guardianship proceeding held before Justice Thomas and therefore res judicata does not apply. Plaintiff also submits an affidavit regarding newly discovered evidence which allegedly indicates that Edwin Ruda was incapacitated since 2003 and therefore the statute of limitations was tolled pursuant to CPLR 208. Defendant claims that the materials were not newly discovered as the same information was utilized at the prior hearing. Defendant also claims that Justice Thomas ruled that Mr. Ruda suffered from dementia commencing early in 2004.

"To establish a prima facie entitlement to judgment as a matter of law with respect to a promissory note, 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 by the defendant to pay in accordance with the note's terms (see Larry Lawrence IRA v Exeter Holding

Ltd., 84 AD3d 1175 [2d Dept. 2011]; Signature Bank v Galit Props., Inc., 80 AD3d 689 [2d Dept. 2011]; Lugli v Johnston, 78 AD3d 1133 [2d Dept. 2010]; Gullery v Imburgio, 74 AD3d 1022 [2d Dept. 2010]; Superior Fid. Assur., Ltd. v Schwartz, 69 AD3d 924 [2d Dept. 2010]; Verela v Citrus Lake Dev., Inc., 53 AD3d 574 [2d Dept. 2008]; Levien v Allen, 52 AD3d 578 [2d Dept. 2008]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting a copy of the unsecured demand note signed by the defendant and plaintiff's affidavit asserting that the defendant failed to make payment on the note after a demand therefor in accordance with the terms of the note (see Verela v Citrus Lake Dev., Inc., 53 AD3d 574 [2d Dept. 2008]; Hestnar v Schetter, 284 AD2d 499 [2d Dept. 2001]).

However, for an action to recover on a promissory note, the statute of limitations is six years (see CPLR 213[2]; Morrison v Zagloul, 88 AD3d 856[2d Dept. 2011]; Sce v Ach, 56 AD3d 457 [2d Dept. 2008]). A cause of action to recover on a note which is payable on demand accrues at the time of its execution (see Sce v Ach, supra, at 458); Comerica Bank, N.A. v Benedict, 8 AD3d 221[2d Dept. 2004]; Shelley v Shelley, 299 AD2d 405[2d Dept. 2002]). Here, the demand was not made until 2011 which was well beyond the six year statute of limitations which expired in June 2003. Thus, the defendant met her initial burden of establishing, prima facie, that the time to commence an action against her had expired. The burden then shifted to the plaintiff to establish that the case falls within an exception to the statute of limitations" (Rosenfeld v Schlecker, 5 AD3d 461 [2d Dept. 2004]).

CPLR 208 provides for a toll of the statute of limitations where the person entitled to commence an action is under a disability due to mental incapacity (see Costello v North Shore Univ. Hosp. Ctr., 273 AD2d 190). An individual will be considered disabled if that person is "unable to protect his or her legal rights because of an over-all inability to function in society" (Rosenfeld v. Schlecker, 5 AD3d 461 [2d Dept. 2002]; also see McCarthy v Volkswagen of America, Inc., 55 NY2d 543 [1982]; Costello v North Shore Univ. Hosp. Ctr. for Extended Care, 273 AD2d 190[2d Dept. 2000]).

Accordingly, this matter is set down for an evidentiary hearing to determine whether the plaintiff is entitled to the benefit of the statutory tolling period under CPLR 208 due to incapacity and whether Justice Thomas's decision is conclusive and binding as to the date of the plaintiff's incapacity or whether Justice Thomas's determination was fact specific vis a vis the issues which were raised at the guardianship proceeding

(see Rosenfeld v Schlecker, 5 AD 3d 461 [2d Dept. 2002]).

The parties are directed to appear for the hearing to be held in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, **at 10:00 a.m on March 9, 2012.**

Dated: February 3, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**