

Breslin v Zitron

2012 NY Slip Op 30668(U)

February 29, 2012

Supreme Court, Nassau County

Docket Number: 020955-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**WILBUR F. BRESLIN and BRESLIN REALTY
DEVELOPMENT CORP.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiffs,

-against-

**Index No: 020955-10
Motion Seq. No. 1
Submission Date: 2/1/12**

BENJAMIN ZITRON,

Defendant.

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Papers Read on this Motion:

**Notice of Motion, Attorney Affirmation, Affidavit in Support and Exhibits.....x
Supplemental Affirmation, Supplemental Affidavits in Support and Exhibits.....x**

This matter is before the court on the motion by Plaintiffs Wilbur F. Breslin (“Breslin”) and Breslin Realty Development Corp. (“BRDC”) (“Plaintiffs”), which was filed on October 14, 2011. By Order dated December 20, 2011 (“Prior Order”), the Court reserved decision on Plaintiffs’ motion and permitted Plaintiffs to provide supplementary submission(s) to the Court on certain issues specified in the Prior Order. The Court incorporates the Prior Order by reference as if set forth in full herein. Pursuant to the Prior Order, Plaintiffs provided supplemental submissions and the motion was submitted on February 1, 2012. For the reasons set forth below, the Court grants Plaintiffs’ motion to the extent that the Court grants Plaintiffs judgment against Defendant on the first cause of action in the Complaint in the amount of \$586,204.76, plus accrued and default interest to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3215, granting Plaintiffs a judgment by default against Defendant Benjamin Zitron (“Zitron” or “Defendant”). In his Supplementary Affidavit, provided pursuant to the Prior Order, Breslin affirms that Plaintiffs are now withdrawing the Second Cause of Action and are seeking judgment against Defendant only on the First Cause of Action.

Defendant has not appeared, and has not submitted an opposition or other response to Plaintiffs’ motion.

B. The Parties’ History

The parties’ history, including the allegations in the Complaint and an outline of the Affidavit and Affirmation in Support of Plaintiffs’ motion, is set forth in detail in the Prior Order. As noted in the Prior Order, the First Cause of Action alleges that Zitron executed and delivered to Breslin Multiple Promissory Notes dated December 13, 2002 through June 9, 2009 and Zitron has failed to make required payments on those notes. The Prior Order also outlines Plaintiffs’ service of the Summons and Complaint on Defendant, and Defendant’s failure to answer or move with respect to the Complaint.

In his Supplemental Affidavit in Support, Breslin provides a General Ledger (“Ledger”) (Ex. B to Breslin Supp. Aff. in Supp.), kept in the ordinary course of his business, which reflects the accrued amounts of the total principal sum due and owing from Zitron as of December 19, 2007. The Ledger contains handwritten notations on page 3 consisting of the word “Approved,” the date of 1/7/08 and a signature. Breslin affirms that these entries were made by the Defendant who, on January 7, 2008, acknowledged and approved the Ledger. The Ledger reflects that the total amount due and owing as of December 19, 2007 was \$586,204.76, which Breslin affirms is the full principal amount due and owing as of that date.

With respect to the Court’s direction in the Prior Order regarding the interest rate on the July 2, 2004 Note, Breslin affirms that he waives his right to any interest accrued on that Note prior to November 8, 2010, the date on which the Complaint was filed. Breslin requests that the Court award statutory interest on that Note from November 8, 2010. Breslin affirms further that he withdraws the second cause of the action in the Complaint on behalf of BRDC, and waives BRDC’s right to collect any sums on that cause of action.

In her Supplemental Affidavit in Support, Beth Alderman (“Alderman”), the Vice President of BRDC, affirms that she witnessed Defendant acknowledge and approve the Ledger on January 7, 2008. Alderman affirms that Defendant, in signing and dating the Ledger, “made it clear that he acknowledged the entire debt reflected in the document (the principal sum of \$586,204.76), and that he agreed to repay the entire amount” (Alderman Supp. Aff. in Supp. at ¶ 7).

In the Prior Order, the Court also permitted Plaintiffs to address, in their supplemental submissions, whether Plaintiffs’ causes of action related to the notes executed prior to November 8, 2004 are time-barred. In his Supplemental Affirmation in Support, Plaintiffs’ counsel submits that, pursuant to CPLR § 3211(e), Defendant waived his right to challenge Plaintiffs’ causes of action as time-barred by failing timely to plead the statute of limitations as an affirmative defense or move to dismiss based on the statute of limitations, and the Court may not consider that defense *sua sponte*. Plaintiffs’ counsel also contends that Defendant’s acknowledgment of the debt by signing the Ledger serves as a valid written acknowledgment within the meaning of General Obligations Law § 17-101, which would revive Plaintiffs’ otherwise time-barred claims.

C. The Parties’ Positions

Plaintiffs submit that they have demonstrated their right to judgment on the first cause of action by 1) establishing service of the Summons and Complaint on Defendant, and Defendant’s failure to appear in this action; and 2) demonstrating their right to judgment by producing the Multiple Promissory Notes and establishing Defendant’s failure to make the required payments pursuant to those Notes. Plaintiffs contend that Breslin is entitled to judgment on the first cause of action in the amount of \$586,204.76 with accrued interest as set forth in each Note, and default interest at the rate of 12% per annum from September 17, 2010 on the principal still due and owing, other than with respect to the Note dated July 2, 2004 on which interest should be calculated from November 8, 2010, based on the statutory rate.

Defendant has not answered the Complaint or submitted any response to Plaintiffs’ motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Promissory Note

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002). Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008).

In the case of a demand note, the applicable six-year statute of limitations begins to run from the date of execution of the note. *Shelley v. Shelley*, 299 A.D.2d 405, 406 (2d Dept. 2002), citing CPLR § 213(2); *Phoenix Acquisition Corp. v. Wickwire*, 81 N.Y.2d 138, 143 (1993); *Pomaro v. Quality Sheet Metal*, 295 A.D.2d 416, 418 (2d Dept. 2002).

C. Waiver of Defense of Statute of Limitations

In *Dougherty v. City of Rye*, 63 N.Y.2d 989 (1984), the Court of Appeals held that the defendant's argument that the action was untimely under the applicable Statute of Limitations had been waived in light of defendant's failure to assert that defense in its answer or in a pre-answer motion. *Id.* at 991, citing, *inter alia*, CPLR § 3211(e).

D. Application of these Principles to the Instant Action

The Court concludes that Plaintiffs have demonstrated their right to judgment against Defendant on the first cause of action in the Complaint by presenting proof of service of the Summons and Complaint on Defendant and providing affidavits setting forth the facts constituting the claim, the default, and the amount due. Specifically, Plaintiffs have established 1) the existence of the Multiple Promissory Notes, 2) Defendant's failure to make payment

pursuant to the terms of those instruments, and 3) the amount due which consists of the principal of \$586,204.76, plus accrued and default interest. The Court also concludes that any statute of limitations claim is waived by virtue of Defendant's failure to assert that defense in an answer or pre-answer motion.

In light of the foregoing, it is hereby

ORDERED, that Plaintiffs' Motion for a Default Judgment is granted to the extent that the Court grants Plaintiffs' motion for judgment on the first cause of action in the Complaint and awards judgment in favor of Plaintiff Wilbur F. Breslin against Defendant Benjamin Zitron in the amount of \$586,204.76 with accrued interest as set forth in each Note, and default interest at the rate of 12% per annum from September 17, 2010 on the principal still due and owing, other than with respect to the Note dated July 2, 2004, on which interest shall be calculated from November 8, 2010 based on the statutory rate; and it is further

ORDERED, that the action is respectfully referred to Special Referee Frank N. Schellace on March 28, 2012 at 9:30 a.m. to hear and determine all issues regarding interest; and it is further

ORDERED, that Plaintiffs' counsel shall serve upon Defendant, by regular mail, a copy of this Order with Notice of Entry, a Note of Issue or Notice of Inquest and shall pay the appropriate filing fees on or before March 16, 2012; and it is further

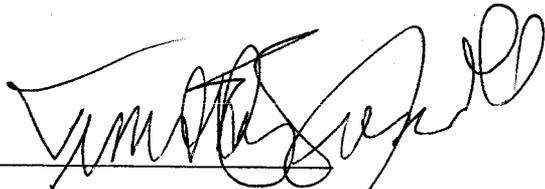
ORDERED, that the County Clerk is directed to enter a judgment in favor of Plaintiff Wilbur F. Breslin and against Defendant Benjamin Zitron in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
February 29, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C. 

ENTERED
MAR 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE