

Moskowitz, Passman & Edelman v U.S. Claims, Inc.
2012 NY Slip Op 31494(U)
May 31, 2012
Supreme Court, New York County
Docket Number: 102161/12
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MOSKOWITZ, PASSMAN & EDELMAN and A. SHELDON

INDEX No. 102161/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

U.S CLAIMS, INC., d/b/a US CLAIMS,

MOTION CAL NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1, 2

Answering Affidavits- Exhibits _____

3

Replying Affidavits _____

4

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

JUN 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

5/31/12

[Signature]

J.S.C.

Check one:

FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----- X
MOSKOWITZ, PASSMAN & EDELMAN and
A. SHELDON EDELMAN,

Index No. 102161/2012

Plaintiffs,

- against-

DECISION AND ORDER

U.S. CLAIMS, INC., d/b/a/ US CLAIMS,

FILED

Defendant.

JUN 06 2012

----- X
DONNA M. MILLS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

This CPLR 3213 action involves a June 30, 2010 purchase agreement, whereby plaintiff, A. Sheldon Edelman, a partner in the plaintiff law firm of Moskowitz, Passman & Edelman, conveyed to "US Claims" an interest in a specific pending lawsuit, to be repaid upon the final settlement of that lawsuit. Plaintiffs received \$30,250 from US Claims, and agreed to pay back \$32,576 if paid by September 14, 2010. Pursuant to the terms of the purchase agreement, the amounts required for repayment increased on a monthly basis to reflect an imputed interest charge at a monthly rate of 2.5%. Plaintiffs have not repaid the amount due, and interest has continued to accrue, compounding at the monthly rate.

Plaintiffs commenced this CPLR 3213 action, seeking a declaration that the loan is usurious and that the loan is therefore void. Plaintiffs also seek a stay of an arbitration that has been noticed pursuant to an arbitration provision contained in the purchase agreement. Plaintiffs move for summary

judgment pursuant to CPLR 3213, which is captioned, "[m]otion for summary judgment in lieu of complaint," and provides, as pertinent:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint ... If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

McKinney's CPLR 3213.

Non-party Lifeline Funding, LLC, doing business as US Claims (Lifeline), makes a limited appearance through counsel to cross-move for summary judgment dismissing the action on, inter alia, the ground of lack of personal jurisdiction. Lifeline submits the affidavit of Rudolph V. DeGeorge, II (DeGeorge), the General Counsel of Lifeline, affirming that, while Lifeline does business as US Claims, it is in no way affiliated with an entity by the name of U.S. Claims, Inc. DeGeorge acknowledges that Lifeline entered into the transaction with plaintiffs through its doing business entity, US Claims.

By submission of the DeGeorge affidavit, Lifeline has established its prima facie entitlement to judgment as a matter of law, dismissing the complaint, on the ground that plaintiffs have not obtained personal jurisdiction over a jural entity, and have sued a non-existent corporation, shifting the burden to plaintiff to present evidence in admissible form demonstrating

the existence of a question of fact (see *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 35-36 [2011]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiffs have failed to present evidence in admissible form sufficient to create a factual issue whether they obtained personal jurisdiction over Lifeline or any legal entity related to the transaction. It is insufficient to allege merely that they had no knowledge of Lifeline. There is also nothing in the record to suggest that there is any entity involved in the transaction that goes by the name of U.S. Claims, Inc., the party plaintiffs named in the complaint.

While there is nothing in the language of CPLR 3213 that would preclude the maker of a note from utilizing the expedited procedure to test the validity of a note, although no reported case appears to so hold, nothing in CPLR 3213 authorizes the court to issue a stay of arbitration, which ordinarily requires a petition under Article 75 of the CPLR, or a motion in a pending proceeding (see CPLR 7502 [a]).

In the event that plaintiffs obtain personal jurisdiction over Lifeline, and seek to pursue this action, in light of the denial of this motion, upon renewal, plaintiffs should serve a petition in a special proceeding pursuant to Article 75 of the CPLR to seek a stay of arbitration. The treatment of the moving and answering papers as a complaint and answer is permissive,

unless the court "orders otherwise" (CPLR 3213), which authorizes a court, as a matter of discretion, to order the service of formal pleadings (see *Schulz v Barrows*, 94 NY2d 624, 628 [2000]).

Accordingly, it is

ORDERED that the CPLR 3213 motion of plaintiffs Moskowitz, Passman & Edelman and A. Sheldon Edelman for summary judgment in lieu of complaint, is denied; and it is further

ORDERED that the cross motion of Lifeline Funding, LLC, doing business as US Claims, for summary judgment dismissing this action on the ground of lack of personal jurisdiction, is granted; and it is further

ORDERED that the action is dismissed with costs and disbursements to Lifeline Funding, LLC, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 5/31/12

E N T E R:

FILED

JUN 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Donna M. Mille

J. S. C.

DONNA M. MILLE, J.S.C.