

<b>First Natl. Bank of N.Y. v Schiff</b>
2013 NY Slip Op 33084(U)
December 9, 2013
Sup Ct, Kings County
Docket Number: 600009/2013
Judge: Carolyn E. Demarest
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At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of December, 2013.

P R E S E N T:

HON. CAROLYN E. DEMAREST,  
Justice.

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FIRST NATIONAL BANK OF NEW YORK,  
successor by merger to Madison National Bank

Index No. 60009/2013

Plaintiff,

**Decision and  
Order**

- against -

ABRAHAM SCHIFF,

Defendant.

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In this action to recover upon a line of credit note, Plaintiff, First National Bank of New York ("FNB"), moves pursuant to CPLR §3213 for Summary Judgment in Lieu of a Complaint against Defendant Abraham Schiff.

**BACKGROUND**

In or around November, 2008, the Defendant executed and delivered to Madison National Bank ("MNB") a Line of Credit Note (the "Note") in the amount of Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000), dated November 12, 2008. The Note had a maturity date of some unspecified day in November 2009.

Subsequently, in January 2010 and January 2011, Defendant executed and

delivered to MNB two extensions to the Note, which did not change the substance of the Note but merely adjusted the Maturity Date to January 21, 2012. In February 2012, MNB again granted an extension of the Maturity Date to April 19, 2012, at which point \$249,000 remained due on the Note, together with interest and other fees. According to Plaintiff, the Maturity Date was extended a fourth time to August 19, 2012.

Plaintiff claims, and Defendant does not dispute, that on or about April 2, 2012, MNB merged into Plaintiff, First National Bank of New York, and is operated as part of Plaintiff, which serves as the active successor institution and is the current holder and owner of the Line of Credit Note and its Extensions. On September 25, 2012, an Extension of Note Letter was issued by the Plaintiff to the Defendant granting a further extension on the 2008 Note, establishing a Maturity Date of November 19, 2012.

According to Plaintiff, on or about November 19, 2012, the Defendant caused an Event of Default to occur under the Note when he failed to timely pay the monthly installment. Plaintiff notified the Defendant in writing that the Defendant was in default and that Plaintiff was demanding immediate payment of all amounts due and owed pursuant to the terms of the Note. Following this notification, no payments were made.

Upon a Summons, accompanied by its Motion for Summary Judgment in Lieu of Complaint, Plaintiff brought this action to recover on the Note against the Defendant in the Supreme Court of New York, County of Suffolk on March 15, 2013. Defendant cross-moved to change venue from Suffolk to Kings County to which Plaintiff consented by

stipulation. By amended notice of motion, dated June 21, 2013, Plaintiff moved in this Court for Summary Judgment in its favor for the sum of \$259,160.78.

### DISCUSSION

“When an action is based on 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” (CPLR §3213). An instrument qualifies under CPLR §3213 “if the instrument contains an unconditional promise to pay a sum certain over a stated period of time” (*Bloom v Lugli*, 81 AD3d 579, 579 [2d Dept 2011]). “It is incontestable that plaintiff would prove a prima facie case by proof of the note and a failure to make its payments called for by the terms” (*Seaman-Andwall Corp. v Wright Mach. Corp.* 31 AD2d 136, 137 [1st Dept 1968]). “Once the plaintiff submits evidence establishing its prima facie case, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue of fact with respect to a bona fide defense” (*Griffon V. LLC v 11East 36th, LLC*, 90 AD3d 705, 707 [2d Dept 2011]).

In support of the instant motion, in addition to Counsel’s affirmation, Plaintiff submits an affidavit from its Vice President, Stuart Fliegelman, attesting that the suit was brought on a line of credit note and that Defendant failed to make the necessary payments on the note, and a copy of the note, which calls for payments in installments and contains an acceleration clause in case of default. The Plaintiff has, therefore, provided proof of its right to judgment. The Line of Credit Note is an instrument for the payment of money

only, as its terms and subsequent extensions contain an unconditional promise to pay a certain amount over a stated period of time. Plaintiff has satisfied the standards of CPLR §3213 and established a prima facie case entitling it to Summary Judgment, thereby shifting the burden to Defendant to present a bona fide defense (*see Seaman-Andwall Corp.*, 31AD2d at 136).

In response to Plaintiff's motion, Defendant does not deny Plaintiff's assertions but, instead, merely requests that the action be transferred to Justice Noach Dear pursuant to an August 21, 2012 Administrative Order on the grounds that the action involves a Consumer Credit Transaction under CPLR §105(f).<sup>1</sup>

Defendant submits no evidence to support his position, except his own affidavit, stating that the loan was a personal one because there were no restrictions as to the use of the funds, which he used for personal expenses. Plaintiff disputes Defendant's characterization of the transaction and contends that the loan was issued for business purposes only and is not a consumer credit transaction within the meaning of CPLR §105(f). In support of its position, Plaintiff annexes two commitment letters, dated November 12, 2008 and January 27, 2010, expressly stating that "Proceeds of the Notes will be used for business purposes . . .". The commitment letters, signed by Defendant, state that he unconditionally agrees to the terms and conditions set forth in the letters.

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<sup>1</sup> "A consumer credit transaction pursuant to CPLR §105(f) is a transaction wherein credit is extended to an individual and the money...which is the subject of the transaction is primarily for personal, family, or household premises" (CPLR §105(f)).

Plaintiff also provides a copy of an application, signed by Defendant and dated November 24, 2009, titled "Commercial Loan Application."

Defendant's self-serving affidavit, refuted by documentary evidence, is insufficient to raise a triable issue of fact supporting a cognizable defense to Plaintiff's claim.

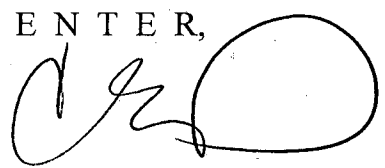
Accordingly, Plaintiff's motion is granted.

**CONCLUSION**

The Plaintiff's motion for Summary Judgment in Lieu of Complaint is granted.

The Clerk of the Court is directed to enter judgment for the sum demanded in the motion.

This constitutes the Decision and Order of the Court.

E N T E R,  


J. S. C.

**HON. CAROLYN E. DEMAREST**