

<b>Pioli v Lions Head LLC</b>
2018 NY Slip Op 33206(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 153529/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Giampaolo Pioli, Luciana Pioli, and Vittorio Pessina,

Plaintiffs,

Index No.  
153529/2018

**DECISION and  
ORDER**

- against -

Mot. Seq. #001

Lions Head LLC and Ron Ferrari,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Giampaolo Pioli (“Giampaolo”), Luciana Pioli (“Luciana”), and Vittorio Pessina (“Pessina”) (collectively, “Plaintiffs”) have commenced this action pursuant to CPLR § 3213 for an Order granting them summary judgment in lieu of complaint against Defendants Lions Head LLC (“Lions Head”) and Ron Ferrari (“Ferrari”), Lions Head’s owner (collectively, “Defendants”). Giampaolo and Luciana seek an Order granting them summary judgment and entering judgment in their favor in the amount of \$375,000.00, plus prejudgment and post judgment interest, and all costs and expenses they have incurred in enforcing their agreement with Defendants. Pessina seeks the same relief with respect to his agreement with Defendants. Plaintiffs each submit supporting affidavits, copies of the respective agreements, and communications with Defendants.

Defendant Ron Ferrari (“Ferrari”) opposes Plaintiffs’ motion. Ferrari cross moves for partial summary dismissing the claims against him. Ferrari submits an affidavit in support of his cross motion. No opposition is submitted on behalf of Lions Head.

### Background and Factual Allegations

Plaintiffs allege that they loaned Defendants a total of \$500,000.00 memorialized in two agreements in the amount of \$250,000.00. Plaintiffs allege that these loans were made in connection with Defendants' acquisition and renovation of certain distressed real estate assets. Both agreements are dated December 1, 2009 and are entitled "Promisary Investor Note." Both agreements are signed by Ferrari on December 11, 2009, as President for Lions Head and individually. In one of the two "Promisary Investor Notes," Giampaolo and Luciana agreed to loan Lions Head "the principal sum of \$ 250,000 and 00/100 (Two Hundred and Fifty Thousand Dollars), with interest at the annual rate of (15%) percent on the unpaid balance of this Note, beginning as of the date hereof, payable in arrears, until any and all amounts due hereunder shall be paid in full at the rates hereinafter provided." It provides:

The entire unpaid balance of the Note, together with any and all accrued interest, in connection with this Note shall be due and payable in full within ten (10) business days subsequent to the sale, and collection of funds from the sale. The Maturity date is 24 months. In addition, on the Maturity date, Borrower shall pay Lender an additional lump sum in the amount of 10% of profits of Real Estate sold in the time period of the investments.

The other "Promisary Investor Note" memorializes a loan from Pessina to Lions Head for \$250,000.00 and contains the same terms as the "Promisary Investor Note."

Plaintiffs claim that their loans remained unpaid on December 1, 2011, the Maturity Date of their "Promisary Investor Notes." Plaintiffs contend that although Ferrari has assured them that the loans would be repaid and has acknowledged the debt on various occasions including on October 22, 2014 and on July 8, 2015, to date, only \$45,000.00 in interest payments were made in June 2012. In their pending motion, Plaintiffs are seeking to enforce a "compromised" amount due on their agreements which they say Plaintiffs and Ferrari agreed upon on July 8, 2015 in "a typed-up statement" which also contains handwritten revisions concerning the amount due.

Plaintiffs claim that the action is not barred by the statute of limitations under General Obligations Law Section 17-101 because Defendants acknowledged their

financial obligations in writing. Plaintiffs claim that the six (6) years started to run on July 8, 2015 and ends on July 8, 2021 and the instant 2018 action is not barred by the statute of limitations. Plaintiffs further claims that they have established a prima facie case of their right to payment under the two Notes.

Ferrari, in his affidavit, challenges Plaintiffs' characterization of the nature of the agreements and his obligation to repay any loans. Ferrari states that the loans were made as an "investment in the business" of Lions Head and were to "be repaid from the proceeds of the business (i.e., upon the successful sale of properties)." Ferrari further contends that he did not guarantee Lion Heads' obligations under the agreements and did not acknowledge any obligation on his behalf to repay any debt owed by Lion Heads. Ferrari further contends that while Lion Heads' business records show payment of \$250,000.00 from Pessina to Lion Heads, he "do[es] not currently have access to Lion Heads' bank account records going back to 2009 ... our records indicate that the \$250,000 was never paid in connection with the Pioli Agreement" and the "records indicate a payment of \$125,000 only."

### Legal Standard

CPLR § 3213 provides that, "[w]hen 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." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document. (*Id.*). The test "is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument read in the first instance." (*Id.*).

To prevail on a motion for summary judgment in lieu of complaint arising out of 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 of the defendant to pay in accordance with the note's terms." (*Zyskind v. FaceCake Mktg. Tech., Inc.*, 101 A.D.3d 550, 551 [1st Dep't 2012]; *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep't 2000]).

Discussion

Here, the subject Notes do not “contain an unequivocal and unconditional obligation to repay” on their face, and therefore this is not a case that falls within the ambit of CPLR § 3213. Therefore, summary judgment is denied.

Wherefore, it is hereby

ORDERED that Plaintiffs’ motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that defendant Ron Ferrari’s cross motion for dismissal is denied; and it is further

ORDERED that Plaintiffs’ moving papers are hereby deemed the complaint in this action and defendant Ron Ferrari’s answering papers are hereby deemed his answer; and it is further

ORDERED that Plaintiffs shall serve a copy of this order with notice of entry on Lions Heads, LLC, along with Plaintiffs’ moving papers, in accordance with the applicable provisions of the CPLR, and Lions Head LLC shall serve an answer with 20 days thereafter; and it is further

ORDERED that Plaintiffs shall serve a copy of this order with notice of entry on the County Clerk who is directed to assign the plenary action to a non-medical malpractice part.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 12, 2018



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Eileen A. Rakower, J.S.C.