

Goren v Tomasino

2011 NY Slip Op 33371(U)

December 7, 2011

Supreme Court, Nassau County

Docket Number: 12163-11

Judge: Timothy S. Driscoll

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SCAN

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ABRAHAM GOREN,

Plaintiff,

-against-

VINCENT TOMASINO, SR.,

Defendant.
-----X

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 12163-11
Motion Seq. No: 1
Submission Date: 10/11/11**

The following papers have been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibit.....X**
- Affidavit in Opposition and Exhibits.....X**
- Reply Affirmation in Further Support and Reply Affidavit.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Abraham Goren ("Plaintiff") on August 19, 2011 and submitted on October 11, 2011. For the reasons set forth below, the Court grants Plaintiff's motion and awards Plaintiff judgment against Defendant in the sum of \$150,000.00, plus interest at 6% from August 16, 2007, together with the costs and disbursements of this action.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting him summary judgment in lieu of Complaint and entering a judgment in favor of Plaintiff and against Defendant in the amount of \$150,000.00, plus interest at six (6%) percent from August 16, 2007, together with costs and disbursements.

Defendant Vincent Tomasino, Sr. ("Defendant") opposes Plaintiff's motion.

B. The Parties' History

Plaintiff affirms that on August 16, 2007, Defendant executed a promissory note ("Note") in Plaintiff's favor (Ex. A to Goren Aff. in Supp.) in the principal sum of \$150,000.00. The Note provided for installment payments of \$25,000.00 beginning on October 1, 2007, with the last installment payment due on February 1, 2009. The Note also provides for a six (6%) percent per annum interest rate on the principal balance. The Note provides further that it may not be changed or terminated orally.

Plaintiff avers that Defendant failed to make any payments under the Note. The total principal amount under the Note is now due, including accrued interest.

In opposition, Defendant affirms that he "do[es] not recollect" signing the Note (Tomasino Aff. in Opp. at ¶ 2), "nor do I recognize the signature thereon as mine" (*id.*). Defendant affirms that the "S" in "Sr." is different from his signature.

Defendant affirms, further, that assuming *arguendo* that his signature on the Note is genuine, there was no consideration for the execution of the Note. Defendant avers that in 2005, he purchased from Plaintiff all of the stock in Caine Realty Inc. ("Caine Realty"), which owned real property in the Bronx, New York. As part of the purchase price, Caine Realty executed a mortgage in the sum of \$250,000.00. Defendant's "recollection" (Tomasino Aff. in Opp. at ¶ 5) is that, at the time of the purchase, he personally guaranteed the mortgage to Plaintiff. Defendant provides a copy of that mortgage (*id.* at Ex. A). The mortgage was sold to Tampa Apts. Realty Corp., as reflected in the assignment provided (*id.* at Ex. B). Thus, Defendant submits, "if I guaranteed the mortgage which plaintiff assigned away, he assigned away any right to collect from me on the guarantee" (*id.* at ¶ 6).

In reply, Plaintiff affirms that prior to 2005, he owned certain property in the Bronx through a corporation. In 2005, he sold the property to Defendant by selling to him all the shares in the corporate owner. Part of the consideration for the sale was providing Plaintiff with a mortgage against the Bronx property in the amount of \$250,000. In 2007, Defendant sought to sell the Bronx property, and in consideration for the assignment of Plaintiff's mortgage to effectuate that sale, Plaintiff was paid the sum of \$50,000 and given the Note in the amount of \$150,000.

Plaintiff affirms that the assignment of the mortgage was the consideration for the Note. Plaintiff, in filing this motion, is not seeking to collect on either the mortgage or guaranty and, thus, Defendant's affirmations are not relevant. Rather, Plaintiff is seeking to collect against the Note. Plaintiff notes that Defendant does not deny signing the Note, or deny failing to make payments on the Note.

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to judgment against Defendant by producing the Note and establishing Defendant's failure to make payment pursuant to its terms.

Defendant opposes Plaintiff's motion, submitting that his assertions that he "does not recall" signing the Note and that the parties executed other documents raise issues of fact making summary judgment inappropriate.

In reply, Plaintiff contends that Defendant's assertions do not raise a valid defense to this action. Plaintiff notes that Defendant does not deny signing the Note, but rather says that he does not recall signing it; notably, Defendant is able to recount the circumstances under which the Note was signed. Plaintiff submits, further, that Defendant's claims regarding lack of consideration "make no sense" (Murray Reply Aff. at ¶ 7), as any issues regarding the guaranty and mortgage are not relevant to Plaintiff's action on the Note, and do not preclude judgment in favor of Plaintiff on the Note.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001). Relief pursuant to CPLR § 3213 is available where a right to payment can be ascertained from the face of a document. *Boland v. Indah Kiat Finance*, 291 A.D.2d 342, 343 (1st Dept. 2002), quoting *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1st Dept. 2000).

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish *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. *Larry Lawrence IRA v. Exeter Holding Ltd.*, 84 A.D.3d 1175, 1176 (2d Dept. 2011), quoting *Lugli v. Johnston*, 78 A.D.3d 1133, 1135 (2d Dept. 2010). 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.*, 57 A.D.3d 708, 710 (2d Dept. 2008); *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794, 795 (2d Dept. 2008).

C. Application of these Principles to the Instant Action

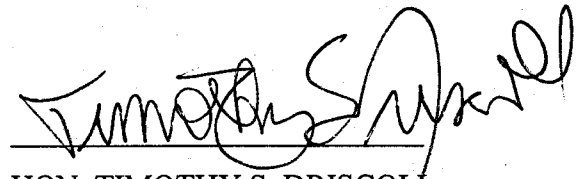
The Court concludes that Plaintiff has demonstrated his right to judgment against Defendant, pursuant to the Note, by establishing the existence of the Note, which contains an unequivocal and unconditional obligation to repay, and Defendant's failure to make payment pursuant to the terms of that instrument. Moreover, Defendant's conclusory denials do not generate a triable issue concerning a bona fide defense, and his other assertions are without merit. Accordingly, it is hereby:

ORDERED, that Plaintiff Abraham Goren have judgment against Defendant Vincent Tomasino, Sr. in the sum of \$150,000.00, plus interest at 6% from August 16, 2007, together with the costs and disbursements of this action.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.
Submit judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY
December 7, 2011



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

ENTERED
DEC 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE