

CF Notes, LLC v Johnson
2014 NY Slip Op 31598(U)
June 19, 2014
Sup Ct, New York County
Docket Number: 653423/2013
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION: PART 39

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CF NOTES, LLC,

Plaintiff,

Index No: 653423/2013
Submission Date: 6/11/14

-against-

DECISION AND ORDER

BRIAN JOHNSON,

Defendant.

-----X
For Plaintiff: Defendant Pro Se:
Friedman Kaplan Seiler & Adelman LLP Brian Johnson
7 Times Square 67 Madison Ave., #215
New York, NY 10036 Memphis, TN 38103

Papers considered in review of the motion for summary judgment in lieu of complaint:

Notice of Motion 1
Aff in Support 2
Memo of Law 3
Mem in Opp 4
Reply Memo of Law 5

HON. SALIANN SCARPULLA, J.:

In this action to recover on an instrument for the payment of money pursuant to CPLR 3213, plaintiff CF Notes, LLC (“CF Notes”) moves for summary judgment in lieu of complaint against defendant Brian Johnson (“Johnson”).

CF Notes’ action seeks to recover the principal sum of \$186,025.80, together with interest, in the total amount of \$404,900.80. CF Notes asserts that this money is owed under a negotiable promissory note and assignment (the “note”), executed by Johnson in

favor of CF Notes, plus interest, reasonable attorneys' fees, expenses, and costs associated with collection.

In support of its motions, CF Notes submits the affidavit of Andrew M. Kofsky ("Kofsky"), its authorized representative. Kofsky states that CF Notes is an affiliate of Cantor Fitzgerald & Co. ("Cantor"), a financial services firm. Kofsky is a Vice President, Assistant General Counsel and Assistant Secretary at Cantor, and he has "responsibilities for CF Notes."

Kofsky states that Cantor hired Johnson as a Senior Vice President in the Fixed Income Group on or about March 17, 2006, and that on or about August 24, 2012 Johnson executed the note and delivered it to CF Notes. A copy of the note is annexed to the Kofsky Affidavit.

Pursuant to the terms of the Note, Johnson agreed to repay CF Notes the principal amount of \$300,000 (the "Loan Amount"), less the principal amount withheld from the loan of \$113,974.20. The resulting "Net Loan Amount" is \$186,025.80. The note also provides for a simple, per annum interest rate on the Loan Amount of 5%.

The note further provides that it "shall immediately become due and payable, without notice or demand," upon the occurrence of a number of events, including but not limited to such time as Johnson "shall cease to be employed by Cantor," and if Johnson should "default in payment or performance on this Note or any of the obligations of this Note."

In addition, the note provides that Johnson assigns to CF Notes all of Johnson's "right, title and interest in and to any and all adjusted compensation due to or to become due from [CF Notes] or any affiliate to [Johnson] to repay the outstanding indebtedness hereunder when due" Johnson also "waive[d] grace, demand and presentment for payment, notice of nonpayment, protest and notice of protest, diligence, filing suit, and all other notice and promises to pay [CF Notes] its costs of collection of all amounts due hereunder, including reasonable attorneys' fees.

The note further provides that CF Notes "shall have the right, without prior notice to [Johnson] . . . to set-off and apply against any indebtedness, including, without limitation, any amounts [Johnson] owes to [CF Notes] against . . . any amount owing from [CF Notes] to [Johnson]." The note also states that it will be governed by and construed in accordance with the laws of th State of New York without giving effect to the principles of conflicts of laws. Additionally, Johnson agrees that any disputes arising under the note are subject to litigation in the courts of the State of New York, and "acknowledges that this Note is as [sic] an agreement for the payment of money only subject to enforcement pursuant to NY CPLR §3213. . . . [Johnson] hereby irrevocably submits to . . . (A) the jurisdiction of the courts of the State of New York, and (B) service of process by mail. [Johnson] hereby waives all his rights to personal service of process."

Discussion

"CPLR 3213, which allows actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a

complaint, ‘provide[s] a speedy and effective means’ for resolving ‘presumptively meritorious’ claims.” *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381(2004) (quoting *Interman Indus. Prods. v R.S.M. Electron Power*, 37 N.Y.2d 151 (1975)).

“To establish prima facie entitlement to summary judgment in lieu of complaint, 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. Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense.” *Zyskind v FaceCake Mktg. Tech., Inc.*, 101 A.D.3d 550 (1st Dep’t 2012) (citations omitted). *See also Banco Popular.*, 1 N.Y.3d 381 (“A party utilizing this accelerated judgment procedure prevails ‘if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment’ for the plaintiff. A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact”) (quoting CPLR 3212 [b]).

“CPLR 3213 begins with the seemingly straightforward – though stringent – requirement that the action be based on ‘an instrument for the payment of money only or a judgment.’ The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time.” *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443-444 (1996).

CF Notes makes its prima facie showing that it is entitled to summary judgment on the note. “To establish a prima facie case, plaintiff must present an ‘instrument[] for the payment of money only’ and evidence of a failure to make the payment called for by its terms.” *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1st Dep’t 2000) (quoting *Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 155 (1975)). CF Notes submitted a copy of note annexed to its moving papers, which is for the payment of money only. Moreover, by its terms, Johnson “acknowledges that this Note is an agreement for the payment of money only subject to enforcement pursuant to NY CPLR § 3213.”

For evidence of Johnson’s failure to make the payment called for by the note, CF Notes submits the Kofsky affidavit, in which Kofsky states that on or about May 17, 2013, Johnson resigned from Cantor. This, by the terms of the note, caused the sum owed under the note to become immediately due and payable. Kofsky further states that Johnson did not earn \$5 million in gross revenue for Cantor, such that the Net Loan Amount would have been forgiven. Kofsky also states that Johnson has not made any payments against the sums due under the loan. CF Notes therefore makes its prima facie showing that Johnson failed to repay the amounts owed under the note. *See JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 384 (2005) (“In this regard, CPLR 3212 [b] provides that a summary judgment motion ‘shall be supported by affidavit’ of a person ‘having knowledge of the facts’ as well as other admissible evidence.”).

In opposition, Johnson fails to demonstrate the existence of triable facts. First, his only submission is styled a “Memorandum” in opposition to CF Notes’ motion, and does not include a sworn affidavit or any factual submissions. Johnson therefore fails to meet his burden in opposing summary judgment. “A party opposing summary judgment is required to submit evidentiary facts or materials, by affidavit or otherwise demonstrating the existence of a triable issue of ultimate. The unsworn statement [] is devoid of probative value. It does not constitute evidentiary proof in admissible form so as to raise a triable issue of fact sufficient to defeat a motion for summary judgment.” *Adams v. Alexander's Dep't Stores*, 226 A.D.2d 130, 131-132 (1st Dep’t 1996) (internal citations and quotations omitted).¹

Even were I to accept Johnson’s “Memorandum” as a sworn statement, Johnson still fails to establish the existence of material questions of fact. Johnson acknowledges that he executed the note, and that upon his termination from Cantor the new loan amount of \$186,025.80 became due. Instead, Johnson asserts that CF Notes should offset his indebtedness by the amount he claims he is owed from his employment at Cantor for unpaid compensation, travel and other reimbursements, and partnership contributions.

CF Notes asserts that under the terms of the note Johnson assigned to CF Notes his right to his interest in any current or future adjusted compensation from Cantor, but this assignment did not obligate CF Notes to credit against the note any of the assigned

¹Johnson also failed to appear before the court at the June 10, 2014 oral argument. This failure to appear constitutes default on the motion.

compensation. CF Notes relies on the provision of the note which states the CF Notes “shall have the right . . . to set-off and apply against any indebtedness . . . any amount owing from [CF Notes] to [Johnson].” (Emphasis added.)

According to the plain, unambiguous language of the note, CF Notes could, but is not compelled to, credit any amounts owed to Johnson.² See *DDS Partners, LLC v. Celenza*, 6 A.D.3d 347, 348 (1st Dep’t 2004) (“when interpreting a contract, words and phrases used by the parties must be given their plain meaning”); *Lopez v. Fernandito’s Antique, Ltd.*, 305 A.D.2d 218, 219 (1st Dep’t 2003) (“Clear and unambiguous terms should be understood in their plain, ordinary, popular and nontechnical meaning”). This defense therefore fails to establish this existence of a triable issue of fact.

In opposition, Johnson also argues that “any request for interest be stricken as the interest rate is shocking to the conscious” The note provides that the interest is “a simple rate per annum equal to five percent (5.0%)” The rate of five percent annually is well below the maximum rate allowed by New York law. *Bouffard v Befese, LLC*, 111 A.D.3d 866, 869 (2d Dep’t 2013) (“The maximum rate of interest permitted by law is, in general, 16% annually”) (citing General Obligations Law § 5-501; Banking Law § 14-a[1]; *O’Donovan v Galinski*, 62 A.D.3d 769 (2d Dep’t 2009); *Abir v Malky, Inc.*, 59 AD3d 646, 649 (2d Dep’t 2009)). This defense is also unavailing.

In his opposition memorandum, Johnson also attempts to assert claims against Cantor and seek discovery. Johnson seeks to bring third-party claims against Cantor for

² CF Notes also denies that Johnson is owed any money from Cantor.

alleged violations of employment and labor laws, for breach of the note for failing to set-off money owed to Johnson, and for fraudulently taking Johnson's partnership contributions. However, as these claims would be against Cantor, which is not a party to the note, Johnson "fail[s] to show that the counterclaims were related to, much less intertwined with, the subject promissory notes." *Singotiko v Kenealy*, 89 A.D.3d 917, 918 (2d Dep't 2011). Accordingly, to the extent that Johnson is seeking to bring third-party claims against Cantor, those claims are denied, and to the extent that Johnson requests discovery in support of those claims, such request is denied as moot. I have reviewed Johnson's other requests, and deny them as without merit.

In accordance with the foregoing it is hereby

ORDERED that the motion by plaintiff CF Notes, LLC for summary judgment in lieu of complaint is granted, and the Clerk is directed to enter judgment in favor of CF notes, LLC and against defendant Brian Johnson in the amount of \$202,900.80, with interest from the date of judgment at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of reasonable attorney's fees is severed and set down before a special referee, to hear and report; and it is further

ORDERED that upon service of a copy of this order on the Referee Clerk , together with a note of issue and a statement of readiness and the payment of proper fees,


if any, this matter shall be placed on the appropriate special referee's calendar for the assessment of reasonable attorney's fees; and it is further

ORDERED that the request by defendant Brian Johnson in his unsworn memorandum in opposition to add Cantor Fitzgerald & Co. as a party, to bring counter claims against it, for discovery, and all other relief is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
June 19, 2014

ENTER :


Saliann Scarpulla, J.S.C.