

<p>Hilton Head Holdings v Peck</p>
<p>2015 NY Slip Op 30290(U)</p>
<p>March 2, 2015</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 161273/2014</p>
<p>Judge: Eileen A. Rakower</p>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HILTON HEAD HOLDINGS b.v.,

Plaintiff,

Index No.
161273/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 001

IAN PECK,
ART CAPITAL GROUP, INC.,
FINE ART FINANCE LLC,
ART CAPITAL GROUP, LLC,
ACG CREDIT COMPANY, LLC,
ACG FINANCE COMPANY, LLC,
ACG CREDIT COMPANY III, LLC,
ACG FINANCE COMPANY III, LLC, and
AMERICAN PHOTOGRAPHY LLC,

Defendants.

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

Plaintiff Hilton Head Holdings b.v. ("Plaintiff" or "HHH") moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants, Ian Peck ("Peck"), Art Capital Group, Inc., Fine Art Finance LLC, Art Capital Group, LLC, ACG CREDIT COMPANY, LLC, ACG Finance Company, LLC, ACG Credit Company III, LLC, ACG Finance Company III, LLC, and American Photography LLC (collectively, "Defendants"), jointly and severally, in the amount of \$44,000, together with interest at the rate of twelve percent per annum from November 8, 2013, attorney's fees and costs. Plaintiff claims that Defendants are in default of their obligations under a promissory note (the "Promissory Note"), dated May 21, 2014, between Plaintiff and Defendants, obligating Defendants to pay Plaintiff the principal amount of \$44,000, with interest thereon to be computed from November 8, 2013 at the rate of twelve per cent per annum.

Plaintiff submits the attorney affirmation of Mark J. Lawless (“Lawless”), dated November 12, 2014; the attorney affirmation of Geoffrey Menin (“Menin”), dated November 12, 2014; the Promissory Note, dated May 21, 2014; a side letter (the “Side Letter”), dated May 22, 2014; a letter instruction dated October 10, 2014; a Federal Express delivery log; a BusinessWeek screenshot; a FedEx receipt; a letter dated October 23, 2014, addressed to D. Stone; an email dated October 23, 2014, addressed to D. Stone; the affirmation of service upon Art Capital Group, LLC, a/k/a Art Capital Group, Inc., Ian Peck, and Gallet Dreyer & Berkey, LLP in the matter captioned *MIP 145 East 57th Street, LLC v. Art Capital Group, LLC, a/k/a Art Capital Group, Inc.*, and Ian Peck, filed under the index number, 156209/2012; and, the pleadings and certain motion papers filed in that action; and, the affirmation of Lawless attesting to service of process upon Defendants by special means pursuant to CPLR § 308(5) as per the Ex Parte Order dated November 18, 2014.

No opposition is submitted.

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.” (*Weissman*, 88 N.Y.2d at 445).

To prevail on a motion for summary judgment in lieu of complaint under CPLR § 3213, the plaintiff must present proof of the “instrument for the payment of money only” and evidence of the defendant’s failure to make the payment called for by the instrument’s terms. (*Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep’t 2000]).

Here, Plaintiff submits the Promissory Note, dated May 21, 2014. The Promissory note provides:

For value received, the undersigned, IAN PECK,
ART CAPITAL GROUP, INC., FINE ART FINANCE
LLC, ART CAPITAL GROUP, LLC, ACG CREDIT

COMPANY, LLC, ACG FINANCE COMPANY, LLC, ACG CREDIT COMPANY III, LLC, ACG FINANCE COMPANY III, LLC and AMERICAN PHOTOGRAPHY LLC (collectively, the “Maker”) jointly and severally promise to pay to the order of HILTON HEAD HOLDINGS b.v. (the “Payee”) the principal sum of FORTY FOUR THOUSAND dollars, with interest thereon to be computed from November 8, 2013 at the rate of twelve per cent (12%) per annum, said interest to be computed on the basis of a three hundred and sixty-five day year, said principal and interest to be paid upon demand. Payment shall be by certified or bank check or wire transfer payable as instructed in any demand for payment, and delivered to the Payee or any Holder in the care of Levine, Plotkin & Menin LLP, 888 Seventh Avenue, 10th floor, New York, NY.

The Promissory Note further provides:

In the event that any payment required by the terms hereof is not made within five (5) business days following receipt of written demand from the Holder hereof, then and in such event, the Holder of this note shall have the right to declare the note in default and to declare the then unpaid principal balance of this note, together with any unpaid interest thereon, to be immediately due and payable. A single demand or notice of default delivered to the office of Ian Peck, 850 Third Avenue, 16D, New York, NY, 10022, or to an address subsequently provided by Ian Peck to the address for Levine, Plotkin & Menin LLP, above, by hand, by overnight courier or by certified mail shall be conclusively deemed to have been delivered to all Makers on actual delivery to that office.

In the affirmation of Lawless, Lawless affirms that Plaintiff and Defendants executed the Promissory Note “for the expedition of the final payment due under an agreement that settled the action, *Hilton Head Holdings b.v., derivatively on behalf of Art Capital Group, Inc., Plaintiff, v. Ian Peck, in his Individual Capacity, and Art Capital Group, Inc.; Fine Art Finance, LLC; Art Capital Group, LLC; ACG Credit Company, LLC; ACG Finance Company, LLC; ACG Credit Company II, LLC; ACG*

Credit Company III, LLC; ACG Finance Company III, LLC; American Photography LLC; and other Unknown, Affiliated Business Organizations that cannot be readily identified at this time, Case No. 1:11-CV-07768-KBF, United States District Court for the Southern District of New York [(the ‘Derivative Suit’)].”

Lawless further affirms:

An attorneys charging lien was asserted by counsel to plaintiff in . . . [the Derivative Suit], and defendants refused to make payment of the amount yet unpaid under the settlement agreement until instructed of the termination of that claim to a charging lien. By a “side letter” executed with the Promissory Note (Exhibit 2), plaintiff agreed to serve such an instruction by the same means as service under the Promissory Note.

In the affirmation of Menin, Menin affirms that he was “designated as the agent for HHH to exchange documents delivered in partial settlement of the [Derivative Suit].” Menin affirms that he received the Promissory Note from Defendants’ counsel in the Derivative Suit, David Stone (“Stone”), who identified the Promissory Note “as having been duly executed by Ian Peck on behalf of each Defendant.”

Menin further affirms, “Upon due investigation, I have not located any record that a change of address for the Defendant Ian Peck from that set forth in the Promissory Note-850 Third Avenue 16D, New York, NY- was provided to me or to Levine, Plotkin & Menin LLP.” Menin affirms that he is “unaware of any past or current address for the residence or actual place of business of Ian Peck, or the actual place of business of any other defendants, other than as set in Mr. Lawless’s Affirmation.” Menin affirms that he is not aware of “any tender of payment pursuant to the Promissory Note, or of any defense thereto.”

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for summary judgment in lieu of complaint is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Hilton Head Holdings b.v. and against defendants Ian Peck, Art Capital Group, Inc., Fine Art Finance LLC, Art Capital Group, LLC, ACG CREDIT COMPANY, LLC,

ACG Finance Company, LLC, ACG Credit Company III, LLC, ACG Finance Company III, LLC, and American Photography LLC, jointly and severally, in the amount of \$44,000 plus interest at the rate of 12% per annum (from 11/8/2013), as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

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

Dated: March 2, 2015

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Eileen A. Rakower, J.S.C.