

Amini v Bowler

2015 NY Slip Op 32188(U)

November 16, 2015

Supreme Court, New York County

Docket Number: 652340/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ISSA AMINI,

Plaintiff,

Index No.
652340/2015

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

DWIGHT A. BOWLER and,
MARGARET BENEDICT,

Defendants.

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

Plaintiff, Issa Amini (“Plaintiff” or “Amini”), moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants, Dwight A. Bowler (“Bowler”) and Margaret Benedict (“Benedict” and together with Bowler, collectively, “Defendants”), in the amount of \$212,000.00 with interest thereon from February 16, 2015. Plaintiff claims to have loaned Defendants the principal amount of \$250,000.00 pursuant to a letter agreement dated November 26, 2007, between Plaintiff and Defendants (the “Letter Agreement”). Plaintiff claims that the loan amount represents Defendants’ portion of an investment in Stillwater Hydro Associates, LLC (“Stillwater”), to operate a hydroelectric plant in Stillwater, New York. Plaintiff claims that the Letter Agreement not only obligates Defendants to repay the principal amount of the loan, but also entitles Plaintiff to a portion of Bowler’s carried interest in the proceeds from the sale of the plant, if the plant is sold. Plaintiff claims that the plant was sold on February 15, 2015, and that Defendants failed to pay the carried interest amount to Plaintiff as required under the Letter Agreement.

In support, Plaintiff submits: the affidavit of Amini, dated June 16, 2015; a record of a wire transfer in the amount of \$250,000.00; the Letter Agreement; and, a copy of Amendment Number One to the Stillwater Operating Agreement.

Defendant opposes. Defendant submits: the affidavit of Bowler, dated July 24, 2015.

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]).

In the affidavit of Amini, Amini avers:

[I]n 2007 [Bowler] asked me to make a \$250,000.00 investment in [Stillwater], which would operate a hydro-electric plant in Stillwater, New York. Bowler also requested that I loan him and his wife, [Benedict] (collectively, the “Bowlers”), \$250,000.00 to cover their portion of an investment in Stillwater. I agreed to loan them the money on terms set forth below, and provided a portion of that amount to them as part of a wire transfer on June 9, 2008. (See Exhibit A hereto.) Stillwater acquired the plant and operated it until it was recently sold on or about February 15, 2015.

(Amini Aff. ¶ 2).

Amini avers that the Letter Agreement between Plaintiff and Defendants sets forth the terms of Plaintiff’s Loan to Bowler. (*Id.* ¶ 3). Amini avers that: “[p]ursuant to the terms of the Letter Agreement, in addition to repaying the amount of the loan,

Bowler is obligated to pay me a portion of the carried interest he received from the net proceeds from the sale of the plant.” (*Id.*).

Amini also avers that, “[u]nder the terms of Amendment Number One to the Stillwater Operating Agreement, if the plant was ever sold, Bowler would receive 20% of the net proceeds of the sale of the plant.” (*Id.* ¶ 4).

The Letter Agreement provides, in relevant part:

Additionally, as will be enumerated in the Stillwater Operating Agreement, I am entitled to a carried interest in the net proceeds from the sale of Stillwater of 20%. In exchange for your investment in Stillwater on my behalf, you shall receive a four percent (4%) carried interest in the net proceeds from the sale of Stillwater, meaning twenty-five percent of my original carried interest in the transaction.

(Pl.’s Ex. B, p. 1 [Letter Agreement]). In addition, pursuant to the Amendment Number One to the Stillwater Operating Agreement:

Capital Transactions. Any Profits and Losses attributable to any transaction or series of interdependent transactions occurring within any twelve consecutive month period and resulting in a sale of all or substantially all the assets of the Company shall be allocated first, by allocating 20% to [Bowler]; and second, among the Capital accounts of the Members based on their respective Ownership Percentages at such time.

(Pl.’s Ex. C [Amendment Number One to the Stillwater Operating Agreement]).

Amini avers that the plant was sold on February 15, 2015. (Amini Aff. ¶ 4). In addition, Amini avers that, “after deduction for various debts and expenses in connection with the operations of the plant and the sale, the net proceeds of the sale were approximately \$5,300,000.00, and the 20% due Bowler was \$1,060,000.00. Bowler has admitted to me that the amount of the carried interest that he received was \$1,060,000.00.” (Amini Aff. ¶ 4).

Amini further avers:

Since Bowler received \$1,060,000.00, the terms of the Letter Agreement with the Bowlers show that at minimum, I am entitled to \$212,000.00, and may be entitled to as much as \$265,000.00. Bowler specifically stated that I was entitled to “twenty-five percent” of his share of the carried interest. (Exhibit B, p. 1.) Since he received \$1,060,000.00, I am entitled to \$265,000.00. He also described the amount to which I was entitled as 4 percent of the net proceeds from the sale, which is \$212,000.00 ($\$5,300,000.00 \times .04 = \$212,000.00$).

(*Id.* ¶ 5).

In addition, Amini’s affidavit states:

I am advised by my attorneys that any lack of clarity in the amount owed should benefit me rather than the Bowlers because [Bowler] drafted the Letter Agreement. Despite the fact that I clearly have a basis for seeking to recover \$265,000.00 rather than \$212,000.00, to eliminate any doubt as to the amount I am entitled to recover, and in the interest of promptly obtaining a judgment, I am willing to forego the additional \$53,000.00 that I could recover in a longer and more drawn out court proceeding. (Should the Court decline to enter judgment for \$212,000 at this time, I reserve the right to seek the additional \$53,000.)

(*Id.* ¶ 6). Amini avers that “Bowler has refused to pay the demanded sum. Bowler has instead tendered to me the sum of \$90,000.00, claiming that such amount is the sum due under the Agreement. The Agreement clearly provides that I am entitled to at least \$212,000.00, and that sum should be promptly paid.” (*Id.* ¶ 8).

In opposition, Defendants argue that the Letter Agreement is ambiguous as to the amount of Bowler’s carried interest owed to Amini. In addition, in the affidavit of Bowler, Bowler avers:

In paragraph 5 of the Affidavit, Mr. Amini claims that I received \$1,060,000.00 from the sale of the Stillwater Hydro project. That is not true. The \$97,000.00 check I

sent to Mr. Amini in February of 2015 shortly after the sale represents 20% of what I received after the sale. Just like the amount of money to be split among Mr. Amini and the equity partners was based on the amount of money received from the purchaser of the project less expenses and reflected the actual cash on hand at the conclusion of the transaction, the amount of money from which to calculate the carried interest was always intended to be the amount of money I actually received from the distributions, not the amount of money I would have received if there were no transactional costs.

Here, insofar as extrinsic evidence is necessary to determine the amount due to Amini under the Agreement, summary judgment in lieu of complaint is not warranted. (*See Ian Woodner Family Collection, Inc. v. Abaris Books, Ltd.*, 284 A.D.2d 163, 164 [1st Dep't 2001]). Accordingly, Plaintiff's motion for summary judgment in lieu of complaint is denied and the parties are directed to proceed with litigation as set forth below.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that Plaintiff's moving papers are hereby deemed the complaint in this action and Defendant's answering papers are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 205, 71 Thomas Street, on February ~~24~~^{23rd}, 2016, at 9:30 AM.

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

Dated: November 16, 2015

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Eileen A. Rakower, J.S.C.