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| 2026 Third Ave. LLC v Chodha |
| 2016 NY Slip Op 31491(U) |
| August 5, 2016 |
| Supreme Court, New York County |
| Docket Number: 651470/2016 |
| 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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2026 Third Avenue LLC, as assignee of Soleplex Inc.
d/b/a Danny K Fashion,

Plaintiff,

Index No.
651470/2016

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

Amit Chodha,

Defendant.

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

Plaintiff, 2026 Third Avenue LLC, as assignee of Soleplex Inc. d/b/a Danny K Fashion (“Plaintiff”), moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendant, Amit Chodha (“Defendant” or “Chodha”), in the amount of \$311,318.90, plus accrued interest and costs of collection and reasonable attorneys’ fees and expenses. Plaintiff claims that Defendant is in default of his obligations under a promissory note dated November 26, 2013 (the “Note”) between Soleplex, Inc. (“Soleplex”), as payee, and Chodha, as maker, in the principal amount of \$275,000.00.

In support, Plaintiff submits: the affidavit of Plaintiff’s President Daniel Kim, dated March 18, 2016; a copy of the Note; and a copy of an Affidavit of Confession of Judgment executed by Chodha on November 26, 2013 “made for the purpose of securing the plaintiff against a default in a Promissory Note dated November 26, 2013, which promises payment to plaintiff in the amount of \$275,000.00 in connection with the debt owed by the defendant(s) to the plaintiff.”

The Note provides that Chodha is to repay the principal along with interest at the yearly rate of 4.25%, and that each of the monthly payments will be in the amount of US \$8,149.71. Payments were to commence January 1, 2014. If on December 1, 2016, Chodha still owed amounts under the Note, he agreed to pay those amounts, in full, on that date. Monthly payments were to be made to Soleplex.

Defendant cross moves for an Order of this Court dismissing and denying the Summons and Notice of Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff pursuant to CPLR 3211(a)(4) on the grounds that there is another action pending between these parties and/or their successors-in-interest in the United States District Court for the Southern District of New York under the case name *Kim v. GSSports, Inc.* under Docket no. 1:15-cv-9819. Chodha submits an affidavit in support of his cross motion.

Chodha claims that the instant action is “a complete duplication” of the federal action above. Chodha contends that both the instant action and the Federal Action “revolve around alleged violations of the ‘Agreement of Sale of Business’ dated November 26th, 2013.”

In the Federal Action, Daniel Kim, individually and as assignee of Soleplex d/b/a Danny K. Fashion, filed a complaint dated December 16, 2015, against GS Sports Inc. d/b/a Moe’s Sneaker Spot (“GS Sports”). The Federal Complaint states:

This action seeks money damages and injunctive relief arising from the defendant's breach of an agreement dated November 26, 2013, whereby the defendant purchased the assets, equipment, inventory and goodwill of plaintiff's assignor, Soleplex Inc. in exchange for the defendant's payment of \$775,000 and assumption of liabilities owed to certain manufacturers and suppliers of sports apparel and footwear. To date, the defendant has failed and refused to pay \$275,000 (of the total \$775,000), plus interest, and defend and indemnify Soleplex Inc. against claims and lawsuits brought against it by those manufacturers and suppliers.

The Federal Complaint states that the purchase price of Soleplex's business was \$775,000, with \$500,000 to be paid at the time of closing (November 26, 2013) and the remaining \$275,000 “to be paid fully over 36 months starting January 1, 2014, with an interest rate of 4.25%.”

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]).

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]).

CPLR § 3211(a)(4) provides that a party may move dismiss an action on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state of the United states; the court need not dismiss upon this ground but may make such order as justice requires.” In determining whether two causes of action are the same, we consider ‘(1) [whether] both suits arise out of the same actionable wrong or series of wrongs[] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy.’” *Rinzler v Rinzler*, 97 A.D.3d 215, 217 (3d Dep’t 2012) (internal citations omitted).

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment on the Note. Plaintiff has proven the existence of the Note executed by Chodha, containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms. Chodha, in opposition, fails to raise a triable issue of fact. Chodha does not dispute that he signed the Note, as well as the affidavit of confession, and that he failed to make payments as required. Plaintiff provides a Notice of Default dated November 23, 2015, requiring payment of amounts due by December 18, 2015 or the entire balance due on the Note would be accelerated. No payment was made. With respect to Chodha’s allegations that Plaintiff’s assignor breached its agreement with GS Sports in the sale of its business, that is a separate claim, unrelated to Plaintiff’s action to enforce the Note that Chodha executed in his individual capacity.

Lastly, with respect to Chodha’s cross motion to dismiss pursuant to CPLR 3211(a)(4) based upon the Federal Action, the Federal Action is not between the “same parties” and not for the “same cause of action.” This action concerns a \$275,000 Note executed by Chodha in his individual capacity. The Federal Action concerns an alleged breach of an Agreement of Sale of Business as between corporate entities. Indeed, Chodha executed that Agreement as President of GS Sports, Inc. Neither the Federal Complaint nor the Agreement for Sale of Business make mention of the instant Note.

Wherefore, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of Complaint is granted; and it is further

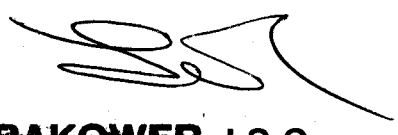
ORDERED that the Clerk enter judgment in favor of plaintiff, 2026 Third Avenue LLC, as assignee of Soleplex Inc. d/b/a Danny K Fashion, and against defendant, Amit Chodha, in the amount of \$275,000.00 together with interest at a rate of 4.25% per annum from November 26, 2013 until December 18, 2015, as per the Note, and thereafter at the statutory rate (9% per annum), 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 amount of reasonable attorneys' fees and costs under the Note is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

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

Dated: AUGUST 5, 2016
HON. EILEEN A. RAKOWER J.S.C.



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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE