

Turjman v Ly

2016 NY Slip Op 31894(U)

September 27, 2016

Supreme Court, New York County

Docket Number: 151109/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 2**

ARIK TURJMAN,

Plaintiff,

-against-

MAMADOU LY,

Defendant.

DECISION/ORDER
Index No. 151109/2016
Motion Sequence 001

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED ¹ |
|--|-----------------------|
| NOTICE OF MOTION FOR SJ IN LIEU OF COMPLAINT, AFF. IN SUPP., AND EXHIBIT ANNEXED..... | 2, 4-5 |
| MEMORANDUM OF LAW IN SUPP..... | 6 |
| AFF. IN OPP. AND EXHIBITS ANNEXED..... | 10 |
| REPLY AFF. AND EXHIBITS ANNEXED..... | 12-13 |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, commenced by summons and motion for summary judgment in lieu of complaint, plaintiff seeks a judgment against defendant in the amount of \$125,000, constituting the alleged remaining balance owed on a promissory note. Defendant submits written opposition. After a review of the papers and the relevant statutes and case law, **the motion is denied.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

According to plaintiff, the parties entered into an agreement for defendant to purchase plaintiff's business – a women's clothing store. (Aff. in Supp.) No date for this agreement is

¹ Unless otherwise indicated, the papers are numbered herein according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

specified. Plaintiff asserts that defendant did not have sufficient funds to purchase the business outright, so plaintiff required him to execute a promissory note in the amount of \$175,000. (Ex. A to *Id.*) Plaintiff avers that defendant “made the first five payments, but then stopped.” (*Id.* ¶ 12.) No dates of these payments are specified. Plaintiff does not describe the totality of the transaction or total purchase price therefor. He does not include any documentation indicating the full extent of their arrangement. Plaintiff makes no representation as to defendant’s method of payment, and, most importantly, no checks or other evidence of payment are included as exhibits to the motion papers.

In opposition, defendant does not dispute that he signed the promissory note attached to plaintiff’s moving papers. Instead, he asserts that plaintiff’s recitation of the payments made is contrary to fact and that, in reality, defendant paid off the balance of the note in advance of the schedule set out therein. In addition to this assertion, defendant contends that plaintiff breached his obligations pursuant to the transfer agreement executed by them, for which the promissory note served as consideration. (Ex. D to Aff. in Opp.) In support of defendant’s contentions, he includes handwritten receipts for cash in the amount of \$150,000 and for checks totaling \$50,000 in July 2014. (Ex. A to *Id.*) He also includes cancelled checks indicating that he made payments to plaintiff in the amounts of \$10,000 in July 2015, \$25,000 in August 2014, \$10,000 in November 2014, \$10,000 in December 2014, \$10,000 in January 2015, and \$40,000 in March 2015. (Exs. B and C to *Id.*) This constitutes a total of \$305,000 of payment to plaintiff.

Included in plaintiff’s reply as an exhibit are copies of the faces of nine checks signed by defendant. The backs of the checks do not appear in the exhibit, and it is therefore impossible to tell whether they were deposited. Plaintiff asserts that the checks are the “actual checks” for the remaining payments under the note. Plaintiff also claims that the receipts included as exhibits to

defendant's motion are not valid, intimating that his signature was forged. He further contends that the payments that defendant's submissions reference were not made in satisfaction of the note.

POSITIONS OF THE PARTIES

Plaintiff argues that he established entitlement to summary judgment in lieu of complaint. Defendant contends in response that there are questions of fact precluding judgment as a matter of law, based upon the evidence of payments beyond that which plaintiff detailed in his initial motion papers.

CONCLUSIONS OF LAW

“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.” CPLR 3213. A plaintiff may establish “entitlement to summary judgment in lieu of complaint by submitting a promissory note executed by [the] defendants and proof of [the] defendants' failure to make payments according to its terms.” *Blumenstein v Wasplit Group, Inc.*, 140 AD3d 620, 620 (1st Dept 2016); *see Goldberger v Magid*, 133 AD3d 546, 546 (1st Dept 2015). “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 AD3d 550, 551 (1st Dept 2012) (citation omitted); *see Emerald Invs. Ltd. v Toms*, 133 AD3d 558, 558-559 (1st Dept 2015); *Gliklad v Cherney*, 132 AD3d 601, 601 (1st Dept 2015).

Plaintiff's initial motion papers, though bare-boned, established that defendant executed a promissory note and then failed to make payments according to its terms. Defendant's papers in

opposition, however, raised numerous questions of fact as to the payments actually made and the amount due to plaintiff. This Court is troubled by plaintiff's failure to indicate in his initial motion papers that he was in possession of post-dated checks signed by defendant. Considering that plaintiff was in possession of the means by which to obtain satisfaction of the note, he should have specified what he meant when he stated that defendant failed to make payments. Did defendant stop payment on the checks? Did defendant direct plaintiff not to deposit the checks? Did a check bounce? Or, as defendant asserts, did plaintiff never attempt to deposit the checks because defendant had already prepaid the balance of the note? There are numerous questions presented by the papers, and this matter cannot be resolved on the instant motion.

Therefore, in light of the foregoing, it is hereby:

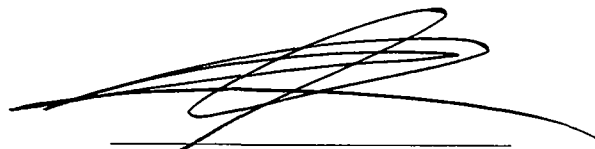
ORDERED that the motion is denied; and it is further

ORDERED that plaintiff's moving papers, consisting of a notice of motion and plaintiff's affidavit in support, are hereby deemed the complaint in this action, and defendant's opposition papers, consisting of defendant's affidavit in opposition, are hereby deemed the answer; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: September 27, 2016

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT