SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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CITY OF NEW YORK DEPARTMENT OF CONSUMER AFFAIRS

Plaintiff,

v

ALL ABOUT AUTOMOTIVE II, INC., and FRANCISCO MARTINEZ

Defendants.
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Index No. 452408/17

DECISION AND ORDER

MOT SEQ. 001

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff, City of New York Department of Consumer Affairs (DCA), moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against the defendants, All About Automotive II, Inc. (AAA II), and its principal, Francisco Martinez, to enforce an administrative appeal determination fining AAA II in the sum of $32,534,500.00 and Martinez in the sum of $4,280,000.00 for engaging in repeated and ongoing illegal towing operations in violation of the Administrative Code of the City of New York (Ad. Code) and the Rules of the City of New York (RCNY). The DCA contends that CPLR 3213, which provides for an expedited disposition of certain disputes, is the appropriate vehicle for enforcement of its administrative order. The defendants do not oppose the motion.

Since the defendants did not timely seek to review the administrative appeal determination pursuant to CPLR article 78, it is a final determination that is binding upon them, and thus incontestable. Moreover, since the DCA has no other statutory or regulatory recourse for enforcement of its determination other than the commencement of an action in the Supreme Court, and the determination sought to be enforced only obligates the defendants to pay a sum certain by a specified time, the court finds that the determination is an instrument for the payment of money only within the meaning of CPLR 3213.

The motion is therefore granted.

II. BACKGROUND

On November 19, 2014, the DCA issued an omnibus notice of hearing to AAA II and Martinez, asserting that, on thousands of occasions during calendar year 2014, they had violated numerous provisions of titles 19 and 20 of the Ad. Code, respectively applicable to illegal towing operations and deceptive business practices, and title 6 of the RCNY, which sets forth the DCA's rules governing the operations of licensed vehicle towing companies. In an administrative order dated August 13, 2015, made after a contested administrative hearing conducted before a DCA administrative law judge (ALJ) over five dates in late 2014, AAA II was found guilty of almost 7,000 counts of violating the

Ad. Code and the RCNY, primarily for the unauthorized towing of vehicles from private parking lots and other private property (Ad. Code § 19-169.1[c], 2,804 counts), failure to maintain required records of its towing operations (6 RCNY 2-378[a][2], [b][2], [b][3], [e][2], [e][3], 124 counts), failure to tow vehicles to an authorized facility (Ad. Code § 19-169.1[e], 1,099 counts), overcharging of vehicle owners (Ad, Code § 20-509[d][1], 2,804 counts), and refusal to accept credit cards in payment of towing and storage fees (Ad. Code § 20-257, 4 counts).

The fines authorized by the Ad. Code and RCNY, and imposed by the DCA, ranged from $500.00 per count to $10,000.00 per count, depending on the particular Ad. Code or RCNY provision violated. See 6 RCNY 6-11, 6-36. Applying the schedule of penalties set forth in 6 RCNY 6-11 and 6-36, The ALJ imposed a total fine upon AAA II in the sum of $32,471,000.00.

In the same administrative order, Martinez was found guilty of almost 6,800 counts of violating many of the same Ad. Code and RCNY provisions, and the DCA imposed a total fine upon him individually in the sum of $4,276,500.00.

In an administrative appeal determination dated January 21, 2016, DCA Appeals Judge David L. Wolfe denied the appeals of AAA II and Martinez, granted the DCA's cross appeal to the extent of finding that AAA II and Martinez were guilty of several additional counts, and concomitantly increased the fines imposed

upon AAA II from $32,471,000.00 to $32,534,500.00 and the fines imposed upon Martinez from $4,276,500.00 to $4,280,000.00. The administrative appeal determination directed both AAA II and Martinez to pay the fines "forthwith," and included no other directives. No party commenced a proceeding pursuant to CPLR article 78 to challenge either the substantive determination of the DCA Appeals Judge or the extent of the penalties imposed.

III. DISCUSSION

The sole issue presented is whether the DCA may avail itself of the procedures set forth in CPLR 3213 in seeking to enforce its administrative order. The court concludes that it does.

CPLR 3213 provides, in relevant part, 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." See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013); Allied Irish Banks, P.L.C. v Young Men's Christian Assn. of Greenwich, 105 AD3d 516 (1st Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1st Dept. 2013). The purpose of the statute "is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself." G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d 517, 517 (1st Dept. 1992).

In order to establish a prima facie entitlement to summary judgment in lieu of a complaint, a plaintiff must produce an instrument containing an "unequivocal and unconditional obligation" to pay (Zyskind v FaceCake Mktg. Tech., Inc., 101 AD3d 550, 551 [1st Dept. 2012]), one which by its terms is for the payment of money only over a stated period of time (see Bloom v Lugli, 81 AD3d 579,580 [2nd Dept. 2011]), and establish that the defendant failed to pay in accordance with those terms. See Zyskind v FaceCake Mktg. Tech., Inc., supra; Rhee v Meyers, 162 AD2d 397 (1st Dept. 1990). The plaintiff must also establish that it properly served the summons and motion papers upon the defendants. See generally Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L., 78 AD3d 137 (1st Dept. 2010); Eisenberg v. Citation-Langley Corp., 99 AD2d 700 (1st Dept. 1984).

The New York City Charter, Ad. Code, and RCNY provide no express method for enforcement of a DCA order, and research has revealed no appellate authority addressing whether a DCA administrative order imposing a civil penalty or monetary sanction is amenable to enforcement by means of CPLR 3213. As a general rule, where a statute or regulation provides an express method for enforcement of an administrative order that imposes a monetary obligation upon a respondent, recourse to CPLR 3213 is inappropriate. See Berman v Waverly Assocs., 19 AD3d 136 (1st Dept. 2005) (9 NYCRR 2526.1[e] permits tenant to enter DHCR rent

overcharge order as judgment in Supreme Court); cf. New York City Charter § 1049-a(d)(1)(g) (Environmental Control Board may enter administrative order assessing penalty as a judgment in Civil Court); Executive Law § 298 (Division of Human Rights must seek confirmation by Appellate Division to enforce its own order awarding money on a discrimination claim).

Otherwise, an administrative agency with authority to impose a fine may commence a plenary action in the Supreme Court to enforce it. See generally City of New York Envtl. Control Bd. v. HSC Management Corp., 191 AD2d 267 (1st Dept. 1993), mod. other grounds 82 NY2d 854 (1993) (decided under NYC Charter former § 1404[d][3], which gave ECB choice of entering order as Civil Court judgment or applying to a court for enforcement); Matter of Glenwood TV, Inc. v Ratner, 103 AD2d 322 (2nd Dept. 1984), affd 65 NY2d 642 (1985)(where agency's order is not self-executing, it must seek judicial enforcement). The question nonetheless remains as to whether such an agency is obligated to file a complaint and thereafter move for summary judgment if the defendant answers (or for leave to enter a default judgment if it does not), or whether it can avail itself of CPLR 3213. The issue turns on the nature of the "instrument" upon which the plaintiff seeks relief.

An "instrument" has been generally defined as "[a]nything reduced to writing, a document of a formal or solemn character, a

writing given as a means of affording evidence. A document or writing which gives formal expression to a legal act . . . for the purpose of creating [and] securing . . . a right." Black's Law Dictionary 801 (6th ed 1990). Although a promissory note is clearly an "instrument" for the payment of money only within the meaning of CPLR 3213 (see Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 [1st Dept. 2008]), other papers also qualify for inclusion within the definition of the term.

> "The statute is not limited to negotiable and nonnegotiable paper within the terms of article 3 of the Uniform Commercial Code . . . CPLR 3213 contains no such restriction nor does the policy underlying this procedure. Rather, what is required is a written unconditional instrument, evidencing an obligation to pay a sum at a certain time or over a stated period."

Maglich v Saxe, Bacon & Bolan, P.C., 97 AD2d 19, 22 (1st Dept. 1983).

> "The distinguishing feature in the cases where the statutory procedure has been permitted, in contrast to those where it has been denied, is that, in the former, liability was predicated upon the terms of the writing plus proof of nonpayment establishing plaintiff's prima facie case and thus qualifying for accelerated treatment under CPLR 3213. In the latter situation, however, the document sued upon set forth something more than the simple promise by the defendant obligor to pay a sum of money."

Id.

An "instrument for the payment of money only" has thus been held to include an independent put agreement (see Nordea Bank Finland, PLC v Holten, 84 AD3d 589 [1st Dept. 2001]), an interest

rate swap agreement (see Allied Irish Banks, P.L.C. v Young Men's Christian Assn. of Greenwich, supra), payments under an equipment lease (see Orix Credit Alliance Inc. v. Fan Sy Prod., 215 AD2d 113 [1st Dept. 1995]), an acknowledgment of an obligation upon an account stated (see Rhee v Meyers, 162 AD2d 397 [1st Dept. 1990]), an accepted sight draft (see Banco Portugues Do Atlantico v Fonda Mfg. Corp., 31 AD2d 122 [1st Dept. 1968], affd 26 NY2d 642 [1970]), a series of letters and loan rollover correspondence pursuant to which a defendant promised to repay a loan (see Maglich v Saxe, Bacon & Bolan, P.C., supra; see also Blum, Gersen & Stream v 346 E. 72nd St. Assocs., 172 AD2d 444 [1st Dept. 1991]), an unconditional guarantee (see Bank of Am., N.A. v Solow, 59 AD3d 304 [1st Dept. 2009]), and a negotiable instrument (see Seaman- Andwall Corp. v Wright Mach. Corp., 31 AD2d 136 [1st Dept. 1968]).

In Maglich v Saxe, Bacon & Bolan, P.C. (supra), the First Department also referred, apparently with approval, to other cases in which a paper was deemed to be an instrument for the payment of money only within the meaning of CPLR 3213. See Baker v Gundermann, 52 Misc. 2d 639 (Sup. Ct., Nassau County 1966) (letter evidencing debt obligation for fixed period at stated interest rate); Ace Off. Cleaning Corp. v Brodsky, Hopf & Adler, 81 Misc. 2d 170 (Sup. Ct., N.Y. County 1975)(letter acknowledging debt in amount set forth in account stated).

The First Department went on to explain that

> "resort to this expedited procedure has been denied, where the action was founded upon documents which, although calling for the payment of a sum of money, also required some other condition or performance, thus leading to the conclusion that the instrument from the face of the document was not one for the payment of a sum of money only."

Maglich v Saxe, Bacon & Bolan, P.C., supra, at 22; see A. Stanley Proner, P.C. v Julien & Schlesinger, P.C., 134 AD2d 182 (1st Dept. 1987). Those instances included a statement of account, a separation agreement, a contract to provide services, a bill of lading with extensive provisions, an employment contract, a bond and mortgage, and a savings account passbook.

The intention of the drafters of CPLR 3213 was to provide a speedy and effective means of securing a judgment on claims for money only that are presumptively meritorious, where there was no need for a court to ascertain whether the parties assumed or performed other obligations in connection with the claims. See First Preliminary Rep. of Advisory Committee on Practice and Procedure, p. 91; N.Y. Legis. Doc., 1957, No. 6[b], p. 91. However, neither the statute itself nor the legislative history thereof clarifies the Legislature's intent surrounding the use of the words "instrument for the payment of money only." Even the later reports to the Legislature, which were submitted by the Advisory Committee on Practice and Procedure right up to the eve of the section's enactment, do not articulate any particular

understanding or other description of the subject phrase. See Fifth Report; N. Y. Legis. Doc., 1961, No. 15, p. 492; Sixth Report; N. Y. Legis. Doc., 1962, No. 8, p. 338.

One court of concurrent jurisdiction has held that a DCA determination directing the payment of a fine is amenable to enforcement pursuant to CPLR 3213. In Aaron's Constr. Corp. v Gould (29 Misc. 3d 1216[A], 2010 NY Slip Op 51840[U][Sup. Ct., N.Y. County 2010]), Justice Judith Gische held that a consumer complainant in a DCA administrative proceeding could avail himself of CPLR 3213 in enforcing an administrative order directing the respondent to make restitution in a sum certain. Justice Gische, citing Maldonado v Man-Dell Food Stores, Inc. (178 Misc. 2d 541 [Civ. Ct., N.Y. County 1998]), concluded that the complainant "present[ed] a persuasive argument for why, although the DCA's decision and order is not a 'judgment,' it serves as a predicate basis for [his] summary judgment motion because it is for a sum certain and only requires the payment of money." Aaron's Constr. Corp. v Gould, supra, 29 Misc. 3d 1216(A), 2010 NY Slip Op 51840(U), *17.

In Maldonado, Justice Martin Shulman, while sitting in the Civil Court, determined that a DCA administrative order imposing a fine may indeed be the subject of a proper CPLR 3213 motion. After describing the legislative history of CPLR 3213, Justice Shulman concluded that, since the DCA had a presumptively

meritorious claim, the nature of which was "readily definable," its order set forth payment terms that unequivocally and unconditionally directed the defendant to pay the fines "forthwith" (id., at 545), and the order required the defendant to make a payment of money and nothing else, the order qualified as "instrument for the payment of money only" within the meaning of the statute. See also Ingvarsdottir v Bedi [2016 NY Slip Op. 32359[U] [Sup Ct, NY County, Dec. 1, 2016] [Edmead, J.]).

In both Aaron's Constr. and Maldonado, the obligor had either exhausted all avenues of judicial review of the administrative order sought to be enforced, or failed to timely challenge the order. Thus, as here, the orders sought to be enforced were final and binding upon the obligor, and did nothing more than evince a legal obligation compelling the obligor only to pay money.

In actions to which CPLR 3213 applies, "a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless." Interman Indus. Prods. v R. S. M. Electron Power, 37 NY2d 151, 154 (1975). The court concludes that the only alternative available to the DCA here would be to file a complaint, await an answer, and either move for summary judgment after the answer is served or, if the defendants do not appear, move for leave to enter a default judgment. Since the administrative order is

final and binding upon the defendants, and essentially incontestable, the only thing that would be accomplished were the court to require such a procedure would be delay, with very little likelihood that the outcome would be any different. The DCA has made the requisite showing of the existence of that instrument, its right to recover thereunder, proper service of the summons and motion papers, and nonpayment of the fines.

The court agrees with the reasoning of both Aaron's Constr. and Maldanado, and thus concludes that the administrative appeal determination qualifies as an instrument for the payment of money only. Hence, the DCA is entitled to summary judgment pursuant to CPLR 3213.

IV. CONCLUSION

Accordingly, it is

ORDERED that this motion for summary judgment in lieu of a complaint (CPLR 3213) is granted, without opposition, and it is further;

ORDERED that Clerk of the court shall enter judgment in favor of the plaintiff and against the defendant All About Automotive II, Inc., in the sum of $32,534,500.00, plus statutory interest from January 21, 2016, and in favor of the plaintiff and

against the defendant Francisco Martinez in the sum of $4,280,000.00, plus statutory interest from January 21, 2016.

This constitutes the Decision and Order of the court.

Dated: June 15, 2018

J.S.C.

HON. NANCY M. BANNON