

Port Auth. of N.Y. & N.J. v Wilenta Feed, Inc.

2020 NY Slip Op 33023(U)

September 14, 2020

Supreme Court, New York County

Docket Number: 451015/2020

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
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 451015/2020

PORT AUTHORITY OF NEW YORK & NEW JERSEY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

WILENTA FEED, INC. and PETER WILENTA,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In this action by plaintiff Port Authority of New York & New Jersey to recover on a guaranty, it moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant Peter Wilenta (“Wilenta”). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff, a body corporate and politic created by compact between the States of New York and New Jersey with the consent of the Congress of the United States, owns, operates, maintains, and controls certain bridges and tunnels linking New York and New Jersey and charges tolls for the use thereof. Although motor vehicles may not use the bridges and tunnels without paying the set tolls, vehicles owned by defendant Wilenta Feed, Inc. (“WFI”) went through E-Z Pass machines (plaintiff’s cashless method of collecting tolls) without paying on over 1,000 occasions. Before commencing suit against WFI and Wilenta to collect the unpaid

tolls, plaintiff entered into a settlement agreement with defendants dated April 25, 2019 pursuant to which defendants agreed to pay \$124,742.00 in monthly payments of at least \$3,300.¹ The same day, Wilenta allegedly executed a personal and unconditional guaranty promising to pay the monies owed by WFI pursuant to the settlement agreement.

Plaintiff thereafter commenced the captioned action by filing a summons and the instant motion for summary judgment in lieu of complaint against Wilenta seeking to enforce the settlement pursuant to the guaranty. The notice of motion reflects that plaintiff seeks a judgment against Wilenta in the amount of \$155,973.37. Doc. 2. In support of the motion, plaintiff submits an attorney affirmation; the affidavit of Peter Van Keuren, a toll violations analyst for plaintiff; the guaranty; the settlement agreement; and a violations citation detail report generated by plaintiff.

In support of the motion, counsel for plaintiff and Van Keuren allege that the claim against defendants was settled for the sum of \$124,742.00 and that defendants only made a payment of \$2,300, leaving an outstanding balance of \$122,442.00. Doc. 2.

Contrary to the foregoing, however, the settlement agreement reflects that that parties agreed to settle the claim, which involves 1,334 E-Z Pass violations, for \$134,349.66. Doc. 10.

LEGAL CONCLUSIONS:

CPLR 3213 provides, in pertinent 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." A settlement agreement may constitute an instrument for the payment of money.

¹ The settlement agreement was actually dated October 1, 2019 and was executed by defendants on October 8, 2019. Doc. 10.

See Park Union Condominium v 910 Union St. LLC, 140 AD3d 673, 673 (1st Dept 2016). Thus, the use of a motion for summary judgment in lieu of complaint is a proper vehicle for collecting the debt owed by defendants under these circumstances.

Nevertheless, certain deficiencies in the motion warrant its denial. As noted above, although the notice of motion reflects that plaintiff is seeking to collect the amount of \$155,973.37, the affirmation of plaintiff's attorney and the affidavit of Van Keuren reflect that the claim was settled for \$124,742.00 and that, since defendants only made a payment of \$2,300, a balance of \$122,442.00 remains outstanding. Doc. 2. This contradicts the settlement agreement itself, which reflects that the claim was settled for \$134,349.66. Doc. 10.

A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). It is well settled that the burden is on the moving party to make a prima facie showing that it is entitled to summary judgment as a matter of law. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Since this Court cannot ascertain from the papers submitted the precise amount owed by defendants, it is constrained to deny the motion with leave to renew upon proper papers. *See generally Mercantile Bank of Chicago v Wismer*, 48 Misc2d 275 (1st Dept 1965).

This Court further notes that, in the event plaintiff opts to renew the motion, it must file and label each exhibit individually in accordance with the Part 2 rules.

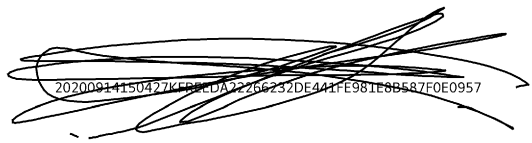
Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion for summary judgment in lieu of complaint is denied, with leave to renew upon proper papers within 30 days after the filing of this order on NYSCEF, upon penalty of dismissal; and it is further

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

9/14/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: