

Kenney v Jacobs

2020 NY Slip Op 33694(U)

September 16, 2020

Supreme Court, New York County

Docket Number: 153623/2020

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63

Justice

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INDEX NO. 153623/2020

CAROL KENNEY, as Executor of the ESTATE OF
JEROME KENNEY, deceased,

MOTION DATE 09/14/2020

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

ELI S. JACOBS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, plaintiff's motion is decided as follows:

Plaintiff's motion seeks an order pursuant to CPLR §3213 seeking summary judgment in lieu of complaint and directing the entry of judgment for the plaintiff in the amount of \$200,000.00 plus interest and costs upon the grounds that the action is based upon an instrument for the payment of money only, which is now due and payable.

Pursuant to CPLR § 3213, when an action is based upon an instrument for the payment of money only or upon a judgment, the plaintiff may serve with the summons a notice of motion for summary judgment in lieu of complaint. An instrument qualifies under 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 (*East New York Sav. Bank v. Baccaray*, 214 AD2d 601 [2nd Dept 1995]). Where the instrument requires something in addition to the party's explicit promise to pay a sum of money, CPLR § 3213 is not available (See *Weissman v. Sinorm Deli, Inc.*, 88 NY2d 437 [1996]; *New Rochelle Dodge, Inc. v. Bank of New York*, 127 AD2d 638 [2nd Dept 1987]).

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy. *Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept 1991]). However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept 1987]).

In support of plaintiff's motion, plaintiff submits the affidavit of Carol Kenney, surviving spouse and executor of the Estate of Jerome Kenney, together with Mr. Kenney's death certificate, certificate of appointment of executor, decree granting probate, the relevant promissory note, decedent's brokerage records and a the Estate's demand for payment, which establish as follows: On July 31, 2013, Defendant entered into a Note pursuant to which he promised to pay to Jerome Kenney on demand the principal sum of \$200,000.00, together with interest at the rate of 5% per annum. Said Note also requires defendant to pay all the costs and expenses of Holder incurred in

the collection of the Note in connection with an Event of Default, including reasonable attorney's fees and expenses. On July 31, 2013, \$200,000.00 was transferred from Mr. Kenney's Merrill Lynch Account to defendant's account. There is no record of any repayment of the subject funds. On May 22, 2020, counsel for the Estate sent a demand letter to Defendant at the address listed in the Note, demanding that Defendant either provide evidence that the Note has been repaid in full or, failing that, repay the Borrowed Amounts plus interest. As such, plaintiff has established a *prima facie* entitlement to summary judgment.

In opposition, defendant submits an affidavit which admits that he entered into the promissory note and alleges that the funds were "to be utilized to invest in a company in which Mr. Kenney was a major stockholder." Defendant further alleges that "After the promissory Note was executed, Mr. Kenney and I agreed that he would not seek payment of the promissory note" in an oral agreement but that he is unable to find any documents in existence concerning the oral agreement. In general, "[a] written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." GOL § 15-301(1) Defendant argues that oral modifications to promissory notes preclude the granting of a motion for summary judgment in lieu of complaint pursuant to CPLR 3213, based upon an exception to the statute, citing *Greenberg v. Frey*, 190 A.D.2d 546 (1st Dep't. 1993); *Citibank (New York State), N.A. v. E.J. Zibro Tire & Appliance Co., Inc.*, 72 A.D.2d 846 (3d Dep't. 1979); *Zipser v. Zipser*, 244 A.D.2d 548 (2d Dep't. 1997); and *McCabe v. Green*, 39 Misc.3d 270 (NY Cty. 2013). However, to overcome such a clause and enforce an oral modification to a written agreement defendant must demonstrate either that the oral modification has in fact been acted upon to completion; or, where there is only partial

performance, that the partial performance is unequivocally referable to the alleged oral modification.” *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 425 (2013). Here, defendant submits only an affidavit alleging that the funds were to be used to purchase stock, but submits no evidence that said funds were actually used to purchase stock or any partial performance of same. As such, defendant has failed to raise an issue of fact.

ORDERED that the plaintiff’s motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$200,000.00, together with interest at the rate of 5 % per annum from the date of July 31, 2013 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs and Attorney’s fees and expenses to be determined at a subsequent hearing.

9/16/2020
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE