

**MEMORANDUM**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

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**PERI FORMWORK SYSTEMS, INC.,**  
**Plaintiff(s),**

**-against-**

**TADCO CONSTRUCTION, INC.,**  
**Defendants.**

**Index No. 19034/06**  
**Motion Date: 12/13/06**  
**Motion Cal. No. 49**

**Dated: December 15, 2006**

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Plaintiff's motion pursuant to CPLR§3213 is granted.

This is an action to recover on a promissory note brought by motion for summary judgment in lieu of complaint pursuant to CPLR§3213. According to plaintiff, on or about August 2, 2005, defendant TADCO CONSTRUCTION, INC., (hereinafter, "TADCO") provided to plaintiff PERI FORMWORK SYSTEMS, INC. (hereinafter, "PERI") a promissory note ("Note"). The Note provides, in pertinent part, that TADCO would pay PERI \$68,628.67 for certain concrete formwork equipment and materials. Pursuant to the terms of the Note TADCO was to pay \$34,314.34 upon execution of the Note, and the remaining \$34,314.34 on or before July 31, 2006. The Note further provides, in pertinent part, that "the failure of (TADCO) to pay (PERI) when due any and all amounts payable . . . under the terms of this Note" shall represent a default. The Note further provides that TADCO is liable for all costs and expenses incurred by PERI in connection with the collection and enforcement of the Note, including attorneys' fees in the amount of fifteen percent (15%) of the outstanding balance. TADCO failed to pay to PERI the remaining \$34,314.34 on or before July 31, 2006. PERI has demanded payment in full of all amounts due under the Note. Despite demands, Defendant has refused to pay the outstanding balance under the Note. As such, plaintiff claims that Defendant is in breach of the terms of the Note and TADCO owes PERI \$34,314.34, plus costs and attorneys' fees of fifteen percent (15%) in the amount of \$5,147.51.

Plaintiff has submitted a copy of the promissory note, various correspondence an affidavit from Harvey Evans, the Executive Vice President of PERI, indicating the above stated facts. This proof is sufficient to establish plaintiff's initial burden of demonstrating its entitlement to judgment as a matter of law. Sacco v Sutera, 266 AD2d 446,(2d. Dept. 1999.) Therefore, it became incumbent upon the defendant to demonstrate, by admissible evidence, the existence of a triable issue of fact with respect to a bona fide defense. *Id.*

Defendant opposes this motion on the ground that the promissory note is not an instrument for the payment of money only within the meaning of CPLR§3213. According to defendant, the note is conditioned and dependent on a promise made by plaintiff to supply services per defendant's "needs and requests". This rendered the document a contract not a promissory note or an unconditional promise to pay within the meaning of CPLR§3213 and UCC §3-104. Defendant also claim that plaintiff has failed to perform in accordance with the contract of sale and disputes exist as to the amounts owed. Finally, defendant claims payments were made for the subject contract that were not properly credited.

Initially, contrary to defendants contention, the promissory note in this case is an instrument for the payment of money only within the meaning of CPLR§3213. CPLR 3213 provides in pertinent part, "When an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." It is well settled that "an instrument qualifies for CPLR 3213 treatment ... if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms". Interman Indus. Prods. v R. S. M. Electron Power, 37 NY2d 151 155 (1975); East New York Savings Bank, v. Baccaray et al., 214 AD2d 601,(2d Dept. 1995 ).

Furthermore, § 3-104 of the Uniform Commercial Code ("UCC") states in pertinent part:

(1) Any writing to be a negotiable instrument within this Article must be signed by the maker or drawer; and contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article. . . .

A writing which complies with the requirements of this section is . . . a "note" if it is a promise other than a certificate of deposit.

Moreover, §3-105(1) ( c ) of the UCC provides the following:

A promise or order otherwise unconditional is not made conditional by the fact that the instrument . . . refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration.

In the present case, the subject note contains an unequivocal and unconditional promise by the defendants to pay to the plaintiff the money for the services provided. The note defines a default as the failure to pay for those services and sets forth the consequences of a default. Although the note contains other terms and provisions none of those require any additional performance by the holder of the note as a condition precedent to payment or otherwise alters the defendants' payment obligation. *Id.*; D H. Cattle Holdings Co. v. Kuntz, 165 A.D.2d at 570 (3<sup>rd</sup> Dept 1991.) Contrary to defendant's contentions, "Rider A" does not condition payment under the Note on defendant's performance, rather, it sets forth the prices which plaintiff would charge defendant if plaintiff did perform any work for Tadco in the

future. Additionally, "Rider A" does not refer to any specific project on which PERI is allegedly required to perform work on.

Defendant's claim that payments were made toward the subject debt is not sufficient to defeat plaintiff's motion. Defendant does not deny the validity of the subject notes and any its conclusory assertions that payments were made is refuted by plaintiff's evidence that shows these payments were for other accounts on separate work projects. Simoni v Time-Line, Ltd, 272 AD2d 537 (2d Dept 2000.) Therefore, defendant has failed to establish the existence of any triable issues of fact or meritorious defenses in opposition to the plaintiff's motion. Consequently, plaintiff's motion for summary judgment pursuant to CPLR§3213 and a judgment for the sum of \$34,314.34, with interest at 9 % per annum from July 31, 2006, together with reasonable attorney's fees in the amount of \$5,147.51. plus costs is granted.

Defendant's cross-motion for an order dismissing the action pursuant to CPLR § 3211 (a) (7) is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see*, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. *See*, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. *See*, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Based upon the above decision on plaintiff's motion, this court finds that a cause of action for payment on the promissory note is properly set forth in plaintiff's moving papers.

Settle Judgment

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**ORIN R. KITZES, J.S.C.**