SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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POWER BUILDING GROUP, INC.,

Plaintiff, Decision and order

- against - Index No. 519271/2024

ALEXANDRA VEKKER,

Defendant, November 26, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiff has moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On September 20, 2018, Gregory Vekker executed three promissory notes. One note in the amount of $200,000 was made to the plaintiff, one note in the amount of $200,000 was made to New Barclay Group Inc., and in the amount of $150,000 was made to Kings Marketing Partners LLC. The defendant Alexandra Vekker and Gregory Vekker guaranteed all three notes. There is no dispute that upon receiving $550,000, the defendant and her husband immediately returned $200,000. Thus, the note to Kings Marketing Partners LLC was paid off and the plaintiff utilized the remaining $50,000 to pay $25,000 of the Barclay note and $25,000 of the Power Building note. Thus, the defendant now owed $175,000 for each note.

The defendant failed to return any of the money owed thus

this motion has been filed seeking summary judgement that as of the date of the filing the defendant owes $175,000 in principal and accrued interest of $78,750. The defendant opposes the motion arguing there are questions of fact which foreclose a summary determination at this time.

Conclusions of Law

It is well settled that in order to be entitled to judgement as a matter of law pursuant to CPLR §3213 the movant must demonstrate that the other party executed an instrument that contains an unequivocal and unconditional promise to repay the party upon demand or at a definite time and the party failed to pay according to the terms of the instrument (Mirham v. Awad, 131 AD3d 1211, 17 NYS3d 473 [2d Dept., 2015]). A promissory note is an instrument for the payment of money only and when sufficient evidence is presented concerning the circumstances upon which it was given then a §3213 motion is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). Thus, the movant must establish the instrument is "facially incontestable" (J. Juhn Associates, Inc., v. 3625 Oxford Avenue Associates L.P., 8 Misc3d 1009(A), 801 NYS2d 778 [Supreme Court Nassau County 2005]). Therefore, where a defendant can raise questions of fact the notes were not instruments for the payment of money only then summary judgement must be denied (Farca v. Farca, 216 AD2d 520,

628 NYS2d 782 [2d Dept., 1995]).

Therefore, where a party introduces evidence of the existence of a loan, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]).

In this case, the plaintiff submitted the affidavit of Alexander Kelenzon, a director and officer of the plaintiff who stated that the defendant or Gregory never paid any money pursuant to the note. That assertion is not based upon any documentary evidence at all. Rather, the affidavit merely states that upon the due date no payment was received. Mr. Kelenzon states that "December 20, 2018 arrived, and no further payment was received" (see, Affidavit of Alexander Kelenzon, ¶26 [NYSCEF Doc. No. 3]).

In opposition, the defendant argues that the plaintiff and Gregory, through his entity called Red Hook Sign and Electric Corp., entered into an agreement whereby the plaintiff would forward funds to Red Hook which would be paid back with work completed. Indeed, the defendant asserts the work was completed and no further funds are owed. While the defendant will be required to establish the existence of these agreements, which conflict with the express terms of the note and guaranty, the

defendants should be afforded an opportunity to pursue these defenses. Thus, where outside proof is required to determine non-payment then a motion for summary judgement in lieu of a complaint is improper (Kitchen Winners, NY Inc., v. Triptow, 226 AD3d 989, 210 NYS3d 231 [2d Dept., 2024]). Since outside proof may be necessary to determine whether in fact any money is owed, the motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: November 25, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC