

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

705

**CA 22-01464**

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

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ELLCOTTVILLE INN CONDOMINIUM ASSOCIATION,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN D. KEMPISTY, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

PETERS & MORIARTY, PC, ELLCOTTVILLE (KATHLEEN MORIARTY FLEMING OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered July 27, 2022. The judgment awarded plaintiff the sum of \$2,500 with interest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: By motion for summary judgment in lieu of complaint (see CPLR 3213), plaintiff moved for judgment in the amount of \$2,500.00, plus interest, pursuant to a memorandum of understanding between the parties regarding the installation and maintenance of a gutter, downspout, and fence between their adjoining properties. County Court granted the motion, and defendant appeals from the judgment awarding plaintiff damages in the amount of \$2,500 plus interest.

Preliminarily, we note that defendant's contention that service of process did not confer personal jurisdiction over him inasmuch as plaintiff did not comply with the due diligence requirement of CPLR 308 (4) was raised for the first time on appeal and thus is not properly before us (see *Robert K. Lesser Living Trust, Dated Apr. 21, 2005 v United Secular Am. Ctr. for the Disabled, Inc.*, 164 AD3d 1659, 1661 [4th Dept 2018]).

We agree with defendant, however, that the court erred in granting the motion inasmuch as the parties' memorandum of understanding is not "an instrument for the payment of money only" (CPLR 3213; see *Divito v Zastawny LLC*, 129 AD3d 1668, 1668 [4th Dept 2015]). Where, as here, an agreement "requires something in

addition to [an] explicit promise to pay a sum of money, CPLR 3213 is unavailable' " (*Divito*, 129 AD3d at 1668; see *Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]; *Whitley v Pieri*, 48 AD3d 1175, 1176 [4th Dept 2008]). We therefore reverse the judgment and deny the motion. In accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively."

Entered: November 17, 2023

Ann Dillon Flynn  
Clerk of the Court