

Demeter Inv. Holdings v J. Streicher Holdings, LLC

2025 NY Slip Op 31111(U)

April 2, 2025

Supreme Court, New York County

Docket Number: Index No. 650032/2025

Judge: Anar R. Patel

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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DEMETER INVESTMENT HOLDINGS

Plaintiff,

- v -

J. STREICHER HOLDINGS, LLC,

Defendant.

INDEX NO. 650032/2025

MOTION DATE 01/17/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28–46, 48 were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Upon the foregoing documents, the motion by Plaintiff Demeter Investment Holdings (“Plaintiff”) for summary judgment in lieu of complaint pursuant to CPLR § 3213 against Defendant J. Streicher Holdings, LLC (“Defendant”) in the amount of \$15,926,029.24, plus pre-judgment interest, legal fees, and expenses is DENIED.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Plaintiff commenced this action by motion for summary judgment in lieu of complaint alleging that Defendant failed to meet its obligations under three (3) promissory notes that Plaintiff claims were executed respectively on March 9, 2023; March 20, 2023; and June 7, 2023.

On March 9, 2023, the parties entered into the first Loan Agreement and Promissory Note (the “March 9 Note”). NYSCEF Doc. No. 39.¹ Pursuant to the March 9 Note, Plaintiff/Lender agreed to lend Defendant/Borrower the principal sum of \$10,000,000.00, to be delivered in two separate tranches. The first tranche consisted of \$3,000,000.00 and the second tranche consisted of \$7,000,000.00. The March 9 Note was fully executed by both parties and contemplated to mature on March 9, 2024 (Due Date). Plaintiff states that the monies were transmitted to Defendant on two successive days—the first tranche on March 10, 2023, and the second tranche on March 11, 2023.

¹ NYSCEF Doc. No. 39 is filed as “May 9, 2023 Note”, but it is in fact the “March 9, Note.”

On March 20, 2023, the parties entered into a second Loan Agreement and Promissory Note (the “March 20 Note”). NYSCEF Doc. No. 40.² Pursuant to the March 20 Note, Plaintiff agreed to lend Defendant the principal sum of \$3,000,000.00. On this fully executed agreement it is reflected that the Due Date is March 29, 2024. Plaintiff asserts that the monies were transmitted to Defendant on March 21, 2023.

On June 7, 2023, the parties entered into a third Loan Agreement and Promissory Note (the “June 7 Note”). NYSCEF Doc. No. 41. Pursuant to the June 7 Note, Plaintiff agreed to lend Defendant the principal sum of \$5,500,000.00. This agreement reflects that the Due Date is June 6, 2024. Notably, this Note is not signed by Defendant. Plaintiff asserts that the monies were transmitted to Defendant on June 8, 2023.

Each of the Notes contains identical repayment terms that set forth the dates the Borrower was obligated to (a) make quarterly interest payments pursuant to the outstanding principal amounts owed and (b) repay the full principal amounts loaned. The Borrower’s obligation is to repay the principal amounts loaned, in addition to an annual interest rate of 10% (to be computed on a quarterly basis), twelve (12) months from the date of receipt of the loan proceeds. The agreements state that late interest payments will continue to accrue *pro rata* to the time after the interest payments’ Due Date and that late payments will otherwise not be subject to penalties. The Notes further provide, as relevant here, that the Borrower would pay costs, expenses, and attorney’s fees paid or incurred in connection with representing the Lender in any bankruptcy, reorganization, receivership, or other proceedings affecting creditors’ rights and involving a claim under the Loan, as well as the costs of suit and such sum as the Court may adjudge as reasonable attorney’s fees in any action to enforce payment of the Agreement or any part of it. The failure of the Borrower, *inter alia*, to make its quarterly interest payments, and if the Borrower defaults under the Agreements and fails to repay the Loans in full by the Due Dates, constitutes an Event of Default and, in turn, all amounts owed by the Borrower under the Notes are due and owing as of the date of the default.

Plaintiff supports its motion with the affirmation of Nicholas Jonathan James Levitt, the CEO and founder of Entrepreneur’s Investment Office Holdings Limited, which wholly owns Demeter Investment Holdings. Mr. Levitt affirms that he has personal knowledge of the facts in this matter. NYSCEF Doc. 38. Plaintiff contends that Defendant has failed to repay the outstanding principal amounts owed under each of the Notes’ maturity dates respectively on March 9, 2024, March 20, 2024, and June 6, 2024; and that Defendant has failed to make timely quarterly interest payments or to pay outstanding interest accrued on late interest payments. Plaintiff also claims that Defendant owes \$15,926,029.24, including \$1,095,497.91 in outstanding interest and \$14,830,531.33 in outstanding principal.

Plaintiff further states that it sent letters to Defendant on January 31, 2024, March 11, 2024, and April 17, 2024, demanding payment of the unpaid balance of principal together with interest and all other amounts accrued. NYSCEF Docs. 42–45. On November 11, 2024, Plaintiff sent Defendant a letter detailing Defendant’s defaults under the provision of the Notes and demanding Defendant to promptly pay all outstanding monies owed to Plaintiff. NYSCEF Doc. No. 46. Pursuant the Notes, Plaintiff provided Defendant “a cure period of 30 days following the

² NYSCEF Doc. No. 39 is filed as “May 20, 2023 Note”, but it is in fact the “March 20, Note.”

November 11, 2024 notice of nonpayment” and demanded that Defendant render all payments of outstanding amounts owed under the Notes by December 11, 2024.

Plaintiff claims that, to date, it has not received a response to the demand expressed by its November 11, 2024 letter, or any other communication or indication from Defendant that it intends to fully satisfy its obligation. Therefore, on January 2, 2025, Plaintiff filed the Summons and Motion for Summary Judgment in Lieu of Complaint pursuant CPLR § 3213. NYSCEF Doc. Nos. 1–21. The Summons, together with the Motion with the supporting documents were served upon Defendant, by serving the supposed registered agent at Legalinc Corporate Services Inc., located at 131 Continental Drive, Suite 305, Newark, Delaware 19713. NYSCEF Doc. No. 24.

On January 17, 2025, Plaintiff filed a notice of withdrawal of the motion (NYSCEF Doc. No. 26), and filed an amended Summons (NYSCEF Doc. No 25) and Notice of Motion (NYSCEF Doc. No. 48). Plaintiff served the amended Summons and Motion with the supporting documents upon Defendant by serving a different registered agent, also the purported registered agent, at Republic Registered Agent LLC, located at 254 Chapman Road Suite 209 Newark, Delaware 192702 (NYSCEF Doc. No. 49).³

The Court observes that not only are the two places of service different, but they are different from the address for service specified in the Notes. This raises a question as to whether Plaintiff properly served Defendant with either motion. Defendant did not file opposition.

LEGAL DISCUSSION

CPLR §3213 permits a party to move for summary judgment in lieu of a complaint when the action is based upon an instrument for the payment of money only. A promissory note is an instrument for the payment of money only for the purposes of CPLR § 3213. *See Seaman-Andwall Corp. v. Wright Mach Corp.*, 31 A.D.2d 136, 137 (1st Dept. 1968). To establish a *prima facie* case on a promissory note, Plaintiff must establish the existence of the instrument and Defendant’s failure to make payment pursuant to the terms of the instrument. *Mangiatordi v. Maher*, 293 A.D.2d 454 (2nd Dept. 2002); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2nd Dept. 1995).

Plaintiff in an unopposed motion for summary judgment in lieu of a complaint bears the burden of establishing that the defendant was properly served with the motion. *Cadle Co. v. Ayala*, 47 A.D.3d 919 (2nd Dept. 2008). CPLR § 3213 is a “hybrid procedure incorporating certain elements of an action and certain elements of motion practice.” *Alpine Capital Bank v. The Estate of Eugenia S. Shiah*, 127 N.Y.S.3d 701 (1st Dept. 2020), citing *Goldstein v. Saltzman*, 13 Misc. 3d 1023, 1025 (Sup. Ct, Nassau Cnty 2006). Thus, as “with a plenary action, jurisdiction is obtained over the defendant by serving the defendant with the summons, notice of motion and supporting papers in a method prescribed in CPLR Article 3.” *Id.* The failure to give proper notice of a motion deprives the court of jurisdiction to hear the motion. *Id.*

³ Plaintiff states that the purpose of the amendment was to correct an error in the spelling of the Defendant’s name in the caption. NYSCEF Doc. No. 47.

Here, Plaintiff's Affidavits of Service raise questions concerning Plaintiff's service of its motion papers. Plaintiff served the original papers on Defendant at a different address from the one where it served Defendant with the amended Summons and Motion. Moreover, as per the Notes, the address provided requires all notices to be delivered at a different address. Accordingly, Plaintiff has not established that Defendant has proper notification of the instant Motion. Even if Defendant was properly served, there still remain issues that preclude granting of the instant motion.

To establish a *prima facie* case on a CPLR § 3213 motion, "a plaintiff must show the existence of a promissory note executed by the defendant containing an equivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms." *Zyskind v. FacCake Mgt. Tech. Inc.*, 101 A.D.3d 550, 551 (1st Dept. 2012) (internal citations omitted). "The prototypical example of an instrument within the ambit of [CPLR § 3213] is ... a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time." *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996); *see also PDL Biopharma, Inc. v Wohlstadter*, 147 A.D.3d 494, 494 (1st Dept. 2017).

Here, Plaintiff has not established its *prima facie* entitlement to summary judgment. While Plaintiff asserts repeatedly that the Agreement contained an "unconditional" promise to repay the loaned amounts, the word "unconditional" does not appear in the relevant agreement, with Defendant's obligation to repay expressly conditioned on the contractual terms. *See PI Fin. v. Evergreen Bldrs. & Constr. Servs., Inc.*, 232 A.D.3d 549, 550 (1st Dept. 2024).

Further, Plaintiff has not established that the June 7 Note was signed by Defendant. Even though the March 9 Note and March 20 Note are each fully executed by both parties, Plaintiff fails to specify what Defendant owes as to each Note and claims that Defendant owes Plaintiff monies pursuant to the terms of the Notes.

For these reasons, viewing the factual contentions in the light most favorable to the non-moving party, Plaintiff's Motion for Summary Judgment in Lieu of a Complaint is hereby denied, without prejudice, notwithstanding the absence of opposition by Defendant.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment in Lieu of Complaint against Defendant is **DENIED** without prejudice for failure to establish entitlement to relief pursuant to CPLR § 3213; and it is further

ORDERED that the motion papers are deemed to be the Complaint; and it is further

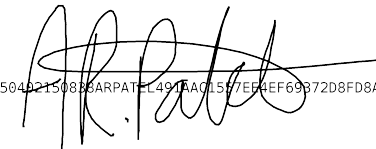
ORDERED that within twenty (20) days of the date of this Decision and Order, counsel for the moving party shall serve a copy of this Decision and Order and the Complaint upon Defendant with notice of entry; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on May 13, 2025, at 11:00 am in Courtroom 428, 60 Centre Street, New York, NY 10007; and it is further

ORDERED that the parties shall comply with this Court’s Practices and Procedures regarding Preliminary Conferences (Section X.A.). Pursuant to Commercial Division Rules 8 and 11, the parties shall meet and confer to jointly prepare a brief statement—not to exceed two (2) pages—describing the facts of the case and the contentions of the parties, and a proposed Preliminary Conference Order, using this Court’s form Preliminary Conference Order. The parties shall submit the joint statement, proposed Preliminary Conference Order, and Rule 10 Certification at least two (2) days prior to the date of the scheduled preliminary conference *via* NYSCEF; and it is further

ORDERED that should Defendant fail to answer, the denial of the instant motion does not preclude Plaintiff from moving, upon proper papers, for a default judgment pursuant to CPLR § 3215.

The foregoing constitutes the decision and order of this Court.

<u>4/2/2025</u> DATE			 <small>20250402150836ARPATEL497FA01577E64EF69372D8FD8A7FCE36</small> <hr/> ANAR R. PATEL, A.J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE