

Roch Sela Inc. v Wilson
2011 NY Slip Op 30391(U)
February 17, 2011
Sup Ct, New York County
Docket Number: 114686/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: J.S.C.
Justice

PART 10

Index Number : 114686/2010

ROCH SELA INC.

vs.

WILSON, KIM E.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion


motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 17 2011


HON. JUDITH J. GISCHE
J.S.C. J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
ROCH SELA INC.,

Plaintiff,

-against-

KIM E. WILSON and WILSON MINE
CONSULTING LLC,

Defendants.
-----X

DECISION/ORDER

Index No.: 114686/10

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):*

FEB 18 2011
NEW YORK
COUNTY CLERK'S OFFICE
Numbered

Papers

Pltf n/m (CPLR § 3213) w/ AA affid, exhs1

Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff's motion for summary judgment in lieu of a complaint based upon a Promissory Note (the "Note"). CPLR § 3213. This motion has been submitted to the court without opposition, and is, therefore, considered by the court on default.

Plaintiff has filed proof that the summons and motion was personally served upon Kim E. Wilson. CPLR § 308(1). Wilson Mine Consulting LLC was served through a registered agent for the corporation. BCL § 306(a). Plaintiff has also complied with the additional notice requirements of CPLR § 3215(g)(3)(i), (4)(i).

Despite such notice and additional notice, defendants have neither appeared in this action nor opposed the motion. Defendants' time to do so has expired and has not been extended by the court. Therefore, this motion is submitted on default and plaintiff

is entitled to summary judgment provided it otherwise establishes a *prima facie* case.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). A motion for summary judgment in lieu of complaint is available when the “action is based upon an instrument for the payment of money only or upon any judgment.” CPLR § 3213. Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a *prima facie* cause of action. Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff’d* 29 N.Y.2d 617 (1971). An instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay the lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634 (2d Dept. 1992). The instrument at issue here, the promissory note, is for the payment of money only, within the meaning of CPLR § 3213.

Plaintiff has set forth the following facts in his motion and through the sworn affidavit of Avraham Azoulay, Treasurer of plaintiff:

This action is based upon a promissory note dated March 15, 2010 (the “Note”) entered into between plaintiff and defendants. Pursuant to the Note, plaintiff loaned defendants \$50,000.00, conditioned on defendants’ repayment of the loan in monthly installments with interest accruing at a rate of 8% per annum from March 15, 2010 and at a rate of 12% per annum from August 26, 2010, until the loan was paid in full. Plaintiff sent defendants a demand dated August 12, 2010 for payment of the entire

principal balance plus interest.

The instrument at issue here, the Judgment, is for payment of money only, within the meaning of CPLR § 3213, and there are no material issues of fact precluding summary judgment because it is for a sum certain.

Defendants' failure to make payments under the Note constitutes a default. Therefore, plaintiff has established its entitlement to summary judgment against defendants, jointly and severally, in the amount of \$50,000.00. See Afco Credit Corp. V. Boropark, *supra*; Bonds Financial, Inc. v. Kestrel Technologies, LLC, 48 A.D.3d 230 (1st Dept 2008). Plaintiff is also entitled to interest at a rate of 8% per annum from March 15, 2010, and at a rate of 12% per annum from August 26, 2010.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted against defendants, jointly and severally.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Note expressly provides that defendants are liable for plaintiff's charges, expenses, and attorney's fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiff may recover from defendants for its reasonable attorneys fees, costs and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be

* 5]
assigned.

Conclusion

It is hereby:

ORDERED that plaintiff ROCH SELA INC.'s motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants, KIM E. WILSON and WILSON MINE CONSULTING LLC, is granted; and it is further

ORDERED that plaintiff is entitled to a money judgment in its favor and against defendants, KIM E. WILSON and WILSON MINE CONSULTING LLC, jointly and severally, for the unpaid principal sum of Fifty Thousand Dollars and Zero Cents (\$50,000.00), with interest at a rate of 8% per annum from March 15, 2010, and at a rate of 12% per annum from August 26, 2010; and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its reasonable attorney's fees, costs and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that within the next 60 days, plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
February 17, 2011

So Ordered:

HON. JUDITH J. GISCHKE, J.S.C.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE