

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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DMITRY LIPSKEROV

Plaintiff,

- v -

MILENA ADAMIAN,

Defendant.

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INDEX NO. 655969/2019

MOTION DATE 2/19/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for SUMMARY JUDGMENT LIEU COMPLAINT.

In this action to recover money owed pursuant to a purported loan agreement, the plaintiff moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. The defendant opposes the motion. The motion is denied but without prejudice to the plaintiff commencing a separate action.

A plaintiff may seek relief under CPLR 3213 “[w]hen [the] action is based upon an instrument for the payment of money only.” See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013); Allied Irish Banks, P.L.C. v Young Men’s Christian Assn. of Greenwich, 105 AD3d 516 (1st Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1st Dept. 2013). The purpose of the statute “is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself.” G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d at 517 (1st Dept. 1992). However, “[w]here the instrument requires something in addition to defendant’s explicit promise to pay a sum of money, CPLR 3213 is unavailable.” Weissman v Sinorm Delj, 88 NY2d 437, 444 (1996). A plaintiff’s prima facie proof “cannot be drawn from sources outside the agreement itself.” Rhee

v Meyers, 162 AD2d 397, 398 (1st Dept. 1990). Thus, CPLR 3213 may not be used where “extrinsic evidence is required to determine the amount” due and where there is “no specific date by which payment in full had to be made.” Ian Woodner Family Collection, Inc. v Abaris Brooks, LTD, 284 AD2d 163, 164 (1st Dept. 2001). That is, any outside proof “other than simple proof of payment” and default (Goodyear Tire & Rubber Co. v Azzaretto, 103 AD3d 880 [2nd Dept. 2013]) exceeds the permissible use of extrinsic proof on a CPLR 3213 motion.” Ian Woodner Family Collection, Inc. v Abaris Brooks, LTD, supra at 164.

Here, the plaintiff submits a signed agreement, in Russian, whereby the defendant states that she received \$515,000.00 as a loan from the plaintiff, and that the defendant agreed to repay the loan amount by April 15, 2018. However, the plaintiff’s affidavit indicates that he never loaned \$515,000.00 to the defendant. Instead, the plaintiff’s affidavit and supporting documents demonstrate that upon investment advice from the defendant, the plaintiff caused non-party Vanterool Financial and Investing Ltd, of which the plaintiff is a managing director, to invest \$515,000.00 in a company called Azimuth SVBio, LLC. Thereafter, it appears that Azimuth SVBio, LLC shut down, resulting in a total loss of the investment. The plaintiff alleges that because of this loss the defendant entered into the purported loan agreement. Based upon these facts contained in the plaintiff’s affidavit, it is clear that extrinsic proof would be required to meet the plaintiff’s burden, and therefore the motion must be denied. See Rhee v Meyers, supra.


Even were the court to consider the extrinsic proof submitted by the plaintiff, the agreement provided to substantiate the underlying \$515,000.00 investment in Azimuth SVBio, LLC is undated, unsigned and makes no reference to the defendant. The affidavit of Jorge Castellano, who claims to be the president of the plaintiff, is not properly notarized (see Executive Law §137) and the plaintiff has not submitted any other affidavit of someone with personal knowledge of the underlying transactions. Nor is any proof of service submitted with the motion.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion pursuant to CPLR 3213 is denied, without prejudice to the plaintiff commencing a separate action.

This constitutes the Decision and Order of the court.

6/5/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER