[* 1]

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

PRESENT: PART 22 DCM

Index Number : 108507/2008

BRANCH, GREGORY

vs

MULLINEAUX, BARRY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

Motion deemed moot per attached decision

FILED
JAN 25 2011
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/15/11

George J. Silver
GEORGE J. SILVER J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

GREGORY T. BRANCH,

Plaintiff,

-against-

BARRY MULLINEAUX, BRIAN GEFTER and MICHAEL SATSKY,

Defendants.

----------X

DECISION

Index #: 108507/2008

SILVER, GEORGE, J.

At a bench trial held on February 26 and March 1, 2010, Gregory Branch ("plaintiff") claims that he loaned Barry Mullineaux, Brian Gefter and Michael Satsky (collectively "the defendants") the sum of Seventy Thousand Dollars ($70,000.00) for a period of approximately four (4) months at an interest rate of ten (10) percent. Defendants claim that the money in question was not a loan but rather an investment in their Hamptons summerhouse venture.

Statement of Facts

Plaintiff, an institutional equity salesperson, testified that he agreed to loan to defendants the sum of Seventy Thousand Dollars ($70,000.00) with interest at a rate of 10% in order for defendants to rent a house in the Hamptons for parties during the summer of 2006. Plaintiff became acquainted with the defendants while frequenting a club in New York City called Club Stereo. He believed that the defendants were owners/managers of the club. Plaintiff stated that he paid the loan in two installments. The first installment of the alleged loan was paid by check, dated May 25, 2006 in the amount of Thirty Five Thousand Dollars ($35,000.00) made payable to MJS Events. When shown the check, plaintiff testified that he did not recognize the handwriting on it since a friend, Malik Edwards, gave a blank check to one of the defendants on plaintiff's behalf. Plaintiff gave defendants a second check in the amount of Thirty Five thousand Dollars ($35,000.00) dated June 8, 2006 which represented the second installment of the alleged loan. Plaintiff testified that he personally drafted this check but did not remember which defendant he gave the check to. Plaintiff also did not recall which defendant told him to make the check payable to the Gerard Family Subchapter Trust of 2002. Since he did not have an ownership stake in the venture, plaintiff testified that was not concerned about how the checks were made out. Plaintiff further testified that after the checks were issued the parties entered into a written Agreement. This agreement was admitted into evidence. The checks were also admitted into evidence. Plaintiff further testified that all parties to the agreement had attorneys review it prior to execution. Plaintiff testified that he believed that he was entering into a fixed income investment for a defined term which in he described in lay persons' terms as a loan. After the time to repay the alleged loan had expired, plaintiff met the defendants in order to seek

repayment. Defendants offered him option to renegotiate the loan and convert it into new equity. Plaintiff testified that he received a check dated November 2006 in the amount of Ten Thousand Dollars ($10,000.00). He also indicated that he received an additional Three Thousand Dollars $3,000.00 from defendant Gefter. An e-mail setting forth a repayment schedule was also admitted into evidence. Plaintiff testified that this email was forwarded to him from defendant Gefter.

On cross-examination, plaintiff was shown one of the checks which he gave to the defendants. After reviewing the check, he stated that he did not write the word "loan" on the notation part of the check. Plaintiff further stated that he discussed the contents of the agreement with his friend, who was also an attorney. Plaintiff claims that he did not retain his friend to act as his attorney but rather to review the agreement to assure that its terms satisfied the requirements of a fixed income instrument. Plaintiff did, however, discuss with his friend the fact that the word "loan" was not mentioned in the agreement but testified that he was comfortable that the agreement nevertheless satisfied all the requirements of a fixed income agreement. Plaintiff further testified that he understood the terms of the contract. When questioned about the fact that he retained a right to first refusal of future endeavors, plaintiff testified that he did not know why that language was included in the agreement and that he never asked the defendants about this clause. The agreement also gave plaintiff had the right to audit the books and records, a right plaintiff testified he never exercised. In addition, plaintiff had the right under the agreement to inspect the premises. However, plaintiff admitted to only visiting the premises and not inspecting them.

Defendant Geftner testified that he believed that the agreement constituted an investment. When questioned about the existence of an operating agreement created pursuant to the formation of Stereo house L.L.C., Geftner testified that he thought that an operating agreement was created but did not remember signing same.

Defendant Satsky testified that he owns and operates night clubs. He became acquainted with plaintiff when plaintiff began to attend a club called Club Stereo in New York City. Plaintiff eventually expressed an interest in investing with defendant Satsky. After some discussions, Satsky asked his attorney to prepare and agreement with plaintiff and to form an L.L.C. for the purpose of holding promotional events in the Hamptons. Defendant Satsky testified that the agreement was negotiated between the attorneys. He further testified that he was involved with Stereo Group L.L.C. and that he signed the agreement with plaintiff. He also admitted that the L.L.C. was not formed when he entered into the agreement with plaintiff. Satsky testified that the business purpose of Stereo House L.L.C. was to operate a Hamptons house for events. When shown the check for the first installment of Thirty Five Thousand Dollars ($35,000.00) Satsky testified that he recognized the handwriting on it. He stated that the monies were to be used for the rental of the Hamptons House. With respect to the second check in the amount of Thirty Five Thousand Dollars ($35,000.00), Satsky testified that he did not know how Stereo House L.L.C. came into possession of that check He also didn't know if the L.L.C. set up a checking account.

Defendant Mullineaux testified that he signed the agreement and that he believed that plaintiff was investing in the rental of the Hamptons house with 10% interest conditioned on the house being profitable. He never viewed the agreement as a loan but as an investment. Accordingly to Mullieaux, the Hamptons venture did not make a profit. With respect to the

formation of the L.L.C., Mullineaux testified that he did not know whether it came into existence. He stated that he did not sign an operating agreement. He admitted that he never saw the L.L.C. papers until prior to his deposition. He stated that no bank accounts were opened for the L.L.C. and that he did not have access to any monies paid to the L.L.C.

On cross-examination, he stated that he was basically "shut" out of the operations by the other defendants.

Conclusion

Although the agreement in question was prepared, negotiated and/or reviewed by sophisticated and savvy counsel, the basic intent of the agreement is contested by the parties. Plaintiff argues that the agreement represents a loan of Seventy Thousand Dollars ($70,000.00) to Stereo House L.L.C. and since that entity was not formed until after the agreement was executed, the individual defendants are personally liable for the unpaid portion of the loan. Plaintiff also contends that the thirteen Thousand Dollars ($13,000.00) he received from the defendants constitutes an acknowledgment on their part that the agreement was a loan and not an investment. On the other hand, the defendants contend that the agreement is merely an investment which did not produce the expected results. The court, however, rejects both propositions as irrelevant.

The initial section of the Agreement entitled "Terms and Conditions provides that "Branch shall invest the sum of seventy thousand dollars ($70,000.00) to be used exclusively for re-opening renovation purposes and operating capital for the House. **This investment, plus ten percent (10%) interest, for a total of $77,000, shall be repaid or caused to be repaid by Stereo on or prior to the Termination Date.**" [emphasis added]. Therefore, regardless of whether the agreement is denominated a loan or an investment, the above provision makes clear that plaintiff is entitled repayment of the Seventy Thousand Dollars ($70,000.00) he provided to defendants, plus ten percent (10%) interest for a total of Seventy Seven Thousand Dollars ($77,000). Since Stereo House L.L.C. is not a named defendant in this action, the real issue for this court to determine is whether the defendants are personally liable for the breach of the instant agreement.

Under New York law, "a promoter who executes a pre-incorporation contract in the name of a proposed corporation is himself personally liable on the contract unless the parties have otherwise agreed" (*Clinton Investors Company, II v. Watkins*, 146 A.D.2d 861,536 N.Y.S.2d 270 (3d Dep't 1989); *see also Oost-Lievense v. North American Consortium, P.C.*, 969 F. Supp. 874, 880 [S.D.N.Y. 1997] [recognizing personal liability of pre-incorporation promoter]. It is undisputed that the corporate entity, Stereo House L.L.C. , did not exist at the time that agreement was entered into in June 2006. Thus, as pre-incorporation promoters, defendants are personally liable for the agreement executed prior to the incorporation of an entity, even if the L.L.C would otherwise be considered the contracting party (*Brandes Meat Corp. v. Cromer,* 146 A.D.2d 666, 537 N.Y.S.2d 177 [2d Dept 1989] [defendant held personally liable for obligations he incurred purportedly on behalf of an entity which, at such time, did not exist] *citing Lorisa Capital Corp. v. Gallo*, 119 A.D.2d 99, 506 N.Y.S.2d 62 [2d Dep't 1986]; *see also Imero Fiorentino Assocs., Inc. v. Green*, 85 A.D.2d 419, 420-21, 447 N.Y.S.2d 942 [1st Dept 1982] [individual defendant liable for agreement made on behalf of a nonexistent principal]. Indeed, a corporation which did not

"exist at the time the contract was entered into, cannot be bound by the terms thereof 'unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying, or accepting it'" (*Metro Kitchenworks Sales, LLC v. Continental Cabinets*, LLC, 31 A.D.3d 722, 820 N.Y.S.2d 79, 81 [2d Dept 2006]; *see also Wieder v. Stimler*, 18 Misc. 3d 137A(A), 859 N.Y.S.2d 900 [App. Term 2008] ["[W]hen a promoter executes a contract on behalf of a nonexistent corporation, the promoter is presumed to be personally liable under that contract absent proof of the parties' contrary intent or until there has been a novation between the corporation and the other contracting party"] [citation omitted]). Here, defendants have proffered no evidence that Stereo House L.L.C. adopted, ratified or accepted the agreement they made with plaintiff. Thus, there is no basis for the court to overcome this presumption and shift the individual defendants' liability for repayment to Stereo House L.L.C.

Accordingly, it is

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff as against defendants Satsky, Gefter and Mullineaux in the sum of $64,000.00[1] with interest from October 1, 2006 at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

GEORGE J. SILVER

George J. Silver

J.S.C.

Dated: June 15, 2010
New York County
Index #: 108507/2008

[1] The Court came to this calculation by subtracting ten Thousand Dollars ($10,000.00) and Three Thousand Dollars ($3,000.00), which plaintiff received from the defendants, from the total owed under the agreement of Seventy Seven Thousand Dollars ($77,000.00).