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Short Form Order

Index Number : 28461-2006

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:
Hon. Emily Pines
Justice Supreme Court

Original Motion Dates:	01-19-2007	
Motion Submit Date:	02-08-2007	
Motion Sequence No's.:	001	MD
	002	MD

X

RUTH ANN HANSEN,

Plaintiff,

-against-

PAULA CAROL,

Defendant.

X

Attorney of Plaintiff
Fallon & Fallon, LLP
53 Main Street, Suite 1
Sayville, New York 11782

Attorney of Defendant
Joseph A. Solow, Esq.
330 Vanderbilt Motor Parkway, Suite 400
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ORDERED, that this motion (motion sequence number 001) by Plaintiff for summary judgment is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 2) by Defendant for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that this matter is set down for a preliminary conference on April 26, 2007 at 9:30 a.m. in D.C.M., Room 203A, Griffing Avenue Annex.

Plaintiff commenced this action against Defendant for recovery of a loan by filing a Summons and Verified Complaint on or about October 10, 2006. The first cause of action of the complaint alleges that Plaintiff loaned Defendant the sum of $235,000 in 2003 and $45,600 in 2004 for a total of $280,600 and that the balance of $102,000 remains due and owing on the loan. The second cause of action alleges that Defendant agreed to pay interest on the unpaid balance at the rate of 5% per annum and that the amount of $4,381.17 representing unpaid interest for the year 2005 remains due and owing. It is undisputed that there was no written agreement or note evidencing the loan.

Issue was joined by Defendant's service of a Verified Answer on or about November 1, 2006.

In the Verified Answer, Defendant denies that Plaintiff loaned her any sums of money as set forth in the complaint.

Plaintiff moves for summary judgment on the ground that no genuine issue of fact exists regarding the loan or Defendant's failure to pay the full amount due and owing. In support of the motion, Plaintiff annexes her affidavit, the marked complaint, copies of cancelled checks and documentation regarding a bankruptcy proceeding of Defendant's son. Specifically, it is alleged that Defendant's son, Chip Hunter ("Hunter"), borrowed certain monies from Defendant totaling approximately $450,000. Plaintiff alleges that Hunter paid her $102,000 from the proceeds of the sale of a certain parcel of real estate, which sum was designed to reduce the principal on the monies owed by Defendant by $88,000 and interest in the sum of $14,000 due on the loan. Unfortunately, it appears that Hunter had also filed for protection under **Chapter 7** of the **United States Bankruptcy Code** and the Bankruptcy Trustee sought return of the funds as a "preferential transfer" which was considered avoidable by the Trustee. The Trustee demanded repayment by Plaintiff of the $102,000 and Plaintiff did in fact return said funds to the Trustee. Plaintiff has annexed a copy of Schedule F of Hunter's Bankruptcy Petition (dated October 14, 2005), which did not include Plaintiff as a creditor. Subsequently, on or about May 24, 2006, Hunter amended the Schedule F to add plaintiff as a creditor.

Plaintiff asserts that she loaned the $280,000 to Defendant, and not to Hunter. She supports this assertion by copies of the cancelled checks made payable to Defendant in which the memo portion of each check states "loan". Plaintiff also annexes copies of checks made by Defendant payable to Plaintiff in which the memo portion of the check states "repay loan" or "loan repay".

Defendant cross-moves for summary judgment dismissing the complaint. In support of the cross-motion, Defendant submits a personal affidavit, an affidavit by her son, copies of the same checks submitted by Plaintiff and copies of checks purportedly demonstrating that she paid bills on behalf of her son and his business ventures. In her affidavit, defendant explains that the loan was really from Plaintiff to her son but that Plaintiff insisted that she acted as the "depositary, guardian and manager of the funds" because her son had a poor history regarding money management (Defendant's affidavit at ¶3).

Defendant has also annexed copies of emails between Plaintiff's daughter (Lisa Mittelstadt), a Certified Public Accountant, and Hunter. These email exchanges discuss the loan of $280,600 plus interest and the terms of repayment, purportedly by Hunter to Plaintiff out of the proceeds of the sale of

certain property he owned. In one email, Plaintiff's daughter actually advised Hunter that he should add plaintiff as a beneficiary on his life insurance policy. The emails from Mittelstadt to Hunter discuss the interest rate and principal balance and proposed calculation of payments by Hunter. Lastly, Defendant has annexed Hunter's amendment to the Schedule F of his Bankruptcy Petition (dated May 24, 2006) which lists Plaintiff as an additional creditor for a personal loan for $280,000.

In opposition to the cross-motion, Plaintiff annexes a further email from Mittelstadt dated September 2, 2005 in which she stated that the loan was between Plaintiff and Defendant. In reply by email on September 3, 2005, Hunter stated that Defendant had "every intention of paying the loan" In that email, Hunter further explains that he and Mittelstadt had "made all the arrangements" for him (Hunter) to take on responsibility for the loan and not involving the parties. In further reply to the opposition, Defendant submits an affidavit by Hunter together with an additional email from Hunter in which he states that the loan was from Plaintiff to him, and not to Defendant.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York University Medical Center,*** 64 N.Y2d 851, 853,487 N.Y.S.2d 316, 64 N.E.2d 851 (1985). Of course, summary judgment is a drastic remedy that should only be granted where there is no clear triable issue of fact and the Court must view the evidence in the light most favorable to the opposing party. ***Akseizr v. Kramer,*** 265 A.D.2d 356, 696 N.Y.S.2d 849 (2d Dept. 1999). However, once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife,*** 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

In the case at bar, Plaintiff has met her initial burden of demonstrating the absence of any material issue of fact regarding the loan to Defendant by submission of copies of the cancelled checks containing the memos "loan" and "repay loan" or "loan repay". ***See, Levine v. Levine,*** 24 A.D.3d 625, 807 N.Y.S.2d 384 (2d Dept. 2005). The burden thus shifted to Defendant to come forward with evidentiary proof sufficient to establish a material issue of fact warranting a trial. Defendant has met this burden by the submission of the emails between Plaintiff's daughter and Defendant's son which tend to demonstrate that the loan in question may have actually

been between Plaintiff and Defendant's son. Minimally, these emails, together with the Amended Schedule F to the Bankruptcy Petition and Defendant's affidavit, raise an issue of fact as to whether Plaintiff loaned the funds to Hunter or to Defendant.

Based upon the foregoing, the motion and cross-motion for summary judgment are denied and the matter is set down for a preliminary conference in accordance herewith.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 15, 2007
Riverhead, New York

Emily Pines
Emily Pines
J. S. C.