Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

PREM GUPTA

- against -

MOTEL 22, INC., et al.

Index Number 23075 2005

Motion Date January 3, 2007

Motion Cal. Number 34

The following papers numbered 1 to 10 read on this motion by defendants to dismiss pursuant to CPLR 3211(a)(1), (2), (4), and (7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-3
Answering Affidavits - Exhibits.....	4-6
Reply Affidavits.....	7-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action seeking payment of a promissory note. The dispute arises out of an agreement for the sale of a motel located in Pennsylvania. The plaintiff sold Motel 22, Inc. to the defendant Shoukat Ali in March 2005. The sale of the motel included the sale of land, a motel complex including an in-ground swimming pool, covered reservoir, water supply complex and sewage treatment plant complex, and a separate office building. The plaintiff received an executed contract of sale on or about March 11, 2005. The purchase price of the motel was $250,000. The defendant Ali received financing from the plaintiff for the purchase of the motel in the amount of $175,000 with a six percent interest rate. The defendant Ali, on behalf of the corporate defendant, executed a promissory note in the amount of $175,000, specifying that the sum of the loan must be paid over a period of 120 months, in installments of $1,942.86 due on the first of every month, commencing with the first payment on May 1,

2005.

The defendant Ali alleges in an affidavit, that after the execution of the contract of sale and the promissory note he learned that motel would be inoperable as it lacked a certificate of occupancy, and that no certificate could be issued do to a significant number of violations of the applicable building codes. The defendant Ali further alleges that he sought to change the purchase price of the sale due to the violations or have the plaintiff reimburse the defendants for correcting pre-existing violations. That after the plaintiff refused to lower the purchase price or reimburse the defendants for the cost of correcting the violations, the defendants on or about August 23, 2005, commenced an action in the court of Common Pleas of Huntingdon County, Pennsylvania Civil Division. The defendants claim to have made payments on the promissory note in an escrow account held by their attorney. The plaintiff alleges in the complaint that the defendants have defaulted under the promissory note. The defendants now move to dismiss the complaint.

In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of plaintiff's claim (Held v Kaufman, 91 NY2d 425 [1998]; Teitler v Max J. Pollack & Sons, 288 AD2d 302 [2001]). The defendants claim that all installment payments were made and no cause of action under the promissory note ever accrued. In support of their motion the defendants submit banking records, including statements of account, and copies of checks allegedly issued by the defendant Ali to the plaintiff. The documentary evidence, however, does not resolve that the defendants actually paid the plaintiff in accordance with the promissory note. While the evidence shows the amount debited from the defendant Ali's account, the evidence does not establish who the defendants actually paid. Therefore, the branch of the motion to dismiss under CPLR 3211(a)(1) must be dismissed.

The defendants move to dismiss pursuant to CPLR 3211(a)(2) arguing that this court does not have subject matter jurisdiction to hear this case. The defendants argue that because of the forum selection clause in the promissory note only Pennsylvania has jurisdiction to hear the case. That clause, however, only mandated that the borrower was limited by the clause and specifically states the "lender is not precluded from bringing any action against any of the Undersigned in any jurisdiction in the United States." Therefore, this court has subject matter jurisdiction to hear this case, as the "New York Supreme Court is a court of original, unlimited, and unqualified jurisdiction and is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed" (Fry v Village of Tarrytown, 89 NY2d 714 [1997]).

The defendants also move under CPLR 3211(a)(4) to dismiss due to the action pending in Pennsylvania that they brought against the plaintiff. The action in Pennsylvania, however, is based on separate theories of damages and recovery and, therefore, the motion to dismiss on this ground should be denied (see Haller v Lopane, 305 AD2d 370 [2003]). Furthermore, this defense has been waived as a matter of law under CPLR 3211(e) as it was not raised as an affirmative defense in the defendants' answer.

Finally, on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (Leon v Martinez , 84 NY2d 83 [1994]; Konidaris v Aeneas Capital Mgt., LP, 8 AD3d 244 [2004]). Here, accepting the allegations in the complaint as true, the plaintiff has stated a cause of action and the motion to dismiss must be denied.

Accordingly, the defendants' motion to dismiss pursuant to CPLR 3211(a)(1), (2), (4), and (7) is denied.

Dated: March 22, 2007

J.S.C.