

**Voluto Ventures, LLC v Jenkins & Gilchrist Parker
Chapin LLP**

2007 NY Slip Op 31116(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0603080/2004

Judge: Rolando T. Acosta

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

HON. ROLANDO T. ACOSTA

PRESENT: _____
Justice

PART 61

Voluto Ventures, LLC,

INDEX NO. 603080/04

MOTION DATE _____

- v -

Jenkins & Gilchrist Parker Chapin, LLP

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1, 2 (EX. A-G)
3 (EX. A-P), 4
5, 6

Cross-Motion: Yes No

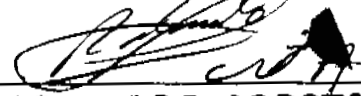
UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this motion ~~and notice of entry~~ ^{of entry cannot be entered based hereon.} To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

SO ORDERED

Dated: 5/1/07


ROLANDO T. ACOSTA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 61**

Voluto Ventures, LLC,

Plaintiff,

– against –

Jenkins & Gilchrist Parker Chapin LLP,

Defendant.

DECISION/JUDGMENT

Index No. 603080/04

Motion Seq. 1

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing plaintiff's motion for summary judgment pursuant to C.P.L.R. § 3212:

Papers

- Amended Notice of Motion, Affirmation
- Affirmation in Opposition, Memorandum of Law
- Opposition
- Reply Affidavit, Reply Memorandum of Law

Numbered

UNFILED 11/2 (Ex. A-G)
 3 (Ex. A-D), 4
 6
 This judgment is not to be entered by the County Clerk and is subject to the County Clerk's review. To obtain a copy, you must be counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Plaintiff Voluto Ventures, LLC ("Voluto") brings the instant motion seeking summary judgment in the amount of \$200,00.00 plus interest and costs against defendant Jenkins & Gilchrist Parker Chapin LLP ("Jenkins"). Voluto alleges that on or about October 2001, its founding member, Vincent Molinari, was approached by a certain Hugh Austin to participate in a potential bridge loan to a company known as 2dobiz.com, Inc., which was a joint venture party by agreement with China National Machinery Import and Export Corporation ("CMC") in a venture known as ChinEx International. Voluto agreed to participate in the bridge loan and invest \$200,000.00 in the venture. Voluto subsequently wired said money to J. Russell Bulkeley, an attorney of defendant law firm, and via e-mail stated the funds were wired with the "understanding that these funds will not be released from your control until such time that assurances are made that DOBZ/ChineEx are not being held in default by their Chinese Joint Venture Partner." Molinari Aff. ¶ 4, Exh. A. Shortly thereafter CMC terminated the venture with 2dobiz.com. Voluto, argues however, its bridge loan funds were never

returned to it, but rather Jenkens released the \$200,000.00 to Austin, one of its own clients, without Volutò's permission.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id., at 562. In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, affording them the benefit of all reasonable inferences that can be drawn. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

Plaintiff has established its *prima facie* entitlement to summary judgment. It is uncontroverted that plaintiff wired the \$200,00.00 to Jenkens, and that Molinari sent an e-mail to defendant that the funds were to be released only after it was determined that CMC would waive 2dobiz.com's default in the Chinex partnership agreement. Plaintiff also provided additional evidence in admissible form, viz, Volutò's founding member's affidavit, which unequivocally stated that the \$200,00.00 never constituted a loan from plaintiff to Austin, Volutò never authorized Jenkens to release the funds to Austin, and Volutò did not designate Austin as its agent for the return of the money. Significantly, Molinari's affidavit also unequivocally stated that none of the escrowed funds were ever recovered by plaintiff.

As plaintiff established a *prima facie* showing of entitlement of summary judgment, the burden then shifted to defendant to establish through admissible evidence the existence of triable issues of fact which would preclude summary judgment. Zuckerman v. City of New York, *supra*, at 562. Defendant has failed to satisfy this burden and has not provided any evidence whatsoever that demonstrates material issues of fact exist. Rather, defendant simply provides the affidavit of its attorney which conclusory alleges that issues of fact exists. Such an affidavit of an attorney without first hand knowledge of the facts is insufficient to overcome a summary judgment motion. *Id.* at 563. See also Hartz Mountain Corp. v. Allou Distributors, Inc., 173 A.D.2d 440 (2nd Dept. 1991) (defendant required to put forth evidentiary proof in admissible form that demonstrate triable issues of fact).

Defendant's naked assertion through counsel that the \$200,000.00 was a loan to Austin is insufficient to create a triable issue of fact. Indeed, defendant provides no explanation whatsoever as to why it believed it had the right or obligation to release the \$200,00.00 to Austin at all. "At this juncture, [defendant] may no longer merely conclude or allege that it was led to believe something, as unsubstantiated or bald conclusory allegations or assertions, even where believable, and shadowy semblances of an issue will not suffice to defeat summary judgment." Borrow v. Liebman, 2007 WL 1139417 (N.Y. Sup. 2007). In short, defendant has failed to lay bare its proof in order to withstand plaintiff's summary judgment motion. Corcoran Group, Inc. v. Morris, 107 A.D.2d 611 (1st Dept. 1985) *affd* 64 N.Y.2d 1034 (1985).¹ Accordingly, based upon the foregoing, it is hereby

ADJUDGED that plaintiff's motion for summary judgment against defendant is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$200,00.00 plus statutory interest, from October 21, 2005 until judgment is entered, as calculated by the Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

¹ In any event, DR 9-102 requires that a lawyer or the lawyer's firm shall identify attorney escrow and accounts and shall maintain a record which shall indicate, *inter alia*, "for whom the funds are or were held." Defendant has failed to produce any bookkeeping record indicating the funds were held for Austin.

Dated: May 1, 2007

ENTER **SO ORDERED**

Rolando Acosta

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION ^{J.S.C.}

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UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).