SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: **HON. WILLIAM R. LaMARCA**
Justice

Scan

DOLORES R. ROSENBERG,

Plaintiff,

-against-

ANTHONY FARINO,

Defendant.

Motion Sequence # 001
Submitted July 5, 2007

INDEX NO: 4880/07

The following papers were read on this motion:

Notice of Motion.....1
Affirmation and Affidavit in Opposition.....2
Reply Affidavit 3

Plaintiff, DELORES R. ROSENBERG, moves for an order, pursuant to CPLR § 3212, granting summary judgment in her favor and against defendant, ANTHONY FARINO, in the sum of $150,000.00, based upon two (2) loans given to defendant that have not been repaid. FARINO opposes the motion, which is determined as follows:

This action was brought for collection of money due pursuant to an alleged Promissory Note executed by the parties on December 31, 2005, in which ROSENBERG gave FARINO an interest free loan in the sum of $100,000.00 for a twelve (12) month period, from January 1, 2006 until January 1, 2007, and a second alleged Note, dated May 4, 2006, in which ROSENBERG gave FARINO the additional sum of $50,000.00, interest

free, for a twelve (12) month period, from June 1, 2006 and ending May 31, 2007. ROSENBERG states that in January 2007, when the first loan was due, she demanded payment and FARINO refused. She thereafter commenced the instant action, on March 20, 2007, when payment of the loans was not forthcoming. FARINO interposed an answer consisting of a general denial and affirmative defenses, including a defense that the monies owed are no yet due and that he has made several payments to plaintiff.

In opposition to the motion, counsel for FARINO states that the purported Notes are not promissory notes, but rather statements of the plaintiff to memorialize her loan to FARINO, as they are only signed by ROSENBERG. In his affidavit, while acknowledging that ROSENBERG did give him $150,000.00, FARINO claims that he never agreed to repay ROSENBERG the full amount of the monies within one (1) year from the date the money was received. Notwithstanding the plain terms of the writing, FARINO claims that the monies would be repaid when he was financially able to do so. He claims that he has repaid more than $26,000.00 to plaintiff, either from himself or from business associates who he personally sent to pay her, but annexes no proof whatsoever of the claimed payments. Counsel for FARINO urges that questions of fact exist to preclude the granting of summary judgment.

In reply, ROSENBERG points out that FARINO did sign the first note for $100,000.00, which was also witnessed and signed by the witness, and that the second writing, although not signed by FARINO, expresses the parties agreement. Moreover, ROSENBERG states that, even without an agreement, the law deems such a loan due on demand and, as she has demanded payment, the loan is due.

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. *See, Hellinger v Law Capital, Inc.*, 124 AD2d 182, 509 NYS2d 50 (2nd Dept. 1986); *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975). The Court finds that plaintiff has met her burden of proof and established a *prima facie* case by evidentiary proof of the existence of the first Promissory Note and of defendant's failure to meet his obligations under the Note. The burden then shifts to the defendant to come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense to defeat a motion for summary judgment. *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791, 493 NYS2d 226 (2nd Dept. 1985), *aff'd.* 67 NY2d 627, 499 NYS2d 679, 490 NE2d 541(C.A. 1986); *Badische Bank v Ronel Systems, Inc.*, 36 AD2d 763, 321 NYS2d 320 (2nd Dept. 1971); *Seaman-Andwall Corp. v Wright Machine Corp.,* 31 AD2d 763, 295 NYS2d 752 (1st Dept. 1968), *aff'd,* 29 NY2d 617, 324 NYS2d 410, 273 NE2d 138 (C.A. 1971). It is incumbent upon the opposing party to submit proof of a defense and to show that the matters set up in their answer are real and not feigned and are capable of being established at trial. *Badische Bank v Ronel Systems, Inc.*, *supra.* Defendant has utterly failed to show that he has a bona fide defense with respect to the first Note and has provided no evidentiary facts to support his position. Mere conclusory allegations without the presentation of any evidentiary proof to support a bona fide defense are insufficient to defeat a motion for summary judgment. *See, S.J. Capelin Assoc. v Globe Mfg. Corp.,* 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 (C.A.

1974); *Spaulding v Benanati*, 57 NY2d 418, 456 NYS2d 733, 442 NE2d 1244 (C.A. 1982); *Mills v Ryan* 41 AD2d 689, 342 NYS2d 889 (4th Dept. 1973), *aff'd,* 33 NY2d 948, 353 NYS2d 730, 309 NE2d 130 (C.A. 1974). However, as the second writing with respect to the $50,000.00 loan is not fully executed, questions of fact are raised sufficient to deny plaintiff's motion for summary judgment on that portion of the loan. *See, Sakow v 633 Seafood Restaurant, Inc.*, 186 AD2d 31, 587 NYS2d 338 (1st Dept. 1992). Accordingly, after a careful reading of the submissions herein, it is hereby

ORDERED, that ROSENBERG's motion for summary judgment is granted to the extent that plaintiff is awarded the sum of $100,000.00 against the defendant in connection with the first Promissory Note. The written agreement, signed by defendant, acknowledges the indebtedness and that it is due implies a promise to pay it on demand, which defendant has failed to do. *See, Gilbert v Adams*, 146 AD 864, 131 NYS787 (1st Dept. 1911); and it is further

ORDERED, that the County Clerk shall enter judgment in favor of DOLORES ROSENBERG and against ANTHONY FARINO in the sum of $100,000.00,together with costs and disbursements, upon the submission of a proposed judgment to the County Clerk that complies with the mandates of CPLR §5018; and it is further

ORDERED, that ROSENBERG's motion for summary judgment with respect to the second writing is denied; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on October 18, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this

order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 17, 2007

WILLIAM R. LaMARCA, J.S.C.

TO: Kerry Gotlib, Esq.
Attorney for Plaintiff
80 Fifth Avenue
New York, NY 10011

Edward L. Wolf, Esq.
Attorney for Defendant
300 Motor Parkway, Suite 120
Hauppauge, NY 11788

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