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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

EILEEN KENNY.

Plaintiff.

Sequence No.: 001
Index No.: 005391/07

- against -

FOKION AVGERINOS and AVGERINOS CHIROPRACTIC, PC and KNIGHT MANAGEMENT.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	**X**
Replying Affidavits	**X**

Upon reading the papers submitted and due deliberation having been had herein, plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is hereby granted as set forth below.

At the outset, the court notes a procedural defect herein. Summary judgment in lieu of complaint pursuant to CPLR 3213 is an expedited procedure pursuant to which a plaintiff may obtain a judgment for a sum certain on an instrument for the payment of money only or on any judgment. CPLR 3213. See, also, Siegel, Practice Commentaries C3213:1. CPLR 3213 provides that the notice of motion is to be accompanied by a summons that requires opposition to the motion by the return date set forth in the notice of motion. Annexed to plaintiff's motion as Exhibit "B" is a summons and complaint in this action. The summons contains the standard time for a responsive pleading or other appearance without reference at all to the notice of motion. The complaint (which, it should be noted is a superfluous document in a motion for summary judgment in lieu of complaint) sets forth a cause of action for breach of contract and/or account stated.

While the court would normally be inclined to deny the motion and dismiss this matter for the jurisdictional defects set forth above, defendants oppose the motion on the merits and even go so far as to submit an answer to the instant complaint (once again a superfluous

document at this stage of a 3213 motion).

As the parties have taken it on themselves to join issue herein, the court shall treat the motion as a proper and timely one for summary judgment in a standard plenary action as set forth in CPLR 3212(a).

In moving for summary judgment plaintiff must demonstrate that there are no triable issues of fact which preclude summary judgment by the tender of evidence in admissible form. See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion defendants must demonstrate a triable issue off act through admissible evidence. Zuckerman v. City of New York, supra.

The instant matter is based upon two promissory notes executed by defendant Fokion Avgerinos and held by plaintiff. Defendant Fokion Avgerinos, a chiropractor, operated his office at 194-11 Northern Boulevard, Flushing, New York and plaintiff apparently sub-leased space from this defendant at that property from December, 2001 until December, 2006. Contained in the answer set forth above is a counterclaim for breach of contract pursuant to which plaintiff was to deduct the sum of $1,500.00 per month, representing the monthly rent owed to defendants from the amounts paid by defendants on the second promissory note.

In her supporting affidavit plaintiff avers that she is seeking to recover on two promissory notes, one dated November 8, 2004 in the sum of $116,335.32 and one dated October 1, 2005 in the sum of $72,000.00. The last payment made by defendants was in September, 2006 leaving a balance due of $101,360.32.

In moving for summary judgment based upon defendants' default in payment on a promissory note plaintiff must demonstrate the existence of the note and defendants' failure to make payments pursuant to its terms. See, Marshall v. Colvin Motor Parts of Long Island, Inc., 140 A.D.2d 822, 528 N.Y.S.2d 1007 (2nd Dep't 1988); Bank of New York v. Realty Group Consultants, 186 A.D.2d 618, 588 N.Y.S.2d 602 (2nd Dep't 1992) and Bosio v. Selig, 165 A.D.2d 822, 560 N.Y.S.2d 196 (2nd Dep't 1990). In the instant matter plaintiff proves the existence of the notes in plaintiff's affidavit and by annexing copies of same to the motion as exhibits. Plaintiff further proves default thereunder and the amount due in said affidavit. It should be noted, however, that upon inspection of said notes, same were only executed by defendant Avgerinos and said notes only impose obligations against this defendant. In fact, no party herein addresses this at all in their supporting papers and pleadings and the court can only conclude that neither the parties nor their attorneys appreciate this. Thus, the court finds that plaintiff has met its burden as to defendant Avgerinos only and the motion is denied as to all other defendants.

Plaintiff having made a *prima facie* demonstration of entitlement to summary judgment, the burden shifts to defendants to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition to the motion, defendant Fokion Avgerinos avers that the second note, by agreement of the parties, extinguished the first and thus summary judgment is improper as to the

first note. In support of this position defendant Avgerinos points to a spread sheet annexed to the opposition papers as an exhibit which, asserts Dr. Avgerinos, was provided to him by plaintiff and reflects that at the time of the execution of the second note, the total owed to plaintiff did not increase by $72,000.00, or the amount of the second note.

As to the second note defendant Avgerinos avers that there was no default under said note and that same is ambiguous. In support of this position this defendant sets forth a rambling recitation of the circumstances of the loans between the parties, why they entered into a second note with the intention of extinguishing the first note and the plaintiff's alleged failure to deduct $1,500 per month from the rent due defendant from plaintiff. Defendants further assert that plaintiff failed to comply with a provision in the second note which requires payment at a certain address due to plaintiff's moving from that address without notifying defendants in writing of where payments should be made. Defendants claim that because plaintiff failed to comply with this requirement that the thirty day period afforded to defendant Avgerinos to cure her default prior to acceleration has not begun to run.

The interpretation of a contract is a matter of law and as such is within the province of the court and is properly determined by motion for summary judgment. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450 (2nd Dep't 1997).

The contract is "...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 (1960). "[C]lear, complete writings should generally be enforced according to their terms." Automotive Mangagement Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995).

When the contract is ambiguous and "...determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact." Amusement Business Underwriters v. American International Group, Inc., 66 N.Y.2d 878 (1985). See, also, Icon Motors, Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463 (2nd Dep't 1991). Whether the contract is ambiguous is to be determined by the court. Amusement Business Underwriters, supra.

Much of the opposition submitted by defendants are classic examples of parole evidence. Having reviewed said notes, the court notes that both unambiguously require defendant to pay the amounts set forth in the notes. In the case of the first note same is to be paid in forty-seven equal payments and in the case of the second note, the entire amount is due on September 1, 2009, borrower being required to pay the sum of $1,500 per month for four years. The second note makes no mention of its extinguishing the first note. Thus, the court finds that it shall not consider the proposed parole evidence submitted by defendants.

Neither does the court find the second note to be ambiguous, as urged by defendant Avgerinos, on the issue of when payment is to be made. The first paragraph of the note requires four years of $1,500 monthly payments to be made until September 9, 2009 "at which time the

entire principal shall be due and payable." The fifth paragraph provides that "the borrower may make partial payments prior to the anniversary of this Note without any penalty thereto. In addition, the entire balance outstanding may be pre-paid at any time without penalty." The court sees no contradiction and resulting ambiguity caused hereby.

Defendants' position that the thirty day period set forth in the second note has not yet commenced because plaintiff failed to provide defendant with written notice of the new address to which payments should be made as required by said note is unavailing. In the absence of a denial of failure to pay the note pursuant to its terms, the court shall not accept this as meriting denial of the motion. Defendants fail to cite any authority for this position.

Thus, based upon the foregoing, the motion is granted as against defendant Fokion Avgerinos only. Plaintiff shall submit judgment to the clerk in the sum of $101,360.32 plus interest against defendant Avgerinos. The second note also provides for payment of attorneys fees in the event of default and plaintiff's commencement of an action for collection. Plaintiff may seek contractual attorneys fees where, as here, she demonstrates default under the terms of the note. Compare, Plant Planter, Inc. v. Pollock, 91 A.D.2d 1017 (2nd Dep't 1983). The issue of attorneys fees shall be determined in the trial of this matter as shall be discussed below.

As defendants still have a viable counterclaim and plaintiff has a viable claim for attorneys fees, the matter is set down for a preliminary conference before the Differentiated Case Management Part (DCM) on October 30, 2007 at 2:30 p.m.

So Ordered.

A.J.S.C.

Dated: September 26, 2007

ENTERED

OCT 03 2007

NASSAU COUNTY

COUNTY CLERK'S OFFICE