SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

NWQ, LLC

Plaintiff,

INDEX No. 7447/07

MOTION DATE: Jan. 28, 2008
Motion Sequence # 001

-against-

AUGUST VENTURES LLC, RAYMOND W. MERRITT and SOL KASSORLA,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in further Support..... X
Reply Affirmation X
Memorandum of Law..... XXX

This motion, by defendants, for an order dismissing the summons and complaint herein pursuant to CPLR Rule 3211(a)(7); and a cross motion, by plaintiff, for an order:

(i) Denying defendants' motion to dismiss; and

(ii) In the amount of One Hundred Thousand ($100,000.00) Dollars, with interest at 10% per annum on Two Hundred Thousand

($200,000.00) Dollars from June 28, 2005 to September 22, 2006, plus on One Hundred Fifty Thousand ($150,000.00) Dollars from September 27, 2006 to October 18, 2006 plus on One Hundred Thousand ($100,000.00) Dollars from October 18, 2006 to date of payment.

(iii) For such other and further relief as this Court deems just and proper,

are **both** determined as hereinafter set forth.

By order of the Court dated December 5, 2007, these motions were converted to motions for summary judgment in light of the mutual reliance upon written documents.

FACTS

On June 29, 2005, the plaintiff, NWQ LLC., entered into an agreement ("agreement") with the defendant, August Ventures LLC.,("Company") for the purpose of investing in the real estate development of three residential lots located in Chatham Township, New Jersey. Co-defendants Raymond W. Merritt and Mr. Sol Kassorla are the managing partners of the defendant LLC. The agreement sets forth the terms of repayment for the investment which was $200,000 at 10% simple interest per year, and 10% of the net profits after the sale of the property. There was no closing as of June 29, 2006 for the sale of the property. The defendant has made partial payment in the form of two checks amounting to $100,000 after demand was made by the plaintiff. Paragraph six of the agreement, which is at issue in this case, provides, "[S]hould a closing on the sale of the property not occur within twelve months of this agreement date, the investor may demand, in writing, that the Company pay the investor, within thirty days, in satisfaction of all obligations set forth in this agreement as follows:

a) 100% of the principal and

b) 10% annual simple interest on the principal".

DEFENDANTS' CONTENTIONS

Defendants aver that paragraph six in the agreement was drafted in the event the

Company wanted to buy the plaintiff out before the sale of the property. In support of this contention the defendants submit to the Court affidavits by the drafting attorney, Mr. McIntyre, as well as those of defendants Mr. Merritt and Mr. Kassorla. All of the affidavits contend that the provision was not meant to give the plaintiff unilateral power to withdraw his investment before the closing of the property. They maintain that the provision was in place, if mutually agreed upon, for the Company to buy-out the plaintiff's investment in the event that the property did not close within a year. They maintain that the language in the agreement is, at minimum, ambiguous, and therefore discovery is warranted in the matter if the Court does not grant their motion for dismissal. They further contend that, even though they were under no obligation to repay the principal to the plaintiff under paragraph six of the agreement, they made two payments totaling $100,000 as a show of good faith.

Defendant argues that the plaintiff has not stated a cause of action as a matter of law because demand for repayment was premature, as the letter was dated June 27, and the year was not up until June 29. They also maintain that summary judgment for the plaintiff is not appropriate until joinder has occurred. They argue that, in the event their motion is not granted, that plaintiff's motion for summary judgment should be denied because the terms of the agreement are ambiguous and the Court must look to the surrounding circumstances and the intent of the parties for clarity. Lastly they contend that defendants Merritt and Kassorla should not be held personally liable.

PLAINTIFFS' CONTENTIONS

The plaintiff argues that it complied with the provision in the agreement. The plaintiff mailed a written demand letter to the defendants on June 27, 2006 because a sale of the property had not occurred. In the complaint, the second cause of action alleges fraud by the defendants, but this cause of action has been **withdrawn** in the plaintiff's reply to defendants' motion, and as such it is **moot** and will not be discussed further.

The plaintiff addresses the defendant's contention, that the demand letter was two days premature due to the fact that it was dated June 27, 2006, and the one year provision began on June 29, 2005, by asserting that mail is not deemed received until 5 days later and the contract does not specify what mode the demand was to be made, just that it be written, therefore the mailing was acceptable under the terms of the agreement. The plaintiff also asserts that the demand letter didn't seek immediate payment, just payment thirty days from June 29, 2006 as per the agreement.

The plaintiff contends that the lack of objection by the defendant after receipt of the demand letter, compounded with the partial compliance, i.e., the $100,000 payment, demonstrates defendant's admission of the debt. The plaintiff argues that the defendant's contention, that paragraph six of the agreement was only intended to avoid the necessity of additional agreement in the event that the Company wanted to buy-out the plaintiff, is inaccurate and the agreement is clear and unambiguous.

The plaintiff submits evidence, in the form of an email communication between the plaintiff and defendant Kassorla, discussing an investment for property in Florida, wherein the defendant Kassorla acknowledges the debt in the agreement, and that the payment made in the amount of $43,333 to the plaintiff was for a separate real estate transaction for property in Florida.

Plaintiff lastly contends that, pursuant to paragraph twelve of the agreement, defendants Merritt and Kassorla personally guaranteed repayment of the investment and therefore should be personally liable as guarantors.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact

> which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this Court, which includes the pertinent pleadings, affidavits submitted by the plaintiff and defendants, and the Agreement. The defendants' evidence must be accepted as true and given the benefit of every inference which can reasonably be drawn from that evidence. (**Demshick v. Community Hous. Mgt. Corp**, 34 A.D.3d 518, 521, 824 N.Y.S.2d 166, 169, 2nd Dept., 2006). Construing the evidence in the light most favorable to the defendant, (**Museums at Stony Brook v. Village of Patchogue Fire Dept.**, 146 A.D.2d 572, 573-74, 536 N.Y.S.2d 177, 179, 2nd Dept., 1989), summary judgment herein is warranted.

The plaintiff has satisfied its burden of making a prima facie showing of its entitlement to judgment as a matter of law. It is clear that the parties entered the Agreement and that the defendants failed to perform when they did not make full repayment to the plaintiff. This much has been all but conceded by the defendants as a result of their failure to deny such facts set forth in the plaintiff's papers.

Furthermore, the plaintiff has demonstrated that the Agreement mandates repayment by the defendants upon the satisfaction of the Demand Provision. Notably, the plaintiff focuses on the defendants' partial performance, in the form of two payments of $50,000 each made to the plaintiff, as evidence of the mandatory nature of the demand provision. Moreover, a reasonable reading of the Agreement as a whole supports the plaintiff's contention. (**Abiele Contr. v. New York City Sch. Constr. Auth.**, 91 N.Y.2d 1, 9-10, 666 N.Y.S.2d 970, 974, 1997; **Correnti v. Allstate Properties LLC**, 38 A.D.3d 588, 590, 832 N.Y.S.2d 594, 596, 2nd Dept., 2007). A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect. (**McCabe v. Witteveeen** , 34 A.D.3d 652, 653-54, 825 N.Y.S2d 499, 501, 2nd Dept., 2006). Despite the use of the word "may" in the provision, it is reasonable to infer that repayment would be mandatory. If this was not the case then the plaintiff's investment could theoretically remain under the control of the defendants for an indefinite period of time, so long as the Property was not sold. Such an outcome would render the Demand Provision useless.

Lastly, the plaintiff has made a sufficient showing that it satisfied the Demand

Provision of the Agreement. While the defendant argues that the plaintiff failed to satisfy the condition precedent by making its demand two days early, the ultimate effect of the plaintiff's demand satisfied the Demand Provision. The Demand Provision of the Agreement provides that, after 12 months, the plaintiff may demand repayment within 30 days of the demand letter. In essence, the plaintiff may demand repayment by a date at least 12 months and 30 days after the date of the Agreement. In setting forth a repayment deadline of July 29, 2006--12 months and 30 days from the date of the agreement--the plaintiff effectively satisfied the timing element of the Demand Provision.

The plaintiff having made a prima facie showing of entitlement to judgment as a matter of law by demonstrating the absence of any material issues of fact, the burden then shifts to the defendants in order to establish the existence of material issues of fact. (**Alvarez**, 68 N.Y.2d 320 at 324).

Here, the defendants have failed to carry their burden.

The defendants strenuously object to the plaintiff's interpretation of the Demand Provision. They argue, instead, that the provision imposes no requirement compelling repayment of the plaintiff. Rather, the Demand Provision merely performs the function of setting forth the relevant terms in the event that both parties agree to conclude their venture and for the defendant to repay the plaintiff. At the least, claim the defendants, the ambiguous nature of the provision requires consideration of parol evidence. The defendants' argument is unpersuasive for two reasons. First, it is well-settled that any ambiguity in contractual language shall be interpreted against the drafter. (**SOS Oil Corp. v. Norstar Bank of Long Island**, 76 N.Y.2d 561, 568, 561 N.Y.S.2d 887, 890, 1990); and herein the defendants' attorney drafted the agreement. Second, as discussed above, a reading of the Agreement as a whole reveals that the plaintiff could have reasonably expected, and the defendants could have reasonably understood, that the plaintiff would be repaid in the event that the Property was not sold after 12 months. (see, **Sutton v East River Savings Bank**, 55 N.Y.2d 550, 555; see also, **Aivaliotis v. Continental Broker-Dealer Corp.**, 30 A.D.3d 446, 447, 817 N.Y.S2d 365, 366, 2nd Dept., 2006) ("the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonably expectations are realized."). Furthermore, matters extrinsic to an agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument. (**Aivaliotis**, 30 A.D.3d at 447, 817 N.Y.S2d at 366). In this case the Court need not consider extrinsic evidence as the intent of the parties can reasonably be found by examining the instrument. Thus, no material issue of fact exists as to the interpretation of

the Demand Provision in the Agreement.

The defendants' insistence that the plaintiff failed to properly satisfy the Demand Provision also falls short of raising a material issue of fact. The defendants fail to raise any issue as to the timeliness of the plaintiff's demand, especially in light of the fact that upon receipt of the demand the defendants voiced no objections as to it timeliness or lack thereof.

The Court perceives no reason for denial of summary judgment on the ground that the defendants need discovery to expose facts essential to oppose the motion. A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence. (**Panasuk v. Viola Park Realty, LLC**, 41 A.D.3d 804, 8 05, 839 N.Y.S.2d 520, 523, 2nd Dept., 2007; **Bryan v. City of New York**, 206 A.D.2d 448, 449, 614 N.Y.S.2d 554, 555, 2nd Dept., 1994) . Here, there is no indication that discovery will lead to the unearthing of evidence that will further supplement or substantiate the arguments thus far set forth by the defendants.

Therefore, for the foregoing reasons, the defendants' motion is **denied**, and the plaintiff's cross-motion for summary judgment is **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

ENTERED

Dated MAR 20 2008 MAR 24 2008 Stephen A. Bucaria

NASSAU COUNTY COUNTY CLERK'S OFFICE XXX J.S.C.