

**Island Assoc. Real Estate, Inc. v Eshaghpour**

2008 NY Slip Op 31366(U)

April 30, 2008

Supreme Court, Suffolk County

Docket Number: 0039474/2007

Judge: Emily Pines

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Supreme Court - State of New York  
Commercial Division, Part 46, Suffolk County

**Present:**

Hon. Emily Pines  
J. S. C.

**Motion Date:** 02-26-2008**Submit Date:** 03-25-2008**Motion No.:** 001 MG

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ISLAND ASSOCIATES REAL ESTATE,  
INC.,

X  
**Plaintiff,**

-against-

ROBIN ESHAGHPOUR and SUTPHIN  
MORICHES REALTY LLC, A/K/A SUTPHIN  
HAMPTON REALTY LLC,

**Defendants.**

Attorney of Plaintiff

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Plaintiff, Island Associates LLC ("Island Associates") moves, by Amended Notice of Motion (motion sequence number 001) for an Order granting Plaintiff Summary Judgment in Lieu of Complaint pursuant to CPLR § 3213, in the sum of \$150,000 plus interest at the rate of 15% per annum, based upon the Defendants' failure to pay the sum due and owing on a Promissory Note attached to Plaintiff's moving papers. Plaintiff also seeks a separate inquest on the issue of attorney's fees which are allegedly also due under the terms of the Note. As set forth, the Note, dated "as of September 26, 2006" and faxed from Defendants' office on April 13, 2007 bearing the signature of the corporate and the individual Defendants, states that the Defendants owe the Plaintiff a commission on the principal amount of \$150,000 plus 9% interest as a commission for the purchase of certain real property located in Smithtown, New York. The note states further that:

"All principal and interest through the date of payment shall be due and payable upon the earlier of the following: (i) five (5) days after site plan approval for the proposed tenant or (ii) June 15, 2007".

The Note states further that upon the failure to make any payment within five days of its due date, the principal shall then be subject to a default interest rate in the amount of fifteen (15%) percent from the date payment was due until the date of actual payment. The Note also

makes the defaulting party responsible for payment of the lender's reasonable attorney's fees and costs of collection. As set forth in the Affidavit of Plaintiff's President, Roger Delisle, Defendants have defaulted under the terms of the Note despite demand having been made by certified letter, dated August 7, 2007 as attached to the moving papers.

Defendants oppose the Summary Judgment motion, stating that the Note attached to Plaintiff's moving papers was never signed by the Defendants. In support of this allegation, Robin Eshaghpour submits an Affidavit on behalf of himself and as President of Sutphin Moriches Realty LLC and Sutphin Hampton Realty LLC ("corporate Defendants"). Mr Eshaghpour annexes a document entitled "AGREEMENT" to his Affidavit and asserts that such is the document he signed regarding a commission owed to the Plaintiff herein. According to Defendants, the Agreement states only that the Defendants will "potentially" owe Plaintiff the sum of \$150,000 as a commission for the purchase and lease of the real property located in Smithtown. This Agreement also states that;

" All principal and interest through the date of payment shall be due and payable upon the earlier of the following: (i) one hundred and eighty (180) days after site plan approval for the proposed tenant, or (ii) upon the receipt of the first months rent.

In the event payment is not received upon the above mentioned terms, this document shall be converted to a 'Note' and shall be enforceable".

The Defendants also assert that the Plaintiff's papers are facially defective because they fail to include a copy of the Amended Summons with Notice, demonstrating that the action was properly commenced, citing **Edith Bolte Trust v Atlantic Coast Construction LLC**, 32 AD 3d 377, 820 NYS 2d 100 ( 2d Dep't 2006).

In Reply, Plaintiff argues that Defendants have failed to raise any genuine issue of fact. Plaintiff asserts that a review of the "Note" and the "Agreement" demonstrates that both were faxed from the Defendants' offices, and Plaintiff attaches copies of the facsimile evidence. In addition, as set forth, the Note signed by Defendant Eshaghpour and faxed to Plaintiff on April 13, 2007 has handwriting that appears remarkably similar to that signed by him and faxed to the Plaintiff on February 8, 2008 (the Agreement). There is no mention in Defendants' papers regarding the obvious similarity of the handwriting on both papers. Plaintiff annexes to its Reply papers a series of e-mails between the parties, where Plaintiff instructs Defendants on August 6, 2007 to wire \$150,000 plus interest to that date. The Defendant does not, as Plaintiff points out, write that the amount is not yet owed. Rather, Defendant Eshaghpour suggests that he will pay

"50,000" rather than what is "own" or any interest. When in a return e-mail, Plaintiff asks what the individual Defendant means, he e-mails Plaintiff and suggests that a third entity that is receiving a commission should split such with the Plaintiff. Nowhere do Defendants suggest that the amount is not owed. Finally, Plaintiff argues that the language in the so-called Agreement attached to Defendants' opposition papers makes little sense, because it is called an Agreement, yet uses the language of a Promissory Note with regard to its terms and conditions.

With regard to the form of its papers, Plaintiff insists that the Defendants misread the Court's determination in the **Edith Bolte Trust** case and append, in any case, a copy of the amended Summons to the Reply to demonstrate that the action was properly commenced in accordance with CPLR §§ 304 and 3213.

A party moving for Summary Judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v New York University Medical Center**, 64 NY 2d 85, 487 NYS 2d 316 (1985); **Zuckerman v City of New York**, 49 NY 2d 557, 562, 404 NE 2d 718, 427 NYS 2d 595 (1980). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. **State Bank of Albany v McAulife**, 97 Ad 2d 607, 467 NYS 2d 944 (3d Dep't 1983).

As recently stated by the Appellate Division, Second Department quoting the Court of Appeals in **Banco Popular Am v Victory Taxi Mgt**, 1 NY 3d 381, "(s)omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature". **Acme American Repairs, Inc v Uretsky**, 39 AD3d 675, 834 NYS 2d 542, (2d Dep't 2007). In **Acme, supra**, the Plaintiff, a tenant in a commercial lease, sought a declaration that a 1984 written and executed lease was valid. The Defendant landlord claimed such was a forgery and submitted a different document with a shorter term. The Appellate Court in that case granted Plaintiff Summary Judgment where the signatures appeared the same, the totality of the evidence including an apparent admission by the defendant indicated the genuineness of the signature, and no expert proof was tendered to create an issue of fact.

Applying the above principles to the case at Bar, the Court finds that Plaintiff has sustained its burden of demonstrating entitlement to Summary Judgment. The Promissory Note attached to the moving papers was clearly faxed from Defendants' business by Defendants on April 13, 2007. It is signed by Robin Eshaghpour both as an individual and on behalf of the corporate Defendants. There is no question that the amount set forth in the Note has not been

paid to date. Accordingly the burden shifts to the Defendants to determine whether they have raised a material issue of fact. The Court finds that they have not. As set forth above, the handwriting on the document Eshaghpour claims to have signed is virtually identical to the one the Plaintiff claims he signed and Defendants have not proffered any expert proof demonstrating a difference in the signatures. Second, the document proffered by Defendants, although termed an "Agreement", contains internally inconsistent language, since it has the terms usually found in a promissory note. Third, as in **Acme, supra**, the e-mail from Defendants, although somewhat inartfully stated, contains an admission in August 2007 that Defendants owed plaintiff money. That would make no sense if the so-called Agreement attached to Defendants' papers were in effect since no funds would have been due and owing when the August e-mails were sent by the individual Defendant to Plaintiff. Why would Eshaghpour offer to pay plaintiff \$50,000 in August of 2007, if Plaintiff's claim for any commission had not, as yet accrued? In sum, based on the totality of the circumstances, those being very similar those set forth in **Acme, supra**, the Court finds that Defendants have failed to sustain their burden of raising an issue of fact, as is necessary to defeat a motion for Summary Judgment.

With regard to the issue of the sufficiency of the Plaintiff's papers, Plaintiff has, in fact complied with the dictates of the case set forth in Defendants' opposition. As set forth in **Edith Bolte Kutz Trust v Atlantic Coast Construction**, 32 AD 3d 377, 820 NYS 2d 100 (2d Dep't 2006), a plaintiff establishes proper commencement of an action by submitting a copy of the Summons with Notice of Motion date stamped by the County Clerk. As set forth above, Plaintiff has submitted such papers annexed to its reply and has thus complied with the provisions of CPLR §§304 and 3214.

Accordingly, for all the reasons set forth, Plaintiff's motion for Summary Judgment pursuant to CPLR § 3213 is granted and Plaintiff is awarded Judgment in the amount of \$150,000 plus interest as set forth in the Promissory Note attached to its moving papers. Submission of final Judgment shall await Plaintiff's request on its application for attorneys' fees which is set down for a hearing before this part on Thursday May 29, 2008 commencing at 9:30 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated:** April 30, 2008  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.