**Perla v Biberaj**

2008 NY Slip Op 31678(U)

June 10, 2008

Supreme Court, Nassau County

Docket Number: 0459-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

DANIEL PERLA and DANIEL PERLA ASSOCIATES, L.P.,

Plaintiffs,

-against-

HASSAN BIBERAJ, GERALD LIEBLICH, RTR FUNDING GROUP, INC., WEST 30TH CORP., RUSI HOLDING CORP., FORDEC REALTY CORP., THE BARRINGTON TRAVEL GROUP, INC.,

Defendants.

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MOTION DATE: April 7, 2008
Motion Sequence # 001

The following papers read on this motion:

Amended Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affidavit.... ..... X

This motion, by plaintiff, for an order pursuant to CPLR 3213 granting plaintiff Daniel Perla and Daniel Perla Associates, L.P., summary judgment in lieu of complaint against defendants Hassan Biberaj, Gerald Lieblich, RTR Funding Group, Inc., West 30th Corp., Rusi Holding Corp., Fordec Realty Corp., The Barrington Travel Group, Inc. and entering a money judgment against the defendants herein for a total amount due as of November 6, 2007 of Four Million One Hundred Eighty Nine Thousand Forty Six and

64/100 ($4,189,046.64) Dollars together with interest accruing on principal balance, together with all interest and late fees hereafter accruing at the rates provided for in the parties' agreement; the costs, fees and disbursements of this action, including reasonable attorneys' fees through the date of the entry of judgment; and for such other, further and different relief as this Court deems just and proper, is determined as hereinafter set forth.

## FACTS

Disputes arose between Daniel Perla ("Perla" or "Plaintiff") and the Hassan Biberaj group (collectively referred to as "Defendants") over professional and personal matters resulted in a settlement agreement ("Pay Off Agreement") dated September 11, 2006. The Pay Off Agreement was just that; a contract and schedule that the defendants would follow to pay off their debts owed to the plaintiff and eventually terminate their relationship. An initial payment of $700,000.00 together with accrued interest was due on the date and delivery of the Pay Off Agreement and was to be wired to Perla. This initial payment was wired to the plaintiff's banking account by the defendants as set forth in the Pay Off Agreement. The Pay Off Agreement also listed six notes that constituted the defendant's debt. The date of each note's inception as well as each note's principal balance, monthly payment and interest rate were listed within the Pay Off Agreement. Each note had a different due date according to the day of creation of each note. Interest on the notes accrued on a monthly basis and the defendants had up to 24 months to settle the debts of the six notes. Paragraph 5 of the Pay Off Agreement governs all possible defaults under the agreement and is the basis of this dispute. Both parties point to Paragraph 5 in the Pay Off Agreement but interpret the clause differently, as listed below. Over the course of the Pay Off Agreement's time frame, the plaintiff claims the defendant failed to make monthly interest payments when due and, as a result, the plaintiff invoked the paragraph 5 default provision and this lawsuit.

## PLAINTIFF'S CONTENTIONS

The plaintiff asserts that the defendants are in violation of Article 5 of the Pay Off Agreement. Specifically, the plaintiff points to Article 5.1(D) which states, "Debtors fail to pay any monthly interest payment **when due** during the term of this Agreement on Notes # 1, 2, 4, 5 and 6 for a period of two (2) consecutive months or fail to make the monthly interest payments when due twice in a ONE HUNDRED AND EIGHTY (180) day period." Perla states that the defendants have failed to pay monthly interest when due over the course of two consecutive months as well as twice in a one hundred and

eighty day period. Perla argues that the defendants did not cure their defaults within 10 days of written notice that was sent to the defendants by Perla as stated in Article 5.1. The plaintiff requests that this court grant summary judgment in their favor and award the plaintiffs $4,189,046.64 as the total amount due together with interest accruing on principal balance, together with all interest and late fees, costs, fees, and disbursements of this action.

## DEFENDANT'S CONTENTIONS

The defendants also cite the Article 5 default provision and claim it has not been properly followed by Perla so as to warrant its invocation against them. Article 5.1 states "The following are events of default if they are **not fully cured after ten (10) days written notice** of same at any time prior to the payment of the Original Principal Indebtedness…". (emphasis supplied). The defendants contend that they are not in default because the plaintiff has never served the defendant with a written notice to cure their supposed defaults as required under Paragraph 5.1 the Pay Off Agreement. In line with this contention, the defendants also argue there can be no late charges due to the plaintiff since they are not in default to begin with. The defendant, in conclusion, states that the plaintiff is asking for unreasonable attorney fees amounting to $6,000.00 that are barred by the Pay Off Agreement the parties entered into.

## 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 and other relevant data. Every reasonable inference which can reasonably be drawn from the evidence provided shall be viewed in the light most favorable to the defendants.

> ""[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" (**Weissman v Sinorm Deli**, 88 NY2d 437, 444, quoting **Interman Indus. Prods. v R.S.M. Electron Power**, 37 NY2d 151, 155). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (**Weissman v Sinorm Deli**,**supra** at 444; see **Beal Bank v Melville Magnetic Resonance Imaging**, 270 AD2d 440). "Where the instrument requires something in addition to the defendant's explicit promise to pay a sum of money, CPLR 3213 in unavailable" (**Weissman v Sinorm Deli**, **supra** at 444)".

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In the instant case, the proof submitted by parties is in clear conflict, and therefore, consistent with prevailing case law, cannot support the motion for summary judgment as requested by the plaintiff. There are fundamental disagreements about the timeliness of various checks and about the appropriate allocation of these checks. Motion for summary judgment pursuant to CPLR 3213 is hereby **denied**.

A Preliminary Conference has been scheduled for July 21, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUN 10 2008

J.S.C.

ENTERED

JUN 12 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE