SHORT FORM ORDER INDEX NO. 14237/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

ANGELO PEDONE and DOROTHY PEDONE,

Plaintiffs,

-against-

ANTHONY CAMBRIA and STACY CAMBRIA,

Defendants.

ORIG. RETURN DATE: JANUARY 17, 2008
FINAL SUBMISSION DATE: APRIL 24, 2008
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 8 read on this motion FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Answering Affirmation and supporting papers 5, 6; Replying Affidavits and supporting papers 7, 8; it is,

ORDERED that this motion by plaintiffs for an Order, pursuant to CPLR 3212, granting summary judgment in favor of plaintiffs and against defendants, to recover the interest due on a loan made by plaintiffs in the principal amount of $100,000.00, alleged to currently be in the amount of $20,250.10 pursuant to a promissory note dated August 25, 2004 ("Note"), together with costs incurred by plaintiffs in enforcing the Note, is hereby **DENIED** for the reasons set forth hereinafter.

Pursuant to the terms of the Note, the defendants herein, along with two others, agreed to pay to plaintiffs within six months the principal balance of the loan, to wit: $100,000.00, together with ten (10%) percent interest thereupon.

Plaintiffs allege that on or about June 20, 2005, the principal amount of $100,000.00 was paid to plaintiffs, but that none of the $16,680.00 in interest that had accrued up to that date was paid. Despite due demand therefor, plaintiffs claim that defendants have failed to pay any interest under the Note, and as such, plaintiffs commenced this action on or about May 4, 2007, to recover the accrued interest plus costs and disbursements of the action.

Plaintiffs have now filed the instant application seeking summary judgment in favor of plaintiffs and against defendants in the amount of the accrued interest, which according to an affidavit of plaintiff ANGELO PEDONE, currently totals $26,226.00.

Defendants have submitted opposition to the instant application wherein they argue that the motion is premature as plaintiffs have not responded to defendants' discovery demands; that plaintiffs failed to name two other necessary parties to this action, namely JON PEDONE and DONNA PEDONE, the two other signatories on the Note; and that the affirmative defenses in their answer raise material issues of fact.

Defendants argue that plaintiffs have been fully paid. Defendants allege that they repaid the principal balance of $100,000.00 on or about June 20, 2005, and further allege that defendants "came to believe" that JON PEDONE paid the interest due under the Note in cash. Defendants characterize the loan as a corporate or trade debt, as they allege the money was borrowed from plaintiffs by BELLA CUCINA ST. JAMES CORP. in connection with the operation of a restaurant owned by defendant ANTHONY CAMBRIA and JON PEDONE. Defendants contend that JON PEDONE directed the restaurant's bookkeeper to repay the principal of the loan by check in the amount of $100,000.00, which plaintiffs accepted and cashed, and that JON PEDONE thereafter repaid the interest in cash. In support of this contention, defendants allege that plaintiffs did not make any demand for the repayment of interest from the date the principal was repaid up until the date of commencement of the instant action, approximately two years later. Defendants have not informed the Court as to the amount of interest repaid or the date of repayment, as they allege JON PEDONE is in possession of the corporate books.

In reply, plaintiffs have "corrected" the amount of interest currently due and owing under the Note. Plaintiffs allege that a payment of $5,000.00 was received by plaintiffs in connection with the $16,800.00 interest that had accrued

through June 20, 2005. As such, plaintiffs allege that $11,800.00 in interest remained unpaid as of that date, and therefore only $20,250.10 remains due and owing plaintiffs.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this 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 the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

The Court finds that plaintiffs have made an initial *prima facie* showing of entitlement to judgment pursuant to CPLR 3212 by establishing that they are the holder of an instrument for money only executed by defendants, that defendants executed an unconditional guarantee in connection therewith, and that defendants defaulted in the payment of interest thereunder (*Kunio Takeuchi v Silberman*, 41 AD3d 336 [2007]; *Silver v Silver*, 17 AD3d 281 [2005]; *Alard, L.L.C. v Weiss*, 1 AD3d 131 [2003]; *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1968], *affd* 29 NY2d 617 [1971]). The Court notes that by the plain language of the guarantee, the parties executing the guarantee "unconditionally guarantees all terms and conditions of the loan." An unambiguous personal guaranty with proof of non-payment generally lends itself to summary relief (*see North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2007]; *Moezinia v Baroukhian*, 247 AD2d 452 [1998]; *Vamattam v Thomas*, 205 AD2d 615 [1994]). Moreover, despite defendants' characterization,

the loan was not given to a corporation, but to the four individuals who executed the Note. The Note recites that it is a "personal loan," and further recites that the loan was given to the four individuals. While the money may have been used for a corporate purpose, the Note imposes liability upon the four individual signatories/guarantors.

Defendants' argument that the $100,000.00 payment of principal was accepted by plaintiffs as payment in full, and therefore served as the basis for an accord and satisfaction among the parties, is unavailing. Generally, acceptance of a check in full settlement of a disputed or unliquidated claim operates as an accord and satisfaction. Thus, a party seeking to establish an accord and satisfaction must demonstrate that there was a disputed or unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract (*see Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590 [1984]; *Pothos v Arverne Houses, Inc.*, 269 AD2d 377 [2000]; *Trans World Grocers v Sultana Crackers*, 257 AD2d 616 [1999]). In the case at bar, the handwritten notation on the Note indicates that $100,000.00 was "paid back" on June 20, 2005; it does not indicate "paid in full." Further, there was no allegation of a dispute as to the amount of principal or interest due under the Note. Consequently, the Court finds that plaintiffs' acceptance of the $100,000.00 check did not constitute an accord and satisfaction among the parties (*see e.g. Patel v Orma*, 190 AD2d 782 [1993]).

Next, defendants' argument that plaintiffs' motion should be denied as plaintiffs have failed to include indispensable parties, namely JON PEDONE and DONNA PEDONE, the two other signatories on the Note, is similarly unavailing. As co-makers of the Note sued upon, the liability of the defendants and the two others is joint and several, and therefore, any maker can be sued separately (*see e.g. Kirshtein v Balio*, 199 AD2d 777 [1993]).

Notwithstanding the foregoing, the Court finds that factual issues exist that preclude the granting of summary judgment to plaintiffs. Specifically, the Court finds that an issue of fact remains as to the amount of interest due and owing plaintiffs under the Note. Plaintiffs' moving papers indicate that defendants failed to pay any interest due under the Note; defendants' opposition papers allege that the interest was repaid in full, albeit without specifics as to the date or amount; and plaintiffs' reply papers acknowledge a payment of interest in the amount of $5,000.00, also without specifics as to the date of payment, who made the payment, and the form of payment, and without a reasonable excuse or

explanation for failing to acknowledge this payment in plaintiffs' original moving papers. Accordingly, this motion by plaintiffs for summary judgment is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: June 23, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court