SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

MANDEL SHERMAN,

Plaintiff,

INDEX No. 005578/07

MOTION DATE: June 13, 2008
Motion Sequence # 002, 003

-against-

KENNETH KLEIN,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affidavit in Opposition..... X
Affidavit in Further Support..... X
Revised Reply Affirmation X

This motion, by defendant, for an order pursuant to CPLR §3212 granting defendant summary judgment dismissing plaintiff's complaint, and for such other and further relief as the Court deems just and proper; and a cross-motion, by plaintiff, for an order:

1. Pursuant to CPLR 3212 granting plaintiff summary judgment and directing the entry of judgment in favor of the plaintiff, and against the defendant, in the sum of $198,356.78, together with interest at the rate of 9% per annum from the date each installment payment was due to the date of entry of judgment; and

2. granting plaintiff such other and further relief as the Court deems just and proper,

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

Procedurally, this action was commenced by filing on April 2, 2007 and initially, no answer was interposed until after the plaintiff moved for a default judgment. That motion was withdrawn after a stipulation was entered into by the parties. Subsequently, after service of the defendant's answer, the defendant moved for summary judgment and that application was withdrawn after service of an amended complaint. Issue was joined by service of an amended answer. This application ensued.

The defendant, on August 10, 1998, executed a promissory note in favor of plaintiff, in which the defendant promised to pay $27,777 per month for 35 months and a 36th payment of $27,805 with 6% interest on the unpaid balance, for a total sum of $1 million. Sixteen payments were made, ending in February 2000.

The defendant claims that he had, prior to the execution of the Note coincidental with the purchase of a business from the plaintiff, made a capital contribution of $800,000 to the plaintiff. As part of the transaction, the defendant asserts that the plaintiff promised referral of investment transactions. He further asserts that the plaintiff ceased referrals shortly after the transaction and subsequently the business ceased operation in 2001. He argues that the plaintiff made his demand for acceleration of the Note in a letter dated March 8, 2001, that more than six years has passed and the Statute of Limitations bars this action.

The plaintiff argues that there is no dispute about the defendant's non-payment of the Note; and that he has demonstrated his **prima facie** entitlement to summary judgment. He asserts, through his attorney, that he now "voluntarily withdraws" his claim for monthly installments due more than six years prior to the commencement of the action, as such recovery is barred by the applicable Statute of Limitations, leaving only those installments due within six years of April 2, 2007, amounting to $198,356.78 in total. Counsel asserts that the language of the Note is clear, unambiguous and complete and no oral agreements can modify it, i.e., the oral promises alleged by the defendant, that the plaintiff was to make business referrals. He further asserts that the letter of March 8, 2001 was not a letter of acceleration of the debt.

The defendant repeats the arguments previously made, and notes that the plaintiff's

amended complaint seeks the same accelerated amount as set forth in the March 8, 2001 letter – thus proving such letter accelerated the debt. Additionally, the missed payments at the time of that letter totaled not $621,577.67, the entire debt, but only $333,324 plus interest. Counsel argues that the terms of the Note are "subject to the terms and conditions of" an agreement and that agreement was that the plaintiff was to provide business referrals, thus permitting admission of evidence of an agreement which modifies the Note.

The plaintiff's attorney argues that the March 8, 2001 letter did not contain any characteristics of an acceleration letter and that the $621,577 amount was the total amount due as of that date. Counsel avers that defendant's attorney's statement of a separate agreement is inadmissible in that the only agreement that may be relevant is the Stock Purchase Agreement which does not express the promises referred to by defendant's counsel.

In reply, the defendant's attorney repeats the arguments previously made, and disputes the plaintiff's attempt to characterize the March 8, 2001 letter as one that did not accelerate the Note. Counsel argues that were this Court to hold that the March 8, 2001 letter did not accelerate the Note, there are factual issues which require denial of the plaintiff's cross-motion, in that the Note intended to compensate the plaintiff for business referrals that the plaintiff was to make to the business and that the plaintiff assured the defendant that if the business did not make a profit, the defendant was not required to keep making payments. He contends that the plaintiff's promises to the defendant were made prior to the execution of the Note and shows the purpose of the Note and is admissible and not parol evidence.

DECISION

Procedurally, the chronology herein is as follows: the complaint and amended complaint both allege and seek different sums of money, i.e., $621,577.67 plus interest at 6% per annum from March 18, 1999 and $643,070.53 plus interest at "9% per annum on the amount due each month from the date each payment was due until the date of entry of judgment"; the defendant's respective answers responsive to those pleadings allege, **inter alia**, the Statute of Limitations defense, that the Stock Purchase Agreement between the parties formed a partial agreement, with attendant oral promises, that constituted fraud in the inducement and promissory estoppel; and these instant applications were made, in which the plaintiff, in a clear admission, has conceded the applicability of the Statue of Limitations (CPLR 213), but argues that it bars only those payments due prior to March 2001.

Initially, this Court views that the plaintiff's "voluntary concession", that the Statute

of Limitations bars recovery of that part of the action which seeks payments, from prior to six years before the action was commenced, as a substitute for what is, in essence, an amended complaint for a lesser amount under a theory of recovery that is somewhat inconsistent with his complaint and his amended complaint. Procedurally, the plaintiff should have proceeded pursuant to CPLR 3025, and the concession is flawed.

The letter of March 8, 2001 states:

> "It has now been over a year (Feb. 22, 2000) since I have received a payment from you on the Note. The outstanding principal balance is currently $621,577.67.
>
> I understood from our various conversations that you were having financial difficulties, and that business is slow. I am willing to talk to you about restructuring the debt based on your present financial situation and ability.
>
> Please give this your attention, as this matter needs to be addressed. I look forward to hearing from you and any suggestions you may have".

There is no dispute that the defendant was in arrears thirteen payments of $27,777, or $361,101, and it is clear that the demand letter, in accord with the provision in the Note, i.e., that "Upon default in the payment of any installment of principal and interest when due, the aggregate unpaid principal amount of this promissory note, at the holder's option, shall. . . become due and payable together with all unpaid interest. . .". That provision permitted the plaintiff holder to accelerate the note by demanding the entire remainder of the sum due plus the interest. That letter clearly demanded the amount that the defendant owed the plaintiff plus the interest, i.e., the entire amount owed to that point in time. Unless the plaintiff herein exercised his acceleration option, the balance of the note was not due and payable to the

plaintiff (see, **Phoenix Acquisition Corp. v Compcore, Inc.**, 81 NY2d 138, 596 NYS2d 752, 1993). Put another way, acceleration is the creditor's option to collect the entire debt and interest all at once instead of the installment previously agreed upon and defaulted upon by the debtor. It terminates the business relationship between the parties and creates, in essence, a litigation posture which initiates the appropriate Statute of Limitations. The somewhat-mitigating language in the March 8, 2001 letter does not change the intent, in that the plaintiff had demanded the full amount of the debt plus the interest. That exercise of the plaintiff's option was the acceleration event and here is the dispositive fulcrum of the six year Statute of Limitations for the entire action, not just those payments due and payable prior to March 2001. (see, **Lorin v Elmakiss**, 302 AD2d 638, 754 NYS2d 741, 3d Dept., 2003).

The March 8, 2001 letter, therefore, is the plaintiff's acceleration of the debt owed by the defendant, and which triggered the Statute of Limitations, i.e., CPLR 213. Accordingly, since the action was commenced after the expiration of the Statute of Limitations, such statute bars this action and the defendant's motion is **granted**. The plaintiff's cross-motion is **denied** as **moot**.

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

So Ordered.

Dated SEP 17 2008

XXX J.S.C.

ENTERED
SEP 19 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE