Scan

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

PETER KATSIKIS,

INDEX NO.: 022528/08

Plaintiff,

MOTION DATE:2-10-09
SUBMIT DATE:3-11-09
SEQ. NUMBER - 001

-against-

GERARD T. GLIBBERY and
PHILIP GRATTAGLIANO,

Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 12-16-08.....1
Affirmation in Opposition, dated 3-5-09.....2
Affirmation in Further Support, dated 3-9-09.....3

This motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted. Let judgment be entered against the defendants for the amount demanded in the complaint, with interest as set forth in the note from the date of default to entry of such judgment, together with attorney's fees, as established by hearing as directed in this order. Entry of such judgment shall be held in abeyance pending the outcome of such hearing. Should plaintiff elect to waive such fees, however, judgment may be entered on this order alone upon a statement to the Clerk of such waiver.

Plaintiff's company Varnova, LLC (Varnova) is the owner of premises (the Premises) in Elmont, New York, upon which there was a gasoline station and auto repair shop, operated by Petrosa Service station, Inc. (Petrosa). Plaintiff is the principal member of Varnova and was the principal shareholder of Petrosa. In May 2004, plaintiff sold his shares of Petrosa to defendants and simultaneously caused Varnova to lease the Premises to P & K Service Station, Inc. (PK), a company in which the defendants are principals.

As part of the purchase price for the sale of the Petrosa shares, the defendants issued a note to plaintiff in the amount of $195,000.00, payable in monthly installments for a period of 10 years from June 2004 to June 2014. (the Note). Defendants made payments on the Note through October 2008 but have failed to make any subsequent payments and as a result, plaintiff has accelerated the balance due on the Note and commenced this action.

Prior to the commencement of this action, defendants and PK sued Varnova and plaintiff, based on various provisions of the lease from Varnova to PK. (the Pending Action) The Sixth and Seventh Causes of Action of the amended complaint, assert respectively a claim by defendants against plaintiff alleging that plaintiff made false representations with respect to the Premises, and that the Note is expressly conditioned and made and given in accordance with the sale of the Petrosa stock to defendants. The rationale of the defendants is that the Note was conditioned on an agreement that was conditioned on the issuance of a lease from Varnova to PK which Varnova breached by removing certain underground fuel tanks. An Eighth Cause of Action pleads without more a claim that plaintiff "breached his agreement with defendants." The remedy sought is reduction of the amount due on the Note by $60,000.00.

In support of this motion, plaintiff has submitted the Note, his affidavit in support and a demand notice. In opposition, defendants have submitted an affirmation of their attorney who does not profess to possess any personal knowledge of events, the verified complaint and amended complaint, an affirmation of defendants' attorney dated August 2008, and an affidavit of one of the defendants also dated August 2008, the latter two documents having been submitted in support of a preliminary injunction in the Pending Action. Neither defendant has submitted any affidavit in opposition to this motion.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's

affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006). It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendants' attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

The forgoing establishes the elements of plaintiff's *prima facie* showing of entitlement to the requested relief. Those are, the presence of an instrument for the payment of money only, the obligation of the defendants to pay thereunder or guarantee such payment, and a

default. *See Alard,L.L.C. v. Weiss*, 1 A.D.3d 131 (1st Dept. 2003); *See also, East N.Y. Sav.Bank v. Baccaray*, 214 A.D.2d 601, 602 (2d Dept. 1995); *See also, Suffolk County Natl. Bank v. Columbia Telecom. Group, Inc.*, 38 A.D.3d 664 (2d Dept. 2007). Specifically the affidavit submitted by the plaintiff sufficiently establishes the element of default in order to construct the *prima facie* showing. *See East N.Y. Sav.Bank v. Baccaray, supra*. Therefore the plaintiff succeeds in establishing his *prima facie* case and shifting the burden to the defendants to raise a genuine issue of material fact necessitating a trial. *Id.*

In sum, the defendants have not raised a material issue of genuine fact necessitating a trial. The note holder's *prima facie* showing is unrebutted, and judgment should therefore be entered granting the motion for summary judgment.

Plaintiff has made a *prima facie* showing of entitlement to relief and thus has shifted the burden to the defendants to establish by admissible evidence the existence of a triable issue with respect to a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 AD3d 709 (2d Dept. 2008). Here, defendants have failed to satisfy their burden. It has been held that, where as here, a claim is made that a note holder breached a separate obligation under a lease, summary judgment is not to be denied where the note and the lease are not inextricably intertwined, and the lease does not require any additional performance by the plaintiff note holder as a condition to repayment or otherwise alter the repayment obligation under the note. *Neuhaus v. McGovern*, 293 AD2d 727 (2d Dept. 2002). *Cf Couch White L.L.P. v. Kelly*, 286 AD2d 526 (3rd Dept. 2001).

The mere allegation of fraud similarly does not serve as an adequate defense to the demand of payment on the Note. To make out a case of fraud in the inducement, a party must

demonstrate: 1) a misrepresentation or an omission of material fact which was false and known to be false by the maker, 2) the misrepresentation was made for the purpose of inducing the person to rely upon it, 3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and 4) injury resulting from said reliance. *See New York Univ. V. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Channel Master Corp. V. Aluminum Ltd. Sales*, 4 N.Y.2d 403 (1995). When a party fails to make further inquiry or insert appropriate language in the agreement for its protection, it cannot later complain that it reasonably relied on the false representations, and in effect has willingly assumed the business risk that the facts may not be as represented. *Global Minerals and MetalsCorp., v. Holme*, 35 A.D.3d 93 (1st Dept. 2006); *Rodas v. Manitaras*, 159 A.D.2d 341(1st Dept.1990); *88 Blue Corp. v. Reiss Plaza Associates*, 183 A.D.2d 662 (1st dept. 1992). As such the defendants have not established that they reasonably relied on the alleged misrepresentation that they claim induced them to sign the Note.

Furthermore even if in the absence of reasonable reliance, defendant's unsupported conclusory assertions are insufficient to defeat the plaintiff's *prima facie* showing. *MDJR Enterprises, Inc., v. LaTorre*, 268 A.D.2d 509 (2nd Dept. 2000). In the absence of proof substantiating the allegation of fraud the maker of a note is liable. *RVC Associates v. Farkas*, 261 A.D.2d 383 (2nd dept. 1999). Finally, a legal presumption exists that signatories read and understood what they signed. *Beattie v. Brown &Wood*, 243 A.D.2d 395 (1st Dept 1997). Here, the promise to pay the Note and the consequences of non-payment are unconditional and while the Note recites that it is given in accordance with a Stock Purchase Agreement, it is not conditioned on any of the terms thereof.

Contrary to the contentions of the defendants, the Note constitutes an unconditional obligation of the defendants and although it makes reference to the Stock Purchase Agreement the Note does not incorporate any of the terms thereof or contain any obligation on the part of the plaintiff. Thus the Note and the other agreements are not inextricably intertwined. *Embraer Finance, Ltd v. Servicos Aereos Profesionales, S.A.*, 42 AD3d 380 (1st Dept. 2007).

The very structure of the transaction supports the foregoing. The Note constitutes payment for the shares of PK, and is made by the individual defendants to the individual plaintiff, while the Premises lease is from Varnova to PK, thus, clearly evincing an intent to keep separate the rights, duties and obligations under the Note from the rights, duties and obligations of the parties under the lease between the business entities. Further, the wrongs allegedly committed by the plaintiff here relate not to the Note or the sale of plaintiff's shares, but rather to events that arose years later based upon the on going landlord tenant relationship. That such claims have been trumpeted in the Pending Action does not relieve the defendants from their obligation here to present evidence of a triable issue of fact that would preclude enforcement of the Note. *Premium Assignment Corp., v. Utopia Home Care, Inc.*, 58 AD3d 709 (2d Dept. 2009); *Quest commercial, LLC, v. Rouner*, 35 AD3d 576 (2d Dept. 2006); *Alard, L.L.C. v. Weiss, supra.*

Defendants have not submitted any affidavits in opposition to this motion. Nevertheless, the Court has considered an affidavit of defendant Grattagliano submitted in support of an application for injunctive relief and their verified and amended complaints in the Pending Action. However, none allege claims or facts sufficient to trace a path from

the sale of the shares for which the Note was given to the dispute under the lease of the Premises. The contention in the Seventh Cause of Action of the amended verified complaint that the "promises to pay [plaintiff] is [sic]expressly conditioned and made and given in accordance with a certain stock purchase agreement ..." is unsupported by any documentation or other facts and is plainly contradicted by the terms of the Note, which constitute an unconditional promise to pay without reference to any external conditions or terms.

That an action is pending before another judge of this Court with respect to claims arising out of the lease of the Premises, and that a motion is pending to dismiss some part of the complaint the Pending Action, does not relieve this Court from analyzing the issues pursuant to summary judgment standards nor, as noted above, relieve the defendants of presenting evidence so as to comport with summary judgment jurisprudence. Although neither side has submitted copies of the submissions in the *sub judice* motion in the Pending Action, neither party has argued that there is a danger of inconsistent results. A motion for summary judgment as we have here, invokes different standards than a motion to dismiss. While judicial economy and efficiency might have been fostered by having the same court take up all of the pending disputes of the various parties, the duty of deciding the issues in this action have been assigned to this Court.

Since the Note does not provide for a sum certain with respect to the recovery of an attorney's fee in the event of a default in payment on the instrument, a hearing must be held to determine the amount of such award, and entry of judgment shall await the establishment of the amount of attorney's fees to be paid by defendants to plaintiff. *Premium Assignment Corp. v. Utopia Home Care, Inc., supra* 725.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of CCP on April 27, 2009, at 9:30 a.m.

A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 20, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Douglas M. Lieberman, Esq.**
Markotsis & Lieberman, P.C.
Attorneys for Plaintiff
183 Broadway
Hicksville, NY 11801

Law Offices of Thomas Weiss, P.C.
Attorneys for Defendants
20 Hempstead Turnpike
West Hempstead, NY 11552