SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

VISCO TRADING CORP.,

Plaintiff,

INDEX No. 6004/08

MOTION DATE: April 22, 2009
Motion Sequence # 004

-against-

ERIC CHUNG and 216 HEMPSTEAD AVE. CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... XX

This motion, by defendants, for an order pursuant to CPLR 3212, granting summary judgment in favor of defendants dismissing the complaint ordering the release of the escrowed funds held by defendants' counsel, and for such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

On March 23, 2005, plaintiff, Visco Trading Corp. ("Visco"), entered into a written agreement to sell, transfer and assign all of its right, title and interest in and to its car wash to defendant, Eric Chung, for the total sum of $1,110,000. The sum of $570,000 was to be paid at closing, and the sum of $540,000 with interest at the rate of 4% per

annum was to be paid in installments commencing June 1, 2006. Chung assigned his interest in the car wash to corporate defendant, Hempstead. Chung was a stockholder, officer, director or principal of Hempstead. In November of 2005, at closing, Hempstead issued a promissory note and security agreement for the balance due to the plaintiff. Chung executed and delivered his personal unconditional guaranty of the payment of the outstanding balance. In addition, plaintiff's landlord effectuated an assignment and revision of the lease, and made adjustments on the balances allegedly due landlord from plaintiff.

CONTENTIONS

Plaintiff alleges that the defendant, Hempstead, failed to pay plaintiff the March 2008 installment of $45,950 due under the promissory note. Further, under an acceleration clause in the agreement, the defendants became liable to the plaintiff for the entire balance on the loan, $125,650, with interest at the rate of 4%.

The defendants contend that the balance due under the March 2008 payment is subject to claims and set-offs by the defendant, and admitted by the plaintiff that is owed to the defendant. The defendants allege that the defendants entered into an escrow agreement with the attorney for the plaintiff, in which the plaintiff agreed to pay water charges and other sums, and to perform certain repairs and other obligations under the lease. The plaintiff's did not pay the amount due under the water bill. The plaintiff also represented that the assets of the car wash were in working order and in compliance with applicable regulations. Following closing, the landlord demanded from the defendant the plaintiff's outstanding water bill. The defendant paid $8,746 so as not to jeopardize the tenancy. Further, the defendant paid to install a back flow preventer and water meter, required under applicable regulations. The defendants deducted these costs from the March 2008 payment after the plaintiff failed to reimburse; therefore, they argue that argue that they were not in default. The defendants move for summary judgment dismissing the plaintiff's complaint pursuant to CPLR § 3212.

The plaintiff opposes the motion on the grounds that defendants' claims are time barred by a survival clause in the Agreement of Sale ("Agreement"). The clause bars the defendant from asserting claims, based on the representations, warranties, obligations, or covenants in the Agreement, more than one year after closing. The claim that the premises did not comply with regulations was raised three years after closing; therefore, it is barred and not a viable "set-off." With respect to the water bill, the plaintiff alleges to

have paid the landlord for the bill, at least through June of 2005. The plaintiff also alleges that the defendants fraudulently altered a document that reduces the amount due under the loan by $50,000.

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)".

In applying the above legal principles to the facts of the case at bar, and construing the evidence in the light most favorable to the plaintiffs, the defendants' motion for summary judgment is **denied**. (**Museums at Stony Brook v Village of Patchogue Fire Department**, 146 A.D.2d. 572, 2nd Dept., 1989).

The survival clause in the Agreement provides that "none of the representations, warranties, covenants, or other obligations of Seller hereunder shall survive the closing, except as expressly provided herein and then only for a period of one year from the

closing date." Consequently, the defendant was not entitled to abate payments as reimbursement for of the costs expended after November 1st, 2006. The defendants installed the back flow preventer and water meter in 2007; therefore, at the very least the defendants are liable for the cost of those installments, totaling $6010. It follows that the defendants were in default for at least $6010 in March of 2008. The defendants' motion for summary judgment is based on the affirmative defense that they do not owe any money to the plaintiff, but the evidence proves otherwise.

On the same basis the Court **grants** summary judgment in favor of the plaintiff **sua sponte** pursuant to CPLR § 3212(b). The plaintiff has made a **prima facie** showing that the defendant defaulted on the promissory note in March of 2008, supported by the defendants' admission that they did not pay the entire payment due on March 2008. Proof of the existence of a promissory note and the defendant's default in his payment obligations thereunder is sufficient in showing entitlement to judgment as a matter of law. (**Elmsford-Interstate Building Material Corp. v. Elm Ridge Management**, 243 A.D.2d 675, 664 N.Y.S.2d 576, 1997). The defendants do not meet their burden of producing evidentiary proof sufficient to establish a material issue of fact in relation to the default. The defendants assert only that they were not in default because they were at liberty to abate the payments in order to recover certain expenditures. As discussed above, the evidence supports a contrary conclusion. "[B]ald, conclusory assertions submitted in opposition to a motion [are] insufficient to demonstrate the existence of genuine issues of material fact" (Id.); therefore, the Court concludes as a matter of law that the defendants were in default.

With respect to the total amount of plaintiff's damages, the parties raise two issues: (1) whether the plaintiff paid the water bill at closing and the amount due under that bill; and (2) whether the plaintiff actually reduced the principle amount of the defendants' loan.

In support of the defendants' claim that they were entitled to abate the payment for the amount due under the water bill, the defendant provides a bill from NYC Department of Environmental Protection suggesting that the plaintiff did not pay his outstanding balance of $8,746 before selling the business. Defendant also provides an escrow agreement that demonstrates the plaintiff's obligation to pay the balance incurred from December of 2003 until November of 2005. In opposition the plaintiff provides a letter from his former landlord's attorney stating that the amount owed for the water bill was

approximately $3,000. In the plaintiff's affidavit he claims to have paid the amount at closing. Additionally, he provides a December 2005 water bill which states that the outstanding amount is only $192. The plaintiff contends that the outstanding balance on the bill was after closing, at most, $192. "The court may not weigh the credibility of the affiants on a motion for summary judgment" and neither parties' evidence is feigned; therefore, summary judgment cannot be granted on this issue. (**Glick & Dolleck v. Tri-Pac Export Corp.**, 22 N.Y.2d 439). Notwithstanding the foregoing, the survival clause bars this claim.

In regard to the second issue, whether the plaintiff actually reduced the principle amount of the defendants' loan, the defendant provides a modified payment schedule, signed by the plaintiff, in which the principal is reduced by $50,000. The plaintiff claims in his affidavit that the document was fraudulently altered by the defendant and that he never agreed to reduce the principle. There is no reason to believe that the plaintiff's claim is feigned; therefore, it is sufficient to create an issue of material fact. (**Glick**, 22 N.Y.2d 439 at 441).

When the pleadings and affidavits fail to raise any triable issue of fact, other than the amount of damages, the court may refer the case to a referee to determine the appropriate amount. (CPLR § 3212(c); **Frank v. Wolfe**, 166 Misc. 415, 2 N.Y.S.2d 548, 1938). The only issue in this case is the amount of damages due to the plaintiff as a result of the defendants' default. The Court **grants** summary judgment in favor of the plaintiff and orders an immediate trial on the issue of damages pursuant to CPLR § 3212 ©.

Accordingly, this matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of damages to be held on July 21, 2009 at 9:30 a.m. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated JUN 10 2009

ENTERED
JUN 11 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.