SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6

MARK WIEBOLDT and ERIK WIEBOLDT, **NASSAU COUNTY**

Plaintiffs, **MOTION DATE: 5/5/09**

-against- **MOTION SEQ. NO.: 004, 005**
INDEX NO.: 009320/07

A.R.T. PROPERTY MANAGEMENT, INC.,

Defendant.

The following papers read on this motion (numbered 1-4):

Notice of Motion(defendant) 1
Notice of Cross Motion(plaintiffs).....2
Affirmation in Opposition(defendant).....3
Reply Affirmation(plaintiffs).....4

In an action to recover the amount due on a debt agreement, defendant moves and plaintiffs cross move for summary judgment pursuant to **CPLR §3212**. Plaintiffs claim that they loaned money to defendant in the amount of $50,000 pursuant to a secured debt agreement, dated December 15, 2000 (the "Agreement") purportedly to fund a venture involving the purchasing and building of replica cars.

The Agreement, characterizes, defendant as "Debtor" and plaintiffs as "Creditor" and provides:

IT IS HEREBY agreed that Debtor "acknowledges receipt of a loan of $25,000 from

1-Mark Wieboldt	$25,000 as of December 15, 2000
2-Erik Wieboldt	$25,000 as of December 15, 2000

and is signed by "Christina Yorek of ART Property Mgmt." The Agreement sets forth the terms as follows: "Repayment of interest only at a rate of 1% per month from DEBTOR to CREDITOR for a period of not less than 1 year(s) then to be extended upon mutual consent for 180 day periods and continue to be so extended unless one of the parties sends the other written notice of same at least six days prior to the expiration of such 180 day period." The Agreement lists six vehicles as "security for such transaction." The Agreement further states that (1) a UCC-1, purportedly annexed as an exhibit, was filed at the County Clerk (although not attached to the motion papers); (2) a letter must be sent to the debtor by creditor to demand payment within 20 days prior to instituting legal proceedings; (3) the Agreement "may be amended by the parties in a 'written [ ] signed by both the parties"; (4) "creditor shall be entitled to recover all costs and attorneys' fees up to $900 for enforcement of the debt herein against the debtors"; and (5) "debtor may turn over to creditor the vehicles herewith noted to satisfy the debt herein for value as noted hereinabove."

The Agreement indicates that it was executed on January 5, 2001 but the signatures are illegible. By Order, dated September 26, 2007 (the "Prior Order"), the Court denied plaintiffs' motion for summary judgment in lieu of complaint pursuant to **CPLR §3213** and defendant's cross motion to dismiss on grounds that the terms of the Agreement were vague and ambiguous and the record did not establish when, and even if, a breach of the Agreement occurred. Accordingly, the Court could not resolve the statute of limitations issue as a matter of law (*See* **Stalis v. Sugar Creek Stores, Inc.**, 295 AD2d 939). The Court also found that there was a triable issue of fact as to whether the Agreement was properly executed on behalf of the corporate defendant. The Court ordered the action converted to ordinary form with the moving and opposition papers constituting the complaint and answer. By Order, dated August 8, 2008, the Court denied plaintiffs' motion to strike defendant's answer which alleged that defendant failed to appear for an examination before trial.

Defendant and plaintiffs now move for summary judgment offering essentially the same proof, with the addition of the following transcripts of depositions held on December 9, 2008: (1) deposition testimony of defendant Richard R. Yorek ("Yorek son"), as president of defendant (the Court notes the deposition transcript incorrectly identifies the person deposed as Richard C. Yorek ("Yorek father"); (2) deposition testimony of Christina Annousas ("Annousas") formerly Christina Yorek, manager and president of All-In-One Auto, Inc. ("All-In-One"); and (3) deposition testimony of plaintiff Erik Wieboldt ("Wieboldt son"). Defendant also submits a copy of the front and back of a check produced by plaintiffs, dated December 14, 2000, in the amount of $50,000 drawn on the account of Constance A. Wieboldt made payable to All-In-One and

deposited in an All-In-One account (the "Check") (Exhibit E to defendant's motion for summary judgment).

Defendant continues to deny any liability on the basis that (i) plaintiffs have not produced sufficient documentary evidence to support their claim that they made a loan to defendant; (ii) defendant never adopted a resolution authorizing Christina Yorek to sign the Agreement; (iii) the Check is insufficient proof that plaintiffs loaned any sums to defendant and that, accordingly, the wrong parties are named in this action; (iv) more than six years has elapsed between the date of the Check and commencement of this action in or about May 2007 (**CPLR §213(6)**); and (v) the deposition testimony of Yorek son, Annousas and Wieboldt son establishes that the circumstances surrounding the loan were unknown to those deposed.

In opposition and in support of their cross motion for summary judgment, plaintiffs submit an affidavit of Mark Wieboldt ("Wieboldt father"), sworn to on April 28, 2009, stating that the Agreement was signed by him and Yorek son and drafted by defendant's accountant. Wieboldt father attests that he was told by Yorek father to make the $50,000 payable to All-In-One. The Check was drawn on the bank account of his wife, Constance Wieboldt. Plaintiffs argue that (i) the Agreement sets forth the obligation of the parties and establishes that plaintiffs loaned defendant $50,000 secured by certain motor vehicles; (ii) the parties conceded in deposition testimony that a loan of $50,000 was made by plaintiffs to defendant and although the loan was made to defendant, defendant directed plaintiff Wieboldt father to make the Check payable to All-In-One; (iii) the Agreement was executed by two officers of defendant and is therefore not invalid even if there is no authorizing corporate resolution; (iv) defendant has failed to make any payments to plaintiffs under the Agreement; (v) the vehicles which were allegedly the security for the loan, were sold but none of the proceeds were paid to plaintiffs to satisfy the loan; and (vi) according to the terms of the Agreement, after the one year period expired, the Agreement was automatically renewed in 180 day increments and, consequently, an action on the Agreement is not barred by the statute of limitations.

Summary judgment is an appropriate remedy only when the record presents no issues of material fact. **Stillman v. Twentieth Century Fox Film Corp.**, 3 NY2d 395. Quoting **Friends of Animals v. Associated Fur Mfrs., Inc.**, 46 NY2d 1065, 1067-1068, the Court in **Zuckerman v. City of New York**, 49 NY2d 557, 562 held that "to obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])."

Deposition of plaintiff Wiebolt son

Wieboldt son testified that plaintiffs wrote two separate checks to defendant, signed by Wieboldt father, each in the amount of $25,000 but that he does not remember what account the checks were drawn on (deposition testimony, pp. 8-9). The Court notes that plaintiffs have not submitted copies of these checks. This assertion contradicts both the statement in the affidavit of Wieboldt father that he "personally handed a check to Yorek father in the amount of $50,000" and the submitted Check which indicates a single payment of $50,000 drawn on the account of and signed by Constance Wieboldt. Wieboldt son also testified as follows: (i) his father signed the Agreement but that Wieboldt son could not identify the other signature (deposition testimony, p. 13); (ii) the checks were delivered on a date unknown to Wieboldt son, by Wieboldt father to Yorek father at 'Poppey's', a restaurant in Wantagh at 10 p.m. (deposition testimony, pp. 13-15); (iii) he had been told by Yorek father at a previous meeting at defendant's shop, with no other party present, that the Agreement was prepared by defendant's accountant (deposition testimony, pp. 15-18); (iv) he and Yorek father became involved in the transaction through a friend of Wieboldt son, Randy Schwarzberg, and that Wieboldt son brought defendant's proposal to Wieboldt father (deposition testimony, pp. 20-21); (v) after receiving the Agreement, plaintiffs agreed to lend $50,000 to defendant without consulting an attorney or visiting defendant's premises to confirm that the six vehicles listed in the Agreement as security for the loan, were actually located there (deposition testimony, pp. 22-23); (vi) he was not aware whether a UCC-1 form was filed in the County Clerk as required by the Agreement (deposition testimony, p. 27); (vii) plaintiffs never received an interest payment on the loan but Wieboldt son never made an inquiry until September 2002 as to why plaintiffs were not receiving payments (deposition testimony, p. 28-31, 34-36) as the Agreement was "between friends on a handshake" (deposition testimony, p. 31); (viii) between September 2002 and sometime in 2006, Wieboldt son would visit defendant's shop unannounced inquiring about the loan (deposition testimony, p. 35); and (ix) Wieboldt son agreed to allow Randy Schwarzberg to sell one of the vehicles securing the loan on Ebay using Wieboldt son's Ebay account but that the vehicle was never sold (deposition testimony, p. 38-39) (contradicting Wieboldt son's prior testimony that he does not remember if the vehicle was put up for sale on Ebay (deposition testimony, p. 32).

Deposition of Yorek son (defendant)

The deposition testimony of Yorek son is even more implausible. With respect to the defendant corporate entity, although he is the president, he testified that he never receives tax documents from his accountant (deposition testimony, pp. 6-7), does not know the purpose of organizing defendant in the form of a holding company or whether

the corporate defendant owns stock of any other company (deposition testimony, p.7) and does not know when defendant ceased doing business (deposition testimony, p. 8). The Court notes that the NYS Department of State website indicates that defendant's current entity status is that of an active corporation. With respect to the loan, Yorek son testified that defendant borrowed $50,000 from plaintiffs but that he does not know if defendant paid back the loan or whether any payments were made (deposition testimony, pp. 9-10). Yorek son also testified that Yorek father may have paid money toward the loan through bartering (deposition testimony, pp. 11-12). Upon looking at the Agreement, Yorek son testified that he could not recall whether Christina Yorek, his sister, was affiliated with defendant or whether she signed the Agreement on behalf of defendant (deposition testimony, pp. 13-16). Yorek son also testified as follows: (i) he does not know whether he is affiliated with All-In-One (deposition testimony, p. 17); (ii) he does not know whether the proceeds were ever given to defendant contradicting his prior testimony that checks were deposited in defendant's corporate checking account (deposition testimony pp. 19-20, 21-25); (iii) he acknowledged that the vehicles, which were security for the loan, were sold but does not know who sold the vehicles or whether any of the proceeds were paid to plaintiffs (deposition testimony, p. 26-28); (iv) he does not know what happened with the loan proceeds (deposition testimony, p. 32); and (v) he saw $50,000 in defendant's bank account but did not know "where it came from" (deposition testimony, pp. 35-36).

Deposition of Christina Annousas (defendant)

The deposition of Christina Annousas (formerly Christina Yorek) is also unavailing. She testified that she is the manager and president of All-In-One which is no longer in existence, that All-In-One had the same address as defendant (deposition testimony, pp. 5-6) and that she has never been employed by defendant (deposition testimony, p. 7), contradicting her statement made in an affidavit, sworn to on July 5, 2007, submitted in support of defendant's prior motion to dismiss that she was Secretary of defendant (deposition testimony p. 9). Annousas testified that "it is possible that [she] might have signed [agreements] as Secretary" of defendant (deposition testimony, p. 11) but that she has nothing to do with the its books and records (deposition testimony, p. 33). With respect to the loan, she testified that she believes that the loan amount was $50,000 but does not know the circumstances surrounding how the loan was made or to whom (deposition testimony, pp. 12, 17), and cannot recall where the funds advanced by plaintiffs were deposited (deposition testimony, p. 26). She testified that the money went to defendant (deposition testimony, pp. 29-30) and that to the best of her knowledge the loan amount was never repaid (deposition testimony, pp. 18-20). Annousas also testified that she does not recall a fax she sent to Wieboldt son stating "I am not them nor will I ever be" and "don't worry, my father would never do anything to hurt you or your

family" (deposition testimony, pp. 21-25) and does not recall what happened with the proceeds generated by the sale of the vehicles (deposition testimony, pp. 31-32).

The Court finds that neither plaintiffs nor defendant have made the prima facie showing of entitlement to summary judgment as a matter of law. Based on the equivocal and ambiguous Agreement, the Court as a threshold matter, cannot resolve the issue regarding whether the statute of limitations would preclude this action. Furthermore, even if the action is not time barred, the foregoing vague and obfuscatory deposition testimony of plaintiff Wieboldt son, and Yorek son and Annousas on behalf of defendant, is littered with incredible assertions which call into question the credibility of the parties in this matter.

Based upon the foregoing, it is

ORDERED, that defendant's motion for summary judgment pursuant to **CPLR §3212** is **denied**; and it is further

ORDERED, that plaintiffs' cross motion for summary judgment pursuant to **CPLR §3212** is **denied**.

This constitutes the Order of the Court

Dated: July 10, 2009

J.S.C.

ENTERED
JUL 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE