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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

MOON CHA KO a/k/a CARINA KO,

Plaintiff,

-against-

HEE WAN BAE a/k/a JONATHAN W. BAE, SEKURA ASSET MANAGEMENT, INC. and INTRADAYSIGNAL.COM INC.,

Defendants.

Motion Sequence #2
Submitted March 27, 2009

INDEX NO: 4467/08

The following papers were read on this motion:

Notice of Motion.....1
Affirmation and Affidavit in Opposition.....2

Counsel for plaintiff, MOON CHA KO a/k/a CARINA KO, moves for an order granting plaintiff summary judgment against defendants, HEE WAN BAE a/k/a JONATHAN W. BAE, SEKURA ASSET MANAGEMENT, INC. and INTRADAYSIGNAL.COM, INC., on the ground that defendants have defaulted in the payment of several promissory notes, together with interest thereon. Counsel for defendant BAE opposes the motion, which is determined as follows:

Initially, plaintiff states, upon information and belief, that BAE has treated defendants, SEKURA ASSET MANAGEMENT, INC. and INTRADAYSIGNAL.COM, INC.

as his alter ego and has co-mingled the business and personal assets of BAE. She states that, on about July 20, 2006, BAE represented that he was a stock trading specialist and induced plaintiff to invest money in SEKURA ASSET and guaranteed the return of the investment with a high yield in profits. Plaintiff relates that she delivered the sum of $200,000 to BAE and SEKURA ASSET, on about August 1, 2006, and that said defendants executed and delivered a promissory note, on about August 30, 2006, reflecting receipt of the money from plaintiff, with a promise to return the $200,000 by August 30, 2006 together with a profit of $10,000 per month. It appears to the Court that the sum given was to be returned on the same date as the loan was made, and the supporting documentation provides little help by way of explanation.

Plaintiff directs the Court to Exhibit "E" for copies of Notes 1 through 5 issued to plaintiff by the defendants, but the Court has found the alleged notes at Exhibit "D". The first, labeled Note 1, is a letter from JONATHAN BAE, dated July 27, 2006 (not August 30, 2006), confirming that SEKURA ASSETS had received $200,000 from Ms. KO, who will receive $10,000 for one month consideration, on August 30, 2006, with the initial $200,000 returned on August 30, 2006.

The second, labeled Note 2, is a letter from JONATHAN BAE, dated September 5, 2006, confirming that SEKURA ASSETS has received $200,000 from Ms. KO, who will receive $5,000 on September 30, 2006, $5,000 on October 30, 2006 and $20,000 on November 30, 2006, with the initial $200,000 returned on November 30, 2006. The third, labeled Note 3 and titled "Promissory Note", is dated February 28, 2007, and reflects that JONATHAN BAE received $200,000 from Ms. KO and, in return she will receive $5,000 on March 29, 2007, $5,000 on April 19, 2007 and $5,000 on May 29, 2007. No Mention

is made of when repayment of the $200,000 sum will be paid. The fourth, labeled Note 4, is a letter from JONATHAN BAE, dated May 29, 2007,confirming that SEKURA ASSETS has received $200,000 from Ms. KO, who will receive $5,500 on June 30, 2007, $5,500 on July 30 2007 and $5,500 on August 30, 2007, with the initial $200,000 returned on August 30, 2007. The fifth, labeled Note 5, is a letter from JONATHAN BAE, dated July 2, 2007, confirming that SEKURA ASSETS has received $100,000 from Ms. KO, who will receive for " this special IPO", $20,000 on September 30, 2007 and $120,000 on December 15, 2007, $40,000 of which will be taxable as income for 2007. The Court sees that all of the listed "notes" are on SEKURA ASSETS letterhead, and are signed by Mr. BAE, individually and not as an officer or principal of the defendant corporations.

Plaintiff states that Mr. BAE and SEKURA ASSETS continually failed to meet the deadlines in the promissory notes for return of the $200,000 principal sum, and the numerous notes were issued to further extend the due date for repayment of the initial capital investment. Indeed, plaintiff states that, around July 2, 2007, BAE induced her to invest an additional $100,000, which is reflected in Note 5. Plaintiff asserts that defendants have repeatedly failed to return the total invested amount of $300,000, and although she has received profits of $86,500, defendants have refused to pay the balance of the promised profits in the sum of $25,000. Plaintiff claims that the total sum of $325,000 remains due and owing and that she is entitled to summary judgment in said sum, together with interest, and punitive damages in the sum of $1 million dollars, together with the costs and disbursement of this proceeding.

In opposition to the motion, counsel for Mr. BAE states that there are triable issues of fact that preclude the granting of summary judgment. Counsel points out that plaintiff

admits that his client has paid $86,500 and raises the "current State usury laws" as a basis for denial of the motion. Moreover, counsel points out that plaintiff has not annexed checks totaling $300,000 to the motion and has, therefore, not provided evidence of the loans. In his affidavit, Mr. BAE admits that Ms. KO gave him $200,000 on one occasion and $100,000 on another occasion, and that he "paid back" $86,000. He claims that he never promised to pay $10,000 per month and the July 27, 2006 letter (Note 1) reflects that a one month consideration of $10,000 was indicated. Mr. BAE states that he fully expected to return all the money to plaintiff, but financial losses beyond his control made honorable repayment impossible. He also states that the inclusion of INTRADAYSIGNAL.COM, INC. is incorrect because the company never agreed to pay any monies to plaintiff and was never contractually involved with the plaintiff.

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing

party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 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, 529 NYS2d 134 [2nd Dept. 1988]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has failed to established her entitlement to judgment as a matter of law and that questions of fact remain as to the actual sums to which she is entitled. Notwithstanding counsel's assertion that there is no proof of the actual loan, it appears to the Court that defendant BAE does not contest that plaintiff is entitled to the return of $300,000, however questions as to appropriate interest and the appropriate parties precludes the granting of summary judgment. It is therefore

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that the parties shall appear for a previously scheduled Compliance Conference to be held before the undersigned on July 29, 2009 at 9:30 A.M.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 8, 2009

WILLIAM R. LaMARCA, J.S.C.

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