[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

JOHN. R O and KWON INT'L, LTD

-v-

SAM NOAH, MODA MAYA et al

INDEX NO. 113788-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for §3212 Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and preliminary conference scheduled in Part 10 on Nov 19, 2009 @ 9:30 am

FILED

NOV 06 2009

COUNTY CLERK'S OFFICE NEW YORK

OCT 30 2009

Dated: _____

HON. JUDITH J. GISCHE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

John Ro and Kwon International, Ltd.,

Plaintiff (s),

-against-

Sam Noah, Moda Maya Sa De CV, Inc., and Allstate Insurance Company Noah Agency,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 113788-2007
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltfs' rev. n/m w/BJG affid, JR affid, exhs	1
Defs' x/m and opp w/SN affid, exhs	2
Pltfs' reply and opp to defs' x/m w/BJG affirm, JR affid, exhs	3
Defs' reply to opp (x/m) w/AMS affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiffs John Ro and Kwon International, Ltd. to recover on a written instrument. Issue has been joined and defendants have asserted a counterclaim for breach of contract. Plaintiffs seek summary judgment on their complaint and dismissal of the counterclaims. Defendants have cross moved[1] for summary judgment on their counterclaims, and seek the dismissal of plaintiff's complaint, based upon it being time barred. Alternatively, they seek the dismissal of

[1]In the future, exhibits must be properly tabbed, not just separated with pages. The cross motion has ten (10) untabbed exhibits, consisting of dozens of pages. This made it more difficult than it had to be for the court to match documents to arguments.

the complaint based upon documentary evidence. CPLR 3211 (a)(1). Since the motion and cross motion for summary judgment were brought after issue was joined and the note of issue has not been filed, they are timely and will be decided on the merits. CPLR § 3212. The court's decision and order is as follows:

Arguments presented

John Ro is associated with Kwon International, Ltd. ("plaintiffs"). Plaintiffs claim they have a promissory note signed by defendant Sam Noah ("Noah") evidencing a personal loan to him of $150,000 that Noah has defaulted in repaying. Noah is a principal of defendant Moda Maya Sa De Cv, Inc. ("Moda") and also of defendant Allstate Insurance Company Noah Agency ("Allstate"). Moda is in the garment business whereas Allstate is in the insurance business. Plaintiffs argue they should be awarded summary judgment because they have proof they lent money to Noah which he acknowledged receipt of in writing. The plaintiffs rely on four (4) separate checks in the total sum of $202,500. The checks were drawn on Moda's account and made payable to John Ro. Before they were cashed, however, Moda stopped payment on them. Although Allstate is not a signatory to the note, and Noah did not sign the note in a personal capacity, Plaintiffs claim nonetheless that Noah and Allstate are jointly and severally responsible for the debt because Noah personally benefitted from the money plaintiffs lent him and he has always operated Moda and Allstate jointly rather than as separate entities.

Defendants maintain that they were improperly served with the complaint because the copy they received from plaintiff was incomplete. They also argue the action is time barred, because the alleged default under the note took place in July

2001 but this action was not commenced until November, 2007. Even if this action is not time barred, defendants allege they have a complete defense in the form of documentary evidence (CPLR 3211 [a] [1]). Defendants contend they satisfied the debt because Moda transferred three (3) letters of credit from Kmart worth $243,808.80 to Kwon International, Ltd. in July 2001. Thus, defendants contend plaintiffs actually made a profit on the deal.

Defendants deny that the document plaintiffs rely on is a "promissory note." They contend the document is a "Promise Note," which is loan agreement, not a "Promissory Note" within the meaning of the Uniform Commercial Code and that the document is missing material terms that would make it an instrument for the payment of money only. Furthermore, the defendants allege the document was altered because someone wrote in the word "Promissory" after the document was signed. Plaintiff agrees the word was later written in, but contends that this happened because the parties are all Korean and when they realized the term of art is "Promissory Note," they made the change to use the correct term.

The disputed document that plaintiffs rely on is dated July 19, 2001 ("document"). It is in the Korean language, with some words written in English. The document has the words "Promise Note" written in English, but above that the word "Promise," appears the word "Promissory." The document has the signature of Sam Noah with the designation "Moda Maya Sa De CV" directly under his name. John Ro also signed the agreement, with the designation "Kwon International Ltd." directly under his name. It is signed by Jungho Chun ("Chun"), but without any designation; only the date "7/19/09" appears under his name. Chun is apparently associated with both Moda

and Kwon International.

Each side has provided the court with an unofficial English translation of the document which consists of six (6) entries. The two translations are different. Below is the translation provided and relied upon by the plaintiff:

> "1) Total loan is $150,000.00
>
> 2) You must L/C $200,00.00 transfer to Kwon International as no. 5
>
> 3) Interest is 7% every 3 months
>
> 4) If past 3 month, interest and principal penalty 25% per month.
>
> *5) Inside $20,000 - machines $10,000.00
> Interest $20,941
> L/C fee - - etc
>
> 6) You must pay back principal
> (Inside 7% L/C fee, surcharge etc.)"

According to the defendant's English translation, item 6 differently states that "any amount exceeding the promised amount shall be refunded immediately (In the 7% there [are] included L/C fees, commission and etc.)"

Defendants' counterclaim is that Moda, Kwon International, Ltd., Ro and nonparty Star Funding, a factor ("factor"), entered into an agreement with plaintiffs wherein it was agreed that plaintiffs would finance Moda's cost (overhead and labor expenses) of fulfilling purchase orders by Kmart for Moda's goods. As proof of this agreement, defendants provide a letter dated August 6, 2001 to the factor. In the letter, Noah, as president of Moda, states as follows:

> "Kwon International, Ltd. . . . will support our overheads subject to your promise that you will pay Kwon International, Ltd . . . the remaining balance due to us after Star Funding, Inc. is paid in full all its costs and fees. . . Moda Maya hereby authorizes Star Funding to make payment to Kwon International, Ltd. all the remaining balance which will be due to us. This authorization will be continued until you receive a termination notice from Kwon International."

The letter is also signed ("confirmed") by Martin Weingarten, the factor's vice president.

According to defendants, Ro "induced" Noah to sell his home to raise money to guarantee defendants' performance under the agreement before plaintiff would provide any of the financing. Noah contends he sold his home at a "distressed" price of $500,000 although it was worth $1,500,000, relying on plaintiffs' agreement to provide financing. Plaintiffs, however, breached the agreement because they never provided any of the financing they had promised. Angry that plaintiffs had breached their agreement, Kim, Moda's treasurer, instructed the bank to stop payment on the four checks Moda issued dated December 13, 2007.

Applicable Law

On a motion for summary judgment, the movant has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v.

Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Where a motion to dismiss is based upon documentary evidence submitted by the moving party in connection with the motion (*see* Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]), such evidence must definitively dispose of plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1st dept. 1995]).

If a motion to dismiss is based upon on a claim being time barred, the court cannot simply extend the statute, but must grant the motion to dismiss. Gottlieb Contracting, Inc. v. City of New York, 49 AD3d 409 (1st Dept 2008).

Discussion

New York's Uniform Commercial Code ("UCC") section 3-104 sets forth the requirements of negotiable instruments. For a writing to be a negotiable instrument within the meaning of the UCC, it must be signed by the maker or drawer and contain an unconditional promise or order to pay a sum certain in money - and no other promise, order, obligation or power given by the maker or drawer (with some limited exceptions). The instrument must also be payable on demand or at a definite time, and be payable "to order of" or to "bearer".

Regardless of whether the document in dispute is a "Promise Note" or "Promissory Note," it is not an unconditional promise to pay a sum certain, and does not contain any of the other hallmarks of a promissory note. It is, therefore, not a

negotiable instrument within the meaning of the UCC. It is, however, an agreement because it sets forth certain material terms of a contract and identifies various obligations of the parties, including the making of a loan and repayment of a debt.

This action is not time barred, as defendants contend and that is not a basis to dismiss this action. There is a six (6) year statute of limitations on an action upon a contractual obligation. CPLR § 213 [2]. Under CPLR § 304, an action is commenced when the summons and complaint are filed. Plaintiff filed the summons and complaint on October 12, 2007. The parties' agreement is dated July 19, 2001 and plaintiffs claim the contract was breached when, on December 13, 2001, Moda gave plaintiffs checks ostensibly to repay the loan, but then stopped payment on all four (4) checks. Since this would be the date on which the contract was breached, these facts set forth by plaintiff support its claims that defendants breach occurred on December 13, 2001, and therefore, this action would have had to be commenced no later than December 13, 2007. Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C., 91 N.Y.2d 256 (1998). Since this action was commenced before then, on October 12, 2007, defendants have not proved this action is time barred. Although defendants argue that the loan was fully repaid to plaintiffs in July 2001, when they assigned the Kmart letters of credit to the plaintiffs, the letters of credit do not definitively dispose of plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, *supra*.) Their significance and why they were given is disputed. Therefore, defendants' motion for summary judgment based upon documentary evidence is also denied.

Defendants have, however, proved that Allstate and Noah are entitled to summary judgment dismissing the compliant against them. A corporate officer who signs in his representative capacity is not personally liable for the corporate obligation unless he signs the agreement individually or personally guarantees the corporate obligation. Metropolitan Switch Board Co., Inc. v. Amici Assocs., Inc., 20 AD3d 455 (2nd Dept 2005).

Here, Noah signed the agreement on behalf of Moda. He did not sign the agreement in his individual capacity or on behalf of Allstate, a corporation. The agreement does not even mention Allstate or expressly inure to its benefit. Although plaintiffs argue that Noah personally benefitted from the agreement and he has operated Allstate and Moda jointly, these broad pronouncements are insufficient, as a matter of law, to impose any liability for breach of contract on Noah, individually or on Allstate. Therefore, defendants' motion for summary judgment dismissing the complaint against Sam Noah, individually and Allstate Insurance Company Noah Agency is granted; the claims against those defendants are hereby severed and dismissed.

Defendants have not proved on this motion that Ro and/or Kwon agreed to pay for Moda's overhead and operating costs. The letter to the factor is not direct evidence of a contract. There is no evidence, other than Noah's statement, that he sold his house for anything other than voluntary reasons and/or that it was sold for under market. The discharge of mortgage is not probative of anything, let alone defendants' claims, that Noah was "induced" to sell his house. At most, it shows Noah gave Ro a

mortgage. Defendants have not met their burden, which is to prove they are entitled to summary judgment on their counterclaims. Plaintiffs, however, have not met their burden either, such that they would be entitled to the grant of summary judgment in their favor dismissing the counterclaims. Clearly the parties have had complicated financial dealings. Exactly what they are and what was promised will have to be decided at trial.

Conclusion

In accordance with the foregoing, the plaintiff's motion for summary judgment is denied in its entirety. Defendant's cross motion is granted only to the extent that the claims against Noah, individually and Allstate are severed and dismissed.

Since no preliminary conference has yet been held in this case, it is hereby scheduled for **November 19, 2009 at 9:30 a.m. in Part 10.** No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 30, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.