

<b>Beneficial N.Y., Inc. v Vazquez</b>
2010 NY Slip Op 30047(U)
January 11, 2010
Supreme Court, New York County
Docket Number: 102622/2009
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
JUDITH J. GISCHE, J.S.C.

PRESENT: \_\_\_\_\_

PART 10

Index Number : 102622/2009  
BENEFICIAL NE WYORK, INC.  
VS.  
VAZQUEZ, SANTA  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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 (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
JAN 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

JAN 11 2010

Dated: 1/11/10

*J. Gische*  
JUDITH J. GISCHE, J.S.C. J.S.C.

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  
BENEFICIAL NEW YORK, INC.,

Plaintiff,

-against-

SANTA VAZQUEZ

Defendants.  
-----X

**Decision/Order**

Index No.: 102622/2009

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**

	<b>Numbered</b>
Pltf's motion [SJ] w/EL affirm, RT affid, etc	1
Def's opp w/SV affid	2

**FILED**  
JAN 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

In this action, plaintiff seeks to recover monies due on a loan agreement.

Plaintiff now moves, pursuant to CPLR § 3212, for summary judgment in its favor and against defendant Santa Vazquez. The defendant, who is self-represented, has appeared in this action and submitted her sworn affidavit in opposition to the motion. Since issue has been joined, but the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212(a); Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

Certain facts are established by the documentary evidence provided on this motion and are not refuted by the defendant. On July 9, 2007, plaintiff and defendant entered into a Loan Repayment Agreement ("Loan Agreement") in the principal sum of

\$8,599 with interest to accrue at the rate of 25% per annum. Defendant agreed to repay the loan in 60 equal monthly installments of \$252.42, the first payment due on August 9, 2007. The Loan Agreement provides that in the event a monthly payment was not paid in full within 10 days after it was due, defendant would be charged an additional 5% of the unpaid amount of the monthly installment. This additional fee, however, is not sought on this motion.

Plaintiff has provided the affidavit of Shalamar Jones, Account Representative with plaintiff, who claims that based upon his review of the documents, account information, and other records of plaintiff, that plaintiff and defendant entered into an agreement in which defendant was to repay the loan amount of \$8,599.95 with interest at the rate of 25%. Plaintiff claims that defendant fulfilled her obligation under the Loan Agreement by making the specified minimum monthly payments through May 25, 2008. However, beginning July 2008, defendant stopped making payments altogether.

Plaintiff claims defendant has an unpaid balance of \$8,638.31 as of January 6, 2009 and that in addition to the principal amount due, \$917.85 in interest has accrued from the date of default (i.e. May 25, 2008) through June 24, 2009, the date of this motion. Accordingly, Plaintiff claims that there is now due and owing a total amount of \$9,610.16 and seeks summary judgment in this amount.

Defendant's answer contains general denials and affirmative defenses, to wit: [1] the complaint fails to state a claim upon which relief may be granted; [2] the purported agreement is unconscionable; [3] lack of personal jurisdiction over the defendant; and [4] failure to attach necessary documents. Defendant has also submitted an affidavit in opposition.

## Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract and Plaintiff has therefore met its burden.

Defendant's affidavit in opposition does not raise any triable issues of fact or set forth any legal arguments that defeat plaintiff's motion for summary judgment or warrant its denial.

Defendant states that plaintiff's motion should be denied because defendant is "having a hard time making ends meet." Defendant's argument is not based in law and is not a valid defense to plaintiff's contractual claim. Inability to pay or financial hardship alone is not a valid excuse for failure to tender installment payments. City of New York v. 130/40 Essex Street Development Corp. 302 AD2d 292 (1st Dept 2003).

Examining defendant's answer, defendant's affirmative defenses are ineffective and completely unsupported by any facts. Thus, defendant's first affirmative defense that the complaint fails to state a claim is contradicted by defendant's own affidavit that she did borrow the money but cannot afford to repay it.

Defendant's second affirmative defense is that the contract is unconscionable. Defendant must set forth facts demonstrating an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Gillman v. Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]). Defendant has not alleged any procedural deficiencies in the contract formation process. Nor has defendant demonstrated that enforcement of the contract would produce an unreasonable result that was not anticipated by the parties during the bargaining process. Therefore, defendant's defense, that the contract is ineffective, fails because defendant freely chose to enter into the contract.

Defendant's third affirmative defense is that there is lack of personal jurisdiction over the defendant. Defendant was served with a summons and complaint; and defendant provided an answer. There is no basis asserted as to how the court failed to obtain personal jurisdiction.

Defendant's fourth affirmative defense is that plaintiff failed to attach all

necessary documents, yet defendant fails to state which necessary documents are missing.

The defendant has, therefore, failed to raise a genuine issue of fact to defeat plaintiff's motion for summary judgment. Accordingly, the motion for summary judgment is granted in favor of the plaintiff and the clerk shall enter judgment in favor of plaintiff and against the defendant in the sum of \$9,610.60.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion for summary judgment is granted; and it is further

**ORDERED** that the clerk shall enter judgment in favor of plaintiff and against the defendant in the sum of \$9,610.16, representing principal and interest due through June 24, 2009. Interest after such date shall accrue at the contract rate (25%) until date of judgment. Post-judgment interest shall accrue at the statutory rate.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
January 11, 2010

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JAN 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE