

**Peacock v Gondrez**

2010 NY Slip Op 30048(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 102989/08

Judge: Jane S. Solomon

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

JANE S. SOLOMON

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

PART 55

*Justice*

Index Number : 102989/2008

PEACOCK, HONIE ANN

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

vs

GONDREZ, HAROLD G., JR.

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

Sequence Number : 003

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

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

Is 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

*See annexed decision & order*

*W/CD*

RECEIVED  
JAN 19 2010  
MOTION SECTION  
NYS SUPREME COURT — NEW YORK COUNTY CLERK

FILED  
JAN 13 2010

Dated: 1-8-10

*[Signature]*  
JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
HONIE ANN PEACOCK,

Plaintiff

Index No.: 102989/08

- against -

DECISION and ORDER

HAROLD G. GONDREZ, JR.,

Defendant

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

-----X  
**Jane Solomon, J.:**

In this action on a promissory note arising out of a business relationship between two friends, plaintiff, Honie Ann Peacock, moves, pursuant to CPLR 3212, for summary judgment thereon against defendant, Harold G. Gondrez, Jr. For the following reasons, the motion is granted.

**Background**

During the period from October 12, 2005 to November 2, 2007, plaintiff made a series of loans to defendant in connection with a building, located at 392 Main Street, Catskill, New York (the building), and owned by Gondrez 392 Corporation (392 Corp.), in which defendant is a shareholder. During the aforementioned period, defendant executed three promissory notes, wherein he agreed to repay the loans made by plaintiff.

Defendant executed the last of the three promissory notes on April 5, 2007 (the Note). The Note subsumed the previous two notes executed by and between the parties, and included both previous loan amounts. Specifically, under the terms of the Note, defendant promised to pay plaintiff the

principal sum of \$108,000, plus interest at the rate of six percent per annum from November 1, 2005 to a specified maturity date. The maturity date is defined as the earlier of 18 months from the date of the Note, i.e., October 5, 2008 or from the date the building was sold.

In addition, on the same day, the parties executed a shareholders' agreement, wherein plaintiff was formally made a co-shareholder of 392 Corp. and given an equal ownership interest in 392 Corp. (see shareholders' agreement dated April 5, 2007 [Shareholders' Agreement], Notice of Motion, Ex. K).

The Note matured on October 5, 2008. Plaintiff claims that she made numerous requests to defendant seeking repayment under the Note. No such payments were made.

Defendant claims that: (1) the Note was signed in March 2007 at plaintiff's apartment, and not before a notary on April 5, 2007, as plaintiff alleges; and (2) the Shareholders' Agreement was agreed to with the understanding that the obligations under the Note would be extinguished.

#### **Discussion**

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]);

*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

A promissory note is a contract that is construed using the normal rules of contract interpretation (*Arnav Indus., Inc. Empl. Retirement Trust v Westside Realty Assocs.*, 180 AD2d 463 [1<sup>st</sup> Dept 1992]). To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show: (1) the existence of a note and (2) the failure to make payments called for therein (*Bronsnick v Brisman*, 30 AD3d 224 [1<sup>st</sup> Dept 2006]; *Mariani v Dyer*, 193 AD2d 456 [1<sup>st</sup> Dept 1993]). Once plaintiff has established her prima facie case, the burden shifts to defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (*id.*).

Here, there is no dispute that the parties executed the Note and that defendant failed to make any payments as set forth therein.

Defendant's allegations that the Shareholders' Agreement was agreed to with the understanding that the obligations under the Note would be extinguished upon execution of the Shareholders' Agreement are insufficient to defeat summary judgment.

While defendant claims that he did not sign the Note on April 5, 2007 before a notary, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Brosnick*, 30 AD3d at 224, quoting *Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). Indeed, non-party Frank R. Hancock, Jr., the notary public who notarized the documents at issue, affirms that he has no prior relationship with the parties and that on April 5, 2007, he notarized two documents, the Note and the Shareholder's Agreement (see Hancock Aff., Notice of Motion, Ex. N).

Save for his own assertions, defendant offers no evidence to demonstrate that the Shareholders' Agreement extinguished the obligations set forth under the Note. (see *Meyersohn v Bloom*, 259 AD2d 432 [1<sup>st</sup> Dept 1999], *affd on appeal after remand*, 288 AD2d 36 [1<sup>st</sup> Dept 2001]). The Note specifically states that "[t]his Note may not be modified, amended or discharged or waived orally, except in writing signed by [defendant] and [plaintiff]" (see Note, Notice of Motion, Ex.

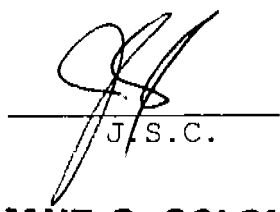
J). The Shareholders' Agreement, which defendant acknowledges he read and signed before a notary, contains no language discharging his responsibility to pay under the Note, and defendant offers no other documentary evidence to support his claims.

As defendant fails to submit any evidence to defeat plaintiff's prima facie case, the motion for summary judgment is granted. Accordingly, it hereby is

ORDERED that the motion for summary judgment by plaintiff Honie Ann Peacock is granted and the Clerk of the Court is directed to enter judgement in favor of plaintiff and against defendant Harold G. Gondrez, Jr. in the amount of \$108,000, together with interest as prayed for at the rate of 6% per annum from the date of November 1, 2005, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: January 8, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

**FILED**  
JAN 13 2010  
NEW YORK  
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