SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

FRED DEN,

Plaintiff,

-against-

DOUGLAS J. KELLER,

Defendants.

MOTION SEQ. NO.: 001, 002
MOTION DATE:12/18/09

INDEX NO.: 19041/09

The following papers having been read on the motion (numbered 1-4):

Notice of Motion for Summary Judgment in Lieu of Complaint.....1
Notice of Cross Motion.....2
Affidavit in Further Support of Motion for Summary Judgment in Lieu of Complaint and in Opposition to Defendant's Cross-Motion.....3
Reply Affidavit in Support of Cross-Motion.....4

Memorandum in Opposition to Motion and in Support of Cross-Motion.....A
Reply Memorandum in Support of Cross-Motion.....B

The following motions are determined herein: (1) Motion by plaintiff for an order pursuant to CPLR 3213 granting him summary judgment in lieu of complaint; and (2) Cross-motion by defendant for an order pursuant to CPLR 3211(a)(1) and (5) dismissing the complaint; or in the alternative, staying the action pursuant to CPLR 2201 and CPLR 7503 on the ground that the issues raised are subject to arbitration; and awarding sanctions pursuant to 22 NYCRR 130-1.

Plaintiff commenced this action to recover the unpaid balance due on a Promissory Note, dated March 2, 2004, in the principal amount of $80,000.00 together with interest at the rate of 3% per annum (the "2004 Note"). The 2004 Note arose out of certain loans and advances made by plaintiff to defendant (who is plaintiff's former son-in-law) during the period of defendant's marriage to plaintiff's daughter. Plaintiff alleges that defendant made sporadic payments of interest through and including December 31, 2006, but failed

to make any payment of principal or interest from that date forward, despite due demand. Accordingly, plaintiff asserts that the entire principal sum is due and payable, together with accrued interest from January 1, 2007, pursuant to the default provisions of the 2004 Note. Defendant does not deny that he executed the 2004 Note or that he has failed to pay the amounts owed thereunder.

Defendant alleges, however, that on July 23, 2008, the parties entered into a settlement of all of plaintiff's claims against defendant, which included claims arising from defendant's management of plaintiff's e-trade accounts, as well as the claim for the unpaid balance on the 2004 Note. In connection with the alleged settlement, defendant executed and delivered an Income Note, in the principal amount of $250,000, payable in installments beginning on February 1, 2008 and ending on February 1, 2015 (the "2008 Note"). There is no assertion that the 2008 Note is in default. Defendant also alleges that, at the same time as the delivery of the 2008 Note, the parties entered into a Confidential General Release and Settlement Agreement (the "Settlement Agreement"), a copy of which is attached to the cross-motion as Exhibit B.

The Settlement Agreement contains a general release (the "Release"), which states (in relevant part):

> "Den, for and in consideration of the obligations assumed by Keller under the Note, attached hereto, and upon execution thereof, hereby remises, releases, acquits, satisfies, forever discharges, ... Keller, ... forever, of and from any and all actions, causes of action, charges, suits, rights, debts (other than the Income Note referred to above), dues, sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, obligations, liabilities, and demands of any kind or nature whatsoever, including all such actions, at law or in equity, which he may have had, ever had, claim to have had, now have, or which his heirs, executors, administrators, successors, or assigns hereafter can, shall, or may have for, upon, or by reason of any such matter, cause, or things whatsoever from the beginning of the world to the date of these presents." Settlement Agreement, ¶2.

The Settlement Agreement also contains a binding arbitration clause (the "Arbitration Clause"), which states (in relevant part):

> "Any and all disputes between the Settling Parties (including any dispute relating to or arising out of this Settlement Agreement or the

attached Note) shall be resolved exclusively through binding arbitration in the city of New York in accordance with the applicable provisions of the American Arbitration Association." Settlement Agreement, ¶10.

Defendant argues that the Release discharges the obligation evidenced by the 2004 Note. Alternatively, defendant argues that any dispute regarding the scope of the Release is subject to binding arbitration pursuant to the Arbitration Clause.

Plaintiff does not challenge defendant's interpretation of the Settlement Agreement. Rather, he claims not to have signed it. Plaintiff contends that the 2008 Note was intended to compensate plaintiff for his stock trading losses, and that the 2004 Note was a separate liability not included in the settlement of plaintiff's other claims. Accordingly, plaintiff asserts, when he was presented with the Settlement Agreement by defendant's attorney, he refused to sign it. Plaintiff claims that, notwithstanding his refusal to sign the Settlement Agreement, it "miraculously" appeared bearing plaintiff's purported signature. Noting the absence of an acknowledgment, plaintiff asserts that the signature is a forgery.

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v Propsect Hosp.*, 68 NY 2d 320, 324 [1986]; and *Zuckerman v City of New York,* 49 NY 2d 557, 562 [1980]. A *prima facie* showing in an action on a promissory note requires proof of the existence of the note and the defendant's failure to make payment in accordance with its terms. CPLR 3213. See *Constructamax, Inc.*, v *CBA Associates, Inc.*, 294 AD2d 460 [2nd Dept. 2002)]; and *E.D.S. Security System v Allyn*, 262 AD2d 351 [2nd Dept. 1999]; *New York College of Health Professions v Sohn*, 10 Misc 3d 1068(A) [NY Sup.2005].

Plaintiff has demonstrated his entitlement to judgment as a matter of law by submitting a copy of the 2004 Note and his undisputed testimony as to defendant's payment default. *Pennsylvania Higher Educ. Assistance Agency v Musheyev*, 68 AD3d 736 [2nd Dept. 2009]; *Verela v Citrus Lake Development, Inc.,* 53 AD3d 574, 575 [2nd Dept. 2008]; *Levien v Allen*, 52 AD3d 578 [2nd Dept. 2008]. The burden thus shifts to defendant to establish by admissible evidence the existence of a triable issue of fact with respect to a *bona fide* defense. *Verela v Citrus, supra; Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2nd Dept. 2006].

The Court finds that defendant has met this burden. In support of the defense of release, defendant has submitted his sworn affidavit together with a copy of the Settlement Agreement, purportedly signed by plaintiff. See *Popular Const., Inc. v Bhutta*,

208 AD2d 514 [2nd Dept. 1994]; cf *Dvoskin v Prinz*, 205 AD2d 661 [2nd Dept. 1994]. The signature is not sufficiently distinct from other examples of plaintiff's signature so as to permit a lay person to deem it a forgery on its face. The above evidence is sufficient to preclude summary judgment for the plaintiff.

The above evidence also constitutes *prima facie* proof for purposes of defendant's cross-motion to dismiss or stay the action. Accordingly, the burden on the cross-motion shifts to plaintiff to demonstrate that it is not his signature on the Settlement Agreement.

A certificate of acknowledgment attached to an instrument or agreement raises the presumption that the instrument or agreement was duly executed. Such presumption can only be overcome by clear and convincing proof to the contrary. *John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620 [2nd Dept. 2008]. Where, as here, there is no acknowledgment, or the acknowledgment is unsigned or defective, the proof required to challenge the genuineness of a signature is not held to the clear and convincing standard. See, e.g., *Seaboard Surety Co. v Earthline Corp.*, 262 AD2d 253 [1st Dept. 1999]. Nonetheless, even where there is no acknowledgment, "[a]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment. Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." *Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004] (internal citations and quotations omitted). See also *Acme American Repairs, Inc. v Uretsky*, 39 AD3d 675 [2nd Dept. 2007]; *Beitner v Becker*, 34 AD3d 406 [2nd Dept. 2006]. The opponent must provide specific and detailed factual assertions which support a claim of forgery. *Banco Popular*, 1 NY3d at 384. See, e.g., *Alvidrez v Roberto Coin, Inc.*, 6 Misc.3d 742 [NY Sup. 2005] (plaintiff's sworn statement that her mother did not accompany her to Spain, where the mother's release was purportedly executed, was sufficient to raise an issue of fact).

In this case, plaintiff states, essentially, that he never signed the Settlement Agreement because he never consented to its terms. In the Court's view, this is nothing more than a "bald assertion of forgery." Whether or not this is sufficient to survive a CPLR 3211 motion to dismiss, it is not sufficient to raise an issue of fact in opposition to the cross-motion for a stay. Plaintiff asserts no objective fact, such as his absence from the place of the execution or his incapacity at the time of execution, that would, if proven, controvert the purported signature. Plaintiff provides no expert opinion as to the authenticity of the signature. Although expert opinion is not required to establish a triable issue of fact [*Banco Popular*, 1 NY3d at 384], it may be necessary if no other offer of proof is available.

The Court finds that plaintiff has not provided a basis to require a hearing on the authenticity of his signature on the Settlement Agreement. Accordingly, the Court determines that the Settlement Agreement is enforceable. The Court does not reach the question of the Release and the corresponding motion to dismiss. Pursuant to the terms of the Settlement Agreement, any and all disputes between the parties, including those arising out of the Settlement Agreement or the 2008 Note, must be resolved by binding arbitration. Therefore, the determination regarding whether or not the Release applies to the 2004 Note must be made by the arbitrator. If the claim on the 2004 Note survives, then the Arbitrator must also determine the scope of the Arbitration Clause; i.e., whether the claim for the unpaid balance on the 2004 Note is included among "any and all disputes between the Settling Parties" that must be resolved by arbitration. Only if the arbitrator determines that neither the Release nor the Arbitration Clause applies to the 2004 Note, can the claim be determined by the Court.

The Court does not find that sanctions are warranted in this case. The basis proffered by defendant is that plaintiff commenced this action on the 2004 Note, notwithstanding his knowledge that the claim was released or subject to arbitration pursuant to the Settlement Agreement. The Court has found that plaintiff's allegation of forgery was insufficient. Nonetheless, the Court cannot determine on the record presented that plaintiff's claim was frivolous or improperly motivated. See *New York College of Health Professions*, 10 Misc 3d at 1068(A) ("Sanctions should not be imposed simply because the court ultimately determines that a claim is without merit."), citing *Levy v Carroll Mgt. Corp.*, 260 AD2d 27 [1st Dept. 1999]; *Hair Say, Ltd. v Salon Opus, Inc.*, 6 Misc. 3d 1041(A) [N.Y. Sup. 2005].

Based upon the foregoing, it is

ORDERED, that plaintiff's motion pursuant to CPLR 3213 for summary judgment in lieu of a complaint is **denied;** and it is further

ORDERED, that defendant's cross-motion, to the extent that it seeks dismissal pursuant to CPLR 3211(a)(1) and (5) is **denied;** and it is further

ORDERED, that defendant's cross-motion, to the extent that it seeks an award of sanctions pursuant to 22 NYCRR 130-1 is **denied;** and it is further

ORDERED, that defendant's cross-motion, to the extent that it seeks to stay this action pending submission of the dispute to arbitration is **granted,** as follows: The action is hereby stayed for a period of one hundred twenty (120) days, commencing upon entry of this Order. If plaintiff seeks to pursue his claim under the 2004 Note, he shall submit the claim to arbitration in accordance with the foregoing. At the end of the 120-day period, this action shall be dismissed without further order of the Court, unless either party shall make an appropriate and proper application to the Court, upon notice to the other party.

This constitutes the Order of the Court. Defendant shall serve upon plaintiff a copy of this Order within 15 days of entry, and shall submit proof of such service to the Court.

ENTER:

Dated: 3/16/10

J.S.C

ENTERED
APR 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE