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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

JACQUELINE SINGOTIKO,

Plaintiff,

- against -

J. BRADFORD KENEALY,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 14880/09

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The defendant moves pursuant to CPLR 2221 (f) for renewal and reargument of the plaintiff's motion for summary judgment in lieu of complaint based upon certain promissory notes. The defendant also seeks reconsideration of the defense opposition to that motion, and upon such reconsideration to deny the plaintiff's motion, or at least to permit discovery on the issue of damages prior to the conduct of a damages hearing. The plaintiff opposes this motion as procedurally flawed. The plaintiff contends the motion is based upon facts which was available to the defendant at the time of the plaintiff's motion for summary judgment. The underlying matter involves two promissory notes executed

on October 7, 2005 and November 10, 2005.

The defendant states, in a March 25, 2010 affidavit, the January 20, 2010 court order there were material facts in dispute as to damages with respect to the plaintiff's motion for summary judgment. The defendant points to the March 24, 2010 affidavit by Jolene Cawley, the comptroller for Celtic Ventures LLC and the defendant for support of this instant motion. The defendant contends the disputed issues of fact should not have been resolved in the plaintiff's favor, and states transactions were directly linked to the note by the plaintiff's instructions. The defendant asserts $68,000.00 should be the subject of a hearing on the issue of damages as distinguished from liability. The defendant concedes the November 4, 2009 opposing affidavit to the plaintiff's motion for summary judgment was unclear about payments of principal; the defendant's computer system software inadvertently dealt with this transaction; and points to the interest/income notations in the memorandum portion of the defendant's draft. The defendant argues a hearing is necessary to ascertain the nature of $23,239.49 in payments, and adds the plaintiff never denied direction to the defendant of monthly $2,000.00 rent payments to be deducted from principal. The defendant also points to the March 25, 2010 affidavit by Richard Rauff about the payment procedure directed by the plaintiff to reduce the principal balance due to the plaintiff by $10,000.00 by payment of certain expenses due from the plaintiff's spouse to Rauff or Rauff's company, Stone Landing Corp. The defendant avers this latter circumstance, which was stated by the plaintiff by a speaker

telephone in the defendant's office, was not raised because the defendant had not located the checks representing those payments. The defendant notes the plaintiff's replay affidavit admits a clash of material facts, and the defendant maintains credibility is an issue on the plaintiff's motion for summary judgment which should be resolved in the nonmovant's favor. The defendant argues summary judgment deprives the defendant of an opportunity provide a defense on the issue of credits directed by the plaintiff with respect to the two promissory notes. The defendant adds a hearing on the issues of material facts would not significantly prejudice the plaintiff.

Cawley states, in a March 24, 2010 affidavit, all interest payments were regularly made at three month intervals to the plaintiff or Kensington Realty which is wholly owned by the plaintiff. Cawley states all payments were regularly made until the early portion of 2007 when the plaintiff and her family moved into a Hauppauge, New York home owned by Londonderry Holdings LLC which is wholly owned by the defendant. Cawley asserts the plaintiff personally instructed her to deduct $2,000.00 monthly from the principal due on the two promissory notes, and make payments of $10,000.00 and $13,239.49 against the principal due on those notes. Cawley maintains the plaintiff told her that money covered the $4,000.00 monthly carrying charges for the plaintiff marketing her home. Cawley indicates the plaintiff and her family resided in the almost 3,000 square foot dwelling ever since without making any payments other than the $2,000.00 in reduced principal. Cawley claims she did not explain to the defense attorney

that these payments were reductions in principal of the note, and that distinction was not clear enough to the Court. Cawley avers the plaintiff resided at the Hauppauge, New York home, and further payments should be credited as the affirmative defense of partial payment of the notes.

Rauff states, in a March 25, 2010 affidavit, he is an officer of Stone Landing Corp., and he was present at meeting on or about June 19, 2006, at 533 Broadway, Massapequa, New York with the plaintiff's spouse and the defendant. Rauff claims the plaintiff's spouse hired him to obtain approvals and install a septic system with complete construction of a dwelling in Centerport, New York. Rauff asserts there was a total installment of $10,000.00, but the plaintiff's spouse did not have the funds to pay the first installment, so the plaintiff's spouse got the money from his wife's account at the defendant's office. Rauff asserts the defendant then contacted the plaintiff on a speaker phone in Rauff's presence to make sure the plaintiff agreed to allow the defendant to make the payment to Rauff for her husband as a reduction of the principal due to the plaintiff on certain notes in the her favor from the defendant. Rauff avers the plaintiff authorized the payment of $10,000.00. Rauff adds a second check was paid on or about July 24, 2006.

The plaintiff's attorney states, in an April 13, 2010 affirmation, this defense motion is flawed because the defendant fails to identify any facts overlooked or misapprehended with respect to the plaintiff's motion. The plaintiff's attorney states this

defense motion is based upon facts which were previously available to the defendant. The plaintiff's attorney notes the defendant never disputed the validity of the two promissory notes nor his default on the payment obligations, and unsuccessfully argued for an offset by money allegedly owed to the defendant from unrelated real estate transactions. The plaintiff's attorney asserts the plaintiff refutes the defendant's contention the purported payments of $23,239.49 constituted payment on the principal balance of the two promissory notes. The plaintiff's attorney points to the plaintiff's April 9, 2010 opposing affidavit; notes this defense motion is not supported by any documentary evidence such as checks, and adds the defendant concedes an inability to locate checks to support the purported payments. The plaintiff's attorney challenges the defendant's statement that they spoke, and the plaintiff's counsel admitted the defendant was entitled to some credits for rent and other matters. The plaintiff's attorney argues, even if leave to reargue and renew the plaintiff's motion for summary judgment is granted, the Court should not disturb summary judgment for the plaintiff because the plaintiff established a *prima facie* showing for it. The plaintiff's attorney contends the defendant's allegations in the self serving sworn statements of Crowley, Rauff and the defendant are tantamount to an alleged modification of an existing obligation for the payment of money which requires a writing to be valid. The plaintiff's attorney maintains the express terms of the two promissory notes states: "The holder of th[ese] note[s] shall not be deemed to have waived any of its rights unless it does so in writing." The

plaintiff's attorney points out the defendant has not produced any written document or memoranda which show the plaintiff agreed to modify the terms of these notes.

The plaintiff states, in an April 9, 2010 affidavit, she never authorized nor instructed Crowley to make payments of $10,000.00 and $13,239.49 against the principal due on the two promissory notes. The plaintiff states she never agreed the alleged monthly $2,000.00 payments would be deducted from the principal due on these notes. The plaintiff asserts she never agreed the defendant was entitled to an additional $10,000.00 credit on account of his making alleged payments for the plaintiff's ex-husband, Steven Singatiko. The plaintiff claims Crowley is the defendant's long time girlfriend, and adds neither Crowley nor Richard Rauff provide any written documents to support their allegations.

The defendant replies to the plaintiff's opposition, in a May 3, 2010 affidavit, and a May 3, 2010 affirmation by defense counsel, and a May 3, 2010 affidavit by Denise Rauff, who states being present on or about November 2008 when the plaintiff walked into a business conference and told Jolene Crawley, "I know I owe Brad money, take it out of my investment account. You know what to do Jolene." The defendant claims, contrary to the contention of the plaintiff's counsel, he called the plaintiff's counsel on January 21, 2010, and they spoke for six minutes about a January 20, 2010 letter from plaintiff's counsel demanding a $200,000.00 principal balance with interest for the plaintiff. The defendant states plaintiff's counsel acknowledged some credits for rent and

other matters were due to the defendant. The defendant maintains the contrary statements by the plaintiff's counsel make it clear the plaintiff's law firm should be disqualified as counsel for the plaintiff since the plaintiff's counsel will be a material witness in this case. The defendant takes issue with the plaintiff's claims the defendant has not presented documentary evidence addressing the plaintiff's claims with respect to payment of principal. The defendant contends the supporting affidavits to this instant motion support the defense position that there are material facts in dispute.

This defense motion is denominated for leave to reargue and to renew, but it appears the motion is solely a motion to reargue. As a motion to renew, it appears the additional evidence alleged by the defense was neither newly discovered nor unavailable to this defendant at the time of the prior motion (***see generally Kirkpatrick v. State Farm Fire & Cas. Co.***, 255 A.D.2d 363, 679 N.Y.S.2d 688 [2nd Dept, 1998]). The Second Department holds

> A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (***see, Pahl Equip. Corp. v Kassis***, 182 AD2d 22; ***Foley v Roche***, 68 AD2d 558). It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (***see, Pahl Equip. Corp. v Kassis, supra; Foley v Roche, supra***)

McGill v. Goldman, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75 [2nd Dept, 1999].

The Second Department holds:

> "It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of a prior

> motion, were not known to the party seeking renewal, and, consequently, not made known to the court" (***Matter of Brooklyn Welding Corp. v Chin***, 236 AD2d 392; ***see, Foley v Roche***, 68 AD2d 558, 568; CPLR 2221). Leave to renew should be denied unless the moving party offers a reasonable explanation as to why the additional facts were not submitted on the original application (***see, Cannistra v Gibbons***, 224 AD2d 570, 571; ***Lee v Ogden Allied Maintenance Corp.***, 226 AD2d 226, 227; ***see also, Mangine v Keller***, 182 AD2d 476, 477)

Goetschius v. Board of Educ. of the Greenburgh Eleven Union Free School District, 281 A.D.2d 418, 418- 419, 721 N.Y.S.2d 271 [2nd Dept, 2001].

Here, the defendant has not shown the Court overlooked nor misapprehended the facts nor the law. Moreover, the defendant fails to provide a reasonable excuse why these purported new facts were not presented at the time of the plaintiff's motion for summary judgment in lieu of a complaint, and not then brought to the attention of the motion Court. The Court determines the defendant has not met the CPLR criteria for reargument nor renewal of the January 20, 2010 order as to summary judgment in favor of the plaintiff.

Accordingly, the motion is denied.

So ordered.

Dated: **July 26, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION XXX NON FINAL DISPOSITION