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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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JANICE FERRARO,

Plaintiff,

-against-

BELLA BABY ENTERPRISES, INC. and SHANNON PASSANANTE,

Defendants.

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SHANNON PASSANANTE,

Counterclaim Plaintiff,

-against

JANICE FERRARO,

Counterclaim Defendant.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 016313-07
Motion Seq. No: 1
Submission Date: 8/9/10

The following papers have been read on this motions

Notice of Motion, Affidavit in Support.....x
Defendant's Memorandum of Law in Support.....x
Affirmation in Support and Exhibits.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x
Affirmation in Response.....x

This matter is before the Court for decision on the motion filed by Defendants Bella Baby Enterprises, Inc. ("Bella Baby") and Shannon Passanante ("Passanante") on May 3, 2010 and

submitted on August 9, 2010. For the reasons set forth below, the Court denies Defendants' motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Defendants.

Plaintiff Janice Ferraro ("Ferraro") opposes Defendants' motion.[1]

B. The Parties' History

In the Verified Complaint ("Complaint"), Plaintiff alleges as follows:

On September 29, 2006, Defendants Passanante and Bella Baby, as Makers, signed a Promissory Note ("Note") with Ferraro as Payee, pursuant to which Defendants promised to pay Ferraro $93,000, plus interest computed at the rate assigned on the home equity loan held by Payee until the entire debt was paid in full. These payments were to be made in monthly installments of $1,000, and Ferraro had the right to declare the unpaid amount due in the event of a default by Defendants.

Defendants made monthly payments of $1,000 between October of 2006 and June of 2007, totaling $9,000, and paid $600 in July of 2007. Defendants made no payments in August of 2007, despite demand by Plaintiff. Plaintiff alleges that Defendants owe Plaintiff the sum of $90,780.62 on the Note. In addition, Passanante is a guarantor on the Note, and has also failed to make payments to Plaintiff since July of 2007. The Note also provides for the payment of counsel fees by Makers and Guarantor for costs incurred by Plaintiff in collecting on the Note.

In her Verified Answer to Complaint and Counterclaim, Passanante admits signing the Note and agreeing to make monthly installment payments of $1,000, but denies many of the remaining allegations. Passanante asserts nineteen (19) affirmative defenses, and asserts counterclaims for 1) fraud in the inducement, 2) breach of fiduciary duty, 3) conversion, and

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[1] Although Plaintiff filed a document titled "Cross Motion," the court had no record of a cross motion having been filed by Plaintiff. Following a conference with the Court regarding this issue, counsel for Plaintiff provided the Court with a letter dated July 22, 2010 confirming that there is no cross motion pending, and that the documents titled "Affidavit in Support and Opposition" and "Affirmation in Support and Opposition" should be considered an Affidavit and Affirmation in Opposition to Defendants' motion for summary judgment.

4) unjust enrichment. In support of those counterclaims, Passanante alleges, *inter alia*, that 1) Passanante and Ferraro are equal shareholders of Bella Baby, a retail establishment that sold children's apparel and accessories; 2) Ferraro improperly converted cash and inventory of Bella Baby for her own use; 3) Passanante signed the Note without the benefit of counsel; and 4) Ferraro made misrepresentations to Passanante regarding how certain funds were used, to the detriment of Bella Baby.

In her Reply to Counterclaim, Plaintiff denies many of the allegations in Defendants' counterclaim.

In her Affidavit in Support dated April 30, 2010, Passanante affirms as follows:

On January 22, 2003, Passanante and Ferraro formed Bella Baby, of which Passanante and Ferraro each owned 50% of the outstanding shares. Attorney Louis Stober ("Stober") incorporated, and performed other legal services for, Bella Baby. Stober dealt exclusively with Ferraro.

On August 6, 2006, Ferraro and Passanante entered into an agreement of sale ("Agreement") of Bella Baby for a purchase price ("Purchase Price") of $100,000, and Stober drafted the Agreement. Despite the Agreement requiring full payment of the Purchase Price at the September 1, 2006 closing date, Ferraro and Passanante had a verbal understanding that only $7,000 would be paid at that time because of Passanante's limited funds. To provide some evidence of this agreement, and to address the possibility that Passanante would be unable to pay the full Purchase Price shortly after the closing, the Note was drafted to reflect what Passanante continued to owe. Passanante did not execute the Note at that time.

Passanante alleges that, during the course of this litigation, she learned that Ferraro produced a second version of the Agreement, purporting to adjust the purchase price downward to $80,000. Passanante denies that she initialed that document.

In September of 2006, Passanante paid Ferraro $7,000 in cash towards the Purchase Price. Bella Baby, however, suffered financial difficulties and Passanante was unable to pay the remainder of the Purchase Price to Ferraro. On September 29, 2006, Passanante executed the Note for $93,000, to establish a payment schedule for the remaining amount due under the Agreement. Paragraph one (1) of the Note provides as follows:

> Makers will pay the indebtedness evidenced by this Note in full within thirty (30) days of the date of this Note or, if full payment cannot be made, then on the first of each month in installments of $1,000 per month until the entire balance and interest is paid in full.

On October 6, 2006, Passanante paid Ferraro $80,000 towards the Note. The funds came from a home equity loan secured by Passanante and her husband. Passanante and Ferraro had previously agreed that these funds would be applied against the debt that Ferraro had accumulated on her credit cards and home equity, and the $80,000 was paid directly to Ferraro's credit card and home equity accounts. Subsequently, in 2007, Passanante made additional payments to Ferraro of $2,600 towards the Note, bringing the total payments to $89,600.

Passanate affirms that the $100,000 purchase price is comprised of 1) approximately $53,000, representing 50% of Bella Baby's inventory and store improvements as of the date of the Agreement, and 2) approximately $47,000, representing 50% of Bella Baby's cash shortfall needed to purchase inventory and store improvements that Ferraro claimed to have funded through her credit cards and home equity account. Passanante submits that the Note simply established a payment schedule evidencing the remaining amounts due under the Agreement.

In her Affidavit in Opposition, Ferraro first disputes Passanante's claims that Passanante had a limited understanding of the operation of Bella Baby. Ferraro affirms that Passanante was knowledgeable about Bella Baby and Passanante's mother had kept the records of Bella Baby for three (3) years.

Ferraro affirms that she and Passanante incurred certain debts in purchasing items for and making improvements to Bella Baby, which were paid for on Ferraro's personal credit cards. As Ferraro had equity in her home, she took out a home equity loan to pay down some of those debts. Ferraro provides credit card statements and other documentation (Ex. 2 to Ferraro Aff.) in support of her assertion that, with limited exceptions, the expenditures were for Bella Baby.

After approximately a year in the store's new location, Ferraro decided to sell her share in Bella Baby. At that time, Ferraro had credit card and home equity debt totaling $186,000. She and Passanante agreed that Passanante would pay off one-half of the debt incurred in connection with Bella Baby over three (3) years, "based upon a note in pay-out of $93,000.00, and the purchase of the store was placed at $100,000.00" (Ferraro Aff. at p.3). Ferraro and Passanante

enlisted a business broker who valued the store at approximately $250,000, but a lower price was agreed to so as to expedite the sale.

Passanante had suggested a third party buyer who would purchase Ferraro's half of the store and go into business with Passanante for $100,000. Stober drew up the appropriate documents but the third party elected not to participate. Passanante and her husband then approached Ferraro and her husband about purchasing Ferraro's share. In August of 2006, they agreed to a $100,000 purchase price and a $93,000 note. Stober drew up the documentation for this transaction and Passanante executed the Note (Ex. 3 to Ferraro Aff.) and the contract for $100,000. The delay between the parties' agreement and the execution of the Note was attributable to Passanante's difficulties in amassing the funds for the purchase price. Ferraro affirms that, at this time, she was still "drowning in debt and making payments toward this $186,000.00 debt as we had gone along" (Ferraro Aff. at p.4).

In late September of 2006, Passanante advised Ferraro that she had the funds for the sale. When Ferraro attempted to collect those funds, Passanante advised Ferraro that she was only able to borrow $80,000. As Ferraro was desperate to sell, they both initialed the contract. Ferraro agreed to reduce the price to $80,000, as reflected by the Agreement of Sale that is Exhibit 4 to Ferraro's Affidavit. Passanante wrote certain checks which, at the direction of Ferraro, were paid directly to Ferraro's credit card and home equity accounts. Ferraro affirms that, although Passanante paid $80,000 of her credit card and home equity debt, these payments did not absolve Passanante from payment pursuant to the Note. Ferraro disputes Passanante's claim that the $80,000 payment, and the Note and Agreement, were related.

Finally, Ferraro disputes Passanante's claim that Stober did not represent her interests. Ferraro affirms that Stober assisted both Passanante and Ferraro, only drew up documentation at the request of Passanante and Ferraro and did not participate in any of the negotiations.

C. The Parties' Positions

Passananate contends that the payments of $80,000 to Ferraro's personal credit card and home equity accounts were made in satisfaction of her obligations under the Agreement and Note which were part and parcel of a single transaction representing her purchase of Plaintiff's interest in Bella Baby.

Although Ferraro acknowledges receipt of funds totaling approximately $89,600, she

maintains that the Note and the Agreement to purchase the hard assets and the goodwill of Bella Baby for $100,000 (later reduced to $80,000)[2] represent two separate transactions. Plaintiff asserts that the money owed under the Note represents Passanante's share of the financing advanced by Plaintiff to fund Bella Baby's cash shortfall. Based on Defendants' alleged default under the Note, Plaintiff seeks to recover $83,400 plus accrued interest and attorneys' fees in the amount of $2,500.

While there is no dispute as to the amount that Passanante paid to Ferraro, the parties dispute whether the Note and Agreement of Sale represent a single transaction or two separate transactions.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to is terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

Under New York law, the initial interpretation of a contract is a matter of law for the

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[2] As noted *supra*, Defendant Passanante denies initialing the Agreement of Sale to reflect the alleged reduction in purchase price.

court to decide. *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.), citing *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1990), quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996). At this stage, the key inquiry is whether the contract is unambiguous with respect to the question disputed by the parties. *International Multifoods*, 309 F.3d at 83. Whether a contract is ambiguous is a question of law for the court. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002); *Gennis v. Pomona Park Bd. of Managers*, 36 A.D.3d 661, 663 (2d Dept. 2007), quoting *Perciasepe v. Premuroso*, 208 A.D.3d 511, 511-512 (2d Dept. 1994). A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings. *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dept. 2006), *rearg. den.*, 2006 N.Y. App. Div. LEXIS 11351 (1st Dept. 2006), quoting *Feldman v. National Westminster Bank*, 303 A.D.3d 271 (1st Dept. 2003), *app. den.*, 100 N.Y.2d 505 (2003).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on a motion for summary judgment. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1st Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v Brustowsky*, 221 A.D.2d 268 (1st Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

C. Application of these Principles to the Instant Action

The Court cannot, based on the record before it, discern the specific understanding between the parties and their intent with respect to the transaction(s) at issue. A factual issue exists as to whether the Agreement of Sale and the Note were part of a single transaction or, in fact, two separate transactions obligating defendant Passanante to pay $100,000 (allegedly reduced to $80,000) to purchase Plaintiff's interest in Bella Baby, plus the sum of $93,000 as and for her share of the $186,000 debt allegedly incurred by Plaintiff to finance the company which,

according to its tax returns, had a negative cash flow for each of the years of its existence. Further, it is in dispute whether the purchase price of Bella Baby was reduced by mutual agreement of the parties from $100,000 to $80,000. These issues precludes an award of summary judgment in Defendants' favor.

The essence of a contract interpretation is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract. *VTech Holdings Ltd. v. Lucent Techs. Inc.*, 172 F. Supp. 2d 435, 441 (S.D.N.Y. 2001), quoting *Reiss v. Financial Performance Corp.*, 279 A.D.2d 13 (1st Dept. 2000). The intent of the parties in this case is not so clear that it can be said, as a matter of law, that the relevant agreements are susceptible only to the interpretation suggested by Defendants. Thus, summary judgment is inappropriate and the Court denies Defendants' motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Pre-Trial Conference on September 10, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
September 7, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
SEP 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE