

**Traina Enters., Inc. v Banner Realty Co., LLC**

2011 NY Slip Op 30332(U)

February 10, 2011

Sup Ct, New York County

Docket Number: 110445/2010

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

Index Number : 110445/2010

TRAINA ENTERPRISES, INC

vs

BANNER REALTY COMPANY, LLC

Sequence Number : 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

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

MOTION DATE 12/17/10

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-6

7-8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

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

FILED

FEB 14 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/10/11

J.S. Solomon  
JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X  
TRAINA ENTERPRISES, INC., d/b/a  
TRAINA CO.,

Index No. 110445/2010  
**DECISION & ORDER**

Plaintiffs,  
  
-against-

BANNER REALTY COMPANY, LLC and JAY  
KATZ,

Defendants.  
-----X

**FILED**

**FEB 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

**JANE S. SOLOMON, J.:**

Plaintiff Traina Enterprises, Inc. (Traina) moves for summary judgment in lieu of complaint (CPLR 3213) against defendants Banner Realty Company, LLC. (Banner) and Jay Katz (Katz, together Defendants), seeking repayment of a \$100,000 loan to Banner and guaranteed by Katz, evidenced by a promissory note dated August 7, 2009 (Note, attached to Affidavit of Joseph Traina, Ex. A).

The Note reads in full:

For good and valuable consideration, namely repayment of \$100,000 loan received from Traina Co, on July 30<sup>th</sup> and August 6<sup>th</sup>, 2009, BANNER REALTY COMPANY, LLC hereby agrees to pay Traina Co. the sum of \$100,000 plus 6% annual interest no later than July 30<sup>th</sup>, 2010.

I, Jay Katz, residing at 401 E.60th St. #27A, NY, NY, personally guaranty repayment of this loan.

(Id.).

It is signed by Jay Katz individually and as "member" for Banner.

"When an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the

supporting papers in lieu of a complaint" (CPLR 3213). A note is such an instrument "provided the plaintiff can establish a prima facie case via proof of the note and a failure to make the payments called for by its terms" (*Bonds Financial, Inc. v. Kestrel Technologies, LLC*, 48 AD3d 230 [1<sup>st</sup> Dept., 2008][Internal quotation marks omitted]). The Note and Mr. Traina's affidavit, stating that no payment has been made, are sufficient to establish this proof.

The burden now shifts to Defendants to prove the existence of a triable issue of fact. To do so, Defendants call into question the validity of the loan and Note and argue that because the Note was executed subsequent to the disbursement of funds that constitute the loan, there was no good and valuable contemporary consideration. They also contend that the lack of specificity in describing the July 30 and August 6 funds makes the Note ambiguous. Next, Defendants reference an August 23, 2010 e-mail from Mr. Traina to Katz's wife, which states: "[A]ll [Katz] needed to do was ask me for a loan and I would have given it to him without any questions or security . . ." (Email, attached to Opposition, Ex. A), which Katz argues is proof that the July and August payments were not a loan, and that he merely signed the Note as "as a vehicle . . . reassuring plaintiff in connection with a separate business transaction" (Affirmation in Opposition, ¶ 11). Finally, Defendants counterclaim that the money owed under the note should be offset by a \$200,000 transaction between Mr. Traina and Katz's wife that took place

[\* 4]

prior to 2004, about which a separate action has been brought. Defendants argue that they will move to join the two actions at some point in the future, and ask that this motion be deferred until then.

Defendants do not raise any triable issues of fact. Past consideration is valid where "the consideration is expressed in the writing and is proved to have been given or performed and would be valid consideration but for the time when it was given or performed" (General Obligations Law, §5-1105). The consideration is clearly expressed in the note. Moreover, Defendants do not deny receipt of the funds at the specified dates on execution of the Note, nor that Katz signed the Note.

Defendants' explanation for the execution of the Note, implying that Katz never intended to honor it, is inadmissible because no reference is made to another agreement in the Note (see, *Thomason's Nathan's Assoc. v. Hajek*, 169 ad2d 568 [1<sup>st</sup> Dept., 1991] [extrinsic references that are inconsistent with the terms of the note will not defeat a motion for summary judgment under CPLR 3213]).

Last, a counterclaim cannot defeat a CPLR 3213 motion (*Diversified Industries, Inc. v. Casa Del Tesoro Corp.*, 79 AD2d 534, 534 [1<sup>st</sup> Dept., 1980]).

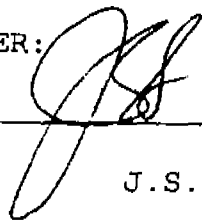
In accordance with the foregoing it hereby is

ORDERED that the motion for summary judgment in lieu of complaint is granted and the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the

defendants in the amount of \$106,000, together with interest at the statutory rate to the date of judgment and costs and disbursements as taxed.

Dated: 2/10/11

ENTER:

  
\_\_\_\_\_

J.S.C.

**JANE S. SOLOMON**

**FILED**

**FEB 14 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**