SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

YELLOW BOOK SALES AND DISTRIBUTION COMPANY, INC.,

Plaintiff,

- against -

Index No.: 1193/11
Motion Seq. No.: 01
Motion Date: 08/17/11
XXX

MONITORCLOSELY.COM, INC. and DREW KARYDES,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits	1
Pro-se Affidavit in Opposition	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §3212, for an order granting summary judgment in its favor and against defendants. Defendant Drew Karydes ("Karydes"), *pro-se,* submitted what he titled an "Affidavit in Response to Request for Judicial Intervention" which the Court will treat as opposition to the instant motion.

This is an action for breach of a promissory obligation for advertising services in the sum of $5,499.00, with contractual attorneys fees of $1,374.75 and contractual interest. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about January 26, 2011. Issue was joined on or about March 21, 2011.

Plaintiff submits that the present action is based upon contracts, signed by defendant Karydes, whereby defendants engaged plaintiff to provide advertising services in plaintiff's publication. On November 13, 2006, defendants executed a contract for advertising to be placed with plaintiff's publication to be paid by twelve monthly installments of $534.00. *See* Plaintiff's Affidavit in Support Exhibit C. Defendants approved the artwork, layout and design of the advertisements to be placed. On January 23, 2007, defendants added an internet product for $1,200.00. *See* Plaintiff's Affidavit in Support Exhibit D. The advertisements were then inserted pursuant to the contracts. Plaintiff states that defendants made partial payments and, after crediting all the payments, there remains a balance due and owing of $5,499.00. The contracts between plaintiff and defendants were entered into by both the corporate defendant and defendant Karydes as co-obligor. Paragraph 15(F) of the contracts reads, "[t]he signer of this agreement does, by his execution, personally and individually undertake and assume the full responsibility hereof including payments of amounts due hereunder." Additionally, pursuant to paragraph 13 of the contracts, defendants agreed to be responsible for attorney's fees up to thirty-three percent (33%) in the event this matter had to be referred to attorneys for collection.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Based upon the evidence and legal argument provided in their motion as detailed above, the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law.

As previously stated, since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendants to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

In his *pro-se,* non-notarized Affidavit, defendant Karydes does not deny entering into the subject contracts with plaintiff, nor does he deny his default in making the payments pursuant to said contracts. Defendant Karydes states that it is his contention that "the contract is misleading and easily open to interpretation....if Yellow Book had been clear as to what the intention of that wording meant, I NEVER would have signed such a contract." Defendant Karydes adds, "Yellow Book claims that they are a great way to reach potential customers, but I found out the hard way that a Yellow pages type ad in New York City is just a really outdated way to advertise. I averaged 1.5 phone inquiries per month for an ad that const me almost $600 per month. ZERO sales resulted from that ad in three months time. It was a complete waste of time and money, and I simply could not afford to pour any more money down that drain. In essence, I paid Yellow Book almost $3,000 for a service that provided nothing. They have already been overpaid, in terms of actual worth, and now they come around trying to take my personal assets as well?"

In reply, plaintiff submits that, "[d]efendant's conclusory and bald allegation regarding the number of phone inquiries as a result of the advertising is not a triable issue of fact. There is no clause in the contract, in statute, nor in common law, which establishes any guarantee of effectiveness of advertising."

It is well settled that "[t]he signer of a written agreement is conclusively bound by its terms unless there is a showing, absent here, of fraud, duress or some other wrongful act." S*ee Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, 487 N.Y.S.2d 105 (2d Dept. 1985). A person is presumed to have read what he signs. *See Lejkowski v. Petrou*, 178 A.D.2d 465, 576 N.Y.S.2d 816 (2d Dept. 1991). Further, a party will not be excused from an agreement by a failure or even a claimed inability to read it. *See Huang v. Cheng*, 182 A.D.2d 600, 583 N.Y.S.2d 370 (1st Dept. 1992). Thus, the law presumes that one who is capable of reading something has read the document which she/he executed, and is conclusively bound by the terms thereof. *See Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 553 N.Y.S.2d 767 (1st Dept. 1990).

See also Sofio v. Hughes, 162 A.D.2d 518, 556 N.Y.S.2d 717 (2d Dept. 1990).

With respect to paragraph 15(F) of the contracts that are the subject of this litigation, in *Yellow Book of New York, Inc. v. Shelley*, 74 A.D.3d 1333, 904 N.Y.S.2d 216 (2d Dept. 2010), the Court held that the written contracts, like the ones in the instant matter, "were unambiguous."

The Court therefore finds that *pro-se* defendant Karydes has offered no evidence to demonstrate the existence of any material triable issue of fact with respect to the liability of defendants for the monies due and owing pursuant to the advertising contracts entered into between plaintiff and defendants.

Accordingly, plaintiff's motion, pursuant to CPLR §3212, for an order granting summary judgment in its favor and against defendants for the relief demanded in the Verified Complaint is hereby **GRANTED.** Plaintiff is directed to submit judgment to the clerk in compliance with this Order.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
September 14, 2011