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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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ENERBANK USA,

Plaintiff(s),

Index No. 5632/09

Motion Submitted: 8/11/11
Motion Sequence: 001

-against-

EDSON A. MAITLAND and YVONNE MAITLAND,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motion by the attorneys for the plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in favor of the defendants is determined as hereinafter set forth.

This is an action to recover damages in the amount of $4,612.02 and attorneys' fees based on the alleged breach of an installment note. (*See* ***CPLR § 325[d]***). The defendants are self-represented litigants. The defendants allege they are "mentally ill."

On or about March 26, 2007, the defendants engaged Keyspan Home Energy Services (Keyspan) and signed and accepted a proposal for the installation of a new hot water heater and boiler with new flue piping as well as the removal of defendants' oil tank. On March 27,

2007, rather than paying for the installation in full, defendants applied for and received a loan from the plaintiff in order to pay for the services over time. On March 27, 2007, defendants, as borrowers, executed and delivered to the plaintiff a Loan Check with respect to a Note and Disclosure Statement (the Agreement) in the sum of $4,750 with interest at the rate of 18.69% per year. The back of the Loan Check states "DO NOT SIGN UNLESS WORK COMPLETED TO BORROWER'S SATISFACTION." Plaintiff asserts that by negotiating and signing the Loan Check, defendants confirmed and admitted the goods and equipment provided by Keyspan were acceptable and the installation completed in a satisfactory manner. The proceeds from the Loan Check were used to pay for the heating system and its installation by Keyspan for the specific benefit of the defendants at their request. Defendants negotiated the Loan Check on May 11, 2007, 30 days after service was performed. By advancing the money to the defendants, plaintiff alleges it performed the terms of the Agreement. Defendants agreed to make 84 monthly payments, each in the sum of $101.77. Plaintiff contends the defendants made 12 partial payments over 14 months pursuant to the Agreement, until their default on or about August 29, 2008, indicating recognition and approval of the Agreement. Plaintiff is the owner and holder of the Agreement.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (***Sillman v. Twentieth Century-Fox Films Corp.***, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York University Medical Center***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Fox v. Wyeth Labs., Inc.***, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept., 1987); ***Royal v. Brooklyn Union Gas Co.***, 122 A.D.2d 132, 504 N.Y.S.2d 519 [2d Dept., 1986]). The plaintiff has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (***Friends of Animals v. Associated Fur Mfgrs.***, 46 N.Y.2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Conclusory statements are insufficient. (***Sofsky v. Rosenberg***, 163 A.D.2d 240, 559 N.Y.S.2d 873 (1st Dept., 1990); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); *see* ***Indig v. Finkelstein***, 23 N.Y.2d 728, 244 N.E.2d 61, 296 N.Y.S.2d 370 (1968); ***Werner v. Nelkin***, 206 A.D.2d 422, 614 N.Y.S.2d 66 (2d Dept., 1994); ***Fink, Weinberger, Fredman, Berman & Lowell v. Petrides***, 80 A.D.2d 781, 437 N.Y.S.2d 1 (1st Dept., 1981), *app dism.* 53 N.Y.2d 1028; ***Jim-Mar Corp. v. Aquatic Construction, Ltd.***, 195 A.D.2d 868, 600 N.Y.S.2d 790 (3d Dept., 1993), lv app den. 82 N.Y.2d 660.

In opposition to the motion the defendants assert two (2) defenses that were set forth in the Verified Answer. First, the defendants allege fraud. Second, the opposition alleges that "Edson Maitland is mentally sick and suffers from mental illness." In support of their opposition, defendants submit a copy of a decision of Social Security Administration, Office of Disability Adjudication and Review, that states that since August 7, 2008, defendant Edson Anthony Maitland was suffering from "bipolar disorder." Social Security found Edson had recurrent episodes of psychotic behavior and mood disturbance which have required repeated hospitalizations. In his decision, the Administrative Law Judge stated that "A determination to appoint a representative payee to manage payments in the claimant's interest is recommended."

The attorneys for the plaintiff served a series of demands for discovery on the defendants. The Notice to Produce, dated June 30, 2009, requested documentation regarding defendant Edson A. Maitland's claimed mental illness, as well as the name of any conservator, or guardian ad litem appointed for Edson A. Maitland. By letter dated September 23, 2010, defendant Yvonne Maitland, in response to the Notice to Produce, advised the plaintiff's attorney that Mr. Maitland was a patient at the Hillside Psychiatric Hospital suffering from "mental illness" with "psychotic episodes and hallucinations." Mrs. Maitland added that she was also "a mental patient."

This court is cognizant that the defendants have not submitted any evidence to demonstrate that they lacked mental capacity at the time of the loan. Nor have defendants set forth allegations sufficient to sustain an affirmative defense sounding in fraud. To establish a cause of action alleging fraud, the defendants must demonstrate that the plaintiff made material representations that were false, knew the representations were false and made them with the intent to deceive the defendants, the defendants justifiably relied on the plaintiff's representations, and that the defendants were injured as a result of the plaintifft's representations. (***Giurdanella v. Giurdanella***, 226 A.D.2d 342, 343, 640 N.Y.S.2d 211 (2d Dept., 1996); *see* ***Crafton Bldg. Corp. v. St. James Constr. Corp.***, 221 A.D.2d 407, 408, 633 N.Y.S.2d 795 [2d Dept., 1995]). The defendants' own documentary evidence establishes that the alleged disability did not begin until August 7, 2008, a year after the loan was executed and the improvement made to the defendants property. The defendants received the benefit of the proceeds of the loan by having a new water heater, boiler and piping installed.

There has been no discovery to date. In light of the report from the Social Security Administration that Mr. Maitland has been diagnosed with bipolar disorder and the letter from Mrs. Maitland regarding Mr. Maitland's recent hospitalization for a mental condition, this court is constrained at this time to deny summary judgment in favor of the plaintiff against the defendants. Moreover, a "self- represented" litigant is now empowered to pursue his or her claim without an attorney under the New York State Courts Access to Justice Program. (*Compare*, ***Roundtree v. Singh***, 143 A.D.2d 995, 996, 533 N.Y.S.2d 609 [2d Dept.,

1988], where the Appellate Division Second Department opined that a self-represented litigant does so at his or her peril). Discovery is necessary to determine if a representative has been appointed to represent the defendants. CPLR § 1021 provides that a motion for substitution may be made "by any party" to the action.

A Preliminary Conference (*see* ***22 NYCRR 202.12***) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 17th day of October, 2011, at 9:30 a.m. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk by regular mail and the defendants by regular and certified mail. In the event this action is settled, a copy of the written stipulation should be forwarded to chambers.

The foregoing constitutes the Order of this Court.

Dated: September 21, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
SEP 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE