

Rhein v NYC 36th LLC
2012 NY Slip Op 31657(U)
June 19, 2012
Supreme Court, New York County
Docket Number: 109862/2011
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

Justice

PART 15

Index Number : 109862/2011
RHEIN, ANNA
vs.
NYC 36TH LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMMODATING DECISION / ORDER**

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FILED

JUN 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/19/12

 J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ANN RHEIN,
Plaintiff,
Index No.
109862/2011

- against -
DECISION
and ORDER

NYC 36th LLC,
Defendant.
FILED Mot. Seq. 03

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HON. EILEEN A. RAKOWER

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Plaintiff Ann Rhein commenced this action by way of summons and notice of motion in lieu of complaint on August 25, 2011. This is an action by plaintiff to enforce a written promissory note executed by defendant NYC 36th LLC on April 12, 2010 in the amount of \$50,000 ("the Promissory Note"). The Promissory Note was executed by Damian DiStasio, defendant's manager, on behalf of the defendant, and was signed by plaintiff.

Plaintiff previously moved for summary judgment in lieu of complaint pursuant to CPLR §3213 based on defendant's alleged default of the Promissory Note. By order and decision dated December 13, 2011, the Court denied the motion and held that the Promissory Note did not qualify under CPLR §3213 because payment was dependent upon a future event, namely, the opening of the club to the general public. The Court noted that even if the Promissory Note qualified under CPLR §3213, summary judgment was not warranted because there remained an issue of fact as to when the club had opened to the "general public."

Plaintiff now moves for an Order granting summary judgment pursuant to CPLR §3212. Plaintiff alternatively moves pursuant to CPLR §3212(g) for an Order limiting the issues of fact for trial and setting down a date for a hearing on same. Defendant opposes the motion.

In support of her application, plaintiff submits an affidavit dated April 23, 2012 and a supporting and reply affirmation of her attorney. Attached as exhibits to her attorney's affirmation are the following documents: a copy of the Promissory Note, a Twenty Day Notice of Default, plaintiff's previous application seeking summary

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judgment, the Court's December 13, 2011 Order, and the transcript of DiStasio's deposition.

The total sum due under the terms of the Promissory Note was to be paid by defendant in ten monthly installments of \$5,000, with the first payment to be due on the first day of the calendar month after defendant opened for business to the general public. Plaintiff states that based on DiStasio's deposition testimony, defendant opened for business to the general public in November 2010. DiStasio testified that defendant opened for "limited events" with up to 499 people who were charged a fee for admission on a first come, first served basis, in November 2010 and for "non-limited" events in January 2011. Plaintiff states that defendant defaulted on its obligation to pay its first installment and to date has failed to make any payments on the Promissory Note. Plaintiff states that a written Twenty Day Notice of Default, dated January 21, 2011, was given pursuant to the terms of the Promissory Note.

In opposition, defendant submits the affidavit of DiStasio dated May 10, 2012 and the affirmation of defendant's counsel. DiStasio states that he has known plaintiff in the capacity of a real estate broker since 2006 when she was employed with Picken Real Estate specializing in lease and sale of commercial properties for the nightlife industry. DiStasio states that beginning in 2008 he was looking for potential spaces in Manhattan for the placement of a new entertainment venue. While viewing a potential space with plaintiff for the new venue in 2008, plaintiff told DiStasio that she knew someone who might be interested in investing in his business venture. Plaintiff set up a meeting with DiStasio and the potential investor in February 2008. DiStasio states that he "re-established contact with the same investor" a year and half later in the summer of 2009 and the investor invested \$1,000,000 paid in three installment on October 7, 2009, December 9, 2009, and January 9, 2010. DiStasio states that he subsequently told plaintiff that he had started a new business venture with the investor that she had previously introduced him to. DiStasio claims that there was "no mention of a finder's fee during this conversation, however, over the following months, plaintiff began to harass [him] for a finder's fee" through "numerous demanding phone calls" and "persistent emails." He states that "[i]n or around March 2010, after being subjected to persistent harassment by plaintiff, [he] finally agreed to meet her at a bar" and orally agreed to pay her a finder's fee. He states that he signed the Promissory Note on behalf of defendant.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the

case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The Court finds that plaintiff has made a prima facie showing of entitlement to summary judgment. Plaintiff has shown, prima facie, that defendant defaulted on the Promissory Note. In opposition, defendant fails to raise an issue of fact. Defendant does not dispute that plaintiff introduced defendant to an investor who subsequently made an investment and that DiStasio, on behalf of defendant, executed the Promissory Note to plaintiff for "value received." Defendant also does not dispute that the club opened to the "general public," thereby triggering its duty to commence payment under the terms of the Promissory Note. Even if, as defendant alleges, the club did not open to the general public until January 2011, the first payment on the Promissory Note came due no later than February 1, 2011. As defendant has failed to make any payment pursuant to the Promissory Note in January or anytime thereafter, the full amount of the Promissory Note has now come due and is owed to plaintiff.

Defendant's arguments that the Promissory Note is unenforceable lack merit. Defendant argues that the Promissory Note is an unenforceable agreement to recover a finder's fee in violation of the statute of frauds. The Court finds that the Promissory Note is a sufficient writing to satisfy the statute as it identifies the parties, sets forth the terms of the agreement, and is signed by DiStasio, defendant's manager.

Defendant also asserts that the Promissory Note is unenforceable because it was executed over two years after plaintiff introduced defendant to the subject investor and as such is based upon past consideration. General Obligations Law §5-1105 expressly provides that "[a] promise in writing and signed by the promisor or his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration for the time when it was given or performed." The Court finds that the Promissory Note, signed by DiStasio, is an unequivocal promise to pay plaintiff a sum certain, at a date certain, and expresses consideration for the promise. Lastly, the Court finds that Defendant's allegation that the Promissory Note was executed under duress to be

unavailing.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$50,000, together with interest at the rate of 9% per annum from the date of August 25, 2011 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 6/12/12



EILEEN A. RAKOWER, J.S.C

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