

Beyes v One For The Money, LLC

2012 NY Slip Op 33458(U)

November 27, 2012

Supreme Court, New York County

Docket Number: 651204/2012

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____
Justice

PART 54

Index Number : 651204/2012
BEYS, PETROS M
vs.
ONE FOR THE MONEY, LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE 8/24/12
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) 1-7
Answering Affidavits — Exhibits _____ | No(s) 9-15, 21-27
Replying Affidavits _____ | No(s) 16-20

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/27/12

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

- 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
- Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
PETROS M. BEYES,

Index No.: 651204/2012

Plaintiff,

**DECISION, ORDER &
JUDGMENT**

-against-

ONE FOR THE MONEY, LLC, ANTHONY C.
MARANO, ANTHONY M. MARANO, and
SCOTT A. MARANO,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

In this action to collect on a promissory note, plaintiff Petros M. Beys (Petros) moves for summary judgment in lieu of complaint against defendants One For The Money, LLC (OFTM), Anthony C. Marano (AC Marano), Anthony M. Marano (AM Marano), and Scott Marano (Scott). CPLR 3213. AC Marano cross-moves to dismiss for lack of personal jurisdiction. CPLR 3211(a)(8). The motions are granted in part and denied in part for the reasons that follow.

I. Factual Background

AC Marano, along with his sons AM Marano and Scott, are members of OFTM. Petros and his son, non-party Michael Beys (Michael), are former members of OFTM. In an Amended, Restated, and Consolidated Unsecured Promissory Note dated August 1, 2007, Petros and Michael agreed to sell their membership interests in OFTM to defendants for \$1.3 million, payable by October 30, 2007. In lieu of making this payment, on December 21, 2007, defendants signed an Unsecured Promissory Note (the Note), whereby they agreed to pay the \$1.3 million principal amount plus 15% annual interest by July 31, 2009. The Note also provides for the following: (1) that the interest rate rises to 17% upon default; (2) that defendants must pay for Petros' costs and expenses incurred enforcing the Note; (3) that the Note is

governed by New York law; and (4) that defendants consent to the jurisdiction of this Court. In 2008, Petros purchased Michael's interest in the Note.

Defendants have refused to pay the amounts due under the Note. Therefore, Petros commenced this action on April 13, 2012 to collect the principal amount of \$1.3 million with 15% interest from December 21, 2007 through July 31, 2009 and 17% interest from August 1, 2009 to the present. Defendants contend that they are not liable under the Note because they were fraudulently induced to enter into it. Their argument relates to several real estate transactions entered into by OFTM.

In April 2005, OFTM acquired a parcel of real property located at 75 First Avenue, New York, New York (the Property), with the intent to construct a residential condominium. A separate company, called Two For The Show, LLC (TFTS), was created to acquire the air rights of 77-81 First Avenue, New York, New York (the Adjoining Property), which adjoins the Property. The acquisition of these air rights was a necessary prerequisite to developing the Property. On June 24, 2005, the owner of the air rights, non-party 78-81 First Avenue Properties L.L.C. (FAP), and TFTS entered into a Declaration of Restrictions and a Single Zoning Lot and Easement Agreement (the Declaration). In late 2006 or early 2007, OFTM decided to build a portion of the condominium over the Adjoining Property. To that end, on January 16, 2007, FAP and TFTS entered into a First Amendment to Declaration of Restrictions and a Single Zoning Lot Easement Agreement (the ZLDA). The Declaration and the ZLDA were both filed with the City Register.

Defendants contend that the ZLDA was negligently prepared by Michael, who is an attorney, because it contained an incorrect description of the easement that has caused significant

delays in the development of the Property. Michael allegedly knew of this error, but did not disclose it to defendants before they entered into the Note. Defendants also claim that the sale of the OFTM shares was ineffective because the notice requirements under OFTM's Operating Agreement were violated.

In reply, Michael submitted an affidavit stating that he did not prepare the ZLDA. Rather, the ZLDA was prepared by OFTM's real estate counsel, Lawrence I. Drath.¹ Defendants have not submitted any evidence to the contrary.

AC Marano, who is represented by separate counsel, contends that he was not properly served. Defendants were all served by mail at 6 West 14th Street, 2nd Floor, New York, NY 10001, the address listed for OFTM in the Note. Pursuant to Section 18 of the Note, defendants consented to service by mail at that address.

Finally, AC Marano contends that he never signed the Note, and that the signature on the document is a forgery. In support, he submitted copies of cancelled checks that he signed in 2007 and 2008. He did not submit an expert affidavit.

II. Summary Judgment in Lieu of Complaint

"Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is 'based upon an instrument for the payment of money only or upon any judgment.'" *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). "An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time." *Id.* (citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 (1996)). "However, '[t]he instrument does not qualify if outside proof is

¹ Michael also set forth his legal background, which consisted primarily of criminal litigation, not real estate transactional work.

needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.”” *Id.* A motion for summary judgment in lieu of complaint is governed by the usual standards for motions for summary judgment brought pursuant to CPLR 3212. *McBean v Goodman*, 27 Misc3d 1212(A), at *2 (Sup Ct, Kings County 2010) (citing *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985)).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court’s examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Petros has established his *prima facie* case by submitting evidence of defendants' default on their obligations under the Note. Defendants have raised three issues that they contend preclude summary judgment: (1) that the Note was fraudulently induced; (2) that AC Marano's signature is a forgery; and (3) that the sale of Petros and Michael's membership interests in OFTM to defendants was not valid due to the failure to comply with the notice requirements in OFTM's Operating Agreement.

A. Fraudulent Inducement

The elements of fraudulent inducement are (1) a representation or concealment of material fact; (2) falsity; (3) scienter; (4) reliance; and (5) injury. *See Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). Also, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

Here, defendants' fraudulent inducement claim is predicated on Michael's alleged negligent drafting of the ZLDA and his alleged concealment of the defect in the ZLDA. The parties dispute whether the ZLDA actually contains an erroneous description of the easement. However, there is no question of material fact as to defendants' failure to properly allege all the elements of this claim.

First, defendants have not rebutted Michael's sworn statement that he did not prepare the ZLDA. Defendants merely contend that he did so "upon information and belief." Such a contention does not satisfy the requirements of CPLR 3016(b) nor does it suffice to rebut Petros' *prima facie* case. Nevertheless, even if Michael negligently drafted the ZLDA, defendants' failure to submit evidence that either Petros or Michael concealed the defect is fatal to their claim. Defendants cannot maintain that the terms of the ZLDA were concealed from them

because they could have reviewed the ZLDA, which is a public record, before entering into the Note. Alternatively, they could have obtained a copy from OFTM's attorney by virtue of their status as members. Thus, they cannot claim reasonable reliance.

B. Forgery

“[A]n expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation.” *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 384 (2004). However, “[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” *Id.*; see also *Hess Corp. v Magnone*, 27 Misc3d 1220(A), at *4 (Sup Ct, NY County 2010) (rejecting defendant's forgery defense because “he submits no documentation, *i.e.* handwriting experts or a signature sample, supporting a conclusion that the signature appearing on the Guarantee is a forgery.”).

The question of fact as to whether AC Marano signed the Note precludes summary judgment as to his liability. Here, on a motion for summary judgment, where the Court cannot decide questions of fact, the Court will not determine if the signatures on the checks submitted by AC Marano differ enough from the signature on the Note to prove a forgery. While they are certainly similar, there are some minor differences, and the determination of whether the signature is a forgery must be made at trial by the finder of fact. See *TD Bank, N.A. v Piccolo Mondo 21st Century, Inc.*, 98 AD3d 499, 500 (2d Dept 2012) (denying summary judgment where defendant submitted copies of her driver's license and passport as examples of her signature because “the handwriting samples . . . differ enough from the signatures on the note . . . to raise a triable issue of fact as to the authenticity of those signatures.”). Consequently, summary judgment is denied against AC Marano.

C. Validity of the Sale of Petros and Michael's Membership Interests

Section 7.4 of OFTM's Operating Agreement specifically allows for the sale of membership interests in OFTM to other members (1) without the consent of the other members and (2) without first offering to sell to OFTM. The sale was between members, so it was valid.

In sum, there is no question of material fact that precludes summary judgment on liability for Petros against OFTM, AM Marano, and Scott. At this time, the Court also grants summary judgment on damages to Petros for the principal amount of \$1.3 million. The calculation of interest, costs, and expenses is referred to a Special Referee to hear and report. However, for the reasons discussed *supra*, part II.B, summary judgment is denied against AC Marano and the parties are directed to conduct limited discovery on whether his signature on the Note is a forgery.²

III. Cross-Motion to Dismiss

Pursuant to Article 3 of the CPLR, this Court does not acquire personal jurisdiction over a defendant until they are properly served. *Calvert Fire Ins. Co. v Special Risk Covers, Inc.*, 125 AD2d 243, 244 (1st Dept 1986). However, parties to a contract may waive the statutory service requirements and designate an alternative means of service. *Alfred E. Mann Living Trust v ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 140 (1st Dept 2010).

Section 18 of the Note clearly allows for service by mail to the address indicated *supra*, part I. However, as discussed *supra*, part II.B, there is a question of fact as to whether AC Marano's signature is a forgery. Ergo, there is a question of fact as to whether service by mail was proper. To put any questions as to this Court's jurisdiction over AC Marano to rest, the

² However, upon a finding that the signature is genuine, this decision shall be considered *res judicata* on AC Marano's liability.

Court directs Petros to serve AC Marano in accordance with the usual the statutory service requirements. Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Petros M. Beys is granted against defendants One For The Money, LLC, Anthony M. Marano, and Scott Marano, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendants in the sum of \$1,300,000; and it is further

ORDERED that the calculation of interest, costs, and expenses is referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance, unless the parties consent to a determination by the Special Referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Petros M. Beys is denied against defendant Anthony C. Marano, and said parties are to conduct limited discovery on whether the signature of said defendant on the Note is a forgery; and it is further

ORDERED that the cross-motion to dismiss by defendant Anthony C. Marano against plaintiff Petros M. Beys is denied; and it is further

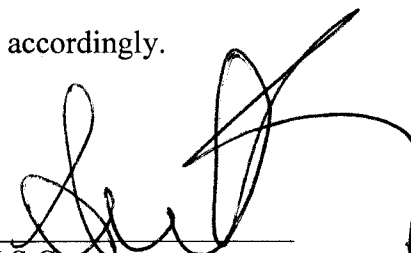
ORDERED that within 20 days of the entry of this order in the NYSCEF System, plaintiff Petros M. Beys shall serve a copy of the Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, and the affidavit of said plaintiff dated April 9, 2012 (e-filed doc. nos. 1-3) upon defendant Anthony C. Marano; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a preliminary conference on January 10, 2013 at 10:00 in the forenoon; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: November 27, 2012

ENTER:



J.S.C.