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SHORT FORM ORDER

INDEX No. 11-3854
CAL. No. 16-1229CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-7-16 (005)
MOTION DATE 3-1-17 (006)
ADJ. DATE 4-26-17
Mot. Seq. # 005 - MD
006 - XMOT D

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NATHAN GARCIA,

Plaintiff,

- against -

MICHAEL MILLER,

Defendant.

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MICHAEL MILLER,

Third-Party Plaintiff,

- against -

REBECCA S. MARIN,

Third-Party Defendant.

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ANTHONY THOMAS SCOTTO, ESQ.
Attorney for Plaintiff
1225 Franklin Avenue, Suite 325
Garden City, New York 11530

FOX & LEFKOWITZ, LLP
Attorney for Defendant/Third-Party Plaintiff
1400 Old Country Road, Suite 108
Westbury, New York 11590

Upon the following papers numbered 1 to 60 read on these motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 50 ; Answering Affidavits and supporting papers 51 - 58 ; Replying Affidavits and supporting papers 59 - 60 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff pursuant to CPLR 3212 for summary judgment in his favor is denied; and it is further

ORDERED that the cross motion by defendant for summary judgment in his favor and sanctions is denied; and it is further

ORDERED that the branch of the cross-motion for an order canceling the notice of pendency is granted.

Plaintiff, Nathan Garcia, commenced this action to recover 10% of the sales price of real property located at 3 Francine Avenue in Amityville, New York pursuant to an alleged "assistant's fee agreement" with defendant, dated April 20, 2010, and to recover the sum of $27,000.00, plus interest at 15%, costs and attorney fees pursuant to an alleged personal loan agreement with defendant, dated March 24, 2010, witnessed by third-party defendant, Rebecca Marin. Defendant, Michael Miller, has denied the allegations in the complaint, and counterclaims that his signature is forged on the "assistant's fee agreement" and on the personal loan agreement. By third-party complaint, defendant alleged that third-party defendant, Rebecca Marin forged his signature on the personal loan agreement. Issue has been joined, discovery is complete, and a note of issue has been filed. The Court notes that by order dated November 20, 2012, the third-party complaint was dismissed.

Plaintiff now moves for summary judgment in his favor on both the assistant's fee agreement and the personal loan agreement. In support of the motion, plaintiff submits, among other things, a copy of the pleadings; the residential contract of sale, deeds to the subject property, HUD statement, and title insurance for 3 Francine Avenue; his own affidavit and an affidavit of Rebecca Marin; and defendant's deposition transcript. Defendant opposes plaintiff's motion and cross-moves for summary judgment dismissing the complaint. Defendant also seeks an order canceling the notice of pendency, granting partial summary judgment in his favor on the counterclaim, and imposing sanctions. In opposition to plaintiff's motion and in support of his cross motion, defendant submits his own affidavit, the sales agreement binder, the residential contract of sale, deeds to the subject property, a HUD statement, the down payment and closing checks, a police report; the assistant's fee agreement, plaintiff's deposition transcript, and the personal loan agreement.

Plaintiff testified that March 24, 2010 he loaned $27,000.00 to defendant, as evidenced by a personal loan agreement. Plaintiff testified that the loan agreement was signed by defendant and witnessed by Rebecca Marin. The loan was to be interest free, but in the event of a default the entire unpaid principal plus interest at 15% every six months would immediately be due. The loan agreement was witnessed by Rebecca Marin and she avers that defendant signed it in her presence. Plaintiff also testified that on April 20, 2010, defendant signed an assistant's fee agreement, wherein defendant agreed to pay his 10% "assistant's fee" for locating investment property at 3 Francine Avenue in Amityville, New York. The fee was to be calculated as 10% of the purchase price of $117,000.00 or $11,700.00, and plaintiff agreed to immediately reinvest that amount into 3 Francine Avenue. Defendant avers that he did not sign the personal loan agreement or the assistant's fee agreement, and that his purported signatures on such agreements were forged.

Defendant testified that he is a self-employed real estate investor and met plaintiff in the summer of 2008, while both were members of the same volleyball league. In 2010, defendant was shown the subject real property located at 3 Francine Avenue in Amityville by a licensed real estate broker, Ed Brown, of Island Advantage Realty. The documentary evidences shows that defendant signed a "sales agreement," prepared by Brown, for the purchase of the real property for $115,000.00, all cash, with closing within thirty days. On April 6, 2010, defendant signed a real estate contract and formally agreed to purchase the property for the increased price of $117,000.00. Defendant testified that on April 6, 2010 at the law offices of James Kocuris, his real estate attorney, he agreed to add plaintiff to the real estate contract, and the document reflects that change. Defendant also issued a personal check for $11,700.00 as a contract deposit at the time both plaintiff and defendant signed the contract. At the closing on April 19, 2010, defendant issued a bank check to the seller for $104,896.96 and a deed to the subject property was issued in both plaintiff's and defendant's names as tenants in common. Defendant testified that after the closing plaintiff informed him that he would be unable to obtain "funds from his aunt that he had previously committed to investing into the purchase of the Francine Avenue premises." As a result, defendant avers James Kocoris drew up a deed transferring the property solely to defendant. Defendant avers that he did not see or hear from plaintiff until February 4, 2011, when he was served with a summons and complaint, which also contained a notice of pendency. Defendant avers that he contacted the Port Washington Police Department as he "never borrowed $27,000.00 or any other amount of money from the plaintiff," never agreed to pay plaintiff an "assistant's fee" and did not sign the personal loan agreement.

Rebecca Marin avers in an affidavit that she did not forge Michael Miller's signature on either of the two agreements, and that on February 14, 2011, she voluntarily provided the Port Washington Police Department with a statement. Marin denies Miller's accusations and avers on March 24, 2010 both plaintiff and Miller were at her home and she "saw Garcia and Miller sign the document (the personal loan agreement)," and she also signed the document.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320; ***Zuckerman v City of New York***, 49 NY2d 557; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, *citing* ***Zuckerman v City of New York***, *supra* at 562).

Plaintiff has established a prima facie entitlement to summary judgment on both the personal loan agreement and the assistant's fee agreement. Based upon his own testimony, plaintiff loaned defendant $27,000.00 in cash that he had saved over a period of fifteen years. The loan was evidenced by the personal loan agreement, and witnessed by Rebecca Marin. Defendant's objections based upon the best evidence rule do not apply, as plaintiff has sufficiently explained the unavailability of the original contract and, therefore, the photocopy is admissible as secondary evidence of the loan agreement's contents (*see* ***Clarke v Rodriguez***, 16 NY3d 815). Likewise, plaintiff has established, based upon his own testimony, the real estate contract, HUD statement, title insurance, and the deed in both his name and defendant's name, as tenants

in common, as well as the "assistant's fee agreement" document itself, his entitlement to summary judgment, based upon the existence of those documents and the defendant's failure to make payment in accordance with the terms of the agreements (*see* ***Imperial Capital Bank v 11–13–15 Old Fulton D, LLC***, 88 AD3d 652; ***Provident Bank v Giannasca***, 55 AD3d 812).

In opposition defendant has raised triable issues of fact regarding the transaction. While something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature (*see* ***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 383–384), defendant's detailed affidavit is sufficient to raise a triable issue of fact regarding his signatures on the two documents. The court notes that while defendant submitted no expert affidavit, an expert opinion is not required to raise a triable issue of fact regarding a forgery allegation (***Banco Popular N. Am. v Victory Taxi Mgt.***, *supra* at 384). In addition, defendant asserts that he never received any funds from plaintiff. Defendant submits the affidavit of real estate attorney James Kocoris, who avers "[i]mmediately after the closing took place on April 19, 2010, Mr. Garcia informed [Kocoris] and Mr. Miller that he would be unable to come up with the previously agreed amount of money that he agreed to contribute to the purchase of the Francine Avenue premises." Thus, there is some evidence to support to defendant's claim that plaintiff did not loan him any money. Such issues of credibility raise triable issues of fact requiring a determination by a factfinder (*see* ***TD Bank, N.A. v Piccolo Mondo 21st Century, Inc.***, 98 AD3d 499; ***Poughkeepsie Sav. Bank v Tyson***, 170 AD2d 818; *see also* ***Pasqualini v Tedesco***, 248 AD2d 604, 604).

With respect to the cross-motion, defendant has raised issues of fact but has failed to establish his entitlement to judgment as a matter of law. Defendant objects that the assistant's fee agreement violates Real Property Law § 442-d, which provides:

> No person, copartnership or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

The record demonstrates that plaintiff is not a licensed real estate broker, defendant was aware of this fact and the initial deed to 3 Francine Avenue indicated that plaintiff was a tenant in common with plaintiff. Significantly, plaintiff testified after the closing he performed demolition, construction, and other physical labor at 3 Francine Avenue. Plaintiff's work at the subject property is evidence of the alleged joint venture between the parties for the development and resale of the subject property. Moreover, the document is dated April 20, 2010, the day after the closing, and after a real estate commission was paid to licensed real estate broker Ed Brown of Island Advantage Realty. Therefore, issues of fact exist as to whether the agreement was in violation of Real Property Law § 442-d. Accordingly, the motion and cross-motion for summary judgment are denied.

Pursuant to CPLR 6513, a notice of pendency is valid for three years from the date of filing, and may be extended for additional three-year periods upon a showing of good cause for an extension (*see* ***Matter of Sakow***, 97 NY2d 436; ***Horowitz v Griggs***, 2 AD3d 404). Here, the notice of pendency was filed on February 3, 2011 and no application was made to extend it. Therefore, the notice of pendency has expired and the branch of the cross-motion to cancel the notice of pendency is granted (*see* ***Ampul Elec. Inc v Village of Port Chester***, 96 AD3d 790; ***Horowitz v Griggs***, *supra*).

Finally, the branch of the cross motion for the imposition of sanctions and an award of attorneys' fees is denied. Defendant has failed to demonstrate that plaintiff engaged in frivolous conduct as that term is defined in 22 NYCRR 130-1.1 (c) (*see* ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1009).

Dated: July 13, 2017

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION