[* 1]

SHORT FORM ORDER INDEX NO. **21968-2011**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*:**

HON. EMILY PINES
J. S. C.

Motion Date: 03-29-2012
Submit Date: 01-18-2013
Motion No.: 001 MD

[ ] Final
[x] Non Final

_____X

MARIA FERNANDES and AUGUSTO C. FERNANDES,

Plaintiffs,

- against -

ANTONIO VALERI, individually,

Defendant.
_____X

Attorney for Plaintiff
Howard M. Bergson, Esq.
194 Main Street
East Setauket, New York 11733

Attorney for the Defendant
Howard Greenberg, Esq.
180 Main Street
Smithtown, New York 11787

Defendant moves, by Notice of Motion (motion sequence #001), pursuant to CPLR § 3211 (a), for an Order dismissing the Plaintiffs' complaint, which is based upon a series of promissory notes that Plaintiffs assert are due and owing and, yet, unpaid.

According to Defendant, Antonio Valeri ("Valeri"), he purchased properties located at 99 and 100 Bradford Avenue in Holbrook N.Y. At that time, the property was owned by non party Christopher Mayor ("Mayor"), who had provided a mortgage to the Plaintiffs herein for the subject property in 1993. The actual transfer of the property from Mayor to CNA Realty, Inc. (in which Defendant Valeri owned an interest) occurred in 2001; and, in 2002, such properties were transferred by CNA

to Valeri individually. However, Valeri states, that at such time, he was unaware that Plaintiffs had commenced a foreclosure action concerning the premises. It is Valeri's position that the notes that are the subject of this action were for a totally separate debt owed by Mayor to the Plaintiffs, but had nothing to do with the mortgage debt. Thus, according to Valeri, when he learned of the foreclosure, he agreed, by letter, on July 25, 2005, to assume and pay the mortgage debt in exchange for the adjournment of the foreclosure proceedings against the properties he then owned. He sets forth that he had no knowledge of the promissory note debt owed by Mayor nor did he ever agree to assume it. In support thereof, he asserts that nowhere in the 2005 writing is there any reference made to any promissory notes. To the extent that the July 25, 2005 letter refers to his making a payment of $10,000 to the Plaintiffs herein, Valeri states that such was made for the express purpose of staying the extant foreclosure action. Ultimately, that action did go forward, Valeri did intervene and it was settled and discontinued on April 2, 2009.

Defendant's counsel argues that the current action must be dismissed on several grounds. He asserts that :1)Plaintiffs lack standing to bring this action because the because none of the notes list the Plaintiffs as the payee(s); 2)the July 25, 2005 letter does not constitute an assumption by Defendant of any promissory note debt, as it does not make any reference to the promissory notes, refers solely to construction and mortgage loans for the subject property, and does not unequivocally acknowledge intent by Defendant to pay promissory note debt of another; 3) an action based on the promissory notes, last executed by Mayor on February 15, 2001, is barred by the six year statute of limitations which expired on February 15, 2005; and 4) for a debt to be removed from the statutory bar, there must be a writing signed by the party to be charged, such never having occurred.

Plaintiff, August Fernandes, opposes the motion to dismiss, and sets forth the following allegations. He states that these notes arose out of a construction contract in 1992 on property located in Riverhead, NY. That contract was between an entity owned by the current Defendant's partner, Mayor, and a construction company owned by Fernandes and his wife, co-Plaintiff Maria Fernandes. Annexed to his opposition papers are a series of promissory notes, totaling $77,158.00, signed by Mayor, and dated between March 1994 and February 1995, all bearing the notation "Riverhead". When, in 2005, the Defendant in this action, sought to adjourn a foreclosure sale regarding a different parcel of property that he had purchased subject to a mortgage executed by Mayor, and in which the Plaintiffs had become the mortgagees, Mr Valeri agreed to assume and acknowledge responsibility for the promissory notes with interest at the rate of 8.5%. While Plaintiff acknowledges that the obligation under the foreclosure was separate and distinct from the obligation covered by the subject promissory notes, it is Plaintiffs' position that such was precisely what the Defendant herein agreed to assume. Augusto Fernandes also asserts that the $10,000 payment made in connection with the July 25, 2005 agreement was to be applied to these very promissory notes being assumed by Valeri. Fernandes attaches numerous checks in partial payment of these promissory notes, all payable to Maria Fernandes and many of them signed by the Defendant herein, disputing Valeri's claim that he was somehow unaware of these promissory notes dealing with the construction obligation on the Riverhead property when he purchased the Holbrook property that was separately subject to a mortgage. In addition, Fernandes attaches a preliminary draft of the July 25, 2005 letter sent by Defendant's former counsel, which he refused to sign specifically because it related the $10,000 payment by Valeri to the mortgage obligation on the Holbrook property as opposed to the construction obligation on the Riverhead property. Thus, the change in the document signed by Fernandes and the Defendant, specifically required, according to Fernandes, that the $10,000 be credited

to the Riverhead construction and the promissory notes and evidenced the acceptance of full responsibility for these notes by the Defendant.

Plaintiffs' counsel, in opposition to the motion to dismiss argues that: 1)the Plaintiffs have standing to bring this action as the July 25, 2005 agreement specifically identifies a debt owed to them arising out of the construction in Riverhead; 2)the July 25, 2005 writing complies with the requirements of GOL § 17-101, as the Defendant assumed, in writing, an identifiable, valid claim and existing obligation - entitling the Plaintiffs to a trial on this issue; 3) the statute of limitations has not expired as the action was commenced on July 25, 2011, within the six years following the July 25, 2005 agreement which is the basis of the Plaintiffs' claim; and 4) as this is a CPLR 3211 (a) motion, the Court must view the complaint in the light most favorable to the Plaintiffs, including the documentary evidence submitted supporting their claim that the Defendant knew of, assumed and acknowledged responsibility for a debt owed to the plaintiffs as represented by the promissory notes issued for the Riverhead construction contract.

When consideration a motion to dismiss under CPLR § 3211 (a), the court must afford the pleading a liberal construction, accepting the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference, determining whether such alleged facts fit within any cognizable legal theory, **Morone v Morone**, 50 NY 2d 481, 429 NYS 2d 592, 413 NE 2d 1154; **Rovello v Orfino Realty Co,** 40 NY 2d, 389 NYS 2d 314, 357 NE 2d 970. In assessing a motion brought under CPLR § 3211 (a)(7), a court may freely consider affidavits and documents submitted by the plaintiff to remedy any alleged defects in the pleading. **Rovello v Orfino Realty Co, supra**. The court is required only to determine whether the proponent of the pleading has a cause of action and not

whether such has been stated. **Guggenheimer v Ginzburg**, 43 NY 2d 268, 401 NYS 2d 182, 372 NE 2d 17; **Rovello v Orfino Realty Co, supra**.

In order to demonstrate that a party has standing to sue, the party must set forth that it has suffered injury in fact. **See, Caprer v Nussbaum**, 36 AD 3d 176, 825 NYS 2d 55 (2d Dep't 2006). If a plaintiff can demonstrate with respect to a promissory note, that it is a "holder in due course" (UCC § 3-302), a mere holder (UCC 1-201[20], or only an assignee or transferee, such person or entity has standing to bring an action to enforce payment on the note. **See, Carlin Jemal,** 68 AD 3d 655, 891 NYS 2d 391 (1st Dep't 2009). Thus, a plaintiff can seek to enforce an instrument's payment even if solely a holder, upon possessing the rights of a holder or a party otherwise possessing legal or equitable ownership in the instrument. See, UCC 3-201;3-301; 3-305; 3-306.

In order to constitute an acknowledgment of an existing debt sufficient to take an enforcement action out of the bar of the statute of limitations, a writing should both recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it. GOL § 17-101, **Knoll v Datek Securities Corp**, 2 AD 3d 594, 769 NYS 2d 581 (2d Dep't 2003). Where writings raise questions as to the defendant's intent in making a certain writing which could be construed as referencing a particular debt, a trial is necessary to determine whether such imports an intention to pay that debt. **See, Knoll v Datek, supra.**

Applying the above law to the motion before the Court, and providing the Plaintiffs with every favorable inference at this stage, as required, necessarily results in denial of the relief sought. While Defendant has stated that he never knew about the promissory notes, Plaintiff has produced notes, all signed by Mayor, and all

allegedly following construction provided by Plaintiffs' corporation for Mayor. Plaintiff has provided more than forty checks in the period between 1994 and 2001, all signed by the Defendant herein and all paid to one of the individual Plaintiffs herein, all referencing "Riverhead", the situs of the construction performed for Mayor. While Defendant claims the 2005 letter, which he acknowledges, only refers to the Plaintiffs' agreement to stay a mortgage foreclosure on a property located in Holbrook for which he assumed the mortgage due and owing to Plaintiffs, the writing specifically contains his acknowledgment of responsibility for a debt owed the mortgagee and/or her husband for construction of a building in Riverhead at an agreed upon interest of 8.5% from inception of that loan less any payments by Defendant or his partner. That language coupled with the numerous checks singed by Defendant to Plaintiff Maria Fernandes with the notation of "Riverhead" on each and every one, when accompanied with the allegations in the Complaint and the Affidavit of Augusto Fernandes in opposition to the within motion, are sufficient to state a claim by the Plaintiffs that they are holders of the notes in question; that such notes relate to construction they performed for Mayor for a building in Riverhead and that when the Plaintiffs stayed a mortgage foreclosure for the Defendant Valeri, they required him to acknowledge his responsibility for payment of amounts on those notes, while giving him credit for any payments that had been made by him or his former partner (Mayor) on such notes in the past. That letter was signed within six years of the current action before this Court. While the Court agrees that there exist certain ambiguities as to the Defendant's intention in signing the 2005 document, there are certainly sufficient allegations set forth to sustain Plaintiff's claim at this stage of the litigation.

Accordingly, the motion to dismiss the Complaint is denied. Defendant shall file an answer within twenty days from this date and counsel for both parties are

directed to appear in this part for a Preliminary Conference before the undersigned at the Alan D. Oshrin Building, One Court Street, Second Floor, Courtroom 2, Riverhead, New York on May 21, 2013 at 9:30 a.m..

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 28, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] Final
[x] Non Final