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| Patti v Corso |
| 2018 NY Slip Op 32486(U) |
| October 1, 2018 |
| Supreme Court, New York County |
| Docket Number: 652837/2015 |
| Judge: Joel M. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN

PART IAS MOTION 45

Justice

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INDEX NO. 652837/2015

JOHN PATTI,

MOTION DATE 09/04/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOHN CORSO, WINGED VICTORY FILMS, LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents:

Plaintiff, John P. Patti ("Plaintiff") commenced this action for breach of contract against Defendants John Corso ("Corso") and Winged Victory Films, LLC ("Winged Victory") (collectively, "Defendants"). Plaintiff alleges Defendants were lent \$34,000.00 from 2008 through 2010, which loans were memorialized by four promissory notes. To date, Defendants have made \$1,400 in payments under the notes. Inclusive of interest, Plaintiff claims entitlement to \$81,263.35 (principal and accrued interest as of January 1, 2018) plus 15% interest thereafter.

For the following reasons, Plaintiff's unopposed motion for Summary Judgment on its claims against Defendants, and for dismissal of Defendant Corso's counterclaims, is granted in part. Given uncertainties as to the calculation of the amounts due and owing on the promissory notes, the matter is referred to a Judicial Hearing Officer for hearing and determination of the amount of damages to which Plaintiff is entitled.

Factual and Procedural Background

On May 18, 2008, in consideration of the sum of \$15,000.00 advanced by non-party Brian Schroeder, the Defendants executed, acknowledged and delivered a promissory note to Mr. Schroeder (the "First Promissory Note"). Under the terms of the promissory note, Defendants were obligated to pay the loaned sum in full plus \$1,500 in interest by the maturity date of August 18, 2009. If not paid by the maturity date, Defendants promised to pay "penalty interest" on the outstanding principal balance at the rate of 15% per annum. (see, Ex. 1 to Patti Affidavit).¹ Schroeder later executed, assigned and delivered the First Promissory Note to Plaintiff. *Complaint* ¶5.

Separately, on September 14, 2008, in consideration of the sum of \$10,000.00 advanced by Plaintiff, the Defendants executed, acknowledged and delivered a promissory note to Plaintiff (the "Second Promissory Note"). Under the terms of the promissory note, Defendants were obligated to repay the principal amount plus interest of 15% per annum by the maturity date of December 18, 2009. If not paid by the maturity date, Defendants promised to pay "penalty interest" on the outstanding principal balance at the rate of 15% per annum. See Exhibit 2 to Patti Affidavit.

On January 29, 2010, in consideration of the sum of \$5,000.00 advanced by Plaintiff, the Defendants executed, acknowledged and delivered a promissory note to Plaintiff (the "Third

¹ Plaintiff's Complaint and motion papers suggest that interest on the First Promissory Note was to be paid at a rate of 15% per annum from the inception of the loan. (see, Patti Affidavit, ¶2; Complaint ¶4). According to the promissory note itself, however, the interest owed upon maturity was a sum certain of \$1,500.00 (i.e., 10% of the principal amount). The "penalty interest" rate for any remaining outstanding principal after the maturity date is set at 15% per annum. Although the calculations used in the motion papers are not entirely clear, Plaintiff seems to have increased the "principal" amount of this loan to \$17,250 and then applied 15% interest on that amount going forward. This seems to be inaccurate in two respects. First, it overstates the amount of interest due at maturity (\$1,500.00). Second, it applies the "penalty interest" to the \$17,250 amount rather than to the "outstanding principal balance," as provided for in the Note, which could have been no higher than \$15,000, depending on whether the amounts Defendants ultimately paid were allocated to the principal amount on the First Promissory Note.

Promissory Note"). Under the terms of the promissory note, Defendants were obligated to repay the principal amount plus interest of 15% per annum by the maturity date of March 31, 2010. If not paid by the maturity date, Defendants promised to pay "penalty interest" on the outstanding principal balance at the rate of 15% per annum. *See* Exhibit 3 to Patti Affidavit.

On March 20, 2010, in consideration of the sum of \$4,000.00 advanced by Plaintiff, the Defendants executed, acknowledged and delivered a promissory note to Plaintiff (the "Fourth Promissory Note"). Under the terms of the promissory note, Defendants were obligated to repay the principal amount plus interest of 15% per annum by the maturity date of May 31, 2010. If not paid by the maturity date, Defendants promised to pay "penalty interest" on the outstanding principal balance at the rate of 15% per annum. *See* Exhibit 4 to Patti Affidavit.

Defendants made sporadic payments, totaling \$1,400, through May 29, 2014, with no payments thereafter. Patti Affidavit, ¶7.²

Corso has appeared in this action, *pro se*, by filing a Verified Answer. In his Answer, Defendant Corso asserts, without explanation, three counterclaims: "Fraud, Breach of Contract and Defamation." *See* Answer at 1 (NYSCEF 3).³ Winged Victory has not appeared in this action. Neither defendant filed opposition to the instant motion.

² Plaintiff's Complaint and motion papers do not indicate clearly how these payments were allocated between principal and interest, and as to which promissory notes.

³ Corso also asserts, without explanation, 16 affirmative defenses. *Id.*

*Analysis**A. Summary Judgment on Plaintiff's Claims*

On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact.'" *Vega v. Restani Contr. Corp.*, 18 N.Y.3d 499, 503 (2012) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). If the movant has made the required showing, the burden shifts to the opposing party to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Here, Plaintiff has made the required showing that it is entitled to summary judgment with respect to liability. He has presented the Court with unrefuted evidence that Defendants have failed to satisfy four promissory notes. The notes are unambiguous and demonstrate unconditional terms of repayment. Plaintiff's Affidavit of Merit offers evidence of Defendant borrower's default. *H & H Custom Homes, Inc. v Kossoff*, 96 AD3d 445, 445 (1st Dep't 2012) (Plaintiff made a *prima facie* showing of its entitlement to judgment as a matter of law in the principal sum of \$200,000 by submitting the promissory note and the amended letter, as well as evidence of default under those documents).

Defendants have not offered any opposition, evidence or explanation as to why they have failed to remit full payment on the promissory notes nor do they raise any triable issues of fact. *Id.*; see also *Grand Pac. Fin. Corp. v 97-111 Hale, LLC*, 90 AD3d 534-535 (1st Dep't 2011). (In an action to recover the amounts due under three loans, Plaintiff established its *prima facie*

entitlement to judgment as a matter of law by providing evidence that it held the three notes and that Defendants had failed to make the payments due under the notes. Defendants' opposition failed to raise a triable issue of fact sufficient to defeat summary judgment.).

Therefore, the Court finds there are no issues of material fact which prevent awarding Plaintiff summary judgment with respect to liability.

As noted above, given uncertainties as to the calculation of the amounts due and owing on the promissory notes, the matter is referred to a Judicial Hearing Officer for determination of the amount of the judgment.

B. Dismissal of Defendant Corso's Counterclaims

Plaintiff also seeks dismissal of Defendant Corso's three Counterclaims as asserted in his Answer.

Corso's pleading of his purported counterclaims consists entirely of legal conclusions: "Fraud, Breach of Contract and Defamation," with no supporting factual allegations. CPLR §3013 states: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of all the transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Here, Corso's purported counterclaims merely state the causes of cause of action by name and offer nothing more.

A cause of action that is asserted in a counterclaim should be treated as if it were alleged in a complaint (CPLR §3019(d)). These allegations should, therefore, sufficiently set forth a cause of action. Moreover, where a purported claim alleges fraudulent conduct, "the circumstances constituting the wrong shall be stated in *detail*." (CPLR §3016(b)) (emphasis added): *Abrams v*

Community Services, Inc., 86 AD2d 555, 556 (1st Dep't 1982). . Corso's conclusory references to legal theories of liability, with no supporting factual allegations, fall far short of satisfying either the CPLR §§3013 or 3019 pleading requirements, let alone the more stringent requirements of CPLR §3016(b) as it relates to Defendant's counterclaim for fraud.⁴

In sum, the Court finds that Plaintiff has satisfactorily demonstrated entitlement to summary judgment on its claims and dismissal of Defendant Corso's counterclaims. The matter is referred to a Judicial Hearing Officer for determination as to the amount of damages to which Plaintiff is entitled.

Therefore, it is:

ORDERED Plaintiff's Motion for Summary Judgment is granted in part. Plaintiff is awarded Summary Judgment on liability and is referred to a Judicial Hearing Officer to hear and determine the amount of damages he is entitled to; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that

⁴ Corso's conclusory affirmative defenses are similarly defective. Affirmative defenses that contain "[bald] conclusory assertions, even if believable, are not enough to defeat summary judgment." *S.J. Capelin Associates, Inc., v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 342 (1974).

Part (which are posted on the website of this Court at www.nycourts.gov/suptctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within 5 days and that counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

NYSCEF DOC. NO. 18
Patti v. Corso., et al.
652837/2015

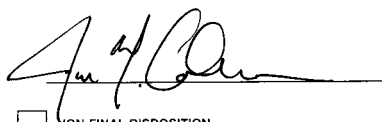
RECEIVED NYSCEF: 10/02/2018

Page 8

ORDERED Plaintiff's Motion to Dismiss Defendant Corso's Counterclaims is granted.

This constitutes the Decision and Order of the Court.

10/1/2018
DATE



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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input checked="" type="checkbox"/> | |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input checked="" type="checkbox"/> | REFERENCE |