

Malekan v Tehrani

2011 NY Slip Op 30444(U)

February 8, 2011

Sup Ct, Nassau County

Docket Number: 004821-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ROBIN MALEKAN,
Plaintiff,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-against-

Index No: 004821-08

**ARIEL TEHRANI, FALCON MOTORS, INC.,
EXECUTIVE FUNDING CORP., and
EXECUTIVE MOTORS, LTD.**
Defendants.

**Motion Seq. No: 7
Submission Date: 12/22/10**

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The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits....x**
- Audiotape provided by Plaintiff in Opposition.....x**
- Reply Affidavit in Support.....x**
- Reply Memorandum of Law in Support.....x**

This matter is before the Court for decision on the motion filed by Defendants Ariel Tehrani ("Tehrani") and Executive Funding Corp. ("Funding") (collectively "Moving Defendants") on January 6, 2010 and submitted on December 22, 2010. ¹ For the reasons set forth below, the Court 1) grants the motion to dismiss the Verified Amended Complaint as to Defendant Executive Funding Corp.; and 2) denies the motion to dismiss the Verified Amended

¹ This action is stayed as to Defendants Falcon Motors, Inc. ("Falcon") and Executive Motors, Ltd. ("Motors"), due to pending bankruptcy actions.

Complaint as to Defendant Ariel Tehrani.

BACKGROUND

A. Relief Sought

Defendants Tehrani and Funding move, pursuant to CPLR § 3212, for an Order granting summary judgment dismissing the Amended Complaint against the Moving Defendants.

Plaintiff Robin Malekan (“Malekan” or “Plaintiff”) opposes the motion.

B. The Parties’ Background

The Verified Amended Complaint (“Amended Complaint”) (Ex. 4 to Tehrani Aff. in Supp.) describes this matter as an action for repayment of a short-term loan (“Loan”) of \$200,000 made by Malekan to Defendants on September 11, 2007, which was to be repaid by September 25, 2007. To date, only \$4,000 has been repaid to Malekan. Allegedly as a result of Defendants’ failure to repay the Loan, Malekan is in danger of foreclosure on his residence, and has insufficient funds to pursue a new business venture (Compl. at ¶ 2).

The Amended Complaint alleges as follows:

Malekan and Tehrani have known each other for many years. Prior to September 11, 2007, Tehrani asked Malekan to make a short-term loan of money to Falcon, Funding and/or Motors, entities owned and/or controlled by Tehrani. Tehrani agreed that the Defendant entities would repay the loan, and that Tehrani would personally guarantee that repayment. Malken agreed to make the Loan.

The principal amount (“Principal”) of the Loan was \$200,000, and it was agreed that the Principal, together with interest of 8 ½ % per annum, would be repaid within two (2) weeks. On September 11, 2007, Malekan wired the \$200,000 Principal to Falcon’s bank account. Malekan mortgaged his home to secure the funds (“Funds”) to make the Loan.

On a date after September 11, 2007, the Principal was withdrawn from Falcon’s bank account and deposited into the bank accounts of Funding and Motors in equal amounts of \$100,000. Defendants have made only a partial payment of \$4,000, via check dated November 1, 2007 and have failed to make the remaining payments, despite due demand by Plaintiff.

In the first cause of action, asserted against the Entity-Defendants, Plaintiff alleges a breach of the Loan Agreement by virtue of the failure of the Entity-Defendants to repay the Loan. In the second cause of action, asserted against Tehrani, Plaintiff alleges a breach of the

guaranty agreement (“Guaranty”) by Tehrani by failing to repay the Principal following the default of the Entity-Defendants on the Loan. Plaintiff seeks damages in the amount of \$196,652, plus interest.

In their Verified Amended Answer (“Amended Answer”) (Ex. 5 to Tehrani Aff.), Moving Defendants deny many of the allegations in the Amended Complaint and assert four (4) affirmative defenses: 1) failure to state a cause of action, 2) Statute of Frauds, 3) duress, and 4) usury. Moving Defendants also assert five (5) counterclaims: 1) a request that the Court declare the Loan void pursuant to General Obligations Law § 5-511(2), which prohibits usurious loans, 2) abuse of process, 3) defamation of character, 4) *prima facie* tort, and 5) intentional infliction of emotional distress. Moving Defendants assert numerous improprieties by Plaintiff in support of their counterclaims, including an alleged threat by Plaintiff to spread rumors concerning Tehrani’s personal life (Amended Answer at ¶ 78).

In his Affidavit in Support, Tehrani affirms as follows:

Tehrani’s father (“Father”), who is in the business of financing vehicles, formed Falcon for the purpose of acquiring an existing Hyundai dealership (“Dealership”) located in Bedford, New York, and in fact acquired that Dealership. Following the closing on that acquisition, upon realizing that additional capital was needed, Tehrani and his Father asked Plaintiff to consider investing in Falcon. Plaintiff agreed to purchase a 20% interest in Falcon and, on September 11, 2007, wire transferred the Principal to Falcon’s bank account (“Account”), and a share certificate was issued to Plaintiff. Tehrani provides a copy of a Falcon Statement (Ex. 7 to Tehrani Aff. in Supp.)² which reflects that wire transfer (“Wire Transfer”). Tehrani affirms that “[n]o other documents or written agreement were memorialized at the time of the transaction” (Tehrani Aff. in Supp. at ¶ 22).

Approximately two months later, Plaintiff demanded a distribution in the amount of \$4,000 which was tendered to Plaintiff even though Falcon was not making distributions to its shareholders at the time. This distribution was recorded in Falcon’s books as a loan to a shareholder.

² There is no document under the tab for Exhibit 7 with the original Tehrani Affidavit in Support. Defendants, however, provided the Court with a “Chambers Copy” of the supporting papers which does include the Account Statement to which Tehrani refers.

While working at the Dealership, Plaintiff assumed a management role and represented himself as an owner of Falcon. As a result of Plaintiff's alleged mistreatment of Falcon's employees, however, Tehrani asked Malekan to cease working at the Dealership. Following that termination, Plaintiff returned to the Dealership and demanded that Tehrani sign a note ("Note") purporting to constitute an offer to buy back his shares. Tehrani submits that it was not until his termination that Plaintiff asserted that the Wire Transfer constituted a loan.

The Note contains typewritten language, including "Corrected Date: 2/7/08" at the top, as well as the following handwritten language, "I agree with repaying of this loan by 8/31/2008 and agree with the rest of the information above." It then contains the printed name "Ariel Tehrani," followed by what appears to be the date "2/8/2008" and a signature. Tehrani affirms that he only signed the Note (Ex. 8 to Tehrani Aff. in Supp.)³ because he was anxious to have Malekan leave the Dealership. Tehrani disputes Plaintiff's assertion that the Note characterizes the \$200,000 investment as a loan to Tehrani personally. Tehrani submits that the Note represents an agreement that Falcon would repay Plaintiff, and does not commit the Moving Defendants to repay Plaintiff. Tehrani affirms that the Note was created five months after the Wire Transfer, and does not reflect the parties' intent with respect to Plaintiff's investment.

In his Affidavit in Opposition, Malekan affirms as follows:

In August and September of 2007, Tehrani asked Malekan to lend him money because he needed to demonstrate that he had capital to obtain financing for the Dealership. Although Malekan had no relationship with Falcon, Malekan wired the Funds to the Falcon Account at the request of Tehrani who said that he needed it done in that fashion for tax purposes. Malekan obtained the Funds pursuant to a line of credit on his home. Despite Malekan's repeated requests for repayment, Tehrani did not repay the Loan. Concerned that he would not be repaid, Malekan began working at the Dealership in an attempt to keep track of the Loan.

Tehrani provided Malekan with a check in the amount of \$4,000 as partial repayment and assured Malekan that he would repay the Loan in full as soon as possible. Malekan provides an invoice that accompanied the check (Ex. A to Malekan Aff. in Opp.) which contains the word "interest" in the column titled "Memo Information." Malekan affirms that the Check

³ See n. 2, supra.

represented partial payment towards the interest that Malekan was paying to the bank for the mortgage that he had taken out.

Tehrani and his family repeatedly assured Malekan that he would be repaid. Malekan recorded some of these conversations (“Conversations”) and provides 1) audio files (“Tapes”) of conversations between Tehrani and his family, and Malekan, 2) transcripts (“Transcripts”) of those Tapes, and 3) an affidavit of Mojdeh Malekan (“Mojdeh”) verifying the transcription and translation of the Tapes from Farsi to English. Mojdeh also affirms his recognition of the voices on the Tapes as the people designated on the Transcripts.

Malekan affirms that the Transcripts reflect Tehrani’s efforts to renegotiate repayment of the Loan that Tehrani now claims constituted an investment in his company. Malekan cites to numerous relevant portions of the Transcripts including 1) Tehrani’s statement to Malekan “You gave the money on my word and I told you that I am trying to take care of it - I gave you solutions - I am going to give you the title to my apartment. This between you and me [sic] there is no reason” (Ex. C at p. 7), and 2) the following exchange between Tehrani and Malekan:

Tehrani: That’s it and then I owe you \$200,000. We sit down
we say ok realistically what do we do. I’ll pay some portion of it.

Malekan: And I gave this to you personally. I didn’t give it to Falcon or
whatever.

Tehrani: Well you did give it to Falcon legally.

Malekan: Uhuh [sic] but what did I tell you? I said I, how you say it -

Falcon [sic]: It’s better if you give it to Falcon than if you give it to me. Falcon
has assets.

Malekan: But I didn’t want to do that. Do you remember?

Tehrani: I don’t know. You gave it to me and Falcon. Is that good? It’s not
a matter of that and Falcon is not going anywhere.

Malekan: Falcon is not going anywhere? Are you going anywhere?

Tehrani: No.

(Ex. B at p. 22)

Tehrani subsequently agreed to meet with Malekan and his attorney to prepare a repayment plan but did not appear for the meeting. Malekan then emailed a “recitation of the facts of the transaction now contained in the personal guarantee” (Malekan Aff. in Opp. at ¶ 20) to Tehrani on February 7, 2008. The next day, Malekan went to Tehrani’s office and Tehrani executed the guarantee. Malekan granted Tehrani six additional months to repay the Loan, as reflected by Tehrani’s agreement to repay the loan by August 31, 2008.

Malekan disputes Tehrani’s claims that he signed the guarantee out of fear. Rather, Tehrani was concerned that any legal action against him and his corporate entities might jeopardize his ability to obtain financing. Malekan avers, further, that Tehrani told Malekan that he would falsely allege that Malekan was an investor in Falcon, and then force Falcon into bankruptcy to delay or avoid any repayment. Malekan cites to a portion of the Transcript in which Tehrani told Malekan that he would file for bankruptcy just to avoid repaying the Funds to Malekan (Ex. B at p. 40). In fact, Tehrani did file for bankruptcy protection, and provided the Bankruptcy Court with an unsigned stock certificate purporting to demonstrate Malekan’s interest in Falcon (Ex. F to Malekan Aff. in Opp.). Malekan affirms that he has never seen, received or signed this stock certificate. Malekan also affirms that Tehrani admitted using the Funds to pay the mortgages on his home, as well as homes belonging to family members, and cites to portions of the Transcript in support of this assertion.

In his Reply Affidavit, Tehrani submits that none of the assertions in Malekan’s Affirmation in Opposition changes the fact that neither of the Moving Defendants signed any writing within the meaning of the Statute of Frauds that would make them liable for the debt of Falcon to Plaintiff. Tehrani also reaffirms that neither he, nor Funding, ever executed any guarantee of Falcon’s obligations to Plaintiff.

C. The Parties’ Positions

Moving Defendants submit that 1) the Complaint fails to state a cause of action against the Moving Defendants because Plaintiff has provided no written agreement, other than the “defectively drawn purported ‘Note’” (Ds’ Memorandum of Law at p. 2), entered into by Moving Defendants in which they agreed to repay the \$200,000 provided by Plaintiff; 2) the documentary evidence reflects that the only potentially appropriate defendant is Falcon, given the lack of privity between Plaintiff and any other Defendant, and the fact that the money was

transferred into Falcon's Account; 3) the Note does not constitute a guaranty by either Moving Defendant of the debt of Falcon; and 4) given that the Note was executed several months after the Wire Transfer, and neither Moving Defendant received any consideration for its consideration, the Note should only be considered a memorialization of Falcon's debt.

In his Affirmation in Opposition, counsel for Plaintiff asserts that Tehrani abused the privilege of doing business in the corporate form to perpetrate a fraud. This appears to be an argument in favor of piercing the corporate veil, which Plaintiff has not set forth in the Amended Complaint.

Plaintiff also submits that the Court should deny Defendants' motion because Defendants' own admissions, as outlined in the Transcripts, dispute Tehrani's assertion that the Funds were intended as an investment in Falcon, not a loan. Plaintiff also argues that the Note satisfies the writing requirement set forth in the Statute of Frauds. In addition, should the Court conclude that the Note is ambiguous with respect to the parties' intent, the Court may consider parol evidence to resolve that ambiguity.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Guarantees

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also*

Schulman v. Westchester Mechanical Contractors, Inc., 56 A.D.2d 625 (2d Dept., 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept., 1994).

The Court of Appeals, in *Salzman Sign Co. v. Beck*, 10 NY2d 63 (1961), held as follows with respect to personal guarantees for corporate obligations:

In modern times most commercial business is done between corporations, [and] everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded, the nearly universal practice is that the officer signs twice, once as an officer and again as an individual.

Id. at 67.

See *Khiyaye v. MikeSad Enterprises, Inc.*, 66 A.D.3d 845 (2d Dept. 2009) (affirmed trial court's dismissal of complaint against individual defendant based on documentary evidence, where contract established that individual defendant executed contract solely in his corporate capacity); *Summit Rovins & Feldesman v. Fonar Corp.*, 213 A.D.2d 201 (1st Dept. 1995) (summary judgment properly granted in favor of individual defendant in absence of direct and explicit evidence of actual intent by him to be held personally liable for corporation's debts, citing *Salzman, supra*, at 67); *Stuyvesant Plaza Inc. v. Emizack, LLC.*, 307 A.D.2d 640 (3d Dept. 2003) (affirmed trial court's order granting summary judgment dismissing the complaint against individual defendant who submitted proof that she never intended to execute personal guaranty and plaintiff provided no competent proof in opposition). Cf. *Star Video Entertainment, LP v J&I Video Distributing, Inc.*, 268 A.D.2d 423 (2d Dept. 2000) (triable issue of fact existed where individual signed his name and word "Pres" underneath language on credit application providing that "the undersigned personally guarantees payment of the account").

Pursuant to General Obligations Law ("GOL") § 5-701(a)(2):

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

Is a special promise to answer for the debt, default or miscarriage of another person

For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758 (1891). *Accord Durso v. Baisch*, 37 A.D.3d 646 (2d Dept. 2007) (to satisfy Statute of Frauds, writing must identify the parties, describe the subject matter, state all the essential terms of an agreement and be signed by the party to be charged).

C. Application of these Principles to the Instant Action

The Court grants the motion to dismiss the Amended Complaint as to Defendant Funding based on the Court's conclusion that Plaintiff has not set forth a *prima facie* case as to that entity. There is no documentation supporting the allegation in the Amended Complaint that the loan was made to Funding. Moreover, although the Amended Complaint alleges that the \$200,000 was withdrawn from Falcon's bank account and deposited into the bank accounts of Funding and Motors in equal amounts of \$100,000, Plaintiff has not provided documentation reflecting the deposit into Funding's account. The Transcripts, while supporting the conclusion that Plaintiff provided money to Tehrani and Falcon, does not demonstrate that the money was provided specifically to Funding. Moreover, in those Transcripts, Tehrani suggests that he will file bankruptcy with respect to Falcon to avoid his debt to Plaintiff. This is further evidence that Plaintiff provided the money to Falcon. In light of the foregoing, the Court dismisses the Verified Amended Complaint against Defendant Executive Funding Corp.

The Court denies the motion to dismiss the Amended Complaint as to Defendant Tehrani based on the Court's conclusion that Plaintiff has established a *prima facie* case that Tehrani personally guaranteed repayment of the Funds to Plaintiff, and there exist issues of fact that preclude summary judgment on that issue. The Note constitutes a written memorandum or note sufficient to satisfy the Statute of Frauds because it identifies the parties, by referring to a "company check" which was provided by Falcon, describes the subject matter, states all the

essential terms of the agreement and is signed by Tehrani, the party to be charged. The probative value of the Note, which was executed months after Plaintiff provided the Funds, will be determined at trial. Moreover, the language on the Note "I agree with repaying of this loan by 8/31/2008 and agree with the rest of the information above," is sufficiently clear and explicit to support the conclusion that Tehrani intended to guarantee repayment of the Funds to Tehrani. Finally, Tehrani's signature on the Note, without reference to any specific entity, raises issues of fact as to whether Tehrani intended to be personally liable for repaying the Funds. In light of the foregoing, the Court denies Tehrani's motion to dismiss the Amended Complaint as to him.

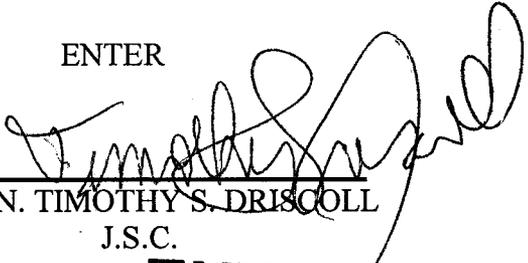
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for Plaintiff and counsel for Defendant Ariel Tehrani to appear before the Court on April 27, 2011 at 9:30 a.m. for a Certification Conference at which time the Court will schedule the matter for trial and direct the filing of a Note of Issue. The Court directs Plaintiff and Tehrani to complete all outstanding discovery prior to that Certification Conference.

DATED: Mineola, NY
February 8, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE