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| ABKCO Music & Records, Inc. v Montague |
| 2010 NY Slip Op 30524(U) |
| March 8, 2010 |
| Supreme Court, New York County |
| Docket Number: 110349/05 |
| Judge: Emily Jane Goodman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GoodmanPART 17*Justice*ABKCO Music Records Inc

INDEX NO.

110349/05

- v -

MOTION DATE

MICHAEL MONACUS

MOTION SEQ. NO.

7

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

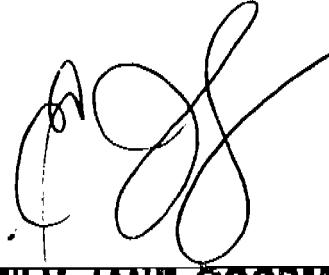
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

as decided
per attested
FILED
 MAR 15 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 3/8/10

EMILY JANE GOODMAN
Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

ABKCO MUSIC & RECORDS, INC.,

Plaintiff,

-against-

Index No. 110349/05

NATHANIEL MONTAGUE, ROSE T. CASALAN,
and THE MONTAGUE-CASALAN FAMILY
TRUST,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

In this action, ABKCO seeks to recover \$353,590.29 allegedly loaned to defendants Nathaniel Montague, Rose T. Casalan, and The Montague-Casalan Family Trust (hereinafter referred to as The Family Trust).¹ By Decision and Order, dated October 14, 2008, this court denied Defendants' motion to dismiss the amended complaint based on statute of frauds, statute of limitations and unjust enrichment.²

Plaintiff now moves for an extension of this court's 45 day dispositive motion rule, for the award of summary judgment and for sanctions, on the basis that it "just recently uncovered physical evidence" (a tape recording) which proves the merits of its case. Plaintiff notes that in the prior decision, the court stated that the central issue in this action is whether the monies at

¹The parties entered into a stipulation, dated July 17, 2008, pursuant to which ABKCO discontinued the action as against the Family Trust.

²In the amended complaint, ABKCO alleges that, in or about 1997, it entered into an oral loan agreement with defendants through ABKCO's New York's office (Amended Complaint, ¶ 6). The funds were to be used for the purpose of cataloguing, photographing, evaluating, insuring, and advertising the art collection (*id.*). Defendants allegedly agreed to repay the funds upon demand (*id.*). ABKCO further alleges that it agreed to make additional cash advances to defendants, also through its New York office, to assist defendants in pursuing business opportunities and to support their general living expenses (*id.*, ¶ 8). According to ABKCO, defendants agreed to repay these funds upon its demand for repayment (*id.*).

issue were provided by Plaintiff to Defendants as gifts or as loans. Plaintiff states that the tape at issue was recently discovered while cleaning out of the office of Plaintiff's former President Allen Klein³ and Plaintiff had no reason to expect that it even existed. The tape is allegedly made by Defendant Rose Casalan (who is identified on the tape as Rose) who details various costs in connection with cataloging a "collection" which concludes "Sincerely and with love, Montague and Rose." It provides in relevant part "we really want you to know that we do understand clearly that you are advancing this financing to us...to ensure the maximum exposure for the sale of these collectors, these collectibles. It is also further understood that you will be reimbursed as purchases are made until the entire sum is paid."

In light of the statements on this tape, Plaintiff alleges that all advances through 2005 to either Defendants or persons or entities identified by Defendants, were made as loans, including \$143,000 for the purchase of a home for Defendants in Las Vegas (Defendants have admitted that the \$143,000 was a loan and repaid it).⁴ Plaintiff further argues that the entire amount given to Defendants was advanced as loans, as evidenced not only by the tape but by unspecified Defendants' requests for approval before expending certain sums, a letter from Defendants' accountant referencing a loan and other letters referring to loan advances, and based on ABKCO's president Jody Klein's affidavit,⁵ all of which were considered by the court in the

³The court did not order the deposition of Allen Klein, who Plaintiff alleged did not have the capacity to testify.

⁴In the prior motion Defendant Montague submitted an affidavit conceding that he and his wife borrowed \$143,000 from ABKCO in connection with the purchase of their home in Las Vegas.

⁵Jody Klein previously submitted an affidavit to the court in connection with Defendants' prior motion for summary judgment. She asserted that the company made a series of loans to

prior decision, which concluded that issues of fact existed for trial.

In opposition to the motion, Defendants argue that good cause is not shown for the late filing of this motion. Even if the good cause is shown, Defendants argue that the motion should be denied because the tape was not authenticated and because Plaintiff has not demonstrated that the tape has not been altered (see Read v Ellenville Nat'l Bank, 20 AD3d 408 [2d Dept 2005] [summary judgment denied with leave to renew because the affidavit of the bank's vice president was insufficient to authenticate the tape]). Defendants further maintain that even if the tape was properly authenticated, the tape only demonstrates that no money is due in this action. The transcription of the tape states '[i]t is also further understood that you will be reimbursed as purchases are made until the entire sum is paid off.' Accordingly, Defendants argue that until the collection is sold, no money is due for repayment.

Good cause has been shown for the filing of this summary judgment motion outside of the court's 45 day rule. However, summary judgment must be denied because even assuming, arguendo, that Plaintiff has properly authenticated the tape based on the affidavit of the President

defendants, which were not repaid for a total of \$353,590.29, as follows:

- August 1, 1999 through December 31, 1999 – \$36,383.44
- January 1, 2000 through December 31, 2000 – \$68,217.07
- January 1, 2001 through December 31, 2001 – \$60,581.42
- January 1, 2002 through December 31, 2002 – \$77,157.49
- January 1, 2003 through December 31, 2003 – \$56,576.93
- January 1, 2004 through December 31, 2004 – \$45,303.27
- January 1, 2005 through March 4, 2005 – \$9,370.67.

who did not find that tape herself⁶ the tape does not establish that Plaintiff is entitled to the monies sought. It is for the trier of fact to decide whether all monies advanced by Plaintiff were advanced, all, or in part, as loans and not gifts. The tape was apparently made on January 16, 1998 and only discusses the purchase of certain limited items. The court cannot decide, as a matter of law, that every single advance (in the hundreds) was made by Plaintiff as loans under an agreement evidenced by the tape--although a trier of fact could do so. Further, even if everything advanced was advanced as a loan, it has not been established, as a matter of law, when repayment is due.

Accordingly, it is

ORDERED that Plaintiff's motion is granted to the extent that it is granted permission to file the late summary judgment motion, but after consideration of this motion, summary judgment is denied as issues of fact exist for trial; and it is further

ORDERED that the parties appear for trial on May 3, 2010 to pick a jury.

This Constitutes the Decision and Order of the Court.

Dated: March 8, 2010

ENTER:

J.S.C.
EMILY JANE GOODMAN

*COURT CLERK
RECEIVED
MAR 15 2010
FILED*

⁶Six weeks after this motion was made, the court received two letters, regarding a Notice to Admit. In one letter, Plaintiff complains that Defendants' attorney's response to the Notice, which merely objected to the use of the device, is not a sworn statement as required by CPLR 3123, and therefore, the matters therein are deemed admitted. Defendants' attorney's letter belatedly requests time to move for a protective order or requests that the court sua sponte disregard the Notice, which the court will not do. Plaintiff has made no motion to deem the matters in its Notice admitted (see e.g. Webb v Tire And Brake Distrib., Inc., 13 AD3d 835 [3d Dept 2004]). Further, to the extent that the matters are deemed admitted, Defendants have not moved for amendment or withdrawal of some or all of the admissions (*id.*).