

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

ADRIANA BITER, et al

INDEX NO. 652003/2011

-v-

MOTION DATE

LOUIS RENZO, et al

MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by plaintiffs for summary judgment is DENIED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 13, 2012

Melvin L. Schweitzer signature and name

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
ADRIANA BITTER, MARK BITTER, and
ROBERT BITTER

Plaintiffs,

-against-

LOUIS N. RENZO, CHARLES RAICH,
RONKONKOMA OPERATIONS LLC, RAICH
ENDE MALTER & CO. LLP, and 300 TRADE
ZONE DRIVE LLC,

Defendants.
-----X

Index No. 652003/2011

DECISION AND ORDER

Motion Sequence No. 003

MELVIN L. SCHWEITZER, J.:

Preliminary Statement

Adriana Bitter, Mark Bitter and Robert Bitter (Plaintiffs) bring this breach of contract action against defendants Louis N. Renzo, Charles Raich, Ronkonkoma Operations LLC, Raich Ende Malter & Co. LLP, and 300 Trade Zone Drive LLC (Defendants) for defendants' alleged failure to remit plaintiffs' cash collateral as required under an agreement relating to the purchase of a company owned by Adriana Bitter. Plaintiffs move for summary judgment pursuant to CPLR 3212. Defendants contend that there are unresolved issues of fact and therefore the motion for summary judgment should be denied.

A motion for summary judgment should only be granted where, upon submission of all the required evidence, plaintiff has established a prima facie case of the underlying claim. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). Moreover, plaintiff must show that "there is no defense to the cause of action" as a matter of law. CPLR 3212. Plaintiff can move for summary

judgment at any time within the statutorily defined limits. CPRL 3212. However, such motion must await the completion of discovery, where information that is the subject of discovery is critical to the non-moving party's defense of the summary judgment motion. *George v New York City Transit Authority*, 306 AD2d 160, 161 (1st Dept 2003); *Elbaz v New York City Housing Authority*, 90 AD3d 986, 987 (2d Dept 2011).

Background

On April 21, 2009 Adriana Bitter (Adriana) and Ronkonkoma Operations LLC (ROL) entered into an agreement (Agreement) in connection with ROL's acquisition of Adriana's company, Scalamandre Silks Inc. (Scalamandre). The Agreement involved a sale of Scalamandre's debt owing to Rosenthal & Rosenthal to ROL and retention by ROL of Adriana's cash collateral of \$1,250,000 as a security for the debt. The Agreement provided the following conditions for the remittance of the cash collateral:

If ROL levies on the collateral for the debt, it will not resort to the Cash Collateral until substantially all of the other collateral for the debt has been applied to the debt or liquidated. **If ROL is able to retain collateral** used by Scalamandre to secure the debt, **then the Cash Collateral will be repaid** to [Adriana] with interest at a rate of 3%.

The Agreement provided a cash collateral repayment schedule:

[O]n the first, second and third anniversary of the closing on the collateral, ROL shall make payments of principal in the amounts of \$500,000, \$500,000 and \$250,000, respectively, together with all interest that is unpaid and accrued to that date.

The Agreement also included a subordination clause with respect to cash collateral repayment:

[T]he payment of such amounts ... will be subordinate to ROL's future senior debt, provided that the terms of such subordination are reasonably acceptable to [Adriana], and provided further that the amount of such senior debt may not exceed \$2,000,000.00. . . .

On May 6, 2009 ROL closed on Adriana's collateral. By the time of the first anniversary on May 6, 2010 ROL had only paid \$2,000.00 towards its \$500,000.00 obligation. To date, only \$34,000 has been paid to Adriana.

Discussion

Under the New York law, in order to establish a prima facie case of breach of contract, plaintiff must demonstrate (1) formation of a contract between plaintiff and defendant, (2) plaintiff's performance, (3) defendant's failure to perform, and (4) plaintiff's resulting damages. *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 (2009).

There is no material issue of fact with respect to the 'formation of a contract' requirement. Plaintiffs provide a copy of the Agreement between Adriana and ROL as evidence of a formed contract. Defendants contend that the Agreement was signed only by one party and therefore is not admissible in evidence. This argument is without merit. Under the New York law, writings creating a contract may be signed by only one party and, in fact, need not be signed by either party. *Weiner & Co. v Teitelbaum*, 107 AD2d 583, 584 (1st Dept 1985); *see also Consarc Corp. v Marine Midland Bank, N.A.*, 996 F2d 568, 572 (1993).

There is also no material issue of fact with respect to the 'plaintiff's performance' and 'damages' requirements of the breach of contract claim. Adriana has clearly performed her contractual obligations by not withdrawing her cash collateral in order to facilitate the debt restructuring. As a result of ROL's failure to remit the cash collateral, Adriana has suffered monetary damages equal to the full amount of the cash collateral and interest thereon, minus \$34,000.

The third requirement of the breach of contract claim – defendant's failure to perform – presents a more complicated question. Defendants' performance – the remittance of the cash

collateral – was conditioned on two separate events. First, the repayment was conditioned on ROL's ability to retain the cash collateral after liquidating the non-cash collateral. Second, the repayment was conditioned on being permissible under the subordination provisions of ROL's senior debt. The court finds that there are unresolved issues of fact with respect to both conditions.

The Agreement provides that ROL will not levy on the cash collateral as long as there is non-cash collateral available for liquidation. The cash collateral will be remitted to Adriana only if it is not used to repay debt.

Defendants argue that they paid \$3,374,592.81 to Rosenthal to buy out Scalamandre's debt. This amount was in excess of Scalamandre's non-cash collateral, the net "book value" of which was \$2,765,480. However, according to defendants, the liquidation value of the non-cash collateral totaled \$500,000, at best. Therefore, defendants claim that they were entitled to retain and to use the cash collateral.

The value of the non-cash collateral can only be calculated through a forensic examination, which has yet to occur. Consequently, there is an open question of material fact regarding whether defendants' were entitled to retain the cash collateral.

The Agreement provides that repayment of the cash collateral becomes subordinate to any senior debt not exceeding \$2,000,000, subject to Adriana's approval of the subordination provisions of the senior debt.

Defendants argue that Adriana's cash collateral became subordinate to a promissory note (Note) for \$500,000 made by Louis Renzo to Antoinette Renzo, which was subsequently amended to substitute ROL as the maker of the Note. Defendants claim that Louis Renzo spoke about the Note with Adriana the night before the Note was signed and that Adriana was aware

the Note would be issued, did not object to it, and thus agreed to ROL entering into the transaction. Moreover, defendants contend that the note was a bona fide secured loan to ROL. Louis Renzo immediately transferred \$500,000 to ROL's account and ROL paid monthly interest to Antoinette Renzo.

Plaintiffs assert that Adriana never approved the subordination provisions of the Note. Plaintiffs also claim that, regardless of Adriana's approval, the Note did not create a financial obligation for ROL as the borrower was Louis Renzo, not ROL.

Questions of fact exist regarding whether Adriana approved the subordination provisions of the Note and whether the Note was a bona fide secured loan to ROL.

In sum, plaintiffs have failed to establish defendants' failure to perform on the contract as a matter of law. Accordingly, the court denies plaintiffs' motion for summary judgment.

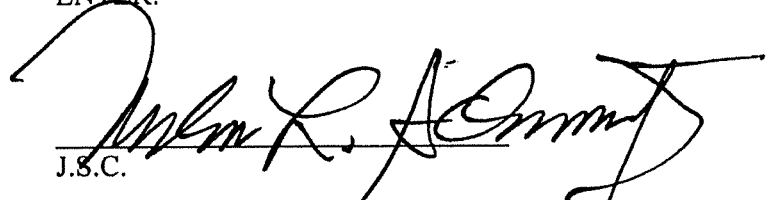
Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the court grants plaintiffs leave to renew the motion for summary judgment upon completion of discovery.

Dated: August 13, 2012

ENTER:


J.S.C.
MELVIN L. SCHWEITZER
J.S.C.