

INDEX
NO. 18817-03

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 12-15-04

Submission Date: 12-15-04

Motion Sequence No.: 001/MOT D

THE BHI GROUP, INC., formerly known
as Beaudette Holdings, Inc., and
FRANK ZANGARA,
Plaintiffs,

- against -

JOSEPH INDOVINO, BODYLINE
COLLISION, INC., and KIM TASSINARI,
Defendants.

COUNSEL FOR PLAINTIFF
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COUNSEL FOR DEFENDANT
(for Kim Tassinari)
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ORDER

The following papers were read on Defendant Tassinari's motion for summary judgment:

Notice of Motion dated November 1, 2004;
Affidavit of Kim Tassinari sworn to on November 1, 2004;
Affidavit of Frank Zangara sworn to on November 30, 2004;
Affidavit of Robert T. Tassinari sworn to on December, 2004.

Defendant, Kim Tassinari ("Kim"), moves for summary judgment dismissing the complaint as to her.

BACKGROUND

Plaintiffs, the BHI Group, Inc. ("BHI"), and Frank Zangara ("Zangara"), the president of BHI, allege in the complaint that, on January 28, 1998, on the instructions of an unnamed investment banker, they wired the sum of \$40,000.00 into a bank account maintained by Kim. These funds were to supposed to be invested in DiaSys Company.

On the same day, BHI wired \$232,500.00 into a bank account maintained by Defendant, Bodyline Collision, Inc. ("Bodyline"). These funds were also to be invested in DiaSys Company.

Defendant, Joseph Indovino ("Indovino"), is the principal and president of Bodyline. He is also Kim's cousin.

BHI and Zangara allege that the money was not invested in DiaSys Company but was used by the Defendants to pay a pre-existing debt they had with the unnamed investment banker. BHI and Zangara further allege that they have not been repaid by the Defendants although demand for repayment has been made.

Based upon these facts, BHI and Zangara allege three causes of action against Kim; to wit: conversion (seventh cause of action); unjust enrichment (eighth cause of action); and the failure to repay the loan (ninth cause of action).

In her answer, Kim denied the material elements of the transaction. She interposed the affirmative defense, that the money wired by BHI and Zangara into her

account constituted repayment of a loan made by her husband, Robert Tassinari ("Robert"), to Zangara.

Although she has not made a motion to amend her answer, Kim has moved for summary judgment on a set of facts seemingly unrelated to her answer. Kim admitted that the \$40,000.00 wired into her account by BHI was a loan but she claimed that she repaid this loan in full. In support of this assertion, Kim has produced and relied upon a check in the sum of \$40,000.00 dated March 16, 1999 drawn on an account of Robert Francis Holding Corp. payable to the order of The BHI Group, Inc. Robert is the sole shareholder and officer of Robert Francis Holding Corp. Robert has submitted an affidavit in support of this motion in which he avers that the check was issued as repayment of the loan made to Kim by BHI.

Likewise, Plaintiffs have not moved to amend their complaint. Their opposition to the motion bears little resemblance to the allegations made in the complaint other than the allegation that the money was a loan and that the loan has not been repaid.

Zangara claims that, at or about the time he wired this money to Kim and Bodyline, Independence Savings Bank ("Independence") was going public. Individuals or businesses which maintained bank accounts with Independence when it went public were given the opportunity to purchase stock at a price less than that being offered to outside investors. Zangara claims that other banks that went public had made similar offers to depositors. The depositors who had purchase at the "insider" price had made a profit when they sold their stock. Zangara maintains that he wired this money to Kim

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and Indovino so they could deposit it into their already existing accounts at Independence.

The amount of stock which a depositor was offered when Independence went public was based upon the amount the depositor had on deposit in the bank when the offer to purchase stock was made. The more money on deposit, the greater number of shares the depositor could purchase at the insider price.

Zangara asserts that Indovino and Kim were supposed to use these funds to purchase Independence stock. If the stock went up, they would sell it and share the profits.

Zangara claims that he wired the money to Kim and Bodyline because he had a long history of investment relations with Robert. Robert was Zangara's superior at the brokerage firm of Tasin & Company. He claims that the transaction involving Independence was one of many he had with Robert over a period of years.

Zangara concedes that he received the March 16, 1999 check in the sum of \$40,000.00 but claims that it was received in repayment of another obligation owed by Robert or Kim to BHI and/or Zangara and that the amount of the payment is coincidental. Zangara asserts that he had never been repaid the \$40,000.00 he wired to Kim in January 1998.

DISCUSSION

Summary judgment is a drastic remedy that will be granted only if the movant establishes that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361

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(1974). See, Mosheyev v. Polevsky, 283 A.D.2d 469 (2nd Dept. 2001).

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Once the movant has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in admissible form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); and Zuckerman v. City of New York, *supra*. See, Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 2001).

When deciding a motion for summary judgment, the Court must determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). Summary judgment must be denied if the Court has any doubt as to the existence of triable issues of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must also give that party all of the reasonable inferences that can be drawn from the evidence. Negri

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v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp.,
282 A.D.2d 657 (2nd Dept. 2001).

Payment would constitute a defense to this action. See, Schad v. Courtney, 247 App. Div. 812 (2nd Dept. 1936). However, the Court has at least four different sets of allegations relating to the transactions involved in this litigation; to wit: the one alleged in the complaint – – that the money was advance by Plaintiffs to the Defendants to invest in Diasys Company; the one alleged in the answer – – that this money was wired to Kim as repayment of loan made by Robert to Zangara; the one alleged in the motion for summary judgment – – that the money was a loan to Kim that was repaid in March 1999; and the one alleged in the opposition to the motion – – that the money was wired to Kim and Bodyline to permit them to purchase shares of Independence Savings Bank at an “insider” price when it went public.

The Court cannot determine issues of credibility when deciding a motion for summary judgment. Ferrante v. American Lung Assn., 90 N.Y.2d 623 (1997). Inconsistencies in the parties’ account of the material elements of the transaction give rise to issues of credibility. Alvarez v. New York City Housing Auth., 295 A.D.2d 225 (1st Dept. 2002). Once questions of credibility exist, summary judgment cannot be granted. See, Teger v. Ford Credit Titling Trust, 11 A.D.3d 676 (2nd Dept. 2004); and Apple v. State, 268 A.D.2d 398 (2nd Dept. 2000).

The different accounts of this transaction clearly give rise to questions of fact which can only be decided at trial.

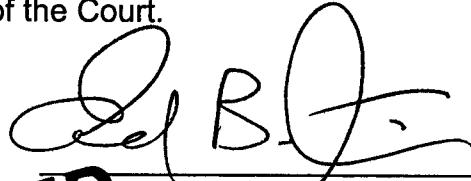
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Accordingly, it is,

ORDERED, that Defendant Kim Tassinari's motion for summary judgment is
denied.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 21, 2005



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
JAN 28 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE