

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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AHMAD MIRGHAHARI,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 008622-07

**VAHID PETER KHORSHAD and
SAYEH SASSOUNI KHORSHAD,**

Motion Seq. No: 1

Submission Date: 8/3/09

Defendants.
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Papers Read on this Motion:

- Notice of Motion, Affirmation in Support,**
- Affidavits in Support (2) and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Plaintiff's Memorandum of Law in Opposition.....X**
- Reply Affirmation in Support.....X**

This matter is before the court on the motion for summary judgment filed by Defendants Vahid Peter Khorshad and Sayeh Sassouni Khorshad on May 22, 2009 and submitted August 3, 2009. For the reasons set forth below, the Court 1) denies Defendants' motion; and 2) directs Plaintiff to file an Amended Verified Complaint within twenty (20) days of service of this Order with Notice of Entry.

BACKGROUND

A. Relief Sought

Defendants moves for an Order 1) pursuant to CPLR § 3212, granting summary judgment in favor of Defendants, against Plaintiff, and dismissing the verified complaint ("Complaint") on the ground that there is documentary evidence establishing that Defendants

have fully paid monies they owe to Plaintiff pursuant to a promissory note and mortgage; or 2) pursuant to CPLR § 3212(c), holding an immediate trial on the issue of damages, if the Court denies Defendants' motion for summary judgment but concludes that the only remaining issue is the sums that Defendants owe to Plaintiff.

Plaintiff opposes Defendants' motion.

B. The Parties' History

In October of 2002, Vahid Peter Khorshad ("Vahid"), his wife, Sayeh Sassouni Khorshad ("Sayeh"), and non-party Osaka Creations, Inc., executed a promissory note ("Note"), pursuant to which they jointly agreed to repay the Plaintiff Ahmad Mirghahari ("Ahmad"), the principal sum of \$122,000.00. This debt was secured by a contemporaneously executed mortgage ("Mortgage") which encumbered the Khorshad's Kings Point, New York residence ("Property").

Ahmad affirms that he and Vahid have known each other for approximately 28 years and have engaged in a variety of prior business dealings together. Those dealings include 1) in 1995, Ahmad lent Vahid and his brother \$60,000 for them to use in a business called Orkido & Co. Ltd.; and 2) in July 2002, Ahmad lent Vahid \$48,000 so that Vahid could purchase certain jewelry that he would resell. Ahmad affirms that Vahid did not fully repay him for these loans.

Ahmad also affirms that, in late 2002, Vahid approached him and asked to borrow additional sums of money. Ahmad avers that, as a result of his conversation with someone with legal training, he insisted that the new loan be secured by a note and mortgage on the Property, which Vahid advised Ahmad was titled solely in the name of Sayeh, Vahid's wife. Ahmad affirms that Vahid told him that Sayeh was willing to sign a mortgage, and Vahid would sign the other documents related to the proposed loan transaction.

On October 8, 2002, Vahid, Sayeh and Vahid on behalf of Osaka Creations, Inc. ("Promissors") signed the Note. The Note recites a principal indebtedness of \$122,000.00, payable in full to the Plaintiff on February 1, 2003, together with interest thereon at the lesser rate of either 20% per annum or the maximum rate allowable by law.

The Note was secured by the Mortgage, which only Sayeh signed. Ahmad affirms, however, that his then-attorney, whom he has since sued for legal malpractice, failed to record the mortgage. That malpractice action is pending in the Supreme Court of New York County,

and Ahmad provides a copy of an Order in that case (New York County Index Number 106679-07) in which the Court stayed the malpractice action until this Nassau County action is resolved.

An "acknowledgment of debt" attached to the Note particularizes the nature of the indebtedness by providing, *inter alia*, that the Defendants were acknowledging a pre-existing debt to the Plaintiff of \$81,200.00, owed from January 1, 1996. The Defendants promised to pay this sum pursuant to the terms of the Note. The acknowledgment allocates the \$122,000.00 principal loan amount as including not only the prior debt of \$81,200.00, but also \$37,659.00 to be taken by the borrowers at closing, and \$2,350.00, attributable to legal fees, disbursements and other closing costs.

Ahmad affirms that he subsequently approached Sayeh's father, Nejatollah Sassouni ("Sassouni"), whom he knew as a man of financial means, and asked him if he could assist in repaying Vahid's debts. Ahmad avers that he never mentioned the Mortgage and Note during his discussions with Sassouni.

Sassouni met with Ahmad twice within a period of a few months in late 2002 and early 2003, and agreed to assist his son-in-law Vahid by giving Ahmad two separate checks: one in the amount of \$25,000.00, dated December 3, 2002, and a second in the sum of \$100,000.00, dated February 14, 2003. Both checks bear a similar handwritten notation; the first contains the notation "on A/C of Vahid Khorshad" and the second contains the notation "For A/C of Vahid Khorshad."

Ahmad contends that, upon receipt of the checks, he credited the first \$25,000.00 Sassouni check towards Vahid's debt with respect to the Note. As to the \$100,000.00 Sassouni check, Ahmad affirms that he applied \$25,000.00 of that sum to another pre-existing, \$25,000.00 debt that Vahid owed to Ahmad's sister-in-law. Ahmad avers that this obligation arose in 1999, when Ahmad lent Vahid money in connection with a plan that Vahid had to sell certain jewelry for Ahmad's sister-in-law. Ahmad alleges that Vahid gave Ahmad an undated check in the sum of \$25,000, to demonstrate his good faith, and asked Ahmad to hold the check until Vahid sold the jewelry and collected the proceeds. Ahmad alleges that Vahid never returned the jewelry or repaid the money to Vahid. Although Ahmad has submitted an undated check signed by Vahid, which allegedly evidences this \$25,000.00 debt, Vahid denies that this jewelry transaction ever took place.

With respect to the remaining portions of the \$100,000.00 Sassouni check, Ahmad affirms that he credited \$52,000 of that sum towards the Note, and applied \$23,000 of the remainder to other debts that Vahid owed him. Ahmad's deposition testimony is somewhat unclear on this point. Certain of that testimony suggests that Ahmad did not apply any of the \$100,000.00 check towards the Note debt, while other testimony suggests that he applied \$22,000.00 to the Note debt.

Upon maturity of the Note and thereafter, Ahmad's counsel sent letters to Vahid and Sayeh in 2004 and 2005 demanding payment of the Note balance, which Ahmad alleges was \$53,000.00 in 2004. These letters threatened foreclosure proceedings in the event that Defendants did not make full payment. Ahmad affirms that, although copies of the letters were also sent to Sassouni, neither Sassouni nor the Defendants ever claimed that the Sassouni checks constituted full payment of the Note.

Significantly, and notwithstanding Defendants' alleged failure to pay the then-overdue Note, Ahmad affirms that he lent Vahid an additional \$25,000.00 in October of 2004. Ahmad affirms that he lent this money because the Defendants advised him that they could use the funds to refinance the Property and thereby obtain the funds necessary to repay the original Note.

On October 20, 2004, Sayeh executed a written document evidencing this October 2004 debt. That document, which Sayeh signed and swore to, states in pertinent part: "I, Sayeh Sassouni, borrowing \$25,000 from Ahmad Mirghahari...promise to pay back by November 20, 2004 \$25,000 plus \$50,000 borrowed from before." (Pltff's Exh. 9) Ahmad affirms that the \$50,000.00 amount that Sayeh mentions in the October 20, 2004 document is a reference to the balance owed on the Note, but also avers that the balance was \$53,000, not \$50,000, at the time that Sayeh executed this document.

Ahmad affirms that the Defendants did, in fact, later repay \$25,000 to Ahmad in early 2005, but submits that this money constituted repayment for \$25,000 that Ahmad lent to Sayeh on October 20, 2004. Ahmad avers that Defendants did not repay him the \$53,000 balance on the Note, and that, as to that sum, "Vahid only counselled patience." (Mirghahari Aff., ¶ 29).

Ahmad affirms, further, that in November 2005, Vahid gave him a signed check for \$62,000.00, dated November 31, 2005, and drawn on Sayeh's account, allegedly as further evidence of his good faith intent to pay the remaining sums owed on the Note. Ahmad also

affirms, however, that Vahid asked Ahmad to hold the check, because Vahid knew that it would not clear. Ahmad provides a copy of this check.

In July 2006, Ahmad made another cash loan to Vahid in the sum of \$30,000.00, for which, Ahmad affirms, no written documentation was ever generated. Ahmad affirms that he did not believe it necessary to document this loan in light of his long friendship with Vahid,.

In August 2006, Ahmad and his wife met with the Defendants at the Defendants' residence, at which time Ahmad again demanded payment of the sums owed. Ahmad alleges that Defendants conceded that they owed Ahmad \$123,000.00 with interest, an amount which was actually more than Ahmad believed Defendants owed him. Defendants gave Ahmad three checks in the sums of \$50,000, \$53,000 and \$20,000, which Ahmad accepted, but these checks were later returned for insufficient funds. Ahmad provides copies of these checks, two of which contain a stamp reading "Payment Stopped - Do Not Redeposit."

Ahmad then commenced this action on May 17, 2007. The verified complaint ("Complaint") contains two causes of action against both Defendants. In the first, Ahmad alleges that Defendants failed to make required payments pursuant to the Note, and seeks damages of \$122,000 plus interest. In the second, Ahmad seeks expenses, including counsel fees, that he has incurred in enforcing his rights pursuant to the Note, pursuant to the applicable provision in the Note.

Although the Complaint seeks damages of the entire \$122,000.00 face amount of the Note, Ahmad now affirms that Defendants owe him a principal balance on the Note of \$80,000.00, plus interest at 20% per annum. In Paragraph 33, Ahmad provides the following explanation of how he arrived at that figure:

After giving the additional \$30,000 to Vahid, and after crediting him with some small payments he made to me, I was owed a balance of \$80,000. In giving the \$30,000.00 to Vahid, I treated it as giving him a portion of the monies I had received from his father-in-law, to which I had credited \$52,000 as against the Mortgage Promissory Note, as set forth in Paragraph 18 above [discussing Ahmad's apportionment of \$100,000 that Sassouni paid him on February 14, 2003], and charged these funds to that Mortgage Note, leaving a balance due and owing to me of \$80,000.00, not including interest.

During Ahmad's deposition on November 9, 2007, he apparently conceded that Defendants had made certain payments on the Note. Following that testimony, and in response

to comments by Defendants' counsel regarding this apparent concession, counsel for Plaintiff stated on the record that, "Based on information and documents [Plaintiff's counsel] obtained after service of the complaint and in the course of discovery, we will move to amend the complaint to the extent necessary to reflect the amount of monies that are owed." (Ahmad Dep. at 61)

In their Verified Answer to the Complaint dated June 27, 2007, Defendants denied the material allegations of the Complaint and asserted three affirmative defenses: 1) the Note had been paid in full; 2) Defendants received no consideration from Plaintiff for the three checks in the sums of \$50,000, \$53,000 and \$20,000; and 3) the court does not have jurisdiction over Defendants due to improper service of process. Defendants also asserted a counterclaim against Plaintiff alleging that the Note was paid in full by virtue of the Sassouni checks and that the Plaintiff's lawsuit is fraudulent and without merit. Defendant seek damages in the sum of \$500,000, as well as punitive damages..

C. The Parties' Positions

Defendants move for summary judgment, arguing, *inter alia*, that 1) the checks from Sassouni in the sums of \$25,000 and \$100,000 constitute documentary evidence establishing that the Note has been paid in full; 2) there is no evidence that, at the time that Ahmad deposited the Sassouni checks, Defendants owed Plaintiff money for any obligation other than the Note; 3) there is no provision in the Note permitting payments to be applied to future loans; 4) in light of the absence of such a provision, neither Sayeh nor Osaka Creations, Inc., co-signors on the Note, may be held liable for future loans that Ahmad extended to Vahid; and 5) in light of Ahmad's concession that Defendants have repaid a portion of the sums due on the Note, and in light of the other documentary evidence, Plaintiff must file a separate lawsuit for sums he claims Defendants owe to him, unrelated to the Note.

Plaintiff opposes Defendant's motion, submitting that Defendants owe a balance of \$80,000 on the Note, plus interest, and that there are issues of fact precluding summary judgment. Specifically, Plaintiff submits that there is documentary evidence, including the document that Sayeh signed on October 20, 2004 reflecting her promise to pay certain sums, that belies Defendants' contention that they paid the Note in full by February 14, 2003.

RULING OF THE COURT

A. Standards of Summary Judgment

It is well-established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2d Dept. 1994); *see also Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *State Bank v. McAuliffe*, 97 A.D.2d 607 (3d Dept. 1983). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman*, 49 N.Y.2d at 562. The Court should not grant a motion for summary judgment when the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. *Scott v. Long Island Power Authority*, 294 A.D.2d 348 (2d Dept. 2002).

B. There are Factual Issues Precluding Summary Judgment

The Defendants have not produced documentary evidence sufficient to eliminate any material issue of fact as a matter of law. *Alvarez*, 68 N.Y.2d at 324. Indeed, the record suggests that both prior to, and after, the Note's maturity, Plaintiff and Defendant Vahid continued to entangle themselves in various loan transactions – some allegedly documented, others memorialized in cryptic and inconclusive fashion, and still others made absent any documentation at all. More particularly, the record does not definitively establish that the Sassouni checks were exclusively intended to pay down the Note, or that the Plaintiff was obligated to apply the check proceeds to any specific indebtedness of the defendants.

Nor have the Defendants produced any written or binding document reflecting Ahmad and Sassouni's alleged agreement that the funds advanced would be applied in any specific fashion. Indeed, it is unclear precisely what arrangement, if any, Ahmad and Sassouni reached with respect to the allocation of the funds. Although the Sassouni checks contain an inconclusive handwritten notation "On/In A/C of Vahid Khorshad," these notations do not

establish that the advances were intended exclusively to pay off the Note, or that Ahmad could not allocate the funds in a particular fashion.

The affidavit that Sassouni submitted in support of Defendants' motion does not resolve this factual dispute. In that affidavit, Sassouni provides specifics regarding the two checks for \$25,000 and \$100,000 that he gave to Ahmad and alleges that these checks "paid off an obligation owed by [Defendants] to [Ahmad]." Sassouni does not, however, affirm that these checks were to be allocated in any specific fashion, or discuss the substance of his conversations with Plaintiff regarding the checks. Plaintiff's apparent willingness to make additional advances to Defendants even after their alleged default on the Note, while seemingly illogical, does not establish as a matter of law that Defendants had made all required payments pursuant to the Note.

In addition, although Plaintiff's conduct in this regard is problematic, Defendants have also engaged in conduct that raises issues regarding their credibility and claims of full payment. After Plaintiff's attorney wrote letters to Defendants and Sassouni demanding payment, neither the Defendants nor Sassouni ever responded by stating that the Note had already been fully paid. Moreover, in 2004, after her father wrote the checks in question, Sayeh executed a document that acknowledged both an unrelated, \$25,000.00 advance, as well as an additional \$50,000.00 borrowed from Ahmad.

Viewing the evidence in the light most favorable to plaintiff, as is appropriate in the context of a motion for summary judgment, *Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 N.Y.3d 96, 106 (2006), the Court concludes that there are issues of fact with respect to the disputed indebtedness that cannot be summarily resolved on the record presented.

C. The Court Will Permit Plaintiff to File an Amended Complaint

Finally, to the extent that the Plaintiff now seeks repayment of a principal amount that is less than the sum identified in the Complaint, the Court notes that the Plaintiff's counsel effectively consented to serve an amended complaint that reflects that lesser amount.

Pursuant to CPLR § 3025(c), the Court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances. The decision whether to permit amendment of the pleadings is within the Court's discretion, and the Court should freely grant leave to amend pleadings,

absent prejudice or surprise resulting directly from the delay. *Sanford v. Sanford*, 176 A.D.2d 932, 933 (2d Dept. 1991).

The Court concludes, under all the circumstances, that it should permit Plaintiff to file an Amended Verified Complaint, in light of Plaintiff's concession that Defendants have made certain payments pursuant to the Note and that the sum Plaintiff seeks in the Complaint is inaccurate. In light of the foregoing, the Court directs Plaintiff, within 20 days of service of this Order with Notice of Entry, to serve and file an Amended Verified Complaint that accurately reflects the specific amount now alleged to be due and owing on the Note.

The Court has considered the Defendants' remaining contentions and concludes that they do not warrant the granting of summary relief upon the papers submitted.

Accordingly, it is,

ORDERED, that the Defendants' motion for, *inter alia*, summary judgment dismissing the Complaint is denied; and it is further,

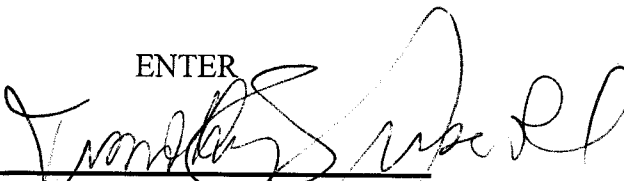
ORDERED, that the Plaintiff shall serve and file an Amended Verified Complaint in accordance herewith, within 20 days of service of the Order of this Court with Notice of Entry.

ORDERED that all counsel shall appear for a Preliminary Conference on November 2, 2009.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
September 18, 2009

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE