

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

-----X
JACOB BEN-HAIM,

Plaintiff(s),

PART 9

INDEX NO. 7119/09

-against-

MOTION DATE: 10/25/10
SEQUENCE NO. 001

ELLEN DOUGLAS, ALLAN EISINGER, and
FISCAL WIZARD, INC.,

Defendant(s).
-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Reply Affidavit.....	<u>3</u>

Motion by defendant Allan Eisinger for an order granting summary judgement dismissing the action against him pursuant to CPLR §3211(a)(I) and (a)(7) is denied.

In this action, plaintiff seeks payment on a written promissary note dated 9/8/08 in the amount of \$65,000.00.

The documentary evidence submitted in support of this application is the promissary note itself, and defendant Allan Eisinger claims that there was no consideration given and the rate of interest is usurious. Defendant Allan Eisinger's affidavit states that "I never met plaintiff". Allan Eisinger acknowledges the promissary note was prepared by defendant Ellen Douglas but there is no allegation that signing the promissory was fraudulent or under duress.

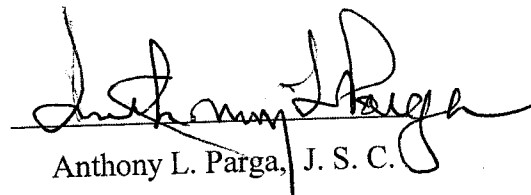
In opposition, plaintiff explains the personal relationship amongst the parties and his giving funds to defendant Ellen Douglas as a financial planner. Plaintiff submits documentation of a promissary note signed by Allan Eisinger on 6/24/08 for \$53,000.00 and paid back on 8/11/08. The promissory note at issue here, dated 9/8/08, is in a similar format and remains unpaid.

The Court has examined the Complaint in a manner consistent with uncontested law. To determine whether a pleading is sufficient to withstand a challenge under CPLR 3211[a][7], the court must consider whether the pleading, taken as a whole, fails to state a cause of action. Looseness and verbosity, must be overlooked on such motion if any cause of action can be spelled out from the four corners of the pleading (*Foley v. D'Agostino*, 21 AD2d 60 (1st Dept., 1964)).

"In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts alleged in the complaint and afford the plaintiffs the benefit of every possible favorable inference in determining whether the complaint states any legally cognizable cause of action" (*Schenkman v. NY College of Health Prof.*, 29 AD3d 671 (2nd Dept., 2006)). The motion is denied as to dismissal for failure to state a cause- of action.

To prevail on a motion for dismissal founded on documentary evidence defendant must show that the promissary notes of 6/24/08 and 9/8/08 resolve all factual issues as a matter of law and definitely disposes of plaintiff's claim. Here, there is no documentation that the circumstances leading to signing of the promissary note on 9/8/08 has occurred in an ambiguous manner. There are factual allegations by plaintiff that still remain unresolved thus defeating dismissal of the Complaint pursuant to CPLR 3211(a)(1). (*Rubinstein v. Salomon*, 46 AD3d 536 (2nd Dept., 2007)).

Dated: November 15, 2010.


Anthony L. Parga, J. S. C.

cc: Natis & Gordon, P.C.
277 Willis Avenue
Roslyn Heights, NY 11577

Gervase & Vallone, P.C.
377 Oak Street, Suite 104
Garden City, NY 11530

Ellen Douglas
43 Woodland Road
Roslyn, NY 11575

Fiscal Wizard, Inc.
43 Woodland Road
Roslyn, NY 11575

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**