SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 8

HAIR'EM CORPORATION and
KAREN N. WOODS,

Plaintiffs,

-against-

LINDA ANNE GENZEL a/k/a
LINDA NUGENT GENZEL,

Defendant.

INDEX NO.: 601055/2009
MOTION DATE: 12/04/2009
MOTION SEQUENCE: 001 and 002

RONALD GENZEL and LINDA ANNE
GENZEL a/k/a LINDA NUGENT GENZEL,

Plaintiffs,

-against-

CHRISTINA M. WILSON, ESQ., BAKER &
McKENZIE LLP, HAIR'EM CORPORATION
and KAREN N. WOODS,

Defendants.

The following documents were read on this motion:

Notice of Motion, Affirmation, Affidavits & Exhibits Annexed 1
Memorandum of Law in Support of Motion for Dismissal or for Summary Judgment 2
Notice of Cross Motion, Affidavits, Affirmation & Exhibits Annexed 3
Affirmation in Opposition to Cross Motion of Kenneth L. Gartner 4
Reply Affirmation in Further Support of Kenneth L. Gartner & Exhibits Annexed 5

PRELIMINARY STATEMENT

Plaintiff moves for summary judgment on two promissory notes. The first, and the amount of $52,084.24 is dated April 18, 2009, and the second, for $11,900 is dated May 4, 2009. An earlier document dated January 19, 2009 acknowledged Linda Genzel's indebtedness to Karen Woods in the amount of approximately $52,000.

Linda Genzel and Ronald Genzel move for an order dismissing the plaintiff's complaint pursuant to CPLR § 3211 (a) (7), (b) and (c)on the ground that the plaintiffs have admitted in their reply to counter claims that there is no factual basis to the complaint and admit that no money ever was advanced to the defendant on or after April 18, 2009. They also seek an order to quash a subpoena duces tecum to take the deposition of a former matrimonial attorney of defendant Linda, and for a protective order limiting the scope of the defendant Ron Genzel's testimony.

BACKGROUND

The underlying action is for $63,984.24 and is based on the two promissory notes. In the first note Hair'Em advanced to, or on behalf of, the defendant Linda $52,084.24. The second note was for $11,900, payable to Karen N. Woods. Each carried interest at the rate of 8% and as of the date of the complaint, June 17, 2009 $64,441.47 was claimed to be due and owing.

The advances were for legal fees incurred by Linda in the course of her matrimonial dispute. At some point the parties reconciled, the funds have not been repaid, and the Genzels remain married. In essence, the defendants claim that Linda was under the influence of alcohol, medication, or combination of both, on the occasions when she signed the notes and that in fact, that no money was advanced.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to

determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

The production of the two notes in question is prima facie evidence of Plaintiff's entitlement to payment. (*Ping Ji v. Malik,* 68 A.D.3d 889 [2d Dept. 2009]). Defendants contend however, that the physical condition of Linda on each date that notes were signed, precluded her from appreciating the effect of her signing the note. This is a factual issue which must be resolved . (*United States Trust Company of New York v. Olsen,* 194 A.D.2d 481, [1st Dept. 1993]). The matter is set down for hearing on this particular issue for March 9, 2010, at 9:30 A.M.

Defendants cross-motion is in all respects denied. The complaint fairly and adequately

states a cause of action against the defendants and the motion pursuant to § 3211 (a) (7) is denied. The references to § 3211 (b) (motion to dismiss a defense) and (c) (treating the motion as one for summary judgment) are perplexing. Defendants have submitted a 40-page affidavit from Lind Genzel, and a 30-page affidavit from Ron Genzel, the vast majority of which is utterly irrelevant to the issues in this proceeding. They do, however, make reference to the two dates upon which the notes appear to have been executed. Defendant Linda states that she was extremely intoxicated and affected by five different medications on the first day and relates a similar situation on the second. While she seems to have no recollection of having signed the April 18 note, she remembers signing the May 4 note at a Mail Box location while being driven to a pharmacy by the plaintiff.

In the absence of any reference to a particular defense to counterclaims, the Court will not consider the claim for dismissal of a defense pursuant to § 3211 (b). Given the factual issues as to the validity of the signature and the existence of consideration, the matter certainly will not qualify for treatment as a motion for summary judgment. The Court acknowledges that there is case law to the effect that a bare denial of a signature is inadequate to create a factual issue, but believes that the allegations of intoxication, which have previously warranted a factual inquiry, lead to the conclusion that such inquiry is appropriate in this case. *Id.*

The court is at a loss to understand the allegation that the plaintiffs have acknowledged lack of consideration in response to counterclaims. There are six counterclaims in the answer: frivolous filing of a lis pendens; abuse of process; wrongful detention of chattels; negligent infliction of emotional harm; intentional infliction of emotional distress; and loss of consortium. It is inconceivable that a response to any of these allegations would include an acknowledgment that the funds for which the notes were signed were never advanced.

In his Reply Affidavit, Ron Genzel claims that the admissions by Plaintiffs that they did not advance funds on April 15 or May 4, 2009 means that they did not advance funds, and there is therefore a lack of consideration. This is a fatuous argument. Plaintiffs claim is that the advances predated the notes, and Defendants do not deny this.

The application to quash the subpoena duces tecum served on Mr. Schlissel, the attorney to whom funds were alleged to have been advanced, is denied. Defendants have acknowledged

that he was Linda's attorney and that money was paid to him by Plaintiff. Plaintiffs are certainly entitled to obtain and utilize information relevant to the payment of fees on behalf of Linda. Defendants have shown no authority to justify the grant of an order of protection limiting the testimony of Ronald Genzel. He has fully inserted himself into the action, with statements relating to both the complaint and counterclaims.

This is a commercial action involving payments allegedly due on promissory notes. There is no confidential relationship between the parties for which secrecy as to trade practices is required. If confidentiality is claimed with respect to the drug and alcohol addictions of his wife, her suicide attempts, and multiple psychiatric hospitalizations, it is hard to believe that there is any more to know than already revealed in her affidavit. To the extent that specific questions are considered to be wholly without merit, the trial court is the appropriate arbiter of this issue. (*Nickerson v. Vold Delta Resources, Inc.,* 199 A.D.2d 212, 213 [1st Dept. 1993]).

With respect to Defendants' counterclaims, the first two are claims against Plaintiffs' former attorneys concerning the filing of a lis pendens. Plaintiff has annexed a general release issued by defendants in favor of Christina M. Wilson, Esq. and Baker & McKenzie, LLP. These counterclaims are dismissed. The third counterclaim is for replevin. The itemization of the personalty claimed to be in the possession of plaintiff is certainly unusual, including medical records, a green card, bank statements, etc., but there is no legal basis upon which to dismiss the counterclaim, although a summary judgment motion may be appropriate at the conclusion of discovery. The motion to dismiss the third counterclaim is denied.

The fourth and fifth counterclaims involve negligent and intentional infliction of emotional distress. Defendants on the counter claims assert that the nature of the claims fail to meet the judicially-imposed threshold for conduct sufficient to sustain such allegations. In the fourth counterclaim the allegations consist of alleged anti-Semetic language by plaintiff with respect to Ron Genzel, claiming that her husband was trying to poison Linda, physically dragging Linda's six year old daughter across the floor as a form of discipline, forcing her to sign documents when she was not capable of understanding what she was doing, and forcing her to hire a specific matrimonial attorney.

As the Court of Appeals has said "to survive a motion to dismiss, the claims must satisfy

the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v. Maloney,* 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 373 N.E.2d 1212, that: 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress'." (*Murphy v. American Home Products Corporation,* 58 N.Y.2d 293 [1983]). As stated in *Murphy,* Comment d to Restatement of Torts § 246 stated that "(l)iability has been found only where the conduct has been so ourtrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society".

Defendant-Plaintiff on the Counterclaims allegations of misconduct by plaintiffs, even if true, are far below the level of outrageousness necessary to constitute a cause of action under these standards. Allegations of conduct far surpassing those claimed have resulted in dismissals. See, for example, *Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azioni,* 585 F.Supp.2d 520, 554 (S.D.N.Y. 2008). The fourth and fifth counterclaims are dismissed.

To the extent relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: February 8, 2010

J.S.C.