

SCANNED ON 5/19/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice _____

Index Number : 604260/2007

INDEX NO. 604260-07

REINLI, TANYA

MOTION DATE _____

VS.

DAVY, DARREN

MOTION SEQ. NO. #001

SEQUENCE NUMBER : # 001

MOTION CAL. NO. _____

SUMMARY JUDGMENT

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and add motion
be decided per

APK

FILED

MAY 19 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/11/09

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

J.S.C.
EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
TANYA REINLI,

Plaintiff,

Index No. 604260/07

-against-

DARREN DAVY,

Defendant.

-----X

Emily Jane Goodman, J.S.C.:

In this action for breach of contract and attorney's fees, plaintiff Tanya Reinli (Reinli) moves, pursuant to CPLR 3212, for an order granting summary judgment on the Complaint and dismissing defendant's counterclaims. Defendant Darren Davy (Davy) cross-moves, pursuant to CPLR 8501(a), for an order requiring plaintiff to post security for costs. For the reasons stated below, the motion is granted on the issue of liability and the cross-motion is denied.

1. Background

According to the Complaint, Reinli is currently a resident of Australia, and Davy is a New York resident. Reinli alleges that she and Davy were involved in a relationship from October 1999 until November 2004, during which time they were engaged to be married. She states that they lived together and maintained their primary

residence in Bermuda.

The Complaint states that in 2001, Davy purchased two contiguous parcels of oceanfront real property located in Australia as a gift for Reinli to provide her with financial security. Plaintiff states that she took title and became the registered owner of the properties on May 23, 2001.

In November 2004, Davy allegedly left Bermuda for New York on a business trip. However, Reinli states that he never returned to Bermuda from the trip and she never saw him again.

Reinli states that she traveled to New York to try to locate Davy but was told by one of his friends that he had married another woman in New York and did not wish to see Reinli again. Reinli then moved to Australia in January of 2005.

Davy disputes many of Reinli's assertions about the nature of their relationship. First, he states that the parties were never engaged to be married. He also states he did not purchase the Australian properties as a gift for Reinli. He states that he purchased the properties as an investment, but did so in her name because she was a resident of Australia, which is a requirement for owning land there.

Davy states that he arranged for a loan to plaintiff of 1.4 million dollars from Lehman Brothers, which he guaranteed. The

parties then executed a mortgage on the properties with Reinli as mortgagor and Davy as the mortgagee. The parties also executed a Deed of Indemnity in Davy's favor relating to the parcels of land, on May 18, 2001.

According to Reinli, all of the arrangements arising in connection with the termination of the parties' relationship were handled through Davy's business partner, John Tarrant. With the assistance of counsel, the parties eventually executed a Deed of Agreement (Agreement) in April of 2005.

The Agreement noted that Reinli was the "registered proprietor" of the land and that Davy provided the funding for its purchase. It further set forth that Davy held a mortgage on the land for \$1.4 million.

The Agreement provided that Reinli would place the Australian properties up for sale and sell them to a third party. The proceeds of the sale would be used to repay the mortgage and any outstanding fees. Any surplus would be retained by Davy.

Pursuant to the Agreement, Davy agreed to pay Reinli:

1. \$10,000 per calendar month for a period of five years...;
2. \$1 million after the completion of the sale of the Land and upon completion by Reinli of a contract to purchase a residential property in Sydney in her own name, with Reinli being responsible for the payment of any balance of

the purchase price over and above that amount;

3. \$30,000 to be used by Reinli to pay the fees of a buyer's agent engaged to assist Reinli in purchasing a suitable residential property...

Section 8.1(1) of the Agreement set forth that Reinli and Davy each released the other:

from all sums of money, accounts, claims, actions, proceedings, demands, and expenses which the other party at any time had or has against the other for or by any reason or in any respect of any act, cause, matter or thing including any liability under the Mortgage;

Reinli asserts that she fully performed her obligations under the Agreement, including selling the Australian properties, which occurred in May 2005. The Complaint states that Davy commenced paying Reinli \$10,000 per month in April 2005 and remitted the other sums due to her under the Agreement. However, he allegedly ceased remitting monthly payments in December of 2006, leaving a balance owed to Reinli of \$400,000.

Reinli commenced this action in December of 2007, asserting claims for breach of contract and attorney's fees. Reinli now moves for summary judgment on the breach of contract claim in the amount of \$400,000 plus interest. She also seeks summary judgment on her claim for attorney's fees and a hearing to determine the amount of such fees.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v NYU Medical Center*, 64 NY2d 851 (1985); *Grob v Kings Realty Associates, LLC*, 4 AD3d 394 (2d Dept 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

2. Breach of Contract

Reinli's first cause of action is for breach of the Deed of Agreement. She alleges that Davy breached the Deed of Agreement by ceasing to remit the required monthly payments in December of 2006.

As a threshold matter, Reinli asserts that the Deed of Agreement is governed by Australian law. However, Reinli has not adequately demonstrated that such law applies here.

CPLR 3016(e) provides that "[w]here a cause of action or defense is based upon the law of a foreign country or its political subdivision, the substance of the foreign law relied upon shall be stated." Here, the Complaint does not plead that Australian law applies to this action and fails to set forth the substance of such law.

Pursuant to CPLR § 4511(b), a party may request that the court take judicial notice of foreign law. In such a case, the party must provide the court with "sufficient information to enable it to comply with the request," and give each adverse party notice of his or her intention make such a request. CPLR § 4511(b). CPLR § 4511(d) provides that "[i]n considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research."

Here, Reinli has failed to provide the court with sufficient information to establish the substance of Australian law and enable the court to apply such law here. Reinli's Memorandum of Law cites numerous Australian cases, but the moving papers do not provide copies of any cases.¹ The motion is also not supported by an affidavit from an expert in Australian law. Therefore, given Reinli's failure to prove the substance of Australian law and its applicability here, the court finds that New York law should be applied. See, *Bank of New York v Nickel*, 14 AD3d 140 [1st Dept 2004] (where party fails to prove applicability of foreign law it

¹Reinli's reply papers attach a complete copy of one decision and a partial copy of a second decision.

consents to application of New York law).

Under New York law, the elements of a claim for breach of contract are: formation of a contract between plaintiff and defendant; performance by plaintiff; defendant's failure to perform; and damages. *Clearmont Property, LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009].

It is undisputed that the Reinli and Davy executed the Deed of Agreement in April of 2005. Davy now contends, however, that this document is not a contract, but rather represents a gift from him to plaintiff. He states that it cannot be considered a contract because it lacks consideration from Reinli to himself.

Davy's argument is unpersuasive. Under New York law, consideration "consists of either a benefit to the promisor or a detriment to the promisee." *Weiner v McGraw-Hill, Inc*, 57 NY2d 458, 464 [1982]. "It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." *Anesthesia Associates of Mount Kisco, LLP v Northern Westchester Hosp Center*, 59 AD3d 473 [2d Dept 2009], quoting *Anand v Wilson*, 32 AD3d 808 [2d Dept 2006].

Here, the Deed of Agreement is clearly supported by consideration on Reinli's part in several ways. Among other things, she agreed to sell the properties and remit the proceeds to Davy,

which she was not otherwise required to do. She also executed a general release in his favor. Therefore, the court finds that Davy has not demonstrated that any material questions of fact exist as to whether the Deed of Agreement is a valid contract.

The court also finds that Reinli has adequately demonstrated that she fulfilled her obligations under the Deed of Agreement by, among other things, selling the properties and remitting the proceeds to Davy.² Further, it is undisputed that Davy stopped making the required monthly \$10,000 payments in December of 2006.

In light of the foregoing, the court finds that Reinli has made a prima facie showing that the parties executed a contract, that Reinli performed under the contract and that Davy breached that contract. The court also finds that Davy has not demonstrated that any material questions of fact exist as to any of these factors, and that the nature of their personal relationship is irrelevant. Therefore, Reinli is entitled to summary judgment on the issue of liability with respect to her claim for breach of

²Davy asserts in his fifth counterclaim that Reinli failed to remit the entire net proceeds of the property, but that assertion is not supported by any proof on this motion. Davy's affidavit cryptically states that Reinli was "given \$1,100,000, rather than \$1,000,000 after the two parcels were sold." It is not clear who gave Reinli that amount, nor how the amount was given to her, but in any event, the alleged overpayment of \$100,000 does not appear to have anything to do with Reinli's obligation to remit the net proceeds of the property to Davy.

contract.

The court finds, however, that Reinli has not demonstrated that she is entitled to summary judgment on the full amount sought on this motion, ie \$400,000. That amount includes damages for certain monthly payments which are not yet due and which defendant is not yet required to remit. Therefore, the issue of damages is set down for an inquest regarding the amount that is past due.

C. Attorney's Fees

Reinli's second cause of action seeks attorney's fees based on section 8.1(1) of the Deed of Agreement which provides that each party agreed to indemnify the other "against any loss, damage, cost or expense suffered or incurred as a result of any claims, actions, suits or proceedings brought by the party, or a third party, in connection with, or relating to or arising from" the Agreement. Based on this provision, and the granting of summary judgment on the breach of contract claim, the court finds that Reinli is entitled to recover reasonable attorney's fees and a determination of the amount of such fees shall be determined at the inquest.

D. Defendant's Counterclaims

Reinli also seeks summary judgment dismissing Davy's counterclaims. That portion of the motion is granted.

Davy's first and second counterclaims seek the return of a ring which he gave to Reinli at some point during their relationship. However, as set forth above, the Deed of Agreement contained a general release of all claims that Davy had against Reinli, which would include a claim for return of the ring in question. Therefore, these claims are dismissed.

Davy's third and fourth counterclaims seek the return of certain monies contained in bank accounts as well as certain personal property from the parties' Bermuda residence. However, as set forth above, those claims are barred by the release contained in the Deed of Agreement.

Davy's fifth counterclaim asserts that Reinli failed to remit the entire net proceeds of the sale of the Australian properties to him. However, Reinli avers that she did remit the entire proceeds of the sale to Davy and, as noted above, his assertion to the contrary is not supported by any proof on this motion. Therefore, this claim is dismissed.

Davy's sixth counterclaim seeks attorney's fees. However, based on the foregoing decision dismissing his counterclaims, he is not entitled to recover such fees.

E. Defendant's Cross-motion

Davy has cross-moved, pursuant to CPLR 8501(a), for an order requiring Reinli to post security for costs. That motion is denied as moot in light of the foregoing decision granting summary judgment to plaintiff. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted as to the issue of liability; and it is further

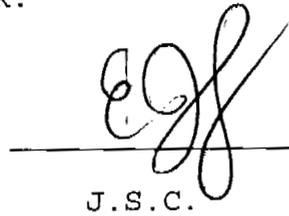
ORDERED that an assessment of damages and attorney's fees against defendant is directed; and it is further

ORDERED that defendant's cross-motion to require plaintiff to post security for costs is denied.

This Constitutes the Decision and Order of the Court.

DATED: May 11, 2009

ENTER:



A handwritten signature in black ink, appearing to read 'EJG', is written over a horizontal line.

J.S.C.

EMILY JANE GOODMAN

FILED

MAY 19 2009

NEW YORK
COUNTY CLERK'S OFFICE