

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/22/18

DEPT. 32

HONORABLE DANIEL S. MURPHY

JUDGE S. LUQUENO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

NONE

Reporter

10:30 am

BC554926

Plaintiff

Counsel

NO APPEARANCES

MAZAKODA INC

VS

Defendant

J&J OIL INC ET AL

Counsel

NATURE OF PROCEEDINGS:

COURT ORDER RE TENTATIVE STATEMENT OF DECISION

After taking the matter under submission, the Court issues the following Tentative Statement of Decision, which is signed and filed this date and incorporated herein as follows:

I. PROCEDURAL HISTORY

From February 15, 2017 through February 16, 2017, this matter came before the court for trial. Plaintiff Mazakoda, Inc. (hereinafter "Mazakoda") was present and represented by Scot Gizer, Diane Luczon and Zachary Gidding. Defendants J&J Oil, Inc. (hereinafter "J&J"), Sharon Melamed, Jenous Tootian, Edmond Melamed, and Rozita Safeipour were present and represented by Duke Peters.

II. BACKGROUND

This is an action for breach of a loan agreement. Mazakoda contends that it made a \$500,000 loan to Defendants J&J Oil, Inc. ("J&J"), Sharon Melamed ("Sharon"), Jenous Tootian, Edmond Melamed ("Edward"), and Rozita Safeipour, and Defendants allegedly defaulted on this loan.

In December, 2007, Sharon had a telephone conversation with attorney Klary Pucci. Sharon had

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retained attorney Pucci previously, and attorney Pucci was going to prepare loan documents for Mazakoda and defendants. In an email dated, December 11, 2007, Sharon provided attorney Pucci with the information needed to finalize the loan documents, and in the email Sharon stated in pertinent part as follows:

Hi Klary,

It was nice to hear your voice again. I really missed you. Please find my answers in below. I have to close the escrow next week and need to get the fund latest by Monday. What do you think? I know it's a rush like always and I am sorry for the rush.
(Exhibit 30.)

On December 17, 2007, Defendants went to attorney Pucci's office. Attorney Pucci was representing Mazakoda and Defendants in this loan transaction, and attorney Pucci received a conflict waiver from Mazakoda and Defendants. At attorney Pucci's office, Pucci witnessed Defendants and Edwin Benyamini for Mazakoda sign the loan agreement (Exhibit 1) and the promissory note (Exhibit 4).

Attorney Pucci gave all parties copies of the signed loan agreement (Exhibit 1) and promissory note (Exhibit 4). Attorney Pucci stated that she either kept the original loan agreement (Exhibit 1) and

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promissory note (Exhibit 4) or gave the originals to Edwin Benyamini. Attorney Pucci does not currently possess the original loan agreement (Exhibit 1) or promissory note (Exhibit 4), nor does she possess any copy the signed loan agreement (Exhibit 1) or promissory note (Exhibit 4). Attorney Pucci testified that she would not usually retain documents from 2007.

The court found attorney Pucci to be credible. The court did not find defendants to be credible when they testified that they did not sign the loan agreement (Exhibit 1) or promissory note (Exhibit 4).

Benyamini of Mazakoda believes that he was given the original loan agreement (Exhibit 1) and promissory note (Exhibit 4) by attorney Pucci. Edwin is currently unable to locate the original loan agreement (Exhibit 1) or promissory note (Exhibit 4), and he unable to locate a signed copy of the loan agreement (Exhibit 1) or promissory note (Exhibit 4). The court finds Benyamini credible when he testified that he was in possession of the original loan agreement and promissory note.

At the December 17, 2007, meeting attorney Pucci gave defendants deed of trust and assignments of rents. These deeds of trust and assignment of rents were signed by defendants before a notary on

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December 18, 2007, and were recorded on June 11, 2008. (See, Exhibit 9 [9824 Flair Drive, El Monte, California]; Exhibit 10 [3278 Slauson Avenue, Vernon, California]; Exhibit 11 [10813 Richland Avenue, Los Angeles, California]; and Exhibit 12 [4360 Estrondo Place, Encino, California].) Each of these deeds of trust and assignment of rents specifically state that the purpose of these deeds are to secure "... Payment of the indebtedness evidenced by one Promissory Note of even date herewith ... in the principal sum of \$500,000 executed by Trustor (defendants) in favor of the Beneficiary (Mazakoda) ..." (See, Exhibit 9-2; Exhibit 10-2; Exhibit 11-2; and Exhibit 12-2.)

A check dated December 17, 2007, was made by out to J&J Oil in the amount of \$495,000, and J&J Oil cashed this check. This check was written by Milan Management, Inc., and Benyamini testified that Mazakoda had invested in Milan Management, Inc. In the memo section of the check it reads: "LOAN \$500,000 - first payment 495,000." (See, Exhibit 8.) Sharon testified that he used the money from this check to purchase an ARCO station.

Paragraph 4.1 of the loan agreement provides that as security for the note, defendants will grant to Mazakoda deeds of trust on five properties. (See, Exhibit 1-2.) The promissory note provides that interest on the \$500,000 shall be payable monthly,

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and the interest rate was set at 10%. (See, Exhibit 4-1.) The monthly interest on the \$500,000 loan was \$4,166.00, and defendants made this monthly interest payments to Mazakoda for two years. (See, Exhibits 6 & 7.) After December, 2009, defendants stopped making monthly the monthly interest payments.

In the summer of 2008, defendant J&J Oil wished to refinance the mortgage at 3278 Slauson Avenue, Vernon, California, and defendants Sharon and Tootian wished to refinance the mortgage at 4360 Estrondo Place, Encino, California. Attorney Pucci assisted defendants. In an email dated July 17, 2008, Sharon sent an email to attorney Pucci with copies of the deed of trust. (See, Exhibit 21-2.) In an email dated July 18, 2008, attorney Pucci provided Sharon the documents that he would have to record to remove the lien on the properties and also the documents he would have to record to "record back the liens." (See, Exhibit 21-1.) In this email attorney Pucci stated as follows:

Just as a warning, the full re-conveyances state that the full loan amount was satisfied, even though it was not, and you guys have agreed that once the properties are refinanced, the recordings will go back on. They all have to be dated, executed and some notarized and taken for recording. (See, Exhibit 21-1.)

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On July 30, 2008, Sharon signed a new deed of trust and assignment of rents concerning the property at 3278 Slauson Avenue, Vernon, California, and this deed of trust was recorded on August 6, 2008. (See, Exhibit 13.) On November 25, 2008, Sharon signed a new deed of trust and assignment of rents concerning the property at 4360 Estrondo Place, Encino, California, and this deed of trust was recorded on November 25, 2008. (See, Exhibit 14.)

In November, 2010, Sharon filed a bankruptcy petition. In this petition, Sharon listed Mazakoda as a creditor and that Mazakoda had "a deed of trust to secure an indebtedness" in the amount of \$500,000. (See, Exhibit 22-9.)

The court did not find defendants credible when they asserted that the \$500,000 was for settlement of a loan and not a debt. There is no paper work evidencing any settlement between defendants and John Aminpour. The fact that Sharon retained attorney Afaghi, to prepare a letter and a complaint for usury violation by John Aminpour is unpersuasive. It is illogical that the memo section of the alleged settlement payment of \$500,000 would state "loan" and would deduct one month of interest so that the check was only for \$495,000. (See, Exhibit 8.) It is also illogical that defendants would make monthly interest payments to Mazakoda for

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two years if this was really a settlement and not a loan. (See, Exhibits 6 & 7 [Exhibit 6-12 - [in the memo section, defendants listed the payment to Mazakoda as "December, 2008 interest payment."])

The fact that John Aminpour has been convicted of a crime and is not a real estate broker has no impact on this court's ruling.

III. MAZAKODA IS ENTITLED TO RECOVER DAMAGES FOR DEFENDANTS' FAILURE TO PAY BACK THE A PERSON ENTITLED TO ENFORCE THE NOTE PURSUANT TO THE CALIFORNIA COMMERCIAL CODE.

Under the California Commerce Code, a "person entitled to enforce" ("PETE") is defined as: "(a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3309 or subdivision (d) of Section 3418." (Cal. Com. Code § 3301.)

Mazakoda concedes that it cannot currently located a signed copy of the promissory note. However, a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Cal. Com. Code § 3309. Cal. Com. Code § 3309 provides: "A person not in possession of an instrument is entitled to enforce the instrument if (1) the person

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was in possession of the instrument and entitled to enforce it when loss of possession occurred, (2) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process."

At the time the note was lost, Mazakoda through its agents, Benyamini and Klary Pucci, had possession of the note. The note was never transferred. Mazakoda is unable to determine the current whereabouts of the Note. As such, Mazakoda demonstrates that it is a PETE under Section 3301 and 3309.

The elements of a cause of action for breach of a loan agreement or promissory note is: 1) the existence of a valid contract; 2) the plaintiff's performance or excuse; 3) the defendant's breach of agreement, and 4) damages to plaintiff.

The evidence clearly establishes that Mazakoda loaned defendants' \$500,000. (See, Exhibits 1 & 4.) The evidence establishes that defendants signed the promissory note and deed. (See, Exhibits 1 & 4.) Defendants made payment on the loan for two years is

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evidence of this agreement. Sharon acknowledged this loan in his bankruptcy. Defendants signed deed of trust and assignments of rents that acknowledge this loan. (See, Exhibit 9-2; Exhibit 10-2; Exhibit 11-2; and Exhibit 12-2.) The check for \$495,000 stating "LOAN" is evidence of the loan.

As stated previously, the court did not find defendants credible when they testified that the \$500,000 was a settlement.

Mazakoda performed it terms of the loan agreement by having the \$495,000 delivered to defendants. Defendants breached the terms of the loan agreement by making no payments on the loan after December, 2009.

As a result of defendants' breach, Mazakoda has been damaged. As of February 15, 2018, Mazakoda has incurred damages from defendants' breach in the amount of \$908,131.73. This includes interest and principal accrued to this date. (\$500,000 principal and interest to February 15, 2018 of \$408,131.73.)

BASED UPON THE FOREGOING, THE COURT RULES AS FOLLOWS:

1. Under the California Commerce Code, Mazakoda is person entitled to enforce to enforce the note.
2. Mazakoda had possession of the note. Mazakoda never transferred the note, and

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Mazakoda is unable to determine the current whereabouts of the Note.

3. A valid contract existed between Mazakoda and defendants.
4. Mazakoda performed its part of the contract when it provided defendants the \$495,000.
5. Defendants breached the contract when they stopped making payments on the note after December, 2009.
6. As of February 15, 2018, Mazkoda has incurred damages from defendants' breach in the amount of \$908,131.73. This includes interest and principal accrued to this date. (\$500,000 principal and interest to February 15, 2018 of \$408,131.73.)
7. The deed of trust to the property at 10813 Richland Avenue, Los Angeles, California, shall be foreclosed and judgment made for the sale of the property according to law. The proceeds of the sale shall be applied to the amounts due to Mazakoda.
8. Mazakoda shall prepare a judgment consistent with this statement of decision.
9. This tentative decision will be the statement of decision unless within 15 days a party specifies controverted issues or makes proposals not covered in the tentative decision. A courtesy copy of any objection to the tentative decision must be filed in Department 32 of the Stanley Mosk Courthouse.

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Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the notice of entry of the above order upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: February 22, 2018

Sherri R. Carter, Executive Officer/Clerk

By: _____
S. Luqueno, Judicial Assistant

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