

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

PITA HOUSE, INC. and MENASHE TSVI

Plaintiffs

-against-

ON THE GRILL B & D, INC. and
DENISE PRISTERIA

Defendants

Index No: 13754/06

Motion Date: 8/23/06

Motion Cal. No.: 26

The following papers numbered 1 to 14 read on this motion for summary judgment in lieu of complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 10
Replying Affidavits.....	11 - 14

Upon the foregoing papers it is ordered that this motion for summary judgment in lieu of complaint is denied. The action as against, Denise Pristeria, is dismissed and the remainder of the action is severed.

The plaintiff shall file and serve a formal complaint upon the attorney for defendant, within 30 days of entry of this Order, and the defendant shall serve an answer within 20 days after service of the answer. (See, Schulz v. Barrows, 94 NY2d 624 [2000].)

Plaintiff, PITA HOUSE, INC., as seller, and defendant, ON THE GRILL B & D, INC., as buyer, entered into a contract for the sale of the seller's business. The agreement of the parties, as drafted by the seller, was contained in a contract and annexed Exhibit A-1 through Exhibit E (hereinafter the Agreement). The agreement provided for a purchase price of \$60,000.00 plus the cost of inventory and payable as follows. Buyer to pay \$30,000.00 upon signing of the contract, \$30,000.00 by 18 equal monthly installments commencing on March 15, 2005 and the value of inventory at the time of the closing. The agreement further provided that if three monthly payments are late and/or not

within 10 days from the agreed date, then all payments will be due immediately together with 2% interest per month from that date forward. In addition, the agreement contained various conditions precedent as well as certain warranties and representations which shall survive closing. A closing took place on December 31, 2004. The purchase price was not secured by a promissory note.

The plaintiffs commenced this action against the corporate buyer and its principal, Denise Pristera, for summary judgment in lieu of complaint, after the defendants' alleged default and plaintiffs' acceleration of the debt on the assertion that this is an action for money only.

CPLR 3213 allows a plaintiff to commence an action "based upon an instrument for the payment of money only" by serving a summons and notice of motion for summary judgment and supporting papers in lieu of a complaint. "[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" (Weissman v. Sinorm Deli, 88 NY2d 437 [1996], 444, quoting Interman Indus. Prods. v. R.S.M. Electron Power, 37 NY2d 151, 155; see, Diversified Investors Corp. v. DiversiFax, Inc., 239 AD2d 231, 233). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (Weissman v. Sinorm Deli, supra, at 444). "'Where the instrument requires something in addition to the defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable'" (Weissman v. Sinorm Deli, supra, at 444).

The agreement of the parties does not qualify as an instrument for the payment of money only within the meaning of CPLR 3213. To establish, prima facie, that the plaintiffs are entitled to payment in accordance with the agreement, plaintiffs must resort to proof outside of the provisions of the agreement and establish compliance with all of the conditions. Notwithstanding plaintiffs' unsupported claim of performance of the conditions, CPLR 3213 is not available where, as here, the character of the instrument relied upon does not meet the express statutory requirement that it be "for the payment of money only". (Haug v. Metal City Findings Corp. supra; see also Kerin v. Kaufman, 296 AD2d 336 [2002].) The determination of whether an instrument qualifies for the accelerated procedure of CPLR 3213 is made by looking at the agreement at the time that it is executed. (Weissman v. Sinorm Deli, suspra at 445; Haug v. Metal City Findings Corp., supra.)

In addition to opposing the motion on the ground that the agreement is not an instrument for the payment of money only, the defendant, Denise Pristeria, individually, asserts that she is not personally obligated under the agreement, that she signed the agreement as the principal of the corporate buyer and that when presented with the Personal Guarantee, she refused to sign it.

There is no written agreement signed by Denise Pristeria, in her individual capacity, by which she explicitly obligated herself to make any payments. (Interman Indus. Prods. v R.S.M. Electron Power, 37 NY2d 151, 155 [1975].) "[A] contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." (Morlee Sales Corp. v. Manufacturers Trust Co., 9 NY2d 16, 19 [1961].) Any doubt or ambiguity in its terms must be resolved most strongly against the drafter (see Evelyn Building Corp. v. City of New York, 257 NY 501, 513 [1931]), and most favorably to and in the way that the promisee had good reason to understand it. (see Moran v. Standard Oil Co., 211 NY 187, 196 [1914]; Wilson & English Const. Co. v. New York Cent. R. Co., 240 App. Div. 479, 483 [1934].) The agreement expressly provides that it is not valid and enforceable unless it is properly signed by the buyer, ON THE GRILL B & D, INC., and seller, identified in the contract as ON THE GRILL B & D, INC. and PITA HOUSE, INC. respectively, and their initial affixed to each page of the attached exhibits. It further provides that the documents are signed by the officer of the individual parties to the agreement who are duly authorized to do so (emphasis added). Under the circumstances, the failure to specifically indicate Denise Pristeria's representative capacity under each signature and innitial does not render Denise Pristeria personally liable under the agreement.

Inasmuch as the plaintiffs have failed to establish any basis for holding Denise Pristeria personally liable, or raise a triable issue of fact in this regard, the action is dismissed as to the defendant, Denise Pristeria, in her individual capacity pursuant to CPLR 3212(b). (See, Weissman v. Sinorm Deli, at 440, 445; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3213:11 at 420-421.)

A copy of this Order is being mailed to the attorney for the parties.

Dated: September 13, 2006
D# 27

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J.S.C.