

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

a v. 
ORIGINAL

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

AHMED NAWAZ KHAN and MOHAMMAD ABDUS
SALAM,

Plaintiffs,

-against-

MOHAMMAD MAHBUB a/k/a MOHAMMED
MAHBUB, CURRY & KABAB RESTAURANT, INC.,
d/b/a FIZA DINER a/k/a FIZA DINER
RESTAURANT, KARIM KABAB & CURRY INC.
d/b/a FIZA DINER a/k/a FIZA DINER
RESTAURANT, and 8315 BROADWAY, LLC,

Defendants.

Index No: 4243/12

Motion Date: 5/2/12

Motion Cal. No.: 164 P 3 3b

Motion Seq. No.: 164 P 3 3b

QUEENS COUNTY CLERK
FILED

The following papers numbered 1 to 12 read on this motion by for
summary judgment in lieu of complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 12

Upon the foregoing papers it is ordered that this motion is
determined as follows.

The plaintiffs' motion for summary judgment in lieu of
complaint as against the defendants, CURRY & KABAB RESTAURANT,
INC., d/b/a FIZA DINER a/k/a FIZA DINER RESTAURANT, KARIM KABAB &
CURRY INC. d/b/a FIZA DINER a/k/a FIZA DINER RESTAURANT, and
8315 BROADWAY, LLC, is denied and the complaint insofar as it is
asserted against these defendants is dismissed.

The plaintiffs' motion for summary judgment in lieu of
complaint as against the defendant, MOHAMMAD MAHBUB a/k/a
MOHAMMED MAHBUB is granted. The plaintiff AHMED NAWAZ KHAN is
granted judgment in his favor in the amount of \$28,408.00 plus

interest from May 13, 2008 and defendant, MOHAMMAD ABDUS SALAM is granted judgment in his favor the amount of \$28,408.00 plus interest from May 13, 2008, together with one bill of costs and disbursements in an amount to be calculated by the clerk of this court.

The plaintiffs commenced this action pursuant to CPLR 3213 based upon two checks executed and given by the defendant, Mahbub, in conjunction with the sale of plaintiffs' shares in Curry & Kabab Restaurant Inc. d/b/a Fiza Diner (hereinafter the Corporation) to defendant, Mahbub.

In support of their motion, plaintiffs submitted, among other things, their affidavits, copies of the dishonored checks, the Shareholder's Agreement, the hand written document memorializing the November 11, 2006 meeting of the shareholders and two Bills of Sale and Assignment, dated July 20, 2007, both executed by Mahbub and one executed by each plaintiff.

The plaintiffs assert the following in their respective affidavits. The plaintiffs, who each owned 49 shares and the defendant, Mahbub, who owned 102 shares, were the sole shareholders of the Corporation. At the November 11, 2006 meeting of the three shareholders, the plaintiffs decided to withdraw from the business and agreed to sell their shares in the Corporation to Mahbub. On July 20, 2007 the plaintiffs and Mahbub met in the offices of an attorney to effectuate the sale. Each plaintiff signed a Bill of Sale and Assignment (herein after the agreements) in which each plaintiff, as Seller, agreed to sell his 49 shares in the Corporation to Mahbub, the Purchaser, for \$58,408.00 by two payments payable upon execution of the agreements. Plaintiffs delivered the shares and Mahbub paid each plaintiff \$30,000.00 by certified funds and \$28,408.00 by a check post dated November 19, 2007. Plaintiffs claim that Mahbub contacted them before November 19, 2007 to give him more time before depositing the check. However, by May 2, 2008 they could wait no longer and deposited the checks on May 13, 2008. On May 16, 2008, the checks were returned unpaid since the account on which they were drawn was closed. Plaintiffs claim that they contacted Mahbub several times since and demanding payment, however, despite his assurances that he would pay, he has failed to do so.

The plaintiffs commenced this action against Mahbub as well as Curry & Kabab Restaurant Inc., Karim Kabab & Curry, Inc., and 8315 BROADWAY, LLC to recover \$56,816.00 plus interest based upon the two dishonored checks. Plaintiffs contend that the checks qualify as instruments for the payment of money only pursuant to

CPLR 3213, that the defendants are "jointly and severally liable" thereon as Mahbub executed the checks as the President of the Corporation, thus, entitling plaintiffs to judgment in the amount of \$56,816.00 plus interest as against all of the defendants.

CPLR 3213 allows a plaintiff to move for summary judgment in lieu of complaint based on an instrument for the payment of money only (see Interman Industrial Products, Ltd. v. R.S.M. Electron Power, Inc., 37 NY2d 151, 155 (1975)). A document comes within the purview of 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, supra). A check is an instrument for the payment of money only (see First Inter-County Bank of New York v. DeFilippis, 160 AD2d 288 [1990] app den 77 NY2d 801 [1991]; Seaman-Andwall Corp. v. Wright Machine Corp., 31 AD2d 136 [1968] aff'd 29 NY2d 617 [1971]).

To establish, prima facie, entitlement to judgment as a matter of law with respect to a check, a plaintiff must show the existence of the check, executed by the defendant in favor of the plaintiff and proof of dishonor (see Luqli v. Johnston, 78 AD3d 1133, 1135 [2010]; Gullery v. Imburgio, 74 AD3d 1022, 1022 [2010]; Sound Shore Medical Center of Westchester v. Maloney, ___ AD3d ___, 2012 WL 2135358). Once the plaintiff establishes these elements the burden shifts to the defendants to come forward with evidence in admissible form sufficient establish the existence of a triable issue with respect to a bona fide defense (see Jin Sheng He v. Sing Huei Chang, 83 AD3d 788, 789 [2011]).

The plaintiffs have demonstrated their entitlement to summary judgment as against the defendant, Mahbub. In opposition, the defendant Mahbub has failed to raise a triable issue as to abonified defense. Mahbub does not deny any of the plaintiff's allegation as to his liability on the checks.

Insofar as plaintiffs' claim against the three corporate defendants, however, the plaintiffs' moving papers have failed to even allege, much less demonstrate any basis for holding the remaining defendants liable on the checks.

Shares in a corporation are personal property (see State Tax Commission v. Shor, 43 NY2d 151, 154 [1977]). A stockholder has the right to transfer his stock just as he has the right to transfer any other property (see Lam v. Li, 222 AD2d 290 [1995]). A shareholder who is also a corporate officer or director has a right to purchase the stock of a shareholder therein, just as any

other person (see Fischer v. Guaranty Trust Co., 259 AD 176 [1940], judgment aff'd, 285 NY 679 [1941]). Here, the plaintiffs in their affidavit admitted that they agreed to sell their stock to Mahbub as a shareholder of the Corporation in accordance with the Shareholder's Agreement which grants "shareholders", not the Corporation, the right of first refusal. Nothing contained in any of the documents indicate that the Corporation was buying its own stock. In addition, the checks which form the basis of this action were executed by Mahbub in his individual capacity and drawn on his individual bank account.

Accordingly, the claim as against the defendants, Curry and Kabab Restaurant Inc., Karim Kabab & Curry, Inc., and 8315 Broadway, LLC is denied and the proceeding is dismissed. Although the plaintiff requests that if summary judgment is denied, the court convert the motion to an action, the court may in its discretion and in accordance with the express provisions of CPLR 3213 dismiss outright (see Schulz v. Barrows, 94 NY2d 624, 628 [2000]) or even grant summary judgment to the defendant (see Weissman v Sinorm Deli, 88 NY2d 437, 446 [1996]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3213:11, at 420; CPLR 3212[b]). In view of the plaintiffs' total failure to submit any evidence to demonstrate a basis for holding the corporate defendants liability, dismissal is appropriate.

Dated: July 17, 2012
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J. S. C.

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