

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D19629  
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Argued - May 16, 2008

ROBERT A. SPOLZINO, J.P.  
JOSEPH COVELLO  
THOMAS A. DICKERSON  
RANDALL T. ENG, JJ.

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2007-00274

DECISION & ORDER

Barry Levien, respondent, v Richard Allen,  
et al., appellants.

(Index No. 5282/05)

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Rafael Delet, New York, N.Y. (Gilbert Azafrani, pro hac vice, of counsel), for appellants.

Kirschenbaum & Kirschenbaum, P.C., Garden City, N.Y. (Kenneth Kirschenbaum and Paul J. Tramontano of counsel), for respondent.

In an action to recover on three promissory notes, the defendants appeal from a judgment of the Supreme Court, Nassau County (Bucaria, J.), entered November 9, 2006, which, upon a decision of the same court dated October 2, 2006, made after a nonjury trial, is in favor of the plaintiff and against them in the principal sum of \$426,865.14.

ORDERED that the judgment is affirmed, with costs.

The Supreme Court properly awarded judgment to the plaintiff. The plaintiff established a prima facie case by submitting proof of the existence of the three promissory notes and the defendants' default on each note (*see Lorenz Diversified Corp. v Falk*, 44 AD3d 910; *Marinis v Scherr*, 306 AD2d 448). The defendants failed to controvert the evidence presented by the plaintiff (*see Lorenz Diversified Corp. v Falk*, 44 AD3d 910). Furthermore, the defendants failed to establish the affirmative defenses of lack of consideration (*see Anand v Wilson*, 32 AD3d 808, 809; *see generally Mencher v Weiss*, 306 NY 1, 8) or usury (*cf. Hicki v Choice Cap. Corp.*, 264 AD2d 710, 711). The defendants also failed to establish that the plaintiff converted the loans to a capital

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contribution (*cf. Security Mut. Life Ins. Co. v Member Servs., Inc.*, 46 AD3d 1077, 1078; *J.L.B. Equities v Mind Over Money, Ltd.*, 261 AD2d 510).

The defendants' remaining contentions are either improperly raised for the first time on appeal or without merit.

SPOLZINO, J.P., COVELLO, DICKERSON and ENG, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".

James Edward Pelzer  
Clerk of the Court