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\$300,000 to Crown Waste Corp., to be paid monthly with interest of 10% per annum, for the next 83 months. A supplementary agreement provided for late fees, interest of 18% per annum upon default, as well as reasonable attorneys' fees and costs. The loan was secured by a mortgage dated December 1, 1992 on commercial property located at 126-46 34th Avenue Corona, New York, that was allegedly owned by Crown Waste. The mortgage note, the supplement to the note and the mortgage were all executed by Thomas Antonacci, the president of Crown Waste. On December 17, 1992, Thomas Antonacci and his wife Teresa Antonacci executed a personal guaranty, whereby they guaranteed payment of the loan.

On August 28, 1992, Thomas Antonucci transferred title to the same commercial property from Crown Waste to TNT Star Corp., another corporation in which the Antonuccis were principals. On the same date TNT, by its president Thomas Antonucci, mortgaged the property back to Crown, pursuant to a mortgage instrument, in the sum of \$180,000. At the time that the loan agreement with the plaintiff was executed in December 1992, neither Crown nor Thomas Antonucci informed plaintiff that Crown no longer owned the property that was used to secure the loan, and that there was another mortgage on this property. Crown and the Antonuccis were represented in the transaction with the plaintiff by Harry Stern. Mr. Stern was also a financial officer of Royal Wine Corporation, whose employees were the participants in the plaintiff trust fund. Mr. Stern, however, was not a trustee or administrator of the trust fund and did not represent the trust fund. Mr. Stern had represented the Antonuccis in other business dealings which are the subject of other unrelated lawsuits.

Plaintiff's request for summary judgment on the first and second causes of action against Crown and the Antonuccis to recover on the note and the personal guaranty is granted. Crown, TNT and Stern, on behalf of the Antonuccis, made certain payments on the mortgage note but ceased making payments after November 10, 1997. The note expressly waived presentment for payment, notice of dishonor, protest and notice of protest. The guaranty also waives notice. Defendants have not established that payments were made on the note after November 10, 1997. The handwritten note, dated April 5, 1997, on Harry Stern's note paper stating that "Harry Stern forgives payment of mortgages from May-January 1995 inclusive of interest charged for that period(i.e. discount for prepayment)" clearly did not change the terms of the note executed by the Antonuccis in favor of the plaintiff. The Stern note does not specifically refer to the subject transaction, and there is no evidence that Stern had the authority to act on behalf of the plaintiff. Moreover, this note refers to 1995 payments and, thus, could not excuse the defendants' failure to make payments after November 1997. Furthermore, the fact that the Antonuccis and assorted family members executed checks payable to Stern does not establish that payment was made to the plaintiff. These checks make no reference to the subject loan and there is no evidence that Stern was authorized to collect payments in his own name from the Antonuccis on behalf of the plaintiff. Finally, plaintiff's counsel was not required to accept checks from the defendants once this

action commenced. Plaintiff asserts that a balance of \$427,828.52, including interest, is now due and owing. This amount does not include late charges, attorneys fees and costs.

That branch of plaintiff's motion which seeks summary judgment on the third cause of action against Crown for breach of warranty and on the fourth cause of action against Crown, TNT and Thomas Antonucci for fraud is granted. It is undisputed that at the time the mortgage was executed that the subject real property was no longer owned by Crown, that it was owned by TNT, and that Thomas Antonucci, an officer and principal of both corporations was aware of this fact. Crown and Thomas Antonucci, however, failed to inform the plaintiff that Crown did not own the property and that it had a mortgage on the property, and clearly misled the plaintiff in order to obtain an unsecured loan. The defendants actions were clearly to the plaintiff's detriment as it is now unable to recover against Crown on the mortgage instrument. In seeking damages on these causes of action, it is unclear whether the plaintiff has suffered damages beyond that sought under the note. To the extent that plaintiff seeks punitive damages, this request is denied. The court further finds that while Teresa Antonucci is alleged to be a principal in Crown and TNT, there is no evidence that she executed any of the deeds transferring the ownership of the real property from Crown to TNT, or that she had knowledge of this transfer. Therefore, the claim of fraud cannot be maintained against Teresa Antonucci.

Plaintiff's request for the imposition of a first equitable mortgage or a constructive trust on the subject real property, and for an order granting summary judgment of foreclosure on the real property is denied. Plaintiff has not established that Crown and TNT were alter-egos and the fact that it did not obtain a security interest in the real property does not warrant the imposition of an equitable mortgage or a constructive trust.

Plaintiff's request to dismiss Crown, TNT and the Antonuccis affirmative defenses and counterclaims is granted. The assorted defenses clearly lack merit and defendants have not presented any evidence in support of their counterclaims. Defendants' accusations and speculations regarding the actions of Harry Stern, the plaintiff and the Royal Wine Corporation are insufficient to maintain the claims against the plaintiff.

The parties are directed to contact chambers for a hearing date to determine the amount of the attorneys' fees and costs. Plaintiff shall also establish at this hearing the total amount of money owed on the note, and shall inform the court whether there are any other damages sought on the actions for breach and warranty that would require a trial.

Dated: July 3, 2000

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Justice John A. Milano

