

<b>Schneider v Rothstein</b>
2009 NY Slip Op 31565(U)
July 8, 2009
Supreme Court, Nassau County
Docket Number: 005546/08
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**RICHARD SCHNEIDER,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 005546/08**

**Motion Seq. No: 1**

**JEFFREY ROTHSTEIN and  
NICHOLAS NAVARRO,**

**Submission Date: 5/8/09**

**Defendants.**

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**Papers Read on this Motion:**

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Plaintiff's Memorandum of Law.....X**
- Affidavit in Opposition (Navarro).....X**
- Affidavit in Opposition and Exhibit (Rothstein).....X**
- Affirmation in Opposition.....X**
- Reply Affidavit and Exhibit.....X**

This matter is before the court on the motion for summary judgment filed by Plaintiff Richard Schneider ("Schneider") on August 6, 2008 and submitted May 8, 2009.<sup>1</sup> For the reasons set forth below, the Court denies Plaintiff's motion.

<sup>1</sup> This Court assumed responsibility for this case, and this motion, on May 8, 2009.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) with respect to the first cause of action in the verified complaint (“Complaint”), granting judgment to Plaintiff against Defendants Jeffrey Rothstein (“Rothstein”) and Nicholas Navarro (“Navarro”) (collectively “Defendants”) on a promissory note in the principal amount of \$100,000, plus interest and expenses; 2) with respect to the second cause of action, a) granting judgment to Plaintiff against Defendants; b) directing the immediate transfer of all collateral pledged to Plaintiff under the parties’ Pledge Agreement; and c) declaring that Plaintiff has certain rights with respect to shares of stock and collateral; or, in the alternative, 3) with respect to the third cause of action, granting judgment to Plaintiff against Defendants for breach of contract and awarding damages in a sum to be determined at trial, but no less than \$100,000.

Defendants oppose Plaintiff’s motion.

### B. The Parties’ History

This action involves a loan that Plaintiff made to Defendants, who are dentists, on or about January 20, 2007 in the sum of \$100,000. Schneider affirms that, on or about January 20, 2007, he funded the loan and advanced funds to Defendant in the amount of \$96,250. The loan is evidenced by a Promissory Note (“Note”) in the amount of \$100,000 which, by its terms, commences on January 20, 2007, referred to in the Note as the “Commencement Date.” The Note provides, in pertinent part, that:

No payments of principal or interest are required to be paid until the due date, which due date is no later than 9 months after the Commencement Date or sale of dental practice located at 349 Connetquot Ave., Islip, N.Y. 11752.

The parties also executed a Pledge Agreement (“Agreement”) dated January 16, 2007 in connection with the \$100,000 loan. That Agreement refers to Defendants as “Debtor” and to Plaintiff as “Secured Party.” Under the Agreement, Defendants granted Plaintiff a security interest in collateral described as “Debtor’s interest in and to Commercial Building–349 Connetquot Avenue, Islip, NY, 11752,” the location at which Defendants operate a dental practice (“Property”). Plaintiff alleges in the Complaint that Rothstein and Navarro are the sole

shareholders of a corporation known as Lifetime of Smiles Realty Corporation (“LSR”), which is the fee owner of the Property.

Plaintiff commenced this action on March 25, 2008. Plaintiff alleges that Defendants failed to pay the \$100,000 due under the terms of the Note on either the original due date of October 20, 2007, or the extended date of March 1, 2008, and after Plaintiff made due demand for payment in full under the Note.

### C. The Parties’ Positions

Plaintiff moves for summary judgment against Defendants in the amount of \$102,041.83, representing principal and accrued interest, as well as the transfer to Plaintiff of Defendants’ shares of stock, and any other interest, in LSR.

While Defendants do not dispute that the loan remains outstanding, they argue that they are not in default because all parties understood that Defendants contemplated a sale of the dental practice, and the due date for repayment of the Note might be conditioned upon the sale. Thus, Defendants submit, the Note affords Defendants additional time to liquidate their dental practice and Defendants were not yet required to make payment under the Note.

### RULING OF THE COURT

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2d Dept. 1994); *see also Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *State Bank v. McAuliffe*, 97 A.D.2d 607 (3d Dept. 1983). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman*, 49 N.Y.2d at 562.

When parties set down their agreement in a clear, complete document, their writing will, as a general rule, be enforced according to its terms. *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 32 (2002), *rearg. den.* 98 N.Y.2d 693 (2002). The

determination whether a writing is ambiguous in the first instance, and the construction and interpretation of an unambiguous written agreement, are issues of law within the province of the court. *Katina v. Famiglietti*, 306 A.D.2d 440, 441 (2d Dept. 2003). The objective is to determine the parties' intention as derived from the language employed in the agreement. *Kalus v. Prime Care Physicians, P.C.*, 20 A.D.3d 452, 453 (2d Dept. 2005).

In determining the obligations of the parties, the court looks to the express language used to give effect to the intention of the parties. Where the language is clear and unambiguous, the court will construe and discern the intent from the document itself as a matter of law. *Shook v. Blue Stores Corp.*, 30 A.D.3d 811, 812 (3d Dept. 2006). If an agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its own notions of fairness and equality. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). Where, however, there is a choice among reasonable inferences to be drawn, reliance on extrinsic evidence is appropriate. *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973). Whether an ambiguity exists must be ascertained from the face of the agreement without regard to extrinsic evidence. *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001). When the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment. *DiLorenzo v. Estate Motors, Inc.*, 22 A.D.3d 630, 631 (2d Dept. 2005).

The Court is mindful of the well-settled principle that a court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of the language utilized to create a new contract for the parties. *Petracca v. Petracca*, 302 A.D.2d 576, 577 (2d Dept. 2003). However, in the matter *sub judice*, the court is confronted with language regarding the repayment date of the Note that is unclear on its face. Specifically, the language regarding the repayment due date, "no later than 9 months after the Commencement Date or sale of dental practice," is equivocal at best. The Court cannot glean the parties' intent from this language, and concludes that extrinsic evidence is necessary to explain the parties' intent regarding the due date.

Moreover, the Court concludes, based on the record before it, that Plaintiff has not proved his claim that, as a result of his extension of the Note's maturity date to March 1, 2008, Defendants waived the right to interpret the repayment provision to mean that repayment would

not be due until the dental practice was sold. The e-mail communication from Defendant Navarro to Plaintiff dated November 17, 2007, on which Plaintiff relies, is insufficient to establish Defendants' agreement to a fixed maturity date of March 1, 2008. That e-mail states, in pertinent part, "Dr's Nicholas Navarro and Jeffrey Rothstein agree to payoff [sic] 100,000 loan from Mr. Dick Schneider by March 1<sup>st</sup>, 2008-as per our phone call. The official documents to follow-this is just a note to let you know I'm not neglecting the issue." Apparently, no such documents were subsequently executed.

Under all the circumstances, the Court concludes that there exists a factual issue whether Defendants are in breach of the Promissory Note. Accordingly, the Court denies Defendants' motion for summary judgment.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a conference before the Court on September 10, 2009 at 9:30 a.m.

DATED: Mineola, NY  
July 8, 2009

ENTER  
  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

JUL 13 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE