

**Yuzuk v Cipriani Accessories, Inc.**

2006 NY Slip Op 30434(U)

October 10, 2006

Supreme Court, New York County

Docket Number: 601487/2005

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----X  
ADAM YUZUK,

Plaintiff,

-against-

CIPRIANI ACCESSORIES, INC. and THE MAX LEATHER  
GROUP, INC.,

Defendants.  
-----X

INDEX NO 601487/2005  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

**ORDERED** that this motion is decided in accordance with the accompanying Decision and Order.

Dated: March 10, 2006

KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
ADAM YUZUK,

Plaintiff,

Index No. 601487/2005

-against-

CIPRIANI ACCESSORIES, INC. and THE MAX  
LEATHER GROUP, INC.,

Defendants.

**DECISION and ORDER**

-----X  
CIPRANI ACCESSORIES, INC.,

Plaintiff,

Index No. 601299/2005

-against-

ADAM YUZUK and BANK OF AMERICA,

Defendants.

-----X  
**MOSKOWITZ, J.:**

Plaintiff Adam Yuzuk moves for an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint, directing entry of judgment in his favor and against defendants Cipriani Accessories, Inc. (Cipriani) and the Max Leather Group, Inc. (Max Leather) in the amount of \$890,409.00, plus costs, expenses and attorneys' fees, on the ground that this action is based upon an instrument for the payment of money only.

Cipriani and Max Leather cross-move for an order: (a) granting summary judgment in their favor; and (b) consolidating this action with a related action pending in this court, entitled Cipriani Accessories, Inc. v Adam Yuzuk, Index No. 601299/05 (Related Action) and amending the caption of this action to reflect the consolidation.

Additionally, in the Related Action, Yuzuk (as defendant) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing Cipriani's Second Amended Complaint, verified April 27, 2005,

(as plaintiff there) (the Related Action Complaint).

The court considers these motions and actions together and for the reasons that follow grants Yuzuk's motions and denies defendants' cross-motion .

### **BACKGROUND**

Cipriani is a privately held company that sells men's accessories. Cipriani employed Yuzuk beginning in January 1995. By 1997, Yuzuk was an officer and a 20% shareholder of Cipriani. In March 2004, Yuzuk sold his shares of Cipriani common stock back to Cipriani pursuant to a March 9, 2004 Stock Purchase Agreement (Stock Purchase Agreement). In part payment, Cipriani executed two promissory notes, both dated March 9, 2004, by which Cipriani promised to pay the sum of \$2,116,987.80 to Yuzuk. The first note was for \$1,075,032.90 (First Note) and the second note was for \$1,041,954.90 (Second Note) (together, the Notes).

Max Leather guaranteed Cipriani's obligations under the Stock Purchase Agreement.<sup>1</sup> Specifically, paragraph 3 of the Stock Purchase Agreement provides that Cipriani's obligations "hereunder, including, but not limited to the payment obligations set forth in Paragraph 1 (a)-(d), shall be guaranteed by [Max Leather]." To this end, Max Leather executed a guarantee, dated March 9, 2004, in favor of Yuzuk, irrevocably and unconditionally guaranteeing Cipriani's payment obligations under the Stock Purchase Agreement and the Notes (Guarantee).

Each of the Notes provides that, if an "Event of Default should occur and be continuing, the Lender, at its option, may declare the outstanding Principal balance on this Note to be immediately due and payable without presentment, demand, protest, or notice of any kind, all of which are hereby expressly waived. . . ."

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<sup>1</sup> Cipriani and Max Leather are related entities. They are, in part or full, commonly owned.

An Event of Default occurs under each Note if "Borrower shall fail to pay any payment of Principal or any other amount due under this Note within seven (7) days of when due . . . ."

The Notes further provide that: "Borrower agrees to pay all fees, costs and expenses, including reasonable attorneys' fees and legal expenses, incurred by Lender in endeavoring to collect any amounts payable hereunder which are not paid when due, whether by acceleration or otherwise."

Pursuant to the terms of the Stock Purchase Agreement, Cipriani obtained an irrevocable letter of credit, dated March 3, 2004, issued by Fleet National Bank (now known as Bank of America) in the amount of \$1,075,032.90, securing a portion of the indebtedness.

Further, by agreement, Yuzuk remained as an employee of Cipriani after the acquisition. Thereafter, however, certain disagreements arose between the parties, and Yuzuk resigned from Cipriani's employ on January 31, 2005.

By letter dated February 25, 2005, Yuzuk's attorney informed Cipriani that Yuzuk believed that Cipriani committed certain improprieties with respect to its purchase of Yuzuk's shares. Yuzuk's attorney wrote:

We have been retained by Adam Yuzuk with respect to his prior ownership interest and employment at [Cipriani]. Mr. Yuzuk recently has discovered certain accounting irregularities and improper inter-company transactions, which not only reduced the amount of payments made to Mr. Yuzuk while he was a Cipriani shareholder (including without limitation, the payout of his share of retained earnings), but which also caused him to sell his stock back to Cipriani at a value far lower than it was worth.

Counsel proceeded, in the above letter, to request a meeting among, inter alia, Yuzuk, Cipriani and Max Leather. Cipriani responded to the above in a March 2, 2005 letter. In a March 3, 2005 letter, Yuzuk's attorney reiterated that:

Cipriani has not addressed the wrongdoing discovered, namely the shifting of

funds from Cipriani to Max Leather, which totals millions of dollars, and which was done without Mr. Yuzuk's knowledge. As a result, Mr. Yuzuk received far lower distributions than those to which he was entitled while a shareholder at Cipriani, and was induced to sell his shares of Cipriani at a reduced value based upon misrepresentations as to the true value of the entity. . . . "

The parties exchanged various other letters but did not resolve their disagreements.

Cipriani apparently made all of the scheduled payments called for in the Notes through March 2005. However, Cipriani failed to make the payment of \$99,233.79 that was due on April 1, 2005 or within seven days thereafter.

In paragraph 19 of his affidavit, sworn to April 25, 2005, Yuzuk states that he treated Cipriani's failure to make this payment as an Event of Default in accordance with the terms of each of the Notes. He thereupon exercised his right to accelerate the outstanding principal balance on the Notes, so that they were immediately due and payable as of the close of business on April 8, 2005, the date of Yuzuk's presentment under the letter of credit: "[b]ased on Cipriani's failure to make its payment due on April 1, 2005, I exercised my right to accelerate the outstanding principal balance on the First and Second Notes such that they were immediately due and payable on April 8, 2005, the end of the cure period provided for in the Notes."

In April 2005, Cipriani commenced the Related Action, and moved, by order to show cause, to enjoin payment of the letter of credit. After oral argument, by order dated April 18, 2005, the court denied Cipriani's request for a preliminary injunction. On April 19, 2005, the Bank paid the letter of credit in full, in the amount of \$909,643.04 (the same amount as due under the First Note, as accelerated). Additionally, as by the court directed, Cipriani paid the sum of \$99,605.92 to Yuzuk (the same amount as the payment that was due on April 1, 2005) on April 15, 2005.

In the Related Action Complaint, Cipriani seeks, among other things: (a) in the first six

causes of action, a declaration that Yuzuk breached the Stock Purchase Agreement or that no Event of Default occurred with respect to the Second Note; and (b) in the seventh and eighth causes of action, a permanent injunction enjoining Yuzuk's acceleration of the Second Note.

The purported eight causes of action in the Related Action Complaint are as follows:

**1<sup>st</sup> cause of action** - judgment declaring that Yuzuk's contentions pertaining to the Stock Purchase Agreement and the Notes rendered the Stock Purchase Agreement inoperable;

**2<sup>nd</sup> cause of action** - judgment declaring that Yuzuk is not entitled to accelerate the amounts owing under the Second Note;

**3<sup>rd</sup> cause of action** - judgment declaring that Yuzuk's averments to the effect that misrepresentations were made to him regarding the Stock Purchase Agreement constitute an antecedent breach of contract which excuse Cipriani's performance under the Stock Purchase Agreement and the Notes;

**4<sup>th</sup> cause of action** - judgment declaring that Yuzuk's actions, including his alleged position that he was not bound by the purchase price for his shares, constitute a repudiation of the Stock Purchase Agreement which entitle Cipriani to suspend performance of the Stock Purchase Agreement;

**5<sup>th</sup> cause of action** - judgment declaring that any breach committed by Cipriani was immaterial and would not support an acceleration of any amounts due under the Second Note

**6<sup>th</sup> cause of action** - judgment declaring that Yuzuk is not entitled to accelerate amounts due under the Second Note because he has failed to satisfy a condition precedent, to wit, he failed or elected not to accelerate the Second Note at a time when there was a continuing default;

**7<sup>th</sup> cause of action** - permanent injunction prohibiting acceleration on the ground of unconscionability; and

**8<sup>th</sup> cause of action** - permanent injunction prohibiting acceleration on the ground of equitable estoppel.

Yuzuk commenced this action by filing a motion for summary judgment in lieu of complaint on April 26, 2005. Yuzuk seeks to obtain a judgment for the amounts due under the Second Note, as accelerated, as well as recovery of his fees, costs and expenses (including

attorneys' fees) incurred in attempting to collect these sums, as against its maker (Cipriani) and its guarantor (Max Leather).

### DISCUSSION

Yuzuk seeks summary judgment, pursuant to CPLR 3213, on the ground that the Second Note and the Guarantee are each instruments for the payment of money only.

Yuzuk contends that, pursuant to the terms of the Notes, upon the occurrence of the Event of Default, he was entitled to, and did, accelerate the entire remaining amounts unpaid, without any requirement that he make any further demand for payment. (Long Island Sav. Bank of Centereach, F.S.B. v Denkensohn, 222 AD2d 659 [2d Dept 1995]). Yuzuk further points out that, under the terms of the Second Note: (a) he is not required to give notice of an election to accelerate payment; and (b) there is no provision allowing the maker or guarantor to cure an Event of Default. Yuzuk maintains he did in fact accelerate the amounts due under the Second Note by instructing his counsel to recover the outstanding balances on the Notes, as evidenced by, among other things his letter of presentment drawing down the letter of credit. Yuzuk asserts that he has therefore demonstrated his entitlement to summary judgment (see Key Intl. Mfg., Inc. v Stillman, 103 AD2d 475, 477 [2d Dept 1984], affd as modified 66 NY2d 924 [1985] ["Acceleration clauses are quite common and are generally enforced according to their terms. . . . [s]ince the contract did not provide for notice, the fact that [defendant] did not give notice is irrelevant"]).

Defendants' opposition to this motion (also alleged in the Related Action Complaint) is based on the following premises:

First, defendants maintain that, by virtue of the February 25 and March 3 letters informing Cipriani that Yuzuk believed Cipriani had committed fraud through improper inter-

company transactions while Yuzuk was a shareholder, Yuzuk purportedly repudiated the Stock Purchase Agreement. Cipriani reasons that, because Yuzuk could theoretically seek rescission of the Stock Purchase Agreement as a redress for an alleged fraud, Cipriani was unsure whether Yuzuk would actually deliver from escrow the shares that he sold to Cipriani under the Stock Purchase Agreement. Cipriani further contends that it requested, but Yuzuk refused to give, adequate assurance with respect to whether or not he intends to affirm the Stock Purchase Agreement. Second, defendants contend that Yuzuk did not properly elect to accelerate the outstanding principal balance due on the Second Note, and therefore Yuzuk is not entitled to summary judgment in lieu of complaint. Defendants contend that: (a) only the First Note was accelerated, effective April 8, 2005; (b) the letter of credit backed the First Note only; and (c) the letter of presentment related to the First Note only. Defendants further contend that, even if Yuzuk did attempt to accelerate the Second Note, it was on April 20, 1995, five days after Cipriani cured the alleged Event of Default by its payment of \$99,233.79 to Yuzuk.

Defendants thus claim that no "Event of Default" occurred because: (a) Yuzuk repudiated or otherwise breached the Stock Purchase Agreement; (b) Cipriani's default of the Stock Purchase Agreement, if any, was de minimus; (c) Yuzuk is equitably estopped to claim there was a default; and/or (d) it would be unconscionable to declare a default. Defendants further stress that, even if an Event of Default occurred: (a) Yuzuk failed to timely and unequivocally accelerate the balance due under the Second Note; and (b) Cipriani cured any default on April 15, 2005, at which time, there was no longer a "continuing" default.

A review of the evidence confirms that there is no genuine issue of material fact in dispute between the parties and that Yuzuk is entitled to summary judgment in his favor in all respects. Specifically, Yuzuk has demonstrated that he is entitled to judgment against Cipriani in

the amount of \$810,409.00, based upon his evidentiary showing that: (a) Cipriani executed and delivered the Notes; (b) the Notes required payment of \$99,233.79 by April 1, 2005; (c) Cipriani defaulted on this payment; and (d) Cipriani did not cure this default within the seven-day cure period provided for under the Notes (see Crest Shipping Agency [NY] Inc. v Commodore Consulting Inc., 294 AD2d 192, 193 [1<sup>st</sup> Dept 2002] [affirming grant of summary judgment in lieu of complaint where plaintiff adduced proof of note, that note was an instrument for the payment of money only and there was proof of default]; First Interstate Credit Alliance, Inc. v Sokol, 179 AD2d 583, 584 [1<sup>st</sup> Dept 1992] [prima facie case made out under CPLR 3213 where plaintiff produced promissory note that defendant executed and demonstrated that defendant failed to pay it]; see also Warburg, Pincus Equity Partners, L.P. v Keane, 22 AD3d 321 [1<sup>st</sup> Dept 2005]; DDS Partners, LLC v Celenza, 6 AD3d 347 [1<sup>st</sup> Dept 2004]; Warburg, Pincus Equity Partners, L.P. v O'Neill, 11 AD3d 327 [1<sup>st</sup> Dept 2004]). Thus:

A plaintiff is entitled to an accelerated procedure to commence and pursue an action to recover on an instrument for the payment of money only (see CPLR 3213). A typical example of an instrument within the meaning of the statute is "a negotiable instrument for the payment of money--an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time" (Weissman v Sinorm Deli, 88 NY2d 437, 444 [1996]). A motion for summary judgment in lieu of complaint is appropriate where "[i]t is incontestable that plaintiff would prove a prima facie case by proof of the note and a failure to make the payments called for by its terms" (Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136, 137 [1968], affd 29 NY2d 617 [1971]).

(DDS Partners, LLC v Celenza, *supra*, 6 AD3d at 348).

Defendants' opposing arguments are unavailing. The Notes are instruments for the payment of money only (see Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136, 137 [1968] affd 29 NY2d 617 [1971]; Warburg, Pincus Equity Partners, L.P. v O'Neill, *supra*) and are not ambiguous (see DDS Partners, LLC v Celenza, *supra*).

Moreover, nothing in either the February 25 or the March 3 letter supports Cipriani's claim that Yuzuk somehow repudiated the Stock Purchase Agreement or otherwise evinced an intention to do so. Defendants' attempts to cast doubt upon whether Yuzuk effectively accelerated the principal amounts due under both the First and Second Notes is similarly unsupported. The court rejects defendants' claims of unconscionability, immaterial breach and equitable estoppel. (see Key Intl. Mfg., Inc. v Stillman, *supra*, 103 AD2d at 477-478; see also Fifty States Mgmt. Corp. v Pioneer Auto Parks, Inc., 46 NY2d 573 [1979]).

The evidence, including the terms of the Notes and Yuzuk's sworn statement, together with the authorities cited above, demonstrate that Yuzuk accelerated the amounts due under both the First and the Second Notes at a time when Cipriani was in default. Defendants have failed to controvert Yuzuk's proof and have failed to raise a question of fact sufficient to refute Yuzuk's showing of his entitlement to summary judgment in lieu of complaint.

Yuzuk is also entitled to summary judgment against Max Leather on the Guarantee (see e.g. Chemical Bank v PIC Motors Corp., 87 AD2d 447, 453 [1<sup>st</sup> Dept 1982], *affd* 58 NY2d 1023 [1983]). The Guarantee provides that "the Guarantor hereby agrees and irrevocably and unconditionally guarantees the prompt payment when due of all amounts owed by Cipriani under the [Stock Purchase] Agreement and the Notes." To enforce a written guaranty, the creditor need only prove an absolute and unconditional guaranty, the underlying debt and the guarantor's failure to perform under the guaranty (Steve Young Intl., Ltd. v Barnes, 267 AD2d 24 [1<sup>st</sup> Dept 1999]; City of New York v Clarose Cinema Corp., 256 AD2d 69 [1<sup>st</sup> Dept 1998]). Yuzuk has done so (having demonstrated, among other things, that an Event of Default occurred under the Notes, acceleration of the amounts due, that Cipriani owes the balance due under the Notes, as accelerated, and that Max Leather guaranteed payment of these amounts to Yuzuk), and has

therefore established his prima facie entitlement to summary judgment in lieu of complaint, pursuant to CPLR 3213. The burden shifted to Max Leather to establish, by admissible evidence, the existence of a triable issue of fact or a meritorious defense (J.L.B. Equities, Inc. v Mind Over Money, Ltd., 261 AD2d 510 [2d Dept 1999]). Max Leather has failed to raise any material issues of fact and has failed to controvert Yuzuk's entitlement to summary judgment on the Guarantee (Id.).

Pursuant to the terms of the Note, Yuzuk is also entitled to recover his "fees, costs and expenses, including reasonable attorneys' fees and legal expenses, incurred . . . in endeavoring to collect any amounts payable . . . ."

In granting Yuzuk's motion for summary judgment, the court also denies defendants' cross-motion for summary judgment. Defendants' request for an order consolidating this action and the Related Action is likewise denied, because, as set forth below, the court grants Yuzuk's motion to dismiss the Related Action Complaint.

All of the purported causes of action asserted in the Related Action Complaint are nothing more than defenses to Yuzuk's claims in this action. The court has already fully considered and rejected those causes and defenses as lacking in merit in granting Yuzuk's motion for summary judgment in lieu of complaint and denying defendants' cross-motion for summary judgment in their favor.

Additionally, the first six causes of action, all of which purport to seek declaratory relief, are improper because, among other things, Cipriani cannot show that there is no adequate remedy at law or that there is a justiciable controversy with respect to Yuzuk's alleged 'repudiation' of the Stock Purchase Agreement. The claims for injunctive relief are likewise deficient because, even if there was any merit to Cipriani's claims, Cipriani cannot show that it could not have been


made whole by an award of money damages.

**CONCLUSION**

Settle orders and judgments providing for appropriate declarations in Cipriani Accessories, Inc. v. Adam Yuzuk, Index 601299/2005 and summary judgement in Adam Yuzuk v. Cipriani et ano and severance and continuance of attorney fees for an assessment on the trial calendar in Part 03.

Dated: March 10, 2006

ENTER:

  
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J.S.C.