

**Switzer v Switzer**

2007 NY Slip Op 31311(U)

April 13, 2007

Supreme Court, New York County

Docket Number: 0112608/2006

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: DEBRA A. JAMES**  
*Justice*

**PART 59**

LOU SWITZER and GINA ABANDONATO SWITZTER,  
Plaintiffs,

Index No.: 112608/06

Motion Date: 01/05/07

- v -

Motion Seq. No.: 01

GREGORY SWITZER and HELENA SWITZER,  
Defendants

Motion Cal. No.: 22

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 6 were read on this motion for summary judgment in lieu of complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3 - 6

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**Cross-Motion:**       Yes       No

Upon the foregoing papers,

The court shall deny summary judgment in lieu of complaint and this action shall proceed in the normal course.

Plaintiff Lou Switzer is the father of defendant Gregory Switzer, and the husband of co-plaintiff Gina Abandonato-Switzer. Defendant Helena Switzer is the spouse of defendant Gregory Switzer. This intra-family dispute manifests itself in the form of a conflict over a promissory note executed by the defendants dated December 11, 1997. The terms of the note state that the defendants would repay the principal, "plus interest at the rate

... IN COMPLIANCE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**Check One:**       FINAL DISPOSITION       NON-FINAL DISPOSITION  
**Check If appropriate:**       DO NOT POST       REFERENCE

of FOUR PERCENT PER ANNUM (4%). Interest to accrue and to be paid with principal at maturity or on demand whichever comes sooner. This is a balloon payment note with a DUE ON SALE provision in the event of the sale of the property commonly known as: City Lights at Queens Landing, 48-18 Fifth Street, Apartment 6G, Long Island City, New York 11101."

Plaintiffs argue that the promissory note qualifies for summary determination under CPLR 3213 and that they have made due demand for payment and defendants have failed to pay according to the terms of the note. Defendants argue that the motion should be denied because the "due on sale" provision is ambiguous and because payment is contingent, this promissory note does not qualify as an instrument for the payment of money only.

Summary judgment must be denied because the court finds the defendants correctly state that the terms of the promissory note are ambiguous. Contrary to plaintiffs' claims, the terms of the note do not necessarily demand repayment of the principal "on demand." Rather, the cited portion of the note could also be read to mean that the interest on the note was payable on demand while the principal was "due on sale." Furthermore, the note on its own terms states that payment is contingent on the sale of a property interest.

As the defendant's point out, plaintiffs commenced a separate lawsuit seeking a declaratory judgment concerning the

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rights of the parties on an agreement related to the promissory note. That suit was heard before another Justice of this Court (Switzer v Switzer, Index No. 112611/2006, DeGrasse, J.). The court in that case ruled against these plaintiffs dismissing their action and holding that the related agreement is void as to the identical defendants in this action. (Switzer v Switzer, Index No. 112611/2006, Order Resolving Motion Seq. No. 1, March 9, 2007, DeGrasse, J.).

The plaintiffs should not be allowed to take advantage of unfortunate waste of judicial resources involved in bringing two separate actions before separate Justices of this Court notwithstanding the identity of claims and parties underlying the dispute. Although the decision dismissing plaintiffs' other lawsuit is not dispositive of the plaintiffs' claims here, it does serve to bolster defendants' argument that plaintiffs' claims here are not subject to summary determination. In considering a similar fact pattern, the First Department held that

While, as a general rule, the breach of a related contract cannot defeat summary judgment on a promissory note, where a fundamental question exists as to whether the agreement between these parties can be viewed as being distinct and separate from the note summary judgment must be denied. If proven at trial, lack of consideration is a perfectly viable defense. Both the maker of the note and the guarantor can assert this defense in defeat of summary judgment since neither the principal nor the guarantor is accountable for anything which has not been received.

Fopeco, Inc. v General Coatings Technologies, Inc., 107 AD2d 609, 610 (1<sup>st</sup> Dept 1985) (citations omitted).

The court shall therefore deny summary judgment to the plaintiffs as there is an issue of fact as to the defendants' obligations thereunder. In order to clarify the factual issues to be litigated before the court, the court shall direct the filing of regular pleadings. See Technical Tape, Inc. v Spray Tuck, Inc., 131 AD2d 404 (1<sup>st</sup> Dept 1987).

Accordingly, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the plaintiffs are directed to serve a complaint within 20 days of the date of service of a copy of this order with notice of entry, and the defendants are to serve their responsive papers within the time set forth for responsive pleadings in the CPLR; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on June 26, 2007, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: April 13, 2007

ENTER:

**FILED**  
*[Signature]*  
**DEBRA A. JAMES** J.S.C.  
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