

<b>Gene Kaufman Architect, P.C. v M &amp; T Bank</b>
2007 NY Slip Op 32037(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0602944/2006
Judge: Karla Moskowitz
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SCANNED ON 7/11/2007  
[\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----X  
GENE KAUFMAN ARCHITECT, P.C.,

Plaintiff,

-against-

M & T BANK, MANUFACTURERS AND TRADERS  
TRUST COMPANY AND M & T BANK CORPORATION,

Defendants.  
-----X

INDEX NO. 602944/2006

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: July 09, 2007

**FILED**

JUL 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
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

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GENE KAUFMAN ARCHITECT, P.C.,

Plaintiff,

Index No. 602944/2006

-against-

M & T BANK, MANUFACTURERS AND TRADERS  
TRUST COMPANY AND M & T BANK CORPORATION,  
Defendants.

-----x

**KARLA MOSKOWITZ, J.:**

Plaintiff, Gene Kaufman Architect, P.C. ("GKA"), pursuant to CPLR 3213, moves (motion sequence no. 001) for summary judgment in lieu of complaint against defendants, M & T Bank, Manufacturers and Traders Trust Company and M & T Bank Corporation, for \$62,078.00, plus interest accruing from February 11, 2004, costs and attorneys' fees because of a stop payment on an official bank check. Defendants cross-move (1) to dismiss this action pursuant to CPLR 3211(a)(1), (4) and (7) on the grounds of documentary evidence, prior action pending with the same issues and overlapping parties and failure to state a cause of action; and (2) in the alternative, pursuant to CPLR 3211(a)(4) and CPLR 602(a), to stay this action or to consolidate it with another action pending before this court, *Gene Kaufman Architect, P.C. and Gene Kaufman v The Gallery at Chelsea, LLC*, Index No. 101897/2005. The court grants plaintiff's motion for summary judgment in lieu of complaint against M & T Bank and Manufacturers and Traders Trust Company. The court grants that part of defendants' cross-motion that seeks dismissal of M & T Bank Corporation but otherwise denies the cross-motion.

**Decision and Order**  
**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**BACKGROUND**

The following facts are from the papers in the motion for summary judgment in lieu of

complaint, the cross-motion and the oppositions.

Gene Kaufman (“Kaufman”) is a registered architect in New York and is the principal of plaintiff GKA. (Affidavit of Gene Kaufman, dated August 16, 2006, ¶ 1). GKA worked on a project at 559 West 23rd Street in Manhattan to develop the property for Stanley Perelman (“Perelman”), principal of the Gallery at Chelsea, LLC (“Gallery”) and of the Gallery’s managing member, Gallery Development Group, LLC. (*Id.* ¶¶ 2, 4). On January 14, 2004, Kaufman and Perelman executed a Termination Agreement that ended the working relationship between GKA and Gallery. (Affidavit of Stanley R. Perelman, dated December 12, 2006, ¶ 3). Pursuant to the Termination Agreement, (1) GKA was to give its work product to Gallery; (2) Gallery was to make a simultaneous payment to GKA; and (3) Gallery’s partners were to make a later payment to GKA. (Kaufman Aff., dated August 16, 2006, ¶ 6).

On December 22, 2003, from an account Perelman had opened for Gallery at M & T Bank, M & T Bank issued an official bank check for \$62,078.00, as the first of the two payments under the Termination Agreement. (Kaufman Aff., dated August 16, 2006, ¶¶ 8, 10). Kaufman seeks summary judgment in lieu of complaint because M & T Bank refused to honor the check. On February 11, 2004, Kaufman deposited the check into GKA’s account at Citibank. On February 12, 2004, Citibank informed Kaufman by letter that M & T Bank intended to return the bank check unpaid because it had stopped payment. (Kaufman Aff., dated August 16, 2006, ¶ 15). Perelman had requested the stop payment by fax dated February 9, 2004. (*Id.* ¶ 18). Perelman claims that, because Kaufman’s attorney, Aaron Friedman, had released the bank check from escrow to Kaufman without Perelman’s “prior authorization” and Perelman had already terminated the deal, Perelman requested the stop payment from M & T Bank. (Perelman Aff.,

dated December 12, 2006, ¶ 12).

Plaintiff alleges that M & T Bank violated its own policies by stopping payment on the bank check because (1) M & T Bank requires 90 days from the date of an official check before executing a stop payment order and the date of issuance here was December 22, 2003 but the stop payment occurred before February 12, 2004, less than 90 days after the check's issuance; and (2) M & T Bank requires that an official bank check be lost, stolen or destroyed before stopping payment and the bank check here was not lost, stolen or destroyed. (Kaufman Aff., dated August 16, 2006, ¶¶ 20-21). In addition, plaintiff alleges that Perelman submitted a false Affidavit, Stop Payment Request and Indemnity Agreement for Lost, Stolen or Destroyed Official Check when, on February 12, 2004, Perelman swore the bank check was lost. (Affidavit, Stop Payment Request and Indemnity Agreement for Lost, Stolen or Destroyed Official Check, dated February 12, 2004, attached to Kaufman Aff., dated August 16, 2006, Exh. 9 [Perelman completed and signed the Affidavit in which he identified the check, dated December 22, 2003, to GKA as "lost."]). Plaintiff bases these allegations on the fact that, three days earlier, Perelman had told M & T Bank the check was in escrow with an attorney and, more importantly, Kaufman presented the check for payment on February 11, 2004. (Kaufman Aff., dated August 16, 2006, ¶¶ 22-23).

This court has pending before it a prior, related action, *Gene Kaufman Architect, PC and Gene Kaufman v The Gallery at Chelsea, LLC*, Index No. 101897/2005, that GKA and Kaufman filed in February 2005. According to defendants, the actions are duplicative because plaintiff bases its claims on the same transaction and alleges the same facts in both actions, such as the existence of the Termination Agreement, the delivery of the bank check to GKA's attorney to

hold in escrow, Perelman's stop payment of the bank check and M & T Bank as the issuing bank. (Perelman Aff., dated December 12, 2006, ¶ 17). Defendants state that, in addition, these actions involve impermissible claim-splitting because plaintiff should have joined its claims against all parties in the prior action. (Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment in Lieu of Complaint and in Support of Defendants' Cross-Motion to Dismiss this Action, p 4 ["Defendants' Memorandum"]).

Defendants further claim that both actions require a determination of whether the parties ever entered the Termination Agreement. Specifically, "[t]o the extent it is determined that the agreement was revoked prior to GKA's acceptance, then there was no agreement and GKA was not entitled to release the Check. To the extent the Court were to find there was an agreement, it is The Gallery's position in the Prior Action that GKA breached such agreement by failing to timely deliver its CAD File and other materials and that, as a result, it was still not entitled to release the Check from escrow." (Perelman Aff., dated December 12, 2006, ¶ 19). Thus, defendants assert that, if GKA did not have the right to deposit the bank check, it has no claims for damages that allegedly arise from the stop payment order. (*Id.* ¶ 20). And, even if GKA has a claim, the prior action provides plaintiff with adequate redress. (Defendants' Memorandum, p 4).

## DISCUSSION

### I. Plaintiff's Motion for Summary Judgment in Lieu of Complaint

#### A. Application of CPLR 3213

CPLR 3213 expedites the resolution of disputes by eliminating the service of formal papers in cases where the "action [is] based upon a judgment or an instrument for the payment of

money only.” (*Technical Tape, Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 406 [1st Dept 1987]). To qualify for CPLR 3213 treatment, “an instrument for the payment of money only must be a written unconditional instrument. Documents which set forth more than the simple promise by the obligor to pay a sum of money may not be sued upon by way of CPLR 3213.” (*Id.* at 406). In addition, “[a]n action comes within the ambit of CPLR 3213 if a prima facie case for nonpayment of a debt can be made out by the terms of the debt instrument itself . . . .” (*Diversified Invs. Corp. v DiversiFax, Inc.*, 239 AD2d 231, 233 [1st Dept 1997]).

An official bank check, in particular, qualifies as an instrument for the payment of money only because it “is clear on its face as to the amount due, without resort to proof of any facts outside the instrument.” (*Abilities, Inc. v Citibank, N.A.*, 87 AD2d 831, 831 [2d Dept 1982]). In addition, a bank check is unconditional in its promise of payment because “the check is the bank’s own direct and primary obligation to the holder . . . .” (*Fur Funtastic, Ltd. v Kearns*, 104 Misc 2d 1030, 1031 [Civ Ct, NY County 1980]; *see also Manhattan Imported Cars, Inc. v Dime Savings Bank of New York*, 70 Misc 2d 889, 890 [1st Dept 1972] [“The teller’s check, delivered as the equivalent of cash, was the bank’s own direct and primary obligation . . . .”]).

Given that the official bank check from M & T Bank reflects on its face, “DRAWER: M & T Bank. Issued by Integrated Payment Systems Inc., Englewood, Colorado. Bank One, NA, Denver, Colorado,” this official bank check can also be considered a teller’s check. “The code [UCC 9-102(11-a)] distinguishes between teller’s checks (drawn by a bank on an account carried with another bank) and cashier’s checks (drawn by a bank where the bank is both drawer and drawee.)” (*Bank of New York v Welz*, 118 Misc 2d 645, 647 [Sup Ct, NY County 1983]; *see also* Haig, *Commercial Litigation in New York State Courts* § 67:20, at 446 [2d ed] [“[A] teller’s

check [is] drawn by one bank upon another bank.”)). The official bank check at issue here qualifies for summary judgment in lieu of complaint not only because it is an unconditional obligation of the bank but also because it provides a “simple promise by the obligor [M&T Bank] to pay a sum of money” to GKA. (*Technical Tape*, 131 AD2d at 406).

## **B. Defenses to CPLR 3213 and Summary Judgment in Lieu of Complaint**

### **1) The Stop Payment**

UCC 4-403 states:

(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4-303.

(2) A remitter or payee of a cashier's check or certified check may by order to the obligated bank stop payment of such a check, and a remitter [Gallery/Perelman] or payee of a teller's check may order the obligated bank [M & T Bank] to order the payor bank [Bank One] to stop payment of such a check, at any time after ninety days from the date of issuance of either a cashier's check or teller's check, and date of certification of a certified check. The stop payment is effective if either the remitter or payee delivers to the obligated bank at a time and in a manner affording a reasonable opportunity to act before any of the actions described in Section 4-303(1) are taken: (i) a written order to stop payment, which shall describe the item with reasonable certainty, and (ii) an affidavit of the remitter or payee containing an averment that the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. (underlining added).

Section 4-403(1) does not apply because Gallery/Perelman is not a “customer” here. A customer “means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank.” (UCC 4-104[e]). As explained above, M & T Bank's official check is a teller's check, so M & T Bank has drawn upon its account with Bank One to provide the funds for the official bank check to GKA. (*See*

*supra* p 5). The account in question therefore is that of M & T Bank, and not Gallery's. Instead, Perelman/Gallery is the remitter of the check. A remitter "means the buyer from the obligated bank of a cashier's check or a teller's check, and the drawer of a certified check." (UCC 4-104[k]). Given that Gallery/Perelman is the remitter of the check, the subsection of UCC 4-403 that applies is the second subsection.

As remitter, Gallery/Perelman "may order the obligated bank [M & T Bank] to order the payor bank [Bank One] to stop payment of such a check, at any time after ninety days from the date of issuance of either a cashier's check or teller's check." (UCC 4-403[2]). M & T Bank is the "obligated bank" because it is the "drawer of a teller's check." (*See* UCC 4-104[i]). Bank One is the "payor bank" because it is a "bank by which an item is payable as drawn or accepted." (*See* UCC 4-105[b]). Gallery/Perelman (remitter), however, ordered M & T Bank (obligated bank) to stop payment of the official bank check on February 9, 2004. To comply with UCC 4-403(2)(i), Perelman could request, and M & T Bank could accept, a stop payment only "at any time after ninety days from the date of issuance [December 22, 2003]" or after March 22, 2004. M & T Bank violated this provision by executing the stop payment on February 12, 2004, when Kaufman learned from its bank, Citibank, that M & T Bank would not honor the check. (Kaufman Aff., dated August 16, 2006, ¶ 15).

In addition, M & T Bank violated UCC 4-403(2)(ii) because it relied on Perelman's Affidavit of February 12, 2004 declaring the check lost (Affidavit, Stop Payment Request and Indemnity Agreement for Lost, Stolen or Destroyed Official Check, dated February 12, 2004, attached to Kaufman Aff., dated August 16, 2006, Exh. 9), even though the check clearly was not lost if Kaufman deposited the check on February 11, 2004 (Kaufman Aff., dated August 16,

2006, ¶ 14). M & T Bank thus failed to comply with the UCC and cannot assert a legal right to stop payment as a defense to summary judgment in lieu of complaint.

The court adheres to the requirements of UCC 4-403 and applies them to this transaction. Official bank checks, including teller's checks, "are more readily accepted in the commercial world than personal checks because the bank becomes guarantor of their value and because the bank cannot stop payment on them when validly issued." (*Savemart v Bowery Savings Bank*, 117 Misc 2d 947, 949 [1st Dept 1982]). Contrary to UCC 4-403, neither M & T Bank nor Gallery/Perelman waited 90 days. Nor did Perelman's affidavit accurately state the status of the official bank check. M & T Bank, as a drawer bank, cannot escape liability for the official bank check it furnished for Perelman/Gallery to GKA. "While the code allows a teller's check to be stopped, New York courts nevertheless have frequently imposed liability on the *drawer* bank where it has stopped payment." (*Bank of New York*, 118 Misc 2d at 647 [emphasis added], citing *Meckler v Highland Falls Sav. & Loan Assn.*, 64 Misc 2d 407, 409 [Sup Ct, Rockland County 1970]; *Malphrus v Home Sav. Bank of City of Albany*, 44 Misc 2d 705, 707 [Albany County Court 1965]). Thus, GKA, as the payee who is receiving the payment of the official bank check, has a cause of action against M & T Bank as drawer. (*Bank of New York*, 118 Misc 2d at 648).

Further, M & T Bank's own policy for stop payment mirrors that of UCC 4-403, and Jason Lipiec, an administrative vice president of M & T Bank, admitted M & T Bank had not followed this policy. (Deposition of Jason Lipiec, dated May 4, 2006, attached to Kaufman Aff., dated August 16, 2006, Exh. 7, p 81). M & T Bank's policy states: "If the check is a certified or official M & T Bank check, all additional requirements of applicable law and M & T Bank policy must be met. For example, the stop payment order may not be executed until after (a) 90 days

have elapsed after the initial issuance of the check (which in the case of an official M & T Bank check is the date of the check . . .) and (b) M & T's receipt of an affidavit or similar declaration made under penalty of perjury in accordance with the applicable state law stating that the check has been lost, stolen or destroyed . . . ." (M & T Bank Commercial Deposit Account Agreement, p 9, attached to Kaufmann Aff., dated August 16, 2006, Exh. 8). The UCC and the M & T Bank Commercial Deposit Account Agreement both bar any defense of M & T Bank's right, as a matter of law, to stop payment on the official bank check to GKA.

## **2) Issues of Fact**

When issues of fact exist about "the quantum of damages due under the guaranty," summary judgment in lieu of complaint is not appropriate. (*Eugenia VI Venture Holdings, Ltd. v AMC Investors, LLC*, 35 AD3d 157, 159 [1st Dept 2006] [citation omitted]; *see also Sung Hwan Co. v Rite Aid Corp.*, 7 NY3d 78, 82 [2006] [denying summary judgment in lieu of complaint because of "unresolved issues of fact regarding the relationship between [the two companies]"]; *Tars Uluslararası Dis Ticaret Turizm ve Sanayi Ltd., Sirketi v Leonard*, 26 AD3d 298, 299 [1st Dept 2006] [affirming summary judgment in lieu of complaint because "defendant has not demonstrated any triable issues of fact to warrant denial of summary relief"]).

Defendants identify two issues as in dispute: (1) because Perelman revoked the offer before GKA had accepted the offer by relinquishing its work product pursuant to the Termination Agreement, whether GKA and Perelman actually entered the Termination Agreement; and (2) if an agreement existed, whether GKA breached the Termination Agreement by its delay in turning over its work product. (Defendants' Memorandum, p 21). In either situation, defendants contend GKA's attorney should not have released the check from escrow and GKA had no right

to payment. (*Id.*). In essence, defendants argue that “a question of fact exists as to whether the Check was improperly released from escrow and thereby procured by fraud.” (*Id.*).

Plaintiff states, “The underlying transaction, that caused defendants’ customer to withdraw money from its account and have the official bank check drawn payable to GKA, is irrelevant to the determination of the bank’s liability. Consequently, there are no disputed material issues of fact, and summary judgment should be granted in plaintiff’s favor.” (Plaintiff’s Opposition, p 1). Plaintiff correctly explains that the only legal issue in this action is M & T Bank’s liability on the official bank check. Moreover, to assert fraud as a defense, defendants must do more than make a conclusory allegation, and defendants allege only the following: “a question of fact exists as to whether the Check was improperly released from escrow and thereby procured by fraud.” (Defendants’ Memorandum, p 21). Defendants must show “a representation of a material fact which was false and was made for the purpose of inducing the other party to rely on it, and that the other party did in fact rely on the material misrepresentation in ignorance of its falsity to his injury. Each of these elements must be supported by facts and allegations constituting the wrong sufficient to satisfy CPLR 3016(b).” (*Estate of Swidow v Kachkowski*, 2003 WL 175256, \*3 [Sur Ct, Nassau County 2003] [describing fraud as a defense for stop payment of a cashier’s check] [internal citation and quotations omitted]).

Defendants can assert neither a right to stop payment on the official bank check nor the existence of issues of fact as grounds to deny plaintiff’s motion. Accordingly, the court grants summary judgment in lieu of complaint in favor of plaintiff.

## **II. Defendants' Cross-Motion**

### **A. Dismissal of Plaintiff's Action under CPLR 3211(a)(1), (4) and (7)**

#### **1) Dismissal under CPLR 3211(a)(7)**

Defendants cross-move to dismiss plaintiff's action against defendant M&T Bank Corporation for failure to state a cause of action. (CPLR 3211[a][7]).

The court accepts defendants' argument for dismissal of M & T Bank Corporation for failure to state a cause of action pursuant to CPLR 3211(a)(7). (Defendants' Memorandum, pp 18-19). M & T Bank Corporation is the parent of M & T Bank, and plaintiff does not allege enough facts to hold M & T Bank Corporation liable. Because, as defendants admit, M & T Bank and Manufacturers and Traders Trust Company are the same entity (*id.* at 1 n 1), these two corporations can be held liable and thus remain in this action. However, with no factual basis to hold in the parent M & T Bank Corporation, the court grants that part of defendants' cross-motion to dismiss based on failure to state a cause of action as against M & T Bank Corporation.

#### **2) Dismissal under CPLR 3211(a)(1)**

Defendants also cross-move to dismiss plaintiff's action against all defendants on the basis of documentary evidence. (CPLR 3211[a][1]).

In their papers, defendants do not clearly identify the documents that allegedly entitle them to dismissal on the basis of documentary evidence. Plaintiff's opposition to defendants' cross-motion suggests defendants cross-move to dismiss plaintiff's claim by using the various written documents defendants attach as exhibits. (Kaufman Aff., dated December 12, 2006, ¶ 4). These exhibits are merely the underlying documents of the parties' exchanges about the Termination Agreement and the stop payment transaction (e.g., emails and letters between Perelman and

Friedman about the Termination Agreement and Perelman's Affidavit, Stop Payment Request and Indemnity Agreement for Lost, Stolen or Destroyed Official Check) that the court in section I(B) rejects as a justification for M & T Bank's stop payment. (*See supra* pp 9-10). Further, defendants had no involvement with the Termination Agreement, so these documents are irrelevant to this motion that addresses only defendants' liability for the official bank check. Accordingly, the court denies that part of defendants' cross-motion seeking dismissal on the basis of documentary evidence.

### **3) Dismissal under CPLR 3211(a)(4)**

Defendants cross-move to dismiss plaintiff's action against all defendants because there is a prior action pending that involves the same issues and has overlapping parties. (Defendants' Memorandum, p 11). CPLR 3211(a)(4) provides for dismissal on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." Specifically, dismissal under CPLR 3211(a)(4) requires a "substantial identity" of the parties and the relief for the actions must be "the same or substantially the same." (*White Light Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 93-94 [1st Dept 1997]).

Defendants fail to satisfy the criteria for dismissal pursuant to CPLR 3211(a)(4). First, the prior action, *Gene Kaufman Architect, PC and Gene Kaufman v The Gallery at Chelsea, LLC*, Index No. 101897/2005, that GKA and Kaufman filed in February 2005, does not include M & T Bank, Manufacturers and Traders Trust Company and M & T Bank Corporation as defendants. The defendants in that action are Perelman, Gallery, Gallery Development Group, LLC, CJA Gallery, LLC, JN Gallery, LLC, Jani Development, LLC, Jani Development II, LLC,

Coleson Management, LLC, Arrow Development Company, The Sedona Group, LLC, Sedona Development Group, LLC, Toni Coburn, Stephen E. McArdle, JMA Auto Tech Corp., Fremont Investment & Loan, Ultra Construction Associates, Inc., VJB Construction 559 W 23rd Street LLC, Peter Scalamandre & Sons, Inc., Blueprint Plumbing LLC, North American Elevator Industries, Inc. and Joseph Gentile. Thus, the prior action is *not* “between the same parties.”

Second, the prior action does not contain a claim for bank liability for stopping payment on the bank check. The claims in the prior action are foreclosure of a mechanic’s lien, breach of the Termination Agreement, breach of the July 9, 2002 Agreement, fraud in the inducement, unjust enrichment, quantum meruit, account stated, and declaratory judgment to pierce the corporate veil. As a result, the prior action does not contain “the same cause of action.” Accordingly, the court denies that part of defendants’ cross-motion to dismiss on the basis of prior action pending.

**B. Request to Stay this Action or to Consolidate it with Another Action**

Defendant states because “[b]oth actions involve common questions of law and fact . . . a stay or consolidation will avoid unnecessary duplication of trials, save unnecessary costs and expenses, and prevent an injustice which would result from conflicting decisions based on the same facts.” (Defendants’ Memorandum, p 4).

Because the court grants plaintiff’s motion for summary judgment in lieu of complaint, the court need not consider defendants’ motion to consolidate this case with the prior action pursuant to CPLR 602. Nor will the court stay this action. As the court explains in section II(A)(3) in the discussion of CPLR 3211(a)(4) (*see supra* pp 11-12), unlike this action, the prior action does not involve any claims regarding bank liability and the defendants are completely

different. “A stay pending determination of another action should not be granted unless the other action presents complete identity of parties, causes of action and relief sought.” (*Del-Val Fin. Corp. v Fed. Ins. Co.*, 193 AD2d 544, 545 [1st Dept 1993] [internal quotations omitted]). Thus, decisions in the two actions will not produce inconsistent judgments. Accordingly, the court denies that part of defendants’ cross-motion to consolidate or stay plaintiff’s action.

### **III. Plaintiff’s Request for Interest, Attorneys’ Fees and Costs**

The court grants plaintiff’s request for interest pursuant to CPLR 5001(b) that states a plaintiff receives interest from the earliest possible date of defendant’s breach. Plaintiff suggests that this date is February 11, 2004, when plaintiff deposited the check in its account. (Plaintiff’s Memorandum of Law in Support of Summary Judgment in Lieu of Complaint, p 15). Pursuant to CPLR 5001 and 5004, plaintiff receives the statutory rate of interest of nine percent per annum. (*Taboada v Bank of Babylon*, 95 Misc 2d 1000, 1004 [Suffolk Dist Ct 1978] [in granting summary judgment in lieu of complaint in favor of plaintiff on an official bank check, plaintiff deserves interest “from the date of dishonor”]). The plaintiff therefore receives interest from the date of dishonor, February 12, 2004, when Citibank informed Kaufman that M & T Bank had stopped payment. Because neither an agreement nor the UCC allows attorneys’ fees, the court denies plaintiff’s request for attorneys’ fees but does award it costs. (*See Manhattan Imported Cars*, 70 Misc 2d at 890 [granting interest pursuant to CPLR 5001 and costs to plaintiff in action for summary judgment when bank stopped payment on the teller’s check even though it knew the affidavit of lost check to be false]).

### **CONCLUSION**

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants M & T Bank and Manufacturers and Traders Trust Company in the amount of \$62,078.00, with interest at a statutory rate of 9 % per annum from February 12, 2004 until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that part of plaintiff's motion for summary judgment in lieu of complaint against M & T Bank Corporation and for attorneys' fees is denied; and it is further

ORDERED that that part of defendants' cross-motion to dismiss as against M & T Bank Corporation is granted but that the cross-motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 09, 2007

ENTER



J.S.C.

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE