

**Waldman v Rosengarten**

2007 NY Slip Op 32321(U)

July 20, 2007

Supreme Court, New York County

Docket Number: 0600278/2007

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

**FBEM**

Waldman, Michael  
PLAINTIFF

INDEX NO. #600278-2007

MOTION DATE \_\_\_\_\_

*- v -*  
Rosengarten, Gerald

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

DEFENDANT

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

**FILED**

Answering Affidavits — Exhibits \_\_\_\_\_

JUL 20 2007

Replying Affidavits \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 7/20/07

Bernard J. Fried  
J.S.C. **BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST [ ] REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 60

-----X  
MICHAEL WALDMAN,

Index No. 600278/07

Plaintiff,

- against -

GERALD ROSENGARTEN and NEW CITY  
ASSOCIATES, LLC,

**FILED**

JUL 20 2007

Defendants  
NEW YORK  
COUNTY CLERK'S OFFICE

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**FRIED, J.:**

In an action to recover on two promissory notes, plaintiff, Michael Waldman, moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint.

Plaintiff, through his limited liability company First Avenue Associates, LLC ("First Avenue Associates"), and defendant Gerald Rosengarten ("Rosengarten"), through his limited liability company 10<sup>th</sup> Street Structural Arts Building, LLC (10<sup>th</sup> Street Structural"), owned equal interests in defendant New City Associates, LLC ("New City"). New City owns the real property and apartment building located at 240 East 10<sup>th</sup> Street, New York, New York.

By Assignment of Membership Interest, dated December 31, 2003, and related documents, including unit deeds and assignment of leases and rents, First Avenue Associates agreed to transfer its interest in New City to 10<sup>th</sup> Street Structural. In connection with the assignment, Rosengarten, individually and as manager of New City, executed two promissory notes, also dated December 31, 2003. The first promissory note required defendants to pay

plaintiff the principal amount of \$21,500, plus interest at the rate of five percent per year, by November 30, 2005. The second promissory note required defendants pay to plaintiff the principal amount of \$300,000, plus interest at the rate of five percent per year, by December 31, 2006. In addition, both promissory notes set default interest on the unpaid principal balance at the rate of 24% per year, and require defendants to pay all collection costs.

Defendants failed to pay the promissory notes and plaintiff commenced this action, by motion for summary judgment in lieu of complaint, seeking judgment awarding him (1) the principal amount of the \$21,500 promissory note, plus unpaid interest computed at the rate of five percent per year through November 30, 2005, or \$2,063.42, as well as interest on the principal amount computed at the default rate of 24% per year from November 30, 2005, together with costs, fees, and disbursements; and (2) the principal amount of the \$300,000 promissory note, plus unpaid interest computed at the rate of five percent per year through January 1, 2007, or \$45,000, as well as interest on the principal amount computed at the default rate of 24% per year from January 1, 2007, together with costs, fees, and disbursements.

Plaintiff establishes a prima facie case by submitting proof of the promissory notes and defendants' failure to pay according to the terms thereof (*Gallagher v Kazmierczuk*, 245 AD2d 418 [2d Dept 1997]). Thus, defendants are required to come forward with proof of evidentiary facts showing the existence of a triable issue with respect to a defense (*see Falco v Thorne*, 225 AD2d 582, 583 [2d Dept 1996]).

During oral argument on the motion, New City stipulated to liability as to the \$21,500 promissory note and the Court granted partial summary judgment as to that promissory note (Transcript, p. 9). However, Rosengarten raises, as defenses (1) rambling assertions of

duress allegedly based on plaintiff's repeated threats to cause physical injury to him or his family if he declined to execute the promissory notes; (2) the assertion that plaintiff defaulted on a loan he made to plaintiff and a nonparty in March 2, 2001, in connection with an unrelated transaction; and (3) the assertion that on December 31, 2006, plaintiff refused delivery of a check in the amount of \$201,394.75, representing full payment of the two promissory notes, minus the outstanding balance on the March 2, 2001 loan.

On review of the submissions, it is evident that defendants fail to establish the existence of triable issues of fact with respect to their proffered defenses. The incomprehensible assertions of threats of physical injury are insufficient to establish that Rosengarten was forced to execute the promissory notes "by means of wrongful threat precluding the exercise of free will" so as to state a viable defense of duress (*Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124, 130 [1971]). Nor does the alleged breach of a loan made by Rosengarten during a separate transaction involving a nonparty constitute a valid defense to plaintiff's claim for payment on the subject promissory notes (*see Logan v Williamson & Co.*, 64 AD2d 466, 470 [4<sup>th</sup> Dept 1978]). Furthermore, the assertion that plaintiff refused delivery of full payment on the promissory notes is unsubstantiated.

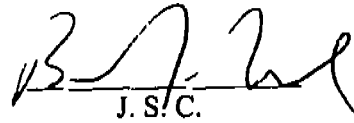
Accordingly, it is

ORDERED that the motion is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants Gerald Rosengarten and New City Associates, LLC in the amount of \$321,500, together with interest as prayed for allowable by law, until the date of entry of the judgment, as calculated by the Clerk, and thereafter at the statutory rate,

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 7/24/07

ENTER:

  
J. S. C.

**BERNARD J. FRIED**  
J.S.C.

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