

**Rosma Dev. LLC v Sound Beyond Elec. Corp.**

2007 NY Slip Op 32811(U)

August 29, 2007

Supreme Court, New York County

Docket Number: 0113941/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Rosma Development  
Sound Beyond

INDEX NO.

113941/06

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

§ 3213

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
SEP 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Aug 29, 2007

Aug 29, 2007

HON. JUDITH J. GISCHE

J.S.C.

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: PART 10

-----X

Rosma Development LLC,

Plaintiff

-against-

The Sound Beyond Electrical Corp.  
David Motovich, Boris Motovich,  
Walter Stanzione, Firealarm Com, Inc.,  
WeGuardYou.Com, Inc., and  
Hill Rose Farms, Inc.,

Defendants.

-----X

**DECISION/ORDER**

Index No.: 113941/06

Seq. No.: 002

Present:

Hon. Judith J. Gische, JSC

**FILED**  
SEP 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a], of the papers considered for the review of this/these motion(s):

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<b>Papers</b>	<b>Numbered</b>
Amended summons (3213) w/MR affid, exhs .....	1
Affirm in opp w/ABK affirm, WAS affid, exhs .....	2
Pltff Reply w/SE affirm .....	3
Order of Consolidation (3/19/07) .....	4
Stip of consolidation .....	5
Transcript of OA .....	6

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*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.*

This is an action on a promissory note. As per this court's Order of Consolidation of March 19, 2007, the case of Rosma Development, LLC v. David Motovich, Boris Motovich, Walter Stanzione, Firealarm Com, Inc., WeGuardYou.Com, Inc., and Hill

[ 3 ]  
Rose Farms, Inc., 113942/2006, then pending before Hon. Joan Madden, was consolidated with this case under the present index number. The consolidation was for all purposes, including joint trial.

The court now has before it plaintiff's motion for summary judgment in lieu of a complaint. CPLR § 3213. Defendants oppose the motion on the basis that Sound Beyond Electrical Corp. was fraudulently induced into signing the note and the court should consider extrinsic evidence.

### **Arguments presented**

Walter Stanzione, the president of the named corporate defendants (collectively the "ACME Group") opposes plaintiff's motion to enter a money judgment against Sound Beyond Electrical Group, Inc. ("Sound Beyond") on the basis that the promissory note plaintiff is suing on is an incomplete document, and that although he signed it on behalf of Sound Beyond, he was fraudulently induced to do so.

To support his claim of fraudulent inducement, Mr. Stanzione states that he, the two Motovich defendants, and Rosma engaged in extensive negotiations that eventually culminated in a memo agreement and then a formal agreement among them. The memo agreement dated July 21, 2005 provides for Rosma to invest millions of dollars into Mr. Stanzione's companies. The formal agreement dated October 26, 2005 ("the agreement") solidifies the investment terms. Subsequently, Sound Beyond made a note payable to Rosma in the sum of \$4,700,000.33; it is amended and redated as of November 23, 2005 ("the note").

[ 4 ]

Insofar as relevant to this motion, the agreement provides (and Stanzione contends) that Rosma would provide defendant with financing or capital, but the loans (e.g. notes) would not become due nor would be demanded until after Sound Beyond had completed certain jobs.

Mr. Stanzione contends that Rosma stopped financing Sound Beyond and because it could no longer meet its operating expenses, Sound Beyond could not complete the projects it had undertaken, including one with the City of New York which he estimates was worth between \$12 - 15 million. Thus, it is Sound Beyond's contention that Rosma precipitated its default on the note, it acted in bad faith and it fraudulently induced Sound Beyond to sign the note with promises that it would continue to provide financing for the projects. Mr. Stanzione contends that the note cannot be independently considered, but has to be examined together with the October 6, 2005 agreement because of the provisions to forbear on demanding repayment. Sound Beyond contends further that it agreed to sign the note with the payment "on demand" language only because it expected Rosma would forbear on demanding payment until after the projects were completed.

Rosma contends the note is a complete document and that reference to extrinsic evidence is not only unnecessary, but barred since it is not ambiguous. Mr. Rosner, a principal of Rosma contends that although he demanded payment, the note remains unpaid.

#### **Discussion**

[\* 5 ]

When an action is based upon an instrument for the payment of money only or upon a judgment, the plaintiff may serve with the summons a notice of motion for summary judgment in lieu of complaint. An instrument qualifies under CPLR § 3213 if a *prima facie* case would be made out by the instrument and a failure to make the payments called for thereunder.

As a general rule, the alleged breach of a related but independent contract will not defeat a summary judgment motion on a promissory note [See: Logan v. Williamson & Co., 64 AD2d 466 (4th Dep't 1978) *app dism* 46 NY2d 996 (1979)], unless the instrument and the contract are sufficiently intertwined [See: Corvetti v. Hudson, 252 AD2d 787 (3d Dep't 1998); East New York Sav. Bank v. Baccaray, 214 A.D.2d 601 (2nd Dept. 1995)]. Moreover, the fact that an instrument that was signed was part of a larger transaction does not, by itself, bar accelerated treatment of plaintiff's claims. Kirkwood v. Nakhmkin, 169 AD2d 693 (1<sup>st</sup> Dept 1991).

Where, as here, the defendant, in opposition to the motion, raises claims of fraudulent inducement this, in appropriate circumstances, may present a triable issue of fact necessitating the denial of the motion. Millerton Agway Co-op., Inc. v. Briarcliff Farms, Inc., 17 N.Y.2d 57 (1966); N & M Plumbing & Heating Corp. v. Cenacle Properties of L.I., Inc., 171 A.D.2d 653 (2nd Dept 1991).

To support a fraudulent inducement claim or defense, defendants would have to present facts that the alleged misrepresentation by Rosma was a "then-present fact," extraneous to the contract, involving a duty separate from or in addition to that imposed by the contract. See: Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 323 (1<sup>st</sup>

[\* 6]

Dept 2004); See also: Qrix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 (1<sup>st</sup> Dept 1998) (a fraudulent inducement claim must allege misrepresentation of facts that are collateral to the contract and which induced the allegedly defrauded party into signing the contract). Sound Beyond's claims fall short of this mark. Even assuming it has counterclaims against Rosma for breach of contract, this is no reason to delay entry of judgment on the note which, by its terms, is unambiguous and is for the payment of money only. See: Banco Do Estado De Sao Paulo, S.A. v. Mendes Jr. Intern. Co., 249 A.D.2d 137 (1<sup>st</sup> Dept 1998). The facts pled do not support a tort action and the tort action claims appears to be identical to any breach of contract claim/defense Sound Beyond may have. Clark-Fitzpatrick, Inc. v. Long Island RR Co., 70 NY2d 382 , 389 (1987).

Plaintiff has proved the note and that the sum of \$4,176,000 remains unpaid despite a demand for payment. Interest shall run from the date of default which is May 18, 2006. The Clerk shall enter judgment in favor of plaintiff Rosma Development, LLC against defendant The Sound Beyond Electrical Corp. in the sum of Four Million One Hundred Seventy Six Thousand Dollars (\$4,176,000), with interest from May 18, 2006, together with the costs and disbursements of this action.

As per the note, plaintiff may also recover its legal fees in connection with this action from defendant Sound Beyond. The issue of the reasonable legal fees plaintiff may recover from defendant is severed and referred to a special referee for a hearing and report to the court. Plaintiff shall serve a copy of this order on the Office of the

[\* 7 ]  
Special Referee at 60 Centre Street, Room 119, so that this reference may be scheduled and assigned.

**Conclusion**

Plaintiff's motion for summary judgment in lieu of a complaint is granted in all respects against defendant The Sound Beyond Electrical Corp.

*It is hereby*

**ORDERED** that the Clerk shall enter judgment in favor of Rosma Development LLC against defendant The Sound Beyond Electrical Corp in the sum of Four Million One Hundred Seventy Six Thousand Dollars (\$4,176,000), with interest from May 18, 2006, together with the costs and disbursements of this action; and it is further

**ORDERED** that the issue of the reasonable legal fees plaintiff is severed is severed and referred to a special referee for a hearing and report to the court; Plaintiff shall serve a copy of this order on the Office of the Special Referee at 60 Centre Street, Room 119, so that this reference may be scheduled and assigned; and it is further


**ORDERED** that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

**ORDERED** that this constitutes the decision, order and judgment of the court.

Dated: New York, New York  
August 29, 2007

**FILED**  
SEP 07 2007  
NEW YORK  
COUNTY CLERKS OFFICE

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC