

**Off Premises Equities, LLC v ATM of America, Inc.**

2007 NY Slip Op 34373(U)

September 1, 2007

Supreme Court, New York County

Docket Number: 0116591/2007

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

Index Number : 116591/2007  
OFF PREMISES EQUITIES, LLC  
vs  
ATM OF AMERICA, INC.  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 ACCOMPANYING MEMORANDUM DECISION

**FILED**  
SEP 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/15

WALTER B. TOLUB *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: IAS PART 15

-----x  
OFF PREMISES EQUITIES, LLC

Plaintiff,

-against-

ATM OF AMERICA, INC., and SABAH AMMOURI  
Defendant.

-----x

Index No. 15 91/07  
Mtn Seq. 001

**FILED**  
SEP 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**WALTER B. TOLUB, J.:**

This is a motion by the Plaintiff for summary judgment on its first and second causes of action for payment on a promissory note and a guarantee. (CPLR 3212). Defendant cross-moves for discovery or, alternatively, a preliminary conference.

Facts

The facts relating to this motion are undisputed. On August 1, 2007, Plaintiff and Defendant, ATM of America, entered into an agreement whereby Plaintiff sold to the Defendant ATM machines and various assets (Agreement). The purchase price was \$150,000.

In connection with the Agreement, ATM of America executed a Promissory Note in the amount of \$50,000 (Note). Defendant Sabah Ammouri, the president of ATM of America, executed a personal guarantee for the obligations of ATM of America (Guarantee).

The Note provides for twelve equal monthly installments of \$4,372.58, commencing September 1, 2007 and interest on the unpaid balance of 9% per year. The Note also provides that in the event a payment is not made within 10 days of its due date,

[\* 3.]  
Plaintiff may elect to accelerate the Note and demand the entire amount of the sum to be immediately due and payable with an additional 2% interest added on for each month of nonpayment and reasonable attorneys' fees in the amount of 20% of the unpaid balance. ATM of America made only one payment that was due under the Note and Guarantee. On October 17, 2007, Plaintiff notified Defendants of its exercise of its right to accelerate the terms of the Note. Defendants did not make any further payment to Plaintiff and Plaintiff now seeks its principal with 2% interest per month and attorney fees.

Plaintiff commenced this action alleging four causes of action. By this motion, Plaintiff seeks summary judgment on its first two causes of action, namely for payment on the Note and the Guarantee.

Defendants argue that Plaintiff violated certain terms of the Agreement and that therefore they are not obligated to pay on the Note and Guarantee since they are part of a unified transaction and are inseparable, barring a summary judgment on the payment instruments alone. Defendants also argue that there was no consideration on the Guarantee and Note. Defendants cross-move for discovery or alternatively, a preliminary conference date for this matter.

#### Discussion

Plaintiff bring this motion pursuant to CPLR §3212. As with

any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atلمان, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

CPLR §3212 is distinguishable from CPLR §3213 in that, CPLR §3213 is a motion for summary judgment in lieu of the complaint. When an action is based upon an instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of the complaint (CPLR §3213). CPLR §3213 is usually applied to cases in which there is a loan<sup>1</sup>.

Plaintiff seeks summary judgment pursuant to CPLR §3212,

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<sup>1</sup>The Court distinguishes CPLR §3212 and §3213 because both parties rely heavily on cases dealing with CPLR §3213. Cases dealing with CPLR §3213 primarily deal with guarantees and promissory notes and their relationships with other agreements entered into between the parties.

arguing that the Note and Guarantee are to be viewed as separate agreements from the underlying Agreement and that Defendants have breached these agreements. Plaintiff further argues that the Note and Guarantee are enforceable separate and apart from the underlying Agreement between the parties (Logan Williamson & Co., 64 Ad2d 466 [4<sup>th</sup> Dept 1978]).

Defendants argue that Plaintiff's motion must be denied because the Note and Guarantee lacked separate consideration from the Agreement. Defendants assert that the consideration for the Note and Guarantee was the performance by the Plaintiff under the Purchase Agreement. Defendants further argue that the Note and Guarantee are inextricably linked to the Agreement and that since Plaintiff breached the Agreement by interfering with Plaintiff's business, they are not obligated to pay on the Note and Guarantee.

Instruments for the payment of money only, can be enforced separate and apart from an underlying agreement (Dresdner Bank AG v. Morse Diesel, Inc., 115 AD2d 64[1st Dept 1986]). However, when there is a defense asserted, namely a breach of the underlying agreement, and the notes and guarantees are intricately tied to the underlying agreement, then the payment instruments may not be enforced (Id.). While as a general rule a breach of a related contract will not defeat summary judgment on a promissory note, where as here, a fundamental question

\* 6 ]  
exists as to whether the agreement between the parties can be viewed as being distinct and separate from the note, summary judgment must be denied (Fopeco, Inc. v. General Coatings Technologies, Inc., 107 AD2d 609 [1<sup>st</sup> dept 1985] citing Ssangyong v. Sung Ae Yoo, 88 AD2d 572 [1<sup>st</sup> dept 1982]).

It follows that there remain questions of fact precluding the granting of summary judgment.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendants' cross-motion for a Preliminary Conference is granted.

Counsel for the parties are directed to appear for preliminary conference on October 10, 1008 at 11AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/11/08

HON. WALTER TOLUB, J.S.C.

FILED  
SEP 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK