

Raico v Concorde Funding Group

2008 NY Slip Op 30968(U)

March 24, 2008

Supreme Court, Nassau County

Docket Number: 3201-06/

Judge: Leonard B. Austin

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**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

**Motion R/D: 11-20-07
Submission Date: 12-10-07
Motion Sequence No.: 001/MOT D**

DENNIS P. RAICO,

Plaintiff,

**COUNSEL FOR PLAINTIFF
Certilman, Balin, Adler & Hyman, LLP
90 Merrick Avenue - 9th Floor
East Meadow, New York 11554**

- against -

**CONCORDE FUNDING GROUP and
ERNEST E. CRAUMER,**

Defendants.

**COUNSEL FOR DEFENDANTS
Briccetti, Calhoun & Lawrence, LLP
81 Main Street, Suite 450
White Plains, New York 10601**

ORDER

The following papers were read on Plaintiff's motion for summary judgment:

- Notice of Motion dated October 22, 2007;
- Affidavit of Dennis Raico sworn to on August 27, 2007;
- Plaintiff's Memorandum of Law;
- Affidavit of Ernest E. Craumer sworn to on November 13, 2007;
- Defendant's Memorandum of Law;
- Affirmation of Robert Connolly, Esq. dated December 7, 2007.

Plaintiff, Dennis P. Raico ("Raico"), moves for summary judgment on two promissory notes and to dismiss Defendants' counterclaims.

BACKGROUND

Defendant, Concorde Funding Group ("Concorde"), is a domestic corporation with its principal office in Riverside, Connecticut.¹ Concorde is in the mortgage brokerage business. Defendant, Ernest E. Craumer ("Craumer"), is the chairman or chief executive officer of Concorde.

On March 17, 2005, Craumer made a promissory note payable to Raico in the principal sum of \$150,000 ("Note 1"). Note 1 bears interest at the rate of six (6%) percent per annum. The entire principal and accrued interest was "...due and payable upon the execution of the operating line of credit of \$1 million from Greenwich Bank and Trust Co. or one year from the date of this Note, whichever occurs sooner." The note has two signature lines, one for Concorde and one for Craumer. The note is signed by Craumer on the line above his name. It is not signed on the line for Concorde.

On June 20, 2005, Craumer made a promissory note payable to Raico in the principal sum of \$325,000 ("Note 2"). Note 2 bears interest at the rate of six (6%) percent per annum. The entire principal and accrued interest was "...due and payable upon the execution of the operating line of credit from the business, or one year from the date of this note, whichever occurs sooner." Note 2 also has signature lines for

¹The court has checked the records of the New York State Secretary of State. Concorde Funding Group, Ltd. is an active, domestic corporation with its principal place of business in Riverside, Connecticut.

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Concorde and Craumer. The note is signed by Craumer on the line above his name. The note is not signed on the line for Concorde.

Concorde never obtained the operating line of credit referenced by the notes. Raico claims the notes became due one year from the date they were made. Raico has not received any payment on these notes.

The notes also provide that, if an action has to be brought on the notes, the maker will pay reasonable counsel fees incurred in the action to collect on the notes.

Defendants allege that, on March 1, 2005, Raico and Craumer agreed they would be equal principals in Concorde with each owning forty (40%) percent of the stock.² Craumer and Raico were each to contribute \$1,250,000 as capital to Concorde. Craumer alleges he made his capital contribution. He alleges that Raico has failed to both execute the regulatory forms required in connection with this agreement and make his full capital contribution.

In the first counterclaim, Craumer and Concorde seek to recover \$387,500 from Raico. Craumer alleges that he contributed \$1,250,000 to Concorde. He seeks to treat the \$475,000 reflected in the promissory notes as Raico's capital contribution. The amount sought in this counterclaim is the amount needed to equalize Raico and Craumer's capital contribution.

²The counterclaim alleges Craumer and Raico were each to own forty (40%) of the stock in Concorde. It does not allege who was to own or owned the other twenty (20%) of the shares.

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The second counterclaim alleges that Raico breached his fiduciary duty to Concorde. Concorde alleges Raico has recruited several persons to be sales and management personnel at Concorde. Raico delayed hiring these persons to work for Concorde and then hired them to work for a financial services firm at which Raico became employed.

Raico seeks summary judgment dismissing these counterclaims. He claims that the first counterclaim is meritless because he never entered into an agreement to make a capital contribution to Concorde. Raico claims the second counterclaim fails because he did not have a fiduciary relationship with Concorde. Since Raico did not have a fiduciary relationship with Concorde, he could not have breached any fiduciary duty.

Craumer asserts as a defense to Raico's actions on Note 1 and Note 2 that these promissory notes were superceded by subsequent promissory notes.

Craumer claims Note 1 was superceded by a promissory note dated March 18, 2005, in the principal amount of \$150,00 made by Concorde payable to Raico. ("Note A"). Note A bears interest at the rate of six (6%) percent per annum. Note A becomes due and payable "...upon the execution and closing of the operating line of credit fo Concorde Funding Group."

Craumer claims Note 2 was superceded by a promissory note dated June 30, 2005 in the principal amount of \$325,000 made by Concorde payable to Raico ("Note B"). Note B bears interest at the rate of six (6%) percent per annum. Note B becomes

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due and payable "...upon the execution and closing of the operating line of credit for Concorde Funding Group."

Craumer claims that since Notes 1 and 2 have been superceded by Notes A and B, Raico's motion for summary judgment should be denied.

Craumer further asserts that he is not personally liable because he did not receive any money personally from Raico. The funds received from Raico in connection with the promissory notes were deposited directly into Concorde's bank account.

Finally, Craumer asserts that Concorde never obtained the line of credit referenced in Notes A and B. Thus, these notes are not due and payable.

Raico seeks summary judgment on his first, second, third and fourth causes of action which seek the amounts due on Notes 1 and 2 and legal fees in accordance with those promissory notes. Raico also seeks summary judgment dismissing the counterclaims.

DISCUSSION

A Summary Judgment

The holder of a promissory note establishes a *prima facie* case by submitting proof of the existence of a promissory note executed by the maker containing an unequivocal and unconditional obligations to repay and the maker's default.

Constructamax, Inc. v. CBA Associates, Inc., 294 A.D.2d 460 (2nd Dept. 2002); and Colonial Commercial Corp. v. Breskel Associates, 238 A.d.2d 539 (2nd Dept.1997). See

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also, Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968),
aff'd, 29 N.Y.2d 617 (1971).

Once the holder of the promissory note has established a *prima facie* case, the maker must come forward with evidence establishing the existence of triable issues of fact or a *bona fide* defense. Colonial Commercial Corp. v. Breskel Associates, *supra*; and Silber v. Muschel, 190 A.D.2d 727 (2nd Dept. 1993).

"It is well settled, however, that a subsequent note does not discharge the original indebtedness in the absence of an express agreement between the parties (citations omitted)." Federal National Mortgage Assoc. v. McAuliffe, 226 A.D.2d 497, 498 (2nd Dept. 1996).

When deciding a motion for summary judgment, the court's function is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M. 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). Summary judgment should be denied if the court has any doubt regarding the existence of triable issues of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984)

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give the party opposing the motion the benefit of all reasonable inference which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Schuhmann

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v. McBride, 23 A.D.3d 542 (2nd Dept. 2005); and Erikson v. J.I.B Realty Corp., 12 A.D.3d 344 (2nd Dept. 2004).

B. Notes 1 and 2

Craumer attempts to create questions of fact through his averments that his obligation on Notes 1 and 2 were superceded by Concorde's obligations on Note A and Note B. However, this is not so. Craumer does not deny that he executed Note 1 or Note 2. While Notes A and B are subsequent to Note 1 and Note 2 and appear to reflect the same indebtedness, Notes A and B do not contain language indicating that Concorde's obligations on Note A and Note B were being substituted for or were intended to supercede Craumer's obligations on Note 1 and Note 2. Thus, Craumer's personal liability on Notes 1 and 2 remains in place.

Since Defendants have failed to establish the existence of questions of fact or a defense to the action, summary judgment must be granted in favor of Raico on Notes 1 and 2. Raico is entitled to recover from Craumer (a) on Note 1, the sum of \$150,000 together with interest at six (6%) percent per annum from March 17, 2005 and (b) on Note 2 the sum of \$325,000 together with interest at the rate of six (6%) percent per annum from June 20, 2005.

C. Notes A and B

Notes A and B while denominated as promissory notes, they are not actually promissory notes. A promissory note is a negotiable instrument. To be a negotiable

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instrument, the writing must be payable on demand or at a definite time. Uniform Commercial Code §3-104(1)(c). Notes A and B are not payable upon demand.

An instrument is not payable at a definite time if it is payable upon an act or event that may never occur. Uniform Commercial Code §3-109(2). "The time of payment is definite if it can be determined from the face of the instrument." 80 NY Jur2d *Negotiable Instruments and Other Commercial Paper* §108. See, Kerr v. Smith, 156 App.Div 807 (1st Dept. 1913). The date of payment of Notes A and B cannot be determined from the face of either note or from any other fixed date. Uniform Commercial Code §3-109(1)(a)(b)(c)(d). Notes A and B are payable upon Concorde executing and closing on an operating line of credit. This is an event that has not taken place nor may it ever take place.

Taking Craumer and Concorde's argument to its logical conclusion, Notes A and B create an illusory obligation to repay. Craumer and Concorde will never have to repay Raico on Note A or Note B by simply not executing or closing on an operating line of credit.

D. Counsel Fees

Notes 1 and 2 each state "...in the even a default occurs and this Note is place in the hands of an attorney for collection, he (Craumer) will pay reasonable attorneys fees." Such provisions are valid and will be enforced. Arent, Fox, Kinter Plotkin & Kahn PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002).

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Legal fees are awarded on a quantum meruit basis and cannot be determined summarily. See, Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridged Development Corp., 270 A.D.2d 377 (2nd Dept. 2000). Therefore, a hearing will have to be held to determine the amount of the legal fees due on the actions on the notes.

E. The Counterclaims

The first counterclaim is premised upon allegations that Raico agreed to make a capital contribution to Concorde in exchange for a forty (40%) percent interest in the business. Other than Craumer's affidavit, there is no evidence to support this assertion. The documentary evidence specifically contradicts this assertion. Notes 1, 2, A and B all indicate that the money Raico gave to Craumer and/or Concorde was a loan; not a capital contribution.

On March 1, 2005, Raico executed an "Offer of Employment" ("Offer") which sets forth the terms under which Raico was to be employed by Concorde. The Offer states that Raico would be granted stock equal to forty (40%) percent of the outstanding shares of Concorde. Based upon the Offer, Raico was to receive Concorde stock as part of his employment. The Offer does not require Raico to make a capital contribution to Concorde to receive the stock.

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The Offer indicates it is to be a "memorandum of understanding" subject to final ratification and execution of a shareholders agreement. Defendants have not produced either an employment agreement or a shareholders agreement obligating Raico to make a capital contribution to Concorde in exchange for his shares.

Thus, the first counterclaim should be dismissed.

The second counterclaim and the motion to dismiss it are an example of what happens when the parties make inconsistent or contradictory allegations in their pleadings or when a party makes a motion that is inconsistent with or contradictory to its pleading.

The second counterclaim is premised upon Raico's alleged violation of his fiduciary duty to Concorde. Raico alleges this counterclaim should be dismissed because he did not have a fiduciary relationship with Concorde.

Raico's motion and affidavit clearly conflict with his complaint. In paragraphs 7, 8, 9, 10 and 11, Raico alleges that (1) on March 10, 2005, Raico entered into an employment agreement with Concorde; (2) Raico was Concorde's president and performed the functions of Concorde's president; and (3) Raico was to be compensated for performing these services. Raico's eight, ninth and tenth causes of action seek damages arising from Concorde's breach of his employment agreement.

An employee owes one's employer a duty of good faith and loyalty in the performance of one's duties. Wallack Freight Line, Inc. v. Next Day Express, Inc., 273

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A.D.2d 462 (2nd Dept. 2000); and Maritime Fish Prods. v. World-Wide Fish Prods., 100 A.D.2d 81 (1st Dept., 1984). A corporate officer has a fiduciary duty to the corporation. Lindner Fund, Inc. v. Waldbaum's, Inc., 82 N.Y.2d 219 (1993); and Busino v. Meachem, 270 A.D.2d 606 (3rd Dept., 2000).

Raico cannot have both ways. If he was an officer and employee of Concorde, he had a fiduciary relationship with and owed a fiduciary duty to Concorde. If he was not an employee and/or officer, then, not only should the second affirmative defense be dismissed, but Raico's eighth, ninth and tenth causes of action should also be dismissed.

Judicial estoppel prevents Raico from alleging in his complaint that he was an employee and officer of Concorde while seeking to dismiss counterclaims based upon his breach of the fiduciary duties resulting from that status. See, Black v. White & Case, 280 A.D.2d 407 (1st Dept. 2001); and McCaffrey v. Schaffer, 251 A.D.2d 300 (2nd Dept. 1998). Therefore, to the extent Raico seeks summary judgment dismissing the second counterclaim, the motion must be denied.

The court also notes that Defendants deny the allegations contained in Paragraphs 7, 8, 9, 10 and 11 of the complaint. These denials conflict with Craumer and Concorde's later allegations that Raico was an employee and officer Concorde and thus had fiduciary obligations thereto.

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These conflicting and contradictory allegations create questions of fact mandating denial of the motion seeking summary judgment dismissing the second counterclaim.

F. Conclusion

This motion does not fully resolve this action. Discovery will be necessary with regard to the causes of action that are not the subject of this motion and Defendants' surviving counterclaim. A hearing will have to be held to determine the counsel fees on the actions on the promissory notes. Therefore, entry of judgment on the causes of action on the actions on Notes 1 and 2 should be stayed pending the trial of this action. CPLR 2201.

Accordingly, it is,

ORDERED, that Plaintiff's motion for summary judgment is **granted**, as follows:

1. On the first cause of action, in the sum of \$150,000 together with interest at the rate of six (6%) percent per annum from March 17, 2005 to the date of entry of the judgment;
2. On the second cause of action for legal fees in connection with the action on Note 1, in a sum to be determined at the time of the trial of this action;
3. On the third cause of action, in the sum of \$325,000 together with interest at the rate of six (6%) per annum from June 20, 2005 to the date of entry of the judgment;

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4. On the fourth cause of action for legal fees incurred in connection with the action on Note 2, in a sum to be determined at the trial of this action;

5. Dismissing Defendants' first counterclaim; and it is further,

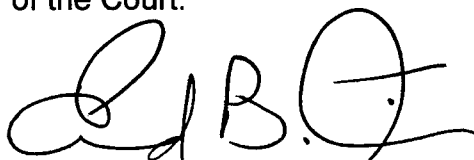
ORDERED, that Plaintiff's motion for summary judgment seeking an order dismissing Defendants' second counterclaim is **denied**; and it is further,

ORDERED, that entry of a judgment in accordance with this order is stayed pending the trial of this action; and it is further,

ORDERED, that counsel for the parties are directed to appear for a preliminary conference on April 18, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 24, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

MAR 31 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**