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

PRESENT: Cahn Justice

PART 49

Index Number : 602077/2007

DURST BUILDINGS CORP.

vs.

J P R 2 INC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 4/28/08

Hon. Cahn 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 49

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THE DURST BUILDINGS CORPORATION,

Plaintiff,

- against -

Index No. 602077/07

J P R 2, INC. and MICHAEL MASTRODDI,

Defendants.

----------X

HERMAN CAHN, J.:

Plaintiff moves for summary judgment against defendants in the amount of $400,000, the principal sum allegedly owed on a promissory note, together with interest and attorneys' fees, CPLR 3212. Alternatively, plaintiff moves to dismiss all of defendants' affirmative defenses, CPLR 3211 (b).

BACKGROUND

Plaintiff The Durst Buildings Corporation alleges that it is a "sister entity" of Durst Front Street, LLC (Durst), which is a member of Yarrow, LLC, which in turn is the owner and developer of a construction project (the Project) in Manhattan's South Street Seaport neighborhood. Yarrow entered into a contract (the Prime Contract) with F.J. Sciame Construction Co., Inc. (Sciame), pursuant to which Sciame acted as the general contractor on the Project. Sciame entered into one or two contracts (the Subcontract) with defendant J P R 2, Inc., pursuant to which JPR acted as a carpentry subcontractor on the Project. Defendant Michael Mastroddi is the president of JPR.

Yarrow did not pay Sciame the amount that Sciame claims to be owed for its work on the Project, and Sciame has, therefore, allegedly been unable to pay JPR approximately $1.5 million that JPR claims to be owed for its work on the Project. Defendants assert that both Sciame's claim for the money that it is allegedly owed under the Prime Contract and JPR's claim for the money that it is allegedly owed under the Subcontract are being addressed in an arbitration proceeding.

Allegedly because Sciame did not pay JPR the money it owed under the Subcontract, JPR

did not have the funds necessary to pay $500,000 which JPR owed in federal and New York State payroll tax obligations. In or about early April 2006, Mastroddi allegedly spoke with Richard Berry, a manager of Yarrow, and "asked whether he could prevail upon Durst to immediately advance the sum to JPR" (Mastroddi Aff., ¶ 15). Plaintiff thereafter advanced $400,000 to JPR, and JPR and Mastroddi executed a promissory note, dated April 26, 2006 (the Note), pursuant to which JPR and Mastroddi agreed to pay plaintiff the principal sum of $400,000 by April 20, 2007. The Note provided that interest would only begin to accrue on April 20, 2007, so long as there was no "event of default" prior to that date, and that JPR's and Mastroddi's obligations under the Note were joint and several. Plaintiff and JPR also entered into an agreement dated April 26, 2006 (the Pledge Agreement), pursuant to which JPR granted and assigned to plaintiff, as collateral for defendants' payment on the Note, all of JPR's right, title and interest in and to the Subcontract, including the right to all payments owed to JPR thereunder.

Mastroddi asserts that: "this whole 'loan' thing was pure fiction"; "Durst was simply advancing JPR money that it owed anyway and that JPR would pay back once Durst paid Sciame and Sciame paid JPR"; he "was assured that Durst and Sciame were negotiating to close out Sciame's contract, so that JPR would be receiving payment on its claim [against Sciame] long before the [N]ote fell due," "the $400,000 advance secured by the [N]ote would be reimbursed out of the proceeds of the settlement of JPR's claim . . . and . . . the [N]ote and [P]ledge [A]greement would never be exercised" (*id.*, ¶¶ 3, 19, 20).

Defendants did not pay the Note either by April 20, 2007 or thereafter. Plaintiff commenced this action, on or about June 21, 2007, by filing a summons and notice of motion for summary judgment in lieu of complaint, CPLR 3213. By order dated October 22, 2007, the Court denied that motion on the ground that the Note did not qualify for CPLR 3213 treatment, deemed plaintiff's moving papers to be the complaint and directed defendants to serve an answer. Defendants served an answer, on November 19, 2007, which includes five affirmative defenses:

(1) fraudulent inducement; (2) mutual mistake; (3) economic duress; (4) unconscionability; and (5) against Mastroddi individually, lack of consideration.

DISCUSSION

Plaintiff has made a prima facie showing of its right to recover payment on the Note by submitting proof of defendants' execution of the Note and their default in making the payments called for therein (*see e.g. Cicconi v McGinn, Smith & Co.*, 35 AD3d 292, 292 [1st Dept 2006]; *Coladonato v Tutto Pizza*, 243 AD2d 330, 330 [1st Dept 1997]).

Defendants do not dispute that: JPR received $400,000 from plaintiff; defendants agreed in the Note to repay that principal amount to plaintiff; both defendants executed the Note; and they have not made the payments called for in the Note (*see* Def. Rule 19-a State., ¶¶ 9, 18, 19). In opposition to plaintiff's motion, defendants have failed to submit evidentiary proof sufficient to raise a triable issue of material fact, precluding summary judgment, with respect to any of their purported affirmative defenses or their obligation to make the payments required by the Note (*see Coladonato v Tutto Pizza*, 243 AD2d at 330).

Defendants' first affirmative defense asserts that the Note is void and invalid because they were fraudulently induced into signing it by plaintiff's assurances or representations that the dispute between Yarrow and Sciame would be resolved -- so that Yarrow would pay Sciame amounts allegedly owed under the Prime Contract and Sciame would pay JPR amounts allegedly owed under the Subcontract -- before the date when payment was due on the Note. Defendants assert that plaintiff knew or should have known, at the time when it allegedly gave the foregoing assurances or representations, that they were inaccurate.

In order to establish fraudulent inducement, defendants must prove "a misrepresentation or a material omission of fact which was false and known to be false by [plaintiff], made for the purpose of inducing [defendants] to rely upon it, justifiable reliance of [defendants] on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also NM IQ LLC v OmniSky Corp.*, 31 AD3d 315, 317 [1st Dept

2006]).

Mastroddi does not identify the person or persons who allegedly made the fraudulent misrepresentations. Plaintiff's president, Douglas Durst, denies that he ever "assured [defendants] that Yarrow and Sciame were negotiating to close out Sciame's contract, so that JPR would be receiving payment on its claim [against Sciame] long before the [N]ote fell due," and claims to be unaware "of anyone else who did so on [p]laintiff's behalf" (Durst Aff., ¶ 11). However, even assuming, arguendo, that some person associated with plaintiff did make the purported representations, they could not serve as a basis for a defense of fraudulent inducement because, rather than being material misrepresentations of fact, they would merely be speculative statements of future intentions and/or expectations (*see e.g. Brett Fabrics v Garan, Inc.*, 170 AD2d 253, 254 [1st Dept 1991]).

Defendants' fraudulent inducement defense also fails because they have not pleaded or established facts indicating "that [plaintiff] knew, at the time the alleged misrepresentations were made, that they were false, and that at such time, [plaintiff] had the intent to deceive" (*New York Med. Coll. v Histogenetics, Inc.*, 6 AD3d 410, 411 [2d Dept 2004]). Indeed, Mastroddi states in his affidavit that "everyone involved in the transaction reasonably believed that [the payments from Yarrow to Sciame and from Sciame to JPR] would be made well before the due date under the [N]ote" (Mastroddi Aff., ¶ 20; *see also* Def. Mem. of Law, at 4 [stating that "it remained everyone's understanding that a [Yarrow]-Sciame resolution would be finalized well before the expiration of the one-year term of the [N]ote"]). Mastroddi's statement would seem to indicate that plaintiff did not know the purported representations to be false at the time when the representations were allegedly made.

Moreover, even if plaintiff made the purported representations, defendants cannot establish that they justifiably relied upon them. First, as has already been stated, the representations were merely speculative expressions of expectation concerning future events. Second, the alleged representations involved conduct by entities other than plaintiff --

i.e., Yarrow's payment of disputed amounts to Sciame and Sciame's payment of certain amounts to JPR -- and defendants could not reasonably have believed that plaintiff exercised a sufficient degree of control over both of those entities such as to be able to guarantee that they would act in a certain manner.

Nor, assuming that plaintiff made the purported representations, did defendants, in fact, rely upon them. Plaintiff has submitted documentary evidence of the parties' negotiations over the terms of the Note and the Pledge Agreement, which includes e-mails and drafts of the Note and the Pledge Agreement, that were exchanged by counsel for the parties over a period of more than a week. Mastroddi's son, a partner with a Manhattan law firm who represented defendants in the negotiations, proposed to plaintiff that the Note should include the following provision:

> 9. **Condition Precedent**. Notwithstanding any other provision of this Note, [defendants] shall not be obligated to make any payment to [plaintiff] of any amount of principal, interest or other sums otherwise required hereunder unless and until [defendants] receive[] any and all sums due and owing (*i.e.*, full payment) to [defendants] from [Sciame] . . . . Should [defendants] receive said full payment on or after April 21, 2007, then, notwithstanding Paragraph 1 (c) above [which provided for a payment due date of April 20, 2007 on the Note], payment of all sums due and owing under this Note shall become due on the 30th day after [defendants] receive[] said full payment.

(Lycoyannis Aff., Ex. I, at 2 [emphasis in original].) Mastroddi states in his affidavit that, although his son "proposed language making it clear that JPR wasn't required to make any repayment until it received payment in full from Sciame under the [Subcontract]," plaintiff "rejected my son's proposed change," and Mastroddi "nevertheless reluctantly signed" the Note (Mastroddi Aff., ¶¶ 18-19). Defendants' attempt to include the quoted provision in the Note -- and alleged reluctance to execute the Note because it did not include the provision -- evidences defendants' awareness that they could not rely upon any purported assurances by plaintiff that the dispute between Yarrow and Sciame would be resolved, and that Sciame would pay JPR amounts allegedly owed under the Subcontract, before the date when payment was due on the Note. Furthermore, the defendants were on notice that the plaintiff did not agree to forgo

payment on the Note until after JPR had been paid by Sciame. Thus, defendants have failed to raise an issue of fact precluding summary judgment with respect to their defense of fraudulent inducement.

Defendants' second affirmative defense asserts that the Note is void and invalid under the doctrine of mutual mistake, because the parties entered into the Note with the mistaken belief and understanding that the dispute between Yarrow and Sciame would be resolved -- so that Yarrow would pay Sciame and Sciame would pay JPR -- before the due date on the Note. While a contract entered into under a mutual mistake of fact may be voidable and subject to rescission, defendants have failed to raise a triable issue of fact as to whether the parties entered into the Note under a mutual mistake of fact.

First, a party may obtain equitable relief based upon the theory of mutual mistake "only where the parties were mistaken as to facts ***existing*** at the time the contract was entered into" (*Childs v Levitt*, 151 AD2d 318, 320 [1st Dept 1989] [citation and internal quotation marks omitted; emphasis in original]). Even assuming, arguendo, that the parties entered into the Note with the assumption that Yarrow would pay Sciame and Sciame would pay JPR before payment became due on the Note, such an assumption would have been -- as previously stated -- merely the parties' prediction, speculation or judgment as to events that would occur in the future, and not a mutual mistake as to facts existing at the time when the Note was entered into which warrants rescission (*see e.g. In re Bradlees Stores, Inc.*, 291 BR 307, 312 [Bankr SDNY 2003]; *De la Gueronniere v Simon*, 1998 WL 226199, *3 [SDNY May 4, 1998], *affd* 166 F3d 1199 [2d Cir 1998]).

Moreover, "[i]n a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Thus, in order to succeed in their defense of mutual mistake, defendants would presumably have to establish that -- despite the Note's plain and unambiguous statement that payment of the outstanding principal balance was due by "April 20, 2007, **time**

being of the essence" (Note, ¶ 1 [c] [ii] [emphasis in original]) -- the parties actually reached an agreement that, if Sciame did not pay JPR the outstanding amount allegedly owing on the Subcontract before that date, then JPR would not be obligated to make payment on the Note by that date. However, defendants have failed to raise a triable issue of fact as to whether the parties ever reached any such agreement.

"[T]here is a heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties, and a correspondingly high order of evidence is required to overcome that presumption" (*id.* at 574 [internal citations omitted]). Defendants have failed to overcome that heavy presumption. Defendants attempted to include in the Note, and plaintiff rejected, a provision that specifically made receipt of payment from Sciame a condition precedent to defendants' obligation to pay the Note on April 20, 2007. Thus, it is clear that: (1) defendants understood that the parties' agreement, as set forth in the Note, required them to pay the Note by April 20, 2007 even if Sciame did not make full payment to JPR until after that date; (2) plaintiff did not agree that, if Sciame did not make full payment to JPR until after the due date of the Note, defendants' time in which to pay on the Note would be extended until after Sciame made such full payment to JPR; and (3) the agreement which was reached by the parties is the same as that which is plainly and unambiguously set forth in the Note, i.e., that defendants were required to pay the Note by April 20, 2007, even if Sciame did not make full payment to JPR until after that date. Defendants have submitted no evidence suggesting any mistaken belief on the part of plaintiff, "a necessity for a finding of mutual mistake" (*K.I.D.E. Assoc. v Garage Estates Co.*, 280 AD2d 251, 253-54 [1st Dept 2001]). Accordingly, defendants have failed to raise an issue of fact, precluding summary judgment, with respect to their defense of mutual mistake.

Defendants' third affirmative defense asserts that the Note is void and invalid under the doctrine of economic duress, because "Durst -- in what amounted to a breach of Yarrow's construction contract with Sciame -- refused to advance monies due JPR under its subcontract

with Sciame, thereby forcing defendants to sign the [N]ote and [P]ledge [A]greement" (Def. Mem. of Law, at 13). Defendants apparently assert that they were subjected to economic duress on the grounds that: plaintiff's refusal to convey money to JPR unless they executed the Note and the Pledge Agreement "amounted to a breach of Yarrow's construction contract with Sciame," because the money which defendants sought from plaintiff was money that was contractually due to JPR under the Subcontract; and economic duress may be demonstrated, in certain instances, by proof that one party to a contract has threatened to breach the contract by withholding performance under the contract unless the other party to the contract agrees to some further demand (*see* Def. Mem. of Law, at 13). However, defendants have failed to raise a triable issue of fact with respect to their defense of economic duress.

"A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will" (*767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216, 218 [1st Dept 2006] [internal citations omitted]). Defendants have failed to allege or establish the existence of facts which would indicate that plaintiff made any threat, let alone a wrongful threat, to defendants. Defendants have not established that plaintiff had any contractual obligation to make any payment to JPR in connection with JPR's work on the Project, under the Subcontract, inter alia, because defendants do not allege that plaintiff was a party to the Subcontract or that plaintiff was in any contractual privity with JPR other than that which exists by reason of the Note and the Pledge Agreement. Plaintiff cannot be said to have made a wrongful threat against defendants merely because it refused to do what it was not legally required to do (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 453 [1983]; *Rochelle Assoc. v Fleet Bank of N.Y.*, 230 AD2d 605, 606 [1st Dept 1996]).

Defendants have also failed to allege or establish the existence of any facts which would indicate that plaintiff's refusal to advance funds to JPR unless defendants executed the Note and the Pledge Agreement would have been sufficient to preclude defendants' exercise of their free

will by choosing not to enter into those agreements. Defendants, despite their conclusory allegation that JPR "had no alternative means to obtain . . . funds" with which to pay its payroll tax obligations (Def. Rule 19-a State., ¶ 5), have not submitted any evidence of that alleged fact.

Finally, a party who would repudiate a contract on the ground that it was procured by duress must act promptly, or the party will be deemed to have elected to affirm the contract (*see Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 30 [1st Dept 1990]; *Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 14 AD3d 352, 353 [1st Dept 2005])). There is no indication that defendants attempted to repudiate the Note at any time before August 2007, when they submitted papers in opposition to plaintiff's motion for summary judgment in lieu of complaint. That was more than one year after they executed the Note and accepted the benefit of plaintiff's performance in reliance upon their execution of the Note, and more than three months after payment on the Note had become due. Accordingly, defendants waived any defense of economic duress by affirming and ratifying the Note (*Societe Financiere de Banque v Bitter-Larkin*, 248 AD2d 298, 298 [1st Dept 1998]; *Bank Leumi Trust Co. of N.Y.*, 163 AD2d at 30).

Defendants have also failed to raise a triable issue of fact with respect to their fourth affirmative defense, which asserts that the Note is void and invalid under the doctrine of unconscionability. "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made -- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal citations omitted]). Defendants assert that the doctrine of unconscionability applies because they had no choice but to sign the Note and the Pledge Agreement, as a result of their urgent need to obtain the funds required to pay their payroll tax obligations, and because the terms of the Note were unreasonably favorable to plaintiff, in that they required defendants to pay to plaintiff funds that JPR was entitled to receive from plaintiff's affiliate, Durst.

"The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice" (*id.* at 10-11). Here, Mastroddi concedes that it was he who initiated the contacts with plaintiff which led to the loan transaction between the parties. Plaintiff has submitted documentary evidence -- i.e., copies of the previously referenced e-mails and drafts of the Note and Pledge Agreement that were exchanged by the parties' attorneys -- which indicate that the Note was the product of negotiations conducted at arm's length between parties represented by counsel (*see* Lycoyannis Aff., Ex. C). Defendants, as already mentioned, have submitted no evidence indicating that they would have been unable to obtain a loan from any source other than plaintiff. Accordingly, defendants have failed to raise a triable issue of fact with regard to whether the Note was procedurally unconscionable at the time when it was made.

Defendants' contention that the Note was substantively unconscionable is also untenable. Although defendants assert that the terms of the Note were unreasonably favorable to plaintiff -- because they required defendants to pay back to plaintiff funds that JPR was entitled to receive from Durst -- defendants have failed to establish that JPR was entitled to receive any funds from Durst or plaintiff, rather than from Sciame, in connection with JPR's work on the Project under the Subcontract. Moreover, the terms of the Note were not unreasonably favorable to plaintiff inasmuch as the Note gave defendants the use of the $400,000 principal for approximately one year before any interest began to accrue.

In the fifth affirmative defense, defendants assert that the Note is not enforceable as against Mastroddi individually. They assert that there was a lack of consideration for Mastroddi's promises and obligations under the Note because he did not benefit personally from plaintiff's payment of $400,000 to JPR. However, that defense is also without merit.

"[I]t is fundamental that a benefit flowing to a third person or legal entity constitutes a sufficient consideration for the promise of another" (*Mencher v Weiss*, 306 NY 1, 8 [1953]; *see also* 22 NY Jur 2d, Contracts § 64 [stating that "to constitute an adequate consideration for a

promise, the benefit need not move to the promisor, as it may move to a third person"]). Thus, even assuming that the benefit of plaintiff's $400,000 loan flowed primarily to JPR, that benefit would be sufficient consideration to support Mastroddi's promise to plaintiff to be personally liable upon the Note. Moreover, it may be presumed that Mastroddi himself received a benefit from the loan since, as the president of JPR, he had an interest in obtaining the loan in order to maintain the continued economic viability of JPR (*Mencher v Weiss*, 306 NY at 8-9). Finally, Mastroddi executed the Note which: defined him, collectively with JPR, as the "Maker" of the Note; stated that "Maker . . . agrees to remain bound until the principal balance, accrued interest and all other sums payable hereunder shall have been paid in full"; and provided that "[t]he obligations under this Note of the parties comprising Maker are joint and several" (Note, ¶¶ 4, 8). Inasmuch as Mastroddi agreed to the terms of the Note, and accepted its benefits given in reliance upon his promise to be personally liable, he may not now argue that that promise is unsupported by consideration (*Mencher v Weiss*, 306 NY at 9).

Defendants having failed to raise a triable issue of fact with respect to any of their affirmative defenses, plaintiff has established its entitlement to recover payment upon the Note. Plaintiff has also established that it is entitled to receive interest at the rate of 18% per annum on the principal amount due under the Note from April 20, 2007, inasmuch as the Note provides that "from and after the occurrence of an 'Event of Default' the amount due under this Note shall bear interest at the rate of eighteen percent (18.0%) per annum" (Note, ¶ 1 [e]), and JPR's failure to pay the amount owing under the Note on April 20, 2007 constituted such an "Event of Default" (Pledge Agreement, ¶ 4 [a]).

Finally, the terms of the Note provide that "Maker agrees to pay, in addition to the principal and interest due and payable hereon, all costs of collecting or attempting to collect this Note, including attorneys' fees and disbursements" (Note, ¶ 5). Accordingly, the issue of the amount of those fees and disbursements will be referred to a Special Referee to hear and report with recommendations.

CONCLUSION AND ORDER

For the foregoing reasons, it is.

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment against defendants J P R 2, Inc. and Michael Mastroddi, jointly and severally, in the amount of $400,000.00, together with interest at the rate of 18% per annum from the date of April 20, 2007 until the date of entry of 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, on the entire action -- except for plaintiff's claim for attorneys' fees and collection costs, which claim is severed -- and the Clerk is directed to enter judgment on said amounts in favor of plaintiff against defendants accordingly; and it is further

ORDERED that the issue of the amount of the reasonable costs incurred by plaintiff in collecting the amount owed under the promissory note dated April 26, 2006, including attorneys' fees and disbursements, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that so much of this motion as seeks to recover plaintiff's costs of collecting upon the Note is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office to arrange a date for the reference to a Special Referee.

Dated: April 28, 2008

FILED
APR 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

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