SHORT FORM ORDER **INDEX NO. 37276/2007**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TODD SMITH and LAURIE ZONE-SMITH,

Plaintiffs,

-against-

TORCH ENTERPRISES, LLC, LESLIE ROTH and ROBERT COOK,

Defendants.

ORIG. RETURN DATE: JANUARY 22, 2008
FINAL SUBMISSION DATE: FEBRUARY 14, 2008
MTN. SEQ. #: 001
MOTION: MG

PLTF'S/PET'S ATTORNEY:
SHAYNE, DACHS, CORKER,
SAUER & DACHS, LLP
114 OLD COUNTRY ROAD - SUITE 410
MINEOLA, NEW YORK 11501-4410
516-747-1100

DEFT'S/RESP ATTORNEY:
REISMAN, PEIREZ & REISMAN, LLP
1305 FRANKLIN AVENUE - POB 119
GARDEN CITY, NEW YORK 11530
516-746-7799

Upon the following papers numbered 1 to 10 read on this motion FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT. Notice of Motion and supporting papers 1-4; Answering Affidavits and supporting papers 5, 6; Memorandum of Law 7; Reply Affirmation and supporting papers 8, 9; Memorandum of Law 10; it is,

ORDERED that this motion by plaintiffs for an Order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint directing the entry of a money judgment in favor of the plaintiffs and against the defendants in the amount of $200,000.00, with interest at the rate of eighteen (18%) percent per annum from June 17, 2007, and granting reasonable attorneys' fees and expenses, is hereby **GRANTED**.

This action was filed to recover damages for breach of a promissory note and personal guarantee, dated November 17, 2006 (the "Note"). The Note was executed in connection with a $200,000.00 loan made by plaintiffs to

defendant TORCH ENTERPRISES, LLC ("Torch"), and unconditionally personally guaranteed by defendants LESLIE ROTH ("Roth") and ROBERT COOK ("Cook"). Pursuant to the terms of the Note, interest at the rate of twelve (12%) percent per month was to be paid on the 17th day of each calendar month, and the principal was to be paid by October 17, 2008 or sooner, "but no later than upon the closing of the last property on the North Carolina real estate development project know (sic) as 'Dilworth'." According to an affidavit executed by both plaintiffs, plaintiffs allege that although due demand was made therefor, no payment of interest has been made since the payment that was due on June 17, 2007. As such, in accordance with the terms of the Note, plaintiffs declared the entire unpaid amount of principal and interest under the Note to be immediately due and payable.

Plaintiffs commenced the instant action, on or about November 30, 2007, seeking a money judgment in favor of plaintiffs and against defendants in the amount of $200,000.00, with interest at the rate of eighteen (18%) percent per annum from June 17, 2007, as well as reasonable attorneys' fees and expenses incurred with respect to collection under the Note.

Defendant Roth has submitted an affidavit in opposition to the instant application. Roth indicates that he is the managing member of Torch, and that defendant Cook is the other member of Torch. Roth alleges that the subject Note was executed in connection with a real estate transaction wherein Torch was "induced" to purchase the interest of plaintiff Todd Smith ("Smith") in a project on Dilworth Street in Charlotte, North Carolina ("Dilworth") based upon alleged misrepresentations by Smith that necessary governmental approvals for the project had been obtained. Roth alleges that the project could not be completed in a timely manner because the governmental approvals had not been obtained, and that subsequently the project was foreclosed upon by a lending institution. As such, Roth argues that defendants have a complete defense to the instant action, to wit: fraudulent inducement and/or negligent misrepresentation, and will be asserting counterclaims against plaintiffs for damages in excess of the value of the Note. Moreover, Roth contends that the acceleration procedures under the Note have not been complied with prior to commencement, and therefore plaintiff's application should be denied on this basis as well.

Based on the alleged misrepresentations by Smith regarding the governmental approvals, Torch agreed to purchase Smith's interest in the Dilworth project for $1,370,000.00, with Torch obtaining short-term financing so

that Torch could initially advance $572,770.00 to Smith to reimburse him for his equity in Dilworth, with a profit. In addition, within thirty (30) days of closing on Torch's long-term loan, Smith was to provide Torch with $200,000.00 so that Torch could repay a portion of the short-term financing it utilized for the closing. In exchange, Torch was to execute the subject Note. Thereafter, Roth alleges that the Dilworth project could not promptly begin as the required approvals had never been obtained. As a result, Roth alleges that Torch defaulted under three purchase agreements relative to the Dilworth project, the project was foreclosed upon by Regions Bank, and Torch lost in excess of $1.4 million.

In reply, plaintiffs argue that the sole affidavit submitted in opposition to their application was made by Roth, and therefore defendant Cook failed to raise any triable issues of fact with respect to his liability under the Note as personal guaranty. In addition, Smith denies making any representations to defendants with respect to governmental approvals for the Dilworth project. Plaintiffs argue that assuming, *arguendo*, that the claims Roth makes are true: (1) none of the alleged false statements are to have been made by plaintiff LAURIE ZONE-SMITH, so therefore Ms. Zone-Smith should be granted summary judgment in her favor against all defendants; and (2) the alleged false statements were not particularly within the defendants' knowledge, and therefore cannot serve as the basis for the proposed defenses. Further, plaintiffs argue that the alleged false statements relate not to the execution of the Note, but to the purchase of Dilworth. Finally, plaintiffs allege that they complied with the acceleration procedures under the Note by sending a demand letter dated September 12, 2007 via certified mail, but it was refused by Torch.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

The essential elements of a claim for fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Orlando v Kukielka*, 40 AD3d 829 [2007]; *Ross v DeLorenzo*, 28 AD3d 631 [2006]). A misrepresentation of a material fact, which is collateral to a contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (*Selinger Enters., Inc. v Cassuto*, 2008 NY Slip Op 3191 [2d Dept]; *Mendelovitz v Cohen*, 37 AD3d 670 [2007]).

A claim based on negligent misrepresentation requires proof that a declarant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that the other party reasonably relied on the information (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792 [2002]; *Grammer v Turits*, 271 AD2d 644 [2000]). There may be liability where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance (*see Grammer v Turits*, 271 AD2d 644, *supra*).

Moreover, breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only unless it can be shown that the contract and the instrument are "intertwined" and that the defenses alleged to exist create material issues of triable fact (*see e.g. Inpar Bldg. Corp. v Veoukas*, 143 AD2d 810 [1988]; *Regal Limousine Inc. v Allison Limousine Inc.*, 136 AD2d 534 [1988]).

Here, the Court finds that plaintiffs have made an initial *prima facie* showing of entitlement to judgment pursuant to CPLR 3213 by establishing that they are the holder of an instrument for money only executed by defendant Torch, that defendants Roth and Cook executed the personal guaranty in connection therewith, and that defendants defaulted in the payment thereof (*Kunio Takeuchi*

v Silberman, 41 AD3d 336 [2007]; *Silver v Silver*, 17 AD3d 281 [2005]; *Alard, L.L.C. v Weiss*, 1 AD3d 131 [2003]; *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1968], *affd* 29 NY2d 617 [1971]). The burden then shifted to defendants to assemble and lay bare their proof to demonstrate the existence of an issue of fact which would establish a defense sufficient to defeat summary judgment (*see e.g. Friends Lumber v Cornell Dev. Corp.*, 243 AD2d 886 [1997]).

Defendants have submitted the affidavit of Roth in an attempt to raise questions of fact to preclude summary judgment. As discussed, Roth alleges that Smith made false statements to defendants that the necessary governmental approvals for the Dilworth project had been obtained in order to induce defendants to purchase Smith's interest in the Dilworth project, and to subsequently enter into the subject Note. Defendants have failed to submit any opposition with respect to defendant Cook. Although Roth's affidavit makes reference to statements made by Smith to "Cook and me," Cook has not substantiated this claim through an affidavit of Cook or through any other means.

For the reasons set forth hereinafter, the Court finds that the statements, alleged to be false and to have been made to induce the defendants to purchase the interest of Smith in the Dilworth project, cannot serve as the basis for defenses sounding in fraudulent inducement or negligent misrepresentation with respect to the subject Note. The "Offer to Purchase and Contract" relative to the Dilworth property was entered into by Smith, as seller, and Torch, LLC, as buyer, in or about August of 2006, the closing was conducted on or about October 24, 2006, and financing was provided by Regions Bank. According to Roth, the subject Note was executed on or about November 17, 2006, three months after the contract, to provide Torch with $200,00.00 so that Torch could repay a portion of the short-term financing it utilized for the closing. In exchange, Torch executed the subject Note.

Initially, the Court notes that by the plain language of the guarantee, the parties executing the guarantee "unconditionally guarantees, or hereby jointly and severally unconditionally guarantee, the full, complete and timely payment of said $200,000. This guarantee is independent of each and all obligations of [Torch] under the Promissory Note and separate action or actions may be brought and prosecuted against Guarantor." The Court finds that the unambiguous, unconditional nature of this guarantee precludes defendants from relying on a defense of fraud in the inducement (*see Citibank v Plapinger*, 66 NY2d 90 [1985]; *Midlantic Commer. Leasing Corp. v Home-Aide Distribs.*, 227

AD2d 220 [1996]; *Citizens Fid. Bank & Trust Co. v Coulston Intl. Corp.*, 160 AD2d 1110 [1990]; *Tucker Leasing Capital Corp. v Marin Medical Management*, 833 F Supp 948 [EDNY 1993]). The claim that the guarantee was induced by false or fraudulent oral representations regarding the governmental approvals is unavailing as the guarantee is, by its terms, "unconditional" (*see Citibank v Plapinger*, 66 NY2d 90, *supra*; *Franklin Natl. Bank v Skeist*, 49 AD2d 215 [1975]). An unambiguous personal guaranty with proof of non-payment generally lends itself to summary relief (*see North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2007]; *Moezinia v Baroukhian*, 247 AD2d 452 [1998]; *Vamattam v Thomas*, 205 AD2d 615 [1994]).

Assuming, *arguendo*, that the plain language of the guarantee did not preclude defenses based upon the alleged misrepresentations, and that the "Offer to Purchase and Contract" in or about August of 2006 is sufficiently "intertwined" with the Note executed on or about November 17, 2006 so that the defenses alleged would create material issues of triable fact with respect to the Note, the Court finds that the statements themselves, if true, were not matters peculiarly within Smith's knowledge, but rather matters of public record. "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Schumaker v Mather*, 133 NY 590 [1892]; *Friedler v Palyompis*, 44 AD3d 611 [2007]; *Orlando v Kukielka*, 40 AD3d 829, *supra*). Notably, the element of justifiable reliance has been found lacking " '[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means' " (*Tanzman v La Pietra*, 8 AD3d 706 [2004], quoting *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96 [1997]; *see also Thriftway Servs. Corp. v Shevchenko*, 35 AD3d 442 [2006]; *Rotterdam Ventures v Ernst & Young*, 300 AD2d 963 [2002]). The alleged misrepresentations by Smith that necessary governmental approvals were obtained were a matter of public record, not exclusively within Smith's knowledge, and discoverable by the exercise of ordinary intelligence. Accordingly, the alleged misrepresentations cannot form the basis for defenses sounding in fraudulent inducement or negligent misrepresentation.

Finally, despite defendants' argument that plaintiffs failed to comply with the acceleration procedures under the Note prior to commencement,

plaintiffs have submitted a copy of the demand letter dated September 12, 2007, proof of mailing to defendants by certified mail, a copy of the envelope utilized marked "unclaimed" by the United States Post Office, and an affidavit made by the person who mailed the letter. As such, the Court finds that plaintiffs complied with the acceleration procedure under the Note.

For the foregoing reasons, plaintiffs' motion for summary judgment in lieu of complaint is **GRANTED**. Plaintiffs may enter judgment against defendants in the amount of $200,000.00, with interest at the rate of eighteen (18%) percent per annum from June 17, 2007, plus attorneys' fees and expenses in the amount of $1,220.00.

The foregoing constitutes the decision and Order of the Court.

SUBMIT JUDGMENT ON NOTICE

Dated: May 20, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court