

**Abrams v Malhotra**

2008 NY Slip Op 31588(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0603114/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART 10

Index Number : 603114/2007  
**ABRAMS, MARC**  
vs.  
**MALHOTRA, GARY**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT/LIEU OF COMPLAINT

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

n 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

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

JUN 02 2008

Dated: \_\_\_\_\_

HON. JUDITH J. GISCHE J.S.C.  
*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

Marc Abrams,

Plaintiff,

Decision/Order

-against-

Index# 603114/07  
Mot. Seq. #001

Gary Malhotra,

Defendant.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS

Notice of Motion, Summons, MA affd. Dated 7/17/07, exhibits.....	1
CS affirm. Dated 1/22/08 in Opp., exhibits.....	2
MA affd. Dated 1/28/08.....	3

**FILED**  
 JUN 10 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff moves for summary judgment in lieu of complaint against a guarantor based upon non-payment of a promissory note. Defendant opposes the motion.

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). A motion for summary judgment in lieu of complaint is available when the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR § 3213. Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a prima facie cause of action. Seaman-Andwall Corp. v. Wright Machine Corm , 31 A.D.2d 136 (1<sup>st</sup> Dept. 1968), *aff'd* 29 N.Y.2d 617 (1971).

In support of his motion plaintiff has presented a loan agreement and separate duly executed promissory note in the principle amount of \$25,000 between him as the lender and 547 West Street Partners, LLC as the borrower. The loan agreement was made on February 14, 2006 and provided for repayment and interest at 8% per annum on February 14, 2007. The loan agreement provides, and is signed by, defendant Gary Malhotra as the guarantor. Plaintiff has provided proof that no payment was made on the note, despite due demand therefore made upon both the primary obligor and the defendant guarantor.

A promissory note is an instrument for the payment of money only. Alard LLC v. Weiss, 1 AD3d 131 (1<sup>st</sup> dept. 2003). Likewise a guaranty is also considered an instrument for the payment of money only. Juste v. Niewdach, 26 AD3d 416 (2<sup>nd</sup> dept. 2006). Plaintiff has otherwise established his prima facie case for summary judgment in lieu of complaint against defendant.

In order to defeat such a motion defendant must come forward with proof of bond fide defenses. Shields v. Stevens, 55 AD2d 1017 (4<sup>th</sup> dept. 1977). In opposition defendant relies only upon the affirmation of an attorney. There is no dispute about the existence of the loan agreement or the note. There is no dispute that the loan was not repaid according to its terms. There is no dispute that defendant signed as the personal guarantor. Defendant's attorney argues that the guarantee is invalid because the guarantor did not receive any consideration; the amount due is subject to offset; the guaranty was never fully executed and that plaintiff is obligated to bring this action against the actual borrower before proceeding against the guarantor. These defenses all fail as a matter of law.

To the extent the opposition consists of an attorney affirmation and is not based on facts personally known to the affirmant, it is a nullity. Zuckerman v. City of New York, 49 NY2d 557 (1980). The argument of lack of consideration also fails. New York law does not require separate consideration for a guaranty. The consideration underlying the primary obligation is sufficient. Erie County Savings Bank v. Coit, 104 NY 532 (1887). Here there is no dispute that 547 West Street Partners, LLC received a loan. There is also no dispute that defendant is a principal of 547 West Street Partners, LLC.

The "offset" fails because the loan agreement precludes any offsets and, in any event, the attorney has no personal knowledge about the facts underlying the offsets. Moreover, the hearsay facts are set forth in only the most conclusory fashion.

Defendant's argument, that the guaranty was not fully executed because it was contemplated that another individual would also guaranty the loan also fails. Here defendant's undisputed execution of the guaranty, without condition, is enforceable separate and apart from any other intended guarantor. Chemical Bank v. Nemeroff, 233 AD2d 239 (1<sup>st</sup> dept. 1996).

Finally and contrary to defendant's argument the loan agreement itself makes it clear that plaintiff was not required to pursue the primary obligor before seeking payment on the guaranty.

Plaintiff seeks to recover his attorney's fees expended in connection with this enforcement matter. Section 2.5 of the Loan Agreement permits the recovery of such fees.

## CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted, and it is further

ORDERED that the clerk shall enter a judgment in the amount of Twenty Five Thousand Dollars (\$25,000) in favor of plaintiff Marc Abrams and against defendant Gary Malhotra with interest in the amount of eight per cent (8%) per annum from February 14, 2006 through the date of entry of judgment, together with statutory costs and disbursements of this action, and it is further

ORDERED that the issue of reasonable attorneys fees incurred in connection with this enforcement actions is referred to a Special Referee to hear and report back to the court, and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order upon the clerk for the Special Referee's office within sixty (60) days of today's date for the purpose of calendaring an attorneys fees hearing, and it is further

ORDERED that the failure of plaintiff to timely calendar the attorneys fees hearing in accordance with this decision will be deemed an abandonment of such issue and will result in a marking of this matter as finally disposed, and it is further

ORDERED that any requested relief not expressly addressed herein is denied, and that this constitutes the decision and order of the court.

Dated: New York, New York  
June 2, 2008

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

SO ORDERED:

J.G. J.S.C. 