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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

CHARLES HACK,

Plaintiff,

-v-

HENRY GOUGELMANN, PATRICIA GOUGELMANN AND THE HENRY P. GOUGELMANN LIVING TRUST,

Defendants.

INDEX NO. 102179/2008

MOTION DATE 7/15/08

MOTION SEQ. NO. 002

MOTION CAL. NO. 30

The following papers, numbered 1 to 4 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-N	1-2
Answering Affidavit — Exhibits 1-7	3
Replying Affirmation	4

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the annexed memorandum decision and order.

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/23/09
New York, New York

J.S.C.

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

Check one: X 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 7

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CHARLES HACK,

Index No. 102179/08

Plaintiff,

Decision and Order

- against -

HENRY GOUGELMANN, PATRICIA GOUGELMANN AND THE HENRY P. GOUGELMANN LIVING TRUST,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Plaintiff seeks to recover from defendants all or a portion of $180,000, which he originally gave as a downpayment in July 2004 toward the purchase of a $1.8 million home (the NY Home) then owned by the defendant trust. Plaintiff claims that the $180,000 became a loan, when the parties agreed that it could be released from escrow and used by defendants to buy a house in Connecticut (the CT House). Despite a written Termination Agreement, plaintiff alleges that a separate oral agreement entitles him to repayment of the $180,000. The individual defendants, the Gouglemanns, trustees of the defendant Henry P. Gougelmann Living Trust, on behalf of themselves and the trust, move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

Background

The parties entered into a real estate sales contract (Sales Contract) for the NY Home in July 2004. Upon execution of the Sales Contract, plaintiff, as the buyer, tendered $180,000 as a down payment to be held in escrow by the defendant trust's attorney until the closing of the sale (the Closing). At the Closing, the $180,000 down payment was to be applied toward the purchase price

of the NY Home. In the event that plaintiff did not go forward with the purchase, the Sales Contract provided that the $180,000 would go to the seller as liquidated damages. The Closing was scheduled to occur in or around February 2005. In the First Verified Amended Complaint (Complaint), plaintiff alleges that in or about September 2004, defendants told him that they wanted to buy a new home in Connecticut (CT House), but could not afford to do so without the funds they were to receive from plaintiff for the sale of the NY Home at the Closing. Plaintiff states that in order to accommodate defendants, he agreed to allow the release of the $180,000 down payment (the $180,000) from escrow prior to the Closing. Plaintiff contends that at this time, the $180,000 ceased being a contract deposit and became a loan. Plaintiff alleges that he also then agreed to lend defendants an additional $470,000 to purchase the CT House, and thus, in September 2004, he loaned defendants $650,000 in total ($470,000 plus $180,000), that the parties agreed would be credited toward the NY Home purchase upon the Closing. Plaintiff maintains that he took a note from defendants for $650,000 (September 2004 Note), secured by a mortgage. The September 2004 Note provides for interest on $470,000, but not on the $180,000.

The Closing did not occur in February 2005. Plaintiff alleges that it was adjourned for approximately three months. Plaintiff further alleges that in or around February 2005, defendants told him that they needed additional funds to fix up the CT House, that they had then already purchased, whereupon he agreed to make a loan to them of an additional $200,000, which was to be applied toward the purchase price of the NY Home. Plaintiff states that the parties agreed that the entire $850,000 thus far transferred from plaintiff to defendants would be credited toward the purchase price for the NY Home at the Closing, and that he took a restated mortgage note from defendants for $850,000 (February 2005 Note). The February 2005 Note provides for interest

payments on only $470,000 of the principal, absent defendants' default on the Sales Contract. The February 2005 Note, payable upon the Closing, does not contain an alternative date for repayment in the event that the parties did not close on the sale of the NY Home.

Sometime in or around April 2005, plaintiff informed defendants that he was not going to proceed with the purchase of the NY Home. Plaintiff contends that he also realized that the February 2005 Note contained no due date for repayment other than the Closing.

Thereafter, the parties executed an agreement, dated May 19, 2005, that they named the "Termination Agreement" (Agreement). In the Agreement, the parties agreed that the Sales Contract was cancelled, that the Gougelmanns would re-list the NY Home for sale, and that a promissory note, a form for which was appended to the Agreement (the Note), would become due at the earliest of April 1, 2006, or the occurrence of certain specified events. Such events included the placement of additional indebtedness on the NY Home, or its sale to a third party.

In the recital paragraphs in the Agreement, among other things, the parties acknowledge that they entered into the Sales Contract and that pursuant to its terms, plaintiff tendered a down payment of $180,000 toward the purchase of the NY Home which he permitted to be released to defendants from escrow. The recital provisions also state that plaintiff advanced to defendants additional funds of $670,000, taking back notes for the total of $850,000 ($180,000 plus $670,000) (Def. Mov. Aff., Exh. I, at 1). Following these recital provisions, but preceding the operative provisions, the Agreement contains a recital paragraph that states: "WHEREAS, Hack has indicated to the Gougelmanns that he desires to terminate the Contract and receive back all monies paid and advanced to Gougelmann thereunder (*id.*, Sixth Recital Paragraph). The Sixth Recital Paragraph is followed by the seventh, which states: WHEREAS, the parties wish to amicably resolve their

differences as set forth herein" (*id.*).

The Agreement also contains operative provisions, and of these, paragraph number four provides:

> "Upon the due date of the [Note], and provided that Gougelmann is not in default of the terms of this Agreement, Gougelmann shall pay to Hack the sum of $670,000.00, plus accrued interest due under the [September 2004 Note]. In the event of a default by Gougelmann under the terms of this Agreement, Hack shall be paid the sum of $850,000, plus accrued interest due under the [September 2004 Note], plus interest on the principal amount of the [Note] commencing from the date hereof at the rate of 9% per annum, plus reasonable fees, costs and expenses incurred in connection [with] the collection of the [Note]."

(*id.* at 2).

Indeed, the parties executed the Note for $850,000, and defendants also gave plaintiff new mortgages, totaling $850,000. Specifically, the Note states that for value received defendants promised to pay plaintiff the principal sum of $850,000 in accordance with the following terms:

> "Provided that Gougelmann is not in default of the terms of a certain Agreement dated simultaneously herewith regarding the [NY Home], Gougelmann shall pay to [plaintiff] the sum of $670,000.00, plus accrued interest due under a certain [September 2004] Note. In the event of a default by Gougelmann under the terms of said Agreement, [plaintiff] shall be paid the sum of $850,000, plus accrued interest due under the [September 2004 Note], plus interest on the principal amount of this . . . Note commencing from the date hereof at the rate of 9% per annum, plus reasonable fees, costs and expenses incurred in connection [with] the collection of this . . . Note."

(Def. Mov. Aff., Exh. J, at 1). The Note also provides that it "may not be changed . . . orally" (*id.*). Plaintiff alleges that the $850,000 principal amount of the Note included the $180,000, and the $470,000 and $200,000 loans (Complaint, ¶ 29).

Plaintiff contends that in discussions surrounding the Agreement, and prior to the signing of it, in consideration of his prior loan accommodations to defendants, the parties reached a separate

oral agreement pursuant to which defendants agreed to pay plaintiff back some or all of the $180,000, upon sale of the NY Home to a third party, depending on a formula that included the sales price at which the home was eventually sold, and the expenses defendants incurred until the sale (the Oral Agreement). Plaintiff claims that defendants agreed to pay him back some or all of the $180,000 in consideration of what he states were his extensive and generous accommodations to them. Plaintiff states that the parties agreed that they could not foresee all possible items of reasonable expenses, but set out how the portion of the $180,000 to be returned to him would be calculated, specifically setting forth items that would be included in determining expenses under the formula, and agreeing that if defendants incurred other unlisted reasonable expenses, those would be included as well.

Plaintiff further alleges that defendants sold the NY Home, prior to September 1, 2005, for a price that, pursuant to the Oral Agreement, required them to pay him the full $180,000. Plaintiff states that defendants fully repaid to him the $670,000 loan, as provided for in the Agreement, and he does not allege that the Agreement was breached, but solely that defendants have not repaid to him any part of the $180,000 that he alleges is due him pursuant to the Oral Agreement. Defendants have provided copies of the check that was payment on the Note, and that defendants fulfilled their obligations under the Agreement and Note is undisputed.

The first cause of action of the Complaint is based on plaintiff's contention that defendants breached the Oral Agreement. In the second cause of action, plaintiff seeks to recover payment on a loan. In the third cause of action, plaintiff alleges that defendants have disavowed the alleged Oral Agreement to return some or all of the $180,000, never intended to honor it, and knowingly misrepresented that they would pay some or all of the $180,000 back in order to induce plaintiff to

sign the Agreement, and accept just the repayment of the $670,000 loan. Plaintiff claims that he reasonably relied on defendants' representations, and was induced by them to sign the Agreement, and to accept repayment of the $670,000 at the closing of the sale of the NY Home to a third party.

Plaintiff seeks $180,000 in damages, plus attorney's fees, interest and costs, on the first and second causes of action, and that plus punitive damages on the third. In the fourth cause of action of the Complaint, plaintiff demands a declaration that the $180,000 is a loan that defendants have the obligation to repay, on the theory that when the $180,000 was released from escrow it was no longer a deposit, but a loan.

Analysis

For purposes of this motion, the Court presumes the allegations of the complaint to be true and accords them "every favorable inference," except insofar as they "consist of bare legal conclusions" or are "inherently incredible or flatly contradicted by documentary evidence" (*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997]). "Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]). In opposing a CPLR 3211 (a) (7) motion, "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). When such a motion has not been converted to a motion for summary judgment, however, "affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint" (*id.* at 636). "[A]ffidavits submitted by the defendant will seldom if ever warrant the relief [sought] unless too the affidavits establish conclusively that plaintiff has

no cause of action" (*id.*).

Defendants argue that the first cause of action of the Complaint should be dismissed because: plaintiff's claim of an Oral Agreement is precluded by GOL 15-301 and the parol evidence rule; the Complaint contains no allegations of any consideration for the alleged separate oral agreement; and defendants were entitled to retain the down payment as liquidated damages pursuant to the Sales Contract when plaintiff cancelled the sale.

Section 15-301 of the General Obligations Law (GOL 15-301) provides:

> "When written agreement or other instrument cannot be changed by oral executory agreement, or discharged or terminated by oral executory agreement or oral consent or by oral notice
>
> 1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Thus, pursuant to GOL 15-301, written agreements, which expressly proscribe oral modifications, cannot be changed by oral executory agreements (*see* GOL 15-301 [1]; *Ralco, Inc. v Citibank, N.A.*, 32 AD3d 301, 301 [1st Dept 2006] ["since the note required that any amendments must be in writing, oral modifications are prohibited by statute"]). Exceptions to that rule may be found upon the full performance of an oral modification, or part performance of the modification in a manner which is unequivocally referable to an oral modification assented to by both parties (*see Calica v Reisman, Peirez and Reisman*, 296 AD2d 367, 369 [2d Dept 2002]). While the Oral Agreement clearly contains terms that would, as discussed below, if enforced, change the terms of the Agreement, giving plaintiff's allegations the benefit of every favorable inference, he does not allege that the parties modified or changed the Agreement, but that the parties entered into a separate Oral

Agreement that preceded the Agreement's execution.

Presumably in response to defendants' contention that the Oral Agreement is barred by the parol evidence rule, plaintiff argues that a comparison of the Sixth Recital Paragraph and paragraph 4 of the Agreement demonstrates that the Agreement is ambiguous, thus permitting consideration of parol evidence of the Oral Agreement. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended . . . is generally inadmissible to add to or vary the writing" (*Vision Dev. Group of Broward County, LLC v Chelsey Funding, LLC*, 43 AD3d 373, 374 [1st Dept 2007], quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Extrinsic or parol evidence is not admissible to create an ambiguity in a written agreement which is otherwise clear and unambiguous (*Del Vecchio v Cohen*, 288 AD2d 426 [2d Dept 2001]). Where an agreement on its face is reasonably read in only one way, a Court may not modify the contract to reflect its notion of fairness (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]). Moreover, "antecedent oral representations which vary or add to the terms of the note are also barred by the parol evidence rule" (*Ralco, Inc.*, 32 AD3d at 301).

Whether or not a writing is ambiguous is a question of law to be resolved by the courts (*W.W.W. Assoc.*, 77 NY2d at 162). In order to determine that an agreement is ambiguous, a court must find that the writing is fairly susceptible to at least two different interpretations (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006]). A party's bald assertion "that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact" (*id.* at 177-178).

Both sides agree that the Agreement, Note and accompanying mortgages should be read together as part of the same transaction.[1] The plain terms of the Agreement and the Note provide for the repayment to plaintiff of $670,000, plus accrued interest on the September 2004 Note (Accrued Interest), upon the earlier of the occurrence of certain specified events or a date certain. In the event of defendants' default on the Note, they were obligated to pay to plaintiff $850,000 plus Accrued Interest. Despite plaintiff's contention otherwise, the plain language of the Sixth Recital Paragraph cannot be fairly read as requiring defendants to repay plaintiff the $180,000. Indeed, that provision states no requirement, but merely that plaintiff indicated that he desired to receive back the monies he had tendered to defendants. The operative provision of the Agreement upon which plaintiff relies, paragraph four, provides that defendants were to pay to plaintiff either $670,000 or $850,000, upon terms explicitly there specified. Thus, the two provisions of the Agreement upon which plaintiff relies, and which the documentary evidence demonstrates were drafted by plaintiff or his counsel, whether read alone or in combination, cannot be said to support two different reasonable interpretations of the Agreement. Consequently, the Agreement is not ambiguous. Although there is support for plaintiff's contention that a recital clause should govern where it is clear and the operative clause ambiguous (*see Musman v Modern Deb, Inc.*, 56 AD2d 752 [1st Dept 1977]), this is of no moment as the provisions upon which plaintiff relies are both clear.

Plaintiff argues that the parol evidence rule is not implicated here because the Oral Agreement is a separate agreement covering the $180,000 portion of the monies that plaintiff loaned to defendants, and does not contradict or modify the Agreement, the Note or the associated

[1]Although the Note and associated mortgages are dated May 12, 2005 and the Agreement is dated May 19, 2005, both sides contend that these agreements are part of the same transaction.

mortgages. Plaintiff also points to the language of a cover letter, dated April 14, 2005, to which was appended a draft of the termination agreement, sent by plaintiff to defendants,[2] which states:

> "Mr. Hack has reviewed the proposed agreement and respectfully requests that the Gougelmanns consider being amenable to the inclusion of a section to the agreement whereby: if and when the Gougelmanns sell the property at a gross price over $1,620,000 plus Gougelmann's carrying expenses of the property from 4/1/05 (the "Base Amount"), Mr. Hack would receive 50% of the difference between the gross price and the Base Amount up to a maximum of $180,000. It is Mr. Hack's hope that in light of his accommodations regarding the loan which enabled the Gougelmanns to purchase the house they wanted in Connecticut, they would agree to some reasonable way that Mr. Hack may lessen his loss of the downpayment. As Mr. Hack did not want to appear presumptuous, he asked that I not add this concept to this version of the agreement. He only wants to appeal to your client's kindness in this regard and hopes they will make this accommodation.

(Def. Mov. Aff., Exh. H). Plaintiff states that this letter leaves open the possibility that the parties did, in fact, reach a separate oral agreement regarding the return of some or all of the $180,000. Finally, plaintiff argues that although he decided not to go through with the purchase of the NY Home, the Court can take notice of defendants' admissions that plaintiff and defendants did not have a typical, business, contract vendor-vendee relationship, and that plaintiff took generous steps to help defendants purchase the CT House in releasing the $180,000 down payment from escrow, loaning them an additional $670,000, and waiting for defendants to be able to close.

While plaintiff's statement that the parol evidence rule does not apply to separate oral agreements is supportable in the law (*Mitchill v Lath*, 247 NY 377, 379-380 [1928] [stating that the parol evidence rule "does not affect a parol collateral contract distinct from and independent of the written agreement" and noting that it is "at times, troublesome to draw the line"]), this argument does not aid him in recovering here. Claims of separate oral agreements are supportable but only

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[2]With the exception of the insertion of some dates, the Agreement is essentially unchanged from the draft agreement that was annexed to the cover letter.

where those agreements are collateral and do not contradict the written agreement, and where the alleged oral promise is not so clearly connected with the writing's substance such "that the parties could have been expected to embody it in that writing" (*Braten v Bankers Trust Co.*, 60 NY2d 155,162 [NY 1983]; *Mitchill*, 247 NY at 380-381; *Williams Real Estate Co. v Ann Taylor, Inc.*, 251 AD2d 230, 231-232 [1st Dept 1998] ["before evidence of an extrinsic oral agreement is received to modify the terms of a written contract, the oral agreement must be collateral to the written agreement, must not contradict the written agreement and must be one that the parties would not ordinarily be expected to embody in the written agreement. It must not be so clearly connected with the principal transaction as to be part of it"]).

Plaintiff's verified pleading states that the Note includes the $180,000 (Complaint, ¶ 29), which, ignoring Accrued Interest, is the difference between the specified $850,000 and $670,000 Note repayment amounts. Although the Agreement does not expressly state that the $180,000 is part of the $850,000, it is implicitly part of that amount. The Agreement and Note address the terms under which the defendants would pay to plaintiff the $180,000, and the terms under which defendants would not be required to do so, but would be required to pay plaintiff only $670,000. In other words, the Note and Agreement address the $180,000 plaintiff seeks to recover, with the repayment terms for that amount stated in those instruments. The terms of the alleged Oral Agreement would require defendants to pay plaintiff the $180,000, or more than $670,000, under terms not stated in the Note and Agreement, and that contradict their plain payment terms. As the Agreement and Note are clear and both directly address repayment terms for the $180,000, consideration of the Oral Agreement to dispose of the $180,000 in a manner different from, and inconsistent with the terms of the written agreements is impermissible, despite the fact that the

documents do not contain merger clauses.

Although the Court need not reach defendants' argument that the Complaint does not state the consideration for the Oral Agreement, it notes that "[i]n the absence of a writing that can be understood without dependence upon extrinsic evidence and that clearly describes the consideration, a promise derived from past consideration is simply not actionable" (*Clark v Bank of N.Y.*, 185 AD2d 138, 140–41 [1st Dept 1992]). In his Complaint, plaintiff alleges that defendants agreed to pay back plaintiff the $180,000 in consideration of plaintiff's extensive and generous accommodations in having previously made loans to them so that they could purchase the CT House (Complaint, ¶ 36). This speaks to past consideration which is insufficient to support enforcement of an oral contract. In light of all of the foregoing, the first cause of action is dismissed.

Also for the reasons stated above, the second cause of action for repayment of a loan for $180,000, essentially predicated on the same allegations as plaintiff's breach of contract cause of action, is also dismissed. Defendants' request for sanctions, pursuant to 22 NYCRR 130-1.1, which they did not request in their notice of motion, and both request and support with only a brief mention in their memorandum of law, is denied.

Defendants argue that the third cause of action of the Complaint, labeled as for "Fraudulent Inducement," should be dismissed because it is duplicative, and based on promises that are not collateral to the contract. In addition to the allegations of the Complaint, discussed above, in opposition to the motion, plaintiff asserts, in his memorandum of law, that defendants lied to him by stating that they would repay to him some or all of the $180,000, based on the NY Home's sale to a third party, when they never intended to do so. Plaintiff further asserts that he would not have entered into the Agreement had he known that defendants' representation to repay him some or all

of the $180,000 was false. Plaintiff argues that the fourth cause of action is not duplicative of his contract claim, and, in the event that his contract claim is dismissed, which it has been, that the fraud claim cannot be dismissed as duplicative.

To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of an existing material fact, which is intended to deceive another party and to induce that party to act upon it, causing injury (*Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-324 [1st Dept 2004][citation omitted]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186,187 [1st Dept 1998]). Fraud allegations which merely recast claims of breach of contract into fraud, without alleging misrepresentations which are collateral to or extraneous from the contract, fail to state a cause of action for fraud (*New York Health & Racquet Club v NIA/Kornreich Ltd. Liab. Co.*, 290 AD2d 348, 349 [1st Dept 2002]). Furthermore, without a present intent to deceive, a statement of future intentions or promises are not actionable as fraud (*Adams v Clark*, 239 NY 403, 410 [1925]). As a fraud claim may not "be based solely upon the assertion that the promise was not, in fact, fulfilled" (*Braddock v Braddock*, __ AD3d __, __, 871 NYS2d 68, 73 [1st Dept 2009]), but must be premised on factual allegations that demonstrate a non-conclusory basis to support the contention that a defendant made a promise while contemporaneously harboring an intention not to fulfill it.

The third cause of action of the Complaint for fraudulent inducement is undoubtedly predicated on the same facts as plaintiff's dismissed claim for breach of contract, and alleges the

same damages. The reason the claim must be dismissed, however, is because the alleged misrepresentation is not of an existing fact, but clearly, as plaintiff states, a promise that defendants would, under certain circumstances, pay plaintiff all or a portion of the $180,000 in the future. In addition, the alleged promise is not extraneous to the agreement into which plaintiff alleges he was fraudulently induced to enter, as the Agreement and Note encompass the terms upon which defendants were obligated to pay the $180,000 to plaintiff, and also the terms under which they were *not* required to do so. The complaint also does not contain factual allegations demonstrating that defendants, at the time they allegedly made promises concerning the $180,000 to plaintiff, did not intend to fulfill those promises, but only conclusory allegations insufficient to support a fraud claim. Therefore, the Court dismisses plaintiff's fraudulent inducement claim as a matter of law, and need not reach plaintiff's argument that without a viable contract claim the fraud claim is not subject to dismissal as duplicative.

In the fourth cause of action, plaintiff seeks relief in the nature of a declaration that the $180,000 was a loan based on plaintiff's agreement to allow defendants to release the $180,000 from escrow. As plaintiff's contract claim has been dismissed, his rights have been adjudicated under another cause of action, and he is therefore not entitled to a declaration (*see Ramos v Madison Sq. Garden Corp.*, 257 AD2d 492 [1st Dept 1999]).

Conclusion

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it

is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: **February 23, 2009**
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN