

<b>Zysman v Medreal, Inc.</b>
2009 NY Slip Op 31186(U)
May 18, 2009
Supreme Court, Nassau County
Docket Number: 9982-05
Judge: Stephen A. Bucaria
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# SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

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SIMON A. ZYSMAN,

Plaintiff,

INDEX No. 9982/05

MOTION DATE: April 1, 2009  
Motion Sequence # 004, 005

-against-

MEDREAL, INC., ISH KUMAR, SHASHI  
SHAH, DAULAT HALDEA, PRAKASH  
SAHARIA and SHYAM PRABHAKAR,

Defendants.

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The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affidavit in Opposition..... XXXXX
- Reply Affirmation/Affidavit..... XX
- Rule 19-A Statement..... X
- Rule 19-A Statement in Support..... XX
- Response to Rule 19-A..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR 3212, for summary judgement on his first through eighth causes of action, is **denied**; and a cross-motion, by defendant Medreal, Inc., pursuant to CPLR 3212, for summary judgment on its third

counterclaim, is **granted** to the extent indicated below.

Medreal, Inc ["Medreal"] was created in 1989 by several of the currently named defendants-physicians and the plaintiff Simon Zysman – a clinical psychologist – for the purpose of acquiring an office building located at 865 Merrick Road, Baldwin, New York.

Zysman – a 7.1428% (1/14<sup>th</sup>) shareholder in Medreal, contends that in 1990 – to assist Medreal in successfully acquiring the Merrick Road building – he and the other Medreal shareholders advanced Medreal the sum of \$510,000.00, of which the plaintiff's share was \$42,500.00. The parties were ultimately able to acquire the building for the principal sum of \$3,680,679.59, with \$1.1 million of that amount having been financed through a mortgage obtained at the time of the purchase. After Medreal acquired the building, the plaintiff occupied a second floor suite at the premises and later – in 1999 – executed a formal, written lease with Medreal which provided for a monthly rental of \$1,630.00. The plaintiff ultimately vacated the suite and relocated his office elsewhere in April of 2005, after which he then commenced the within action against Medreal and the individual defendants in May of the same year.

According to codefendant Ish Kumar, although Medreal was formed as a corporation in 1989, it did not adhere strictly to corporate formalities since its only real business was acquiring and then maintaining the Baldwin building. Medreal's income was primarily derived from the individual shareholders' rental payments and their *pro rata* tax and carrying expense contributions.

As memorialized by a "mortgage note" dated September 5, 1990, the above-referenced \$510,000.00 shareholder advance was to be repaid by Medreal on or before September, 2000 at an annual rate of 9%. Significantly, the mortgage note contains a provision which provides that "[t]his note may not be changed or terminated orally".

The plaintiff contends, *inter alia*, that although the note obligated Medreal to repay him with interest in 2000, it failed to do so and has not done so to date – with the result that the sum now due and owing, including interest is allegedly \$196,618.86.

Kumar claims, however, that although the 1990 shareholder debt was nominally secured by the 9% mortgage note, at some point after the note was executed, all Medreal shareholders – including the plaintiff – collectively agreed and understood that, based in

Medreal's limited resources, repayment of the sums due thereunder would be made only when Medreal actually had the funds available to make the payments. Kumar additionally asserts, *inter alia*, that: (1) the parties further understood that the foregoing repayment event was not likely to occur until the building was either refinanced or sold outright; that (2) in general, "the rental income derived from the shareholders was barely sufficient to maintain the carrying expenses of the building"; (3) that in accord with the parties' alleged oral understanding, Medreal has, to date, never made any payments on the 1990 note; (4) that the 1990 mortgage note debt has been carried on Medreal's books as a corporate liability for some 17 years; (5) that all shareholders were apprised, and/or always aware of, Medreal's financial condition and its ability (or lack thereof) to reduce shareholder liabilities; and (6) that prior to the commencement of the plaintiff's action, no shareholder, including the plaintiff, had ever demanded entitlement to immediate and full repayment in accord with the literal terms of the 1990 note (Kumar, Aff., ¶¶ 17-21, 44-46, Exh., "F").

In 1992, the plaintiff loaned Medreal the additional sum of \$218,000.00 – a debt formally memorialized by a promissory note dated August 1, 1992. Pursuant to the August 1992 note, repayment was to be made in equal monthly installments of \$6,957.72 at an interest rate of 9% per annum. In connection with the 1992 note, codefendants Kumar, Shah, Haldea, Saharia and Prabhakar each executed personal guarantees by which they jointly and severally guaranteed repayment of the sums advanced. The plaintiff contends that after the note was executed, Medreal made payments sporadically, but that no payments at all were made after February of 2005.

Kumar asserts that Medreal made "all" payments on the plaintiff's 1992 advance and other shareholder advances, until 1995 – when some \$32,226.872 remained outstanding on the plaintiff's note. In March of 1995, however, Kumar claims that the plaintiff's 1992 loan was completely restructured and converted into a new, \$40,000.00 indebtedness carrying an increased interest rate of 12% – which was the same rate which had been given to other shareholders who had also made advances to Medreal. As with the 9% note, it was agreed that repayment would be made when and if Medreal possessed the resources to do so. As part of the same transaction, the defendants argue that the plaintiff was also given a credit of \$7,732.32 – arising out of an unrelated transaction – and also received an additional and separate check for \$1,742.00 – which check and attached check stub contain notations stating, respectively, "original loan conversion to \$40K at 12%" and "Loan Conv. to \$40K at 12%" (Kumar Aff., ¶¶ 27-28; Defs' Brief at 9; Exh., "K"). Significantly, the defendants contend that none of the other shareholders

agreed – as they had with the 1992 note – to guarantee Medreal's payment of the newly re-crafted, \$40,000.00 debt. Although the newly restructured debt was not memorialized by any written or formally executed loan document, the reconstituted loan was recorded as such in Medreal's corporate ledger.

Thereafter, Medreal was able to pay interest to the various shareholders for several years on the "12%" loans, including the plaintiff's allegedly restructured loan. By 2000, however, Medreal allegedly lacked the resources to continue doing so. The defendants contend, in fact, that "[o]nly occasionally between 2000 and 2004" was Medreal allegedly able to make interest payments on the then outstanding, 12% shareholder loans (Kumar Aff., ¶¶ 32, 35, Exh., "E"). In 2004, however, the building was refinanced and some of the funds obtained were used to reduce the outstanding shareholder loans, including \$39,000.00 in payments made to the plaintiff. The defendants assert that, since 2004, Medreal has simply lacked the funds to make further loan repayments. In fact, they note that after the plaintiff made his 1992 advance to Medreal, he accepted the partial payments made by Medreal on his loan for some 12 years without complaint or further demand – until he after he finally vacated the premises in 2005. As to the plaintiff's tenancy and the written lease he executed in 1999, the plaintiff contends that although that lease provided for a monthly rental of \$1,630.00, Medreal nevertheless improperly demanded that he tender rent well in excess of this amount – or face eviction, *i.e.*, it demanded the increased sum of approximately \$2,445.00 per month. Notably, the plaintiff had occupied office space in the premises for some two years prior to the execution of the lease and had been paying the higher amount even before he executed the 1999 lease. The plaintiff further advises that, when he executed the lease in 1999, Medreal allegedly refused to return an executed copy of the document to him. In light of the purported eviction threat, and since the plaintiff did not have an executed lease in his possession, he allegedly paid the greater amount until January of 2004 without documented protest – overpayments which he claims now total some \$48,900.00. According to the plaintiff, he finally obtained the lease from Medreal's new president in January of 2004 and then ceased paying the allegedly excessive amounts which he had been previously paying.

With respect to the plaintiff's related claim of alleged rent overpayments, the defendants assert that the plaintiff was always aware that his personal rental obligation was \$2,445.00 – and that he paid that amount without protest for five years "precisely because this was the amount he knew he was obligated to pay" (Kumar Aff., ¶ 22; Defs' Brief at 18). In fact, the defendants contend that the 1999 lease was given only as an

"accommodation" in connection Medreal's proposed, but ultimately unsuccessful, 1999 refinance application, and that the lease was "never recognized" or regarded as a binding agreement for this reason by either party (Shaaban ¶¶ 6-7; Exh., "B"). More particularly, the defendants claim that the rent due for the approximately 1150 square foot second floor "Suite 305" – which the plaintiff and his brother occupied – was derived from a square footage formula (\$22.50) memorialized in a 1998 shareholders' agreement, which resulted in full rental amount of \$3,360.00.

That rent was allegedly then further divided between the plaintiff and his brother, who agreed between themselves to pay \$2445.00 and \$815.00, respectively. The plaintiff later sublet a portion of his suite space to another professional. In connection with the 1999 refinance application, the defendants contend that they requested that the plaintiff execute a written lease for the entire suite in the full rental amount of \$3,360.00, but the plaintiff purportedly declined, and instead informed the defendants that he wanted his written lease to reflect only an amount which corresponded to the space he was actually occupying at the time – not the full suite footage, *i.e.*, an amount reflecting footage reductions for the space occupied by his brother and the subtenant. In accord with this request, the plaintiff and his brother executed separate leases in the respective amounts of \$1630.00 and \$815.00, although the subtenant later declined to execute a separate, direct lease. Apparently, various other shareholders were also asked to execute leases for the same purpose, *i.e.*, submission to the lender in connection with the 1999 refinance effort. The 1999 refinance ultimately failed and the defendants claim that the newly executed shareholder leases were never submitted to the lender. Nevertheless, and despite the \$1,630.00 and \$815.00 amounts recited in the 1999 leases, the plaintiff and his brother thereafter continued to pay without documented protest, the full rental amount, *i.e.*, \$2445.00, until January of 2004.

With respect to Medreal's real estate taxes, Medreal's current president, codefendant Magdy Shaaban, asserts that, although the plaintiff vacated his office space in April, 2005, he is still a shareholder and therefore remains obligated to contribute his *pro rata* share of real estate taxes due and owing from 2007 through the first half of 2009, which amount: (1) has not yet been paid; and (2) now equals \$16,564.00 based on the plaintiff's 1/14<sup>th</sup> shareholder interest. In May of 2005, the plaintiff commenced the within action to recover monies loaned and/or advanced to Medreal and rental overpayments. The plaintiff's original complaint made no specific reference to – or claim based upon – the 1990 or "9%" mortgage note.

By order dated February 25, 2008, this Court permitted the plaintiff to file an amended complaint which, *inter alia*, added the individually named defendants as guarantors and also added certain new claims. At the same time, the Court also permitted the defendants to amend their answer. The plaintiff's amended complaint now contains nine causes of action, including claims for, *inter alia*, the overpayment of rent and recovery on both the 1990, "9%" mortgage note and on the 1992 promissory note and personal guarantees. The defendants have answered, denied the material portions of the complaint and have interposed various affirmative defenses and counterclaims, including their third counterclaim for recovery of the plaintiff's unpaid, *pro rata* share of real estate taxes from 2007 through the first half of 2009. The plaintiff now moves for summary judgment on his first through eighth causes of action, while the defendants have cross moved for summary judgment on their third counterclaim for unpaid taxes. The plaintiff's motion is **denied**. The defendants' cross motion is **granted**.

Preliminarily, the defendants suggest – albeit without citation to case law or statutory authority – that the plaintiff's claims relating to the 1990 not "would" be time-barred if asserted as a breach of contract claim, and that recovery on the 1992 promissory note would similarly be time-barred to the extent recovery is sought on the note as it was originally constituted in 1992. The Court notes that the defendants' limitations arguments are framed obliquely so as to raise doubt as to whether they are actually being advanced as full-blown dismissal arguments – or merely offered as parenthetic observations intended to preface the factual claims later principally relied upon. In any event, the plaintiff's opposing/reply papers have demonstrated that the 1990 obligation was continually recognized by the defendants themselves, both through notation in Medreal's corporate records over the years and by virtue of their current modification theory, which is founded on the claim that the 1990 obligation – albeit as allegedly modified – is still viable and, in fact, will be ultimately be discharged (*see generally*, *Hui v. East Broadway Mall, Inc.*, 4 NY3d 790, 791, 2005; *Jeffrey L. Rosenberg & Associates, LLC v. Lajaunie*, 54 AD3d 813, 815; *City of New York v. North River Housing Development Fund Corp.*, 12 AD3d 294, 296; *Atlantic Nat. Trust LLC v. Silver*, 9 AD3d 321, 322; ; General Obligations Law § 17-101).

Moreover, the defendants concede that payments were made on the promissory note (12%) obligation as recently as 2004, although it is disputed as to whether those payments were made in connection with the original, 1992 note or the purportedly "restructured" obligation now relied on by the defendants (*see e.g.*, *Island ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816; *Grant v. Marshall*, 270

AD2d 229; Mundaca Inv. Corp. v. Rivizzigno, 247 AD2d 904, 906). Under these circumstances – and assuming that the defendants are actually asserting a limitations theory on the motion – they have failed to sustain their burden of demonstrating that the applicable periods constitute a bar to the claims advanced by the plaintiff (Island ADC, Inc. v. Baldassano Architectural Group, P.C., *supra*, 49 AD3d at 816; In re Schwartz, 44 AD3d 779).

Turning then, to the 1990 mortgage note, while the plaintiff has established his entitlement to judgment by submitting the fully executed and unpaid mortgage note – which contains a provision barring oral termination and/or oral modification its terms (e.g. Verela v. Citrus Lake Development, Inc., 53 AD3d 574, 575; Popular Financial Services, LLC v. Williams, 50 AD3d 660; Timeless Realty Corp. v. Connecticut Diversified Holdings, LLC, 44 AD3d 745, 747; General Obligations Law, §§ 15-301; 5-1103), the defendants have generated a triable issue of fact with respect to the claim that the mortgage note was modified by Medreal’s shareholders.

As the parties note, General Obligations Law § 15-301[1] provides, in part that, “[a] written agreement \* \* \* 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” (Irving O. Farber, PLLC v. Kamalian, 16 AD3d 506 *see*, Rose v Spa Realty Assoc., 42 NY2d 338, 343, 1977). Accordingly, where “where a contract contains a ‘no oral modification clause’ that clause will be enforceable” (Israel v. Chabra, 12 NY3d 158, 2009, *supra*, *see also*, Healy v. Williams, 30 AD3d 466, 467-368; Calica v Reisman, Peirez & Reisman, 296 AD2d 367, 369). Nevertheless, an oral modification will be enforced where, *inter alia*, there is part performance that is actually performed and “unequivocally referable” to the alleged modification (*see*, Rose v. Spa Realty Assocs., *supra* *see generally*, Sudit v. Schapiro, 57 AD3d 968; L & W Supply Corp. v. A.D.F. Drywall, Inc., 55 AD3d 1026).

In general “[u]nequivocally referable’ conduct is conduct which is ‘inconsistent with any other explanation’” (745 Nostrand Retail Ltd. v. 745 Jeffco Corp., 50 AD3d 768, 769, *quoting from*, Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y., *supra*, 304 AD2d 462, 463), and is not “otherwise \* \* \* compatible with the agreement as written” (Rose v. Spa Realty Assocs., *supra*, at 344 *see*, Anostario v. Vicinanza, 59 NY2d 662, 663-664 [1983] *see also*, Lake Anne Realty Corp. v. Lake Anne at Monroe Associates, LLC, 29 AD3d 866).

Here, the defendants' submissions have at least raised a triable issue of fact as to whether Medreal's shareholders orally agreed to refrain from seeking repayment on the mortgage note as a special accommodation in light of Medreal's alleged, financially inconsistent position subsequent to its acquisition of the building (*see generally, L & W Supply Corp. v. A.D.F. Drywall, Inc., supra*, 55 AD3d 1026).

The record indicates, in this respect, that, notwithstanding the September, 2000 maturity date specified for repayment of the loan, none of the contributing shareholder/creditors has ever previously demanded repayment in accord with the literal terms of the mortgage note. Further, it is undisputed that, in fact, no repayments have ever been made by Medreal in connection with the 1990 obligation. Indeed, and insofar as the parties' submissions indicate, the only memorialized or expressly written demand for repayment ever made has been the recent, post-litigation demand made by the plaintiff in his November, 2007, amended complaint. The foregoing tends to support the existence of a "mutual departure" from the written terms of the mortgage note, since "the parties' conduct conformed to the terms of the alleged oral agreement, and the record" does not necessarily "indicate other motivations for" their actions (*Healy v. Williams, supra*, 30 AD3d at 468).

Significantly, the plaintiff has not offered an alternative interpretation of these factual occurrences which otherwise plausibly accounts for the unusual, collective uniformity in the conduct and forbearance of the all contributing shareholders with respect to the 1990 debt – at least prior to the commencement of the instant action (*e.g., Staten Island Emergency Physicians, P.C. v. Staten Island University Hosp.*, 57 AD3d 650). It has been observed in an analogous context that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence" (*Coliseum Towers Associates v. County of Nassau*, 2 AD3d 562, quoting from, *Old Colony Trust Co. v. Omaha*, 230 US 100, 118 [1913] *see, Lipsztein v. Donovan*, 289 AD2d 51, 52). Nor does the Court agree that, as a matter of law, there is a failure of consideration to the plaintiff in connection with the alleged oral modification (*see, 72nd Street Associates v. Greystone Servicing Corp., Inc.*, 36 AD3d 566; *Rooney v. Slomowitz*, 11 AD3d 864, 867 *see also*, General Obligations Law § 5-1103). As gleaned from the relevant factual averments made by the defendants' two key affiants – Drs. Kumar and Shaaban – the underlying rationale supporting the alleged modification was that Medreal simply lacked the operating funds or resources to repay the loans in light of, *inter alia*, its tax and

carrying cost obligations, which were defrayed primarily by shareholder rental payments. According to Kumar, the resources available to Medreal were not always sufficient to pay the carrying costs of the building, thereby requiring the shareholders “to make additional advances and loans to cover maintenance repairs and taxes” (Kumar Aff., ¶ 17-18). The foregoing facts support the inference that in exchange for their forbearance in demanding immediate and full payment, the shareholders – including the plaintiff – received a valuable, *quid pro quo* as tenants and equity owners of the corporation, *i.e.*, they minimized the extent to which potentially additional and costly shareholder contributions would be required – and further ensured that their tenancies and Medreal’s corporate stability would be unaffected by potential defaults in carrying costs and/or other immediate and pressing obligations. The Court also agrees that the alleged oral modification can be construed as non-executory in nature, since the asserted, collective agreement to forebear until appropriate funding was available was arguably complete upon the maturity of the note in 2000 – at which time, and for years thereafter, Medreal concededly neither paid the shareholders nor received any documented, written demands for payment in accord with the actual payment terms of the mortgage note (*e.g.*, Maynard Court Owners Corp. v. Rentoulis, *supra*, 235 AD2d 867, 868).

Upon viewing these facts “in the light most favorable to \* \* \* [defendants], as is appropriate in the context of \* \* \* [the plaintiff’s] motion for summary judgment” (Fundamental Portfolio Advisors, Inc. v. Tocqueville, 7 NY3d 96, 106 [2006]; Mosheyev v. Pilevsky, 283 AD2d 469), the Court finds that issues of fact exist with respect to the defendants’ claim that the 1990 mortgage note was orally modified (Sudit v. Schapiro, *supra*, 57 AD3d 968). Similarly, and as to the 1992 promissory note, although the plaintiff has produced the executed instrument and the accompanying guarantees signed by the individual defendant-guarantors (*see*, Gera v. All-Pro Athletics, Inc., 57 AD3d 726, 727), the defendants have raised triable issues with respect to their claim that the agreement was modified and/or restructured in 1995 (*see*, Suffolk County Nat. Bank v. Columbia Telecommunications Group, Inc., 38 AD3d 644, 645). More specifically, Medreal’s corporate documents suggest that in 1995, a \$40,000.00 Medreal indebtedness was created which carried an increased interest rate of 12% per annum. Further buttressing this conclusion is the defendants’ submission of a certain contemporaneously drawn check which contains a notation expressly referring to an alleged “loan conversion” to “40K at 12%”.

The plaintiff has not determinatively addressed the defendants’ factual assertions with respect to alleged, 1995 restructuring transaction *i.e.*, he has not provided an

explanation which persuasively accounts for the reference to \$40,000.00 loan in Medreal's corporate ledgers; the contemporaneous "loan conversion" notation on the check and stub produced by the defendants; or the series of payments and adjustments which were allegedly made in 1995 as part of the restructuring process, which also brought the plaintiff's interest rate in line with those given to the other shareholders. It bears noting as well that there are no contemporaneously generated documents before the Court which indicate that – prior to the instant lawsuit – the plaintiff ever registered any objection to the manner in which Medreal was repaying the debt reflected by the 1992 note – a period spanning over a decade. Further, and contrary to the plaintiff's contentions, the subject note does not contain a provision barring all oral modifications, but instead, merely provides that the "lender" could elect to grant extensions or renewals of the note terms, provided they were in writing and signed by lender and borrower. At bar, however, the claim is that an entirely new, recast and restructured agreement was reached which replaced the original note (*see generally*, *Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339, 340; *DeVito v. Benjamin*, 243 AD2d 600; *Dayan v. Yurkowski*, 238 AD2d 541, 542).

The Court also finds that the defendants' opposing submissions are not deficient as improperly based exclusively upon hearsay submissions (*e.g.*, *Gier v. CGF Health System, Inc.*, 307 AD2d 729, 730). In sum, issues of fact exist as to whether the 1992 note was restructured in accord with the terms alleged to have been adopted by the defendants and whether the original guarantees are applicable to any newly recast debt (*see generally*, *White Rose Food v. Saleh*, 99 NY2d 589, 591 [2003]; *Arlona Ltd. Partnership v. The 8th of January Corp.*, 50 AD3d 933, 934). With respect to plaintiff's claim for overpayment of rent, the defendants have generated triable issues of fact regarding their contention that the 1999 lease was crafted as an accommodation and/or never intended by the parties to create a binding obligation (*Polygram Holding, Inc. v. Cafaro, supra*). Although the parol evidence rule bars evidence offered to contradict the express terms of a document (*e.g.*, *Marine Midland Bank-Southern v. Thurlow*, 53 NY2d 381, 387 [1981]), nevertheless "the rule does not preclude a party from offering evidence demonstrating that what appears to be an obligation was not intended to be an obligation at all" (*DeVito v. Benjamin, supra*, 243 AD2d 600 *see also*, *Polygram Holding, Inc. v. Cafaro, supra*, 42 AD3d at 340). Here, the defendants have shown that despite the lesser amounts contained in the written lease, the plaintiff was regularly paying rent at a significantly higher rate, which apparently reflected the square footage formula contained in the 1998 shareholder's agreement. Moreover, and insofar as the record indicates, he did so without written objection for some two years prior to the

execution of the 1999 lease and then for several years thereafter (*Healy v. Williams, supra*, 30 AD3d at 468) – only raising the overpayment claim after he finally vacated his office space and left the building altogether in early 2005. Also inconclusive in the Court’s view, is the strained explanation that the plaintiff paid the disputed, higher rental amount for years – despite his awareness of the allegedly “correct” monthly rental – solely because he did not have a copy of the lease and/or because he was threatened with eviction – claims which are unsupported by any contemporaneously generated documentation or proof.

In sum, the defendants have “submitted sufficient evidence in the form of affidavits and exhibits raising questions as to whether \* \* \* [the 1999 lease] was ever intended to be a binding agreement or rather an accommodation \* \* \*” (*Fiumera v. Kamp*, \_\_\_ Misc3d \_\_\_, 2008 WL 4282865 [Supreme Court, Broome County 2008]). Summary judgment is a drastic remedy which must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Dykeman v. Heht*, 52 AD3d 767, 769; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

Lastly, and with respect to the defendants’ cross motion on its tax liability (third counterclaim, the plaintiff has not disputed that he is obligated as a shareholder to contribute his *pro rata* portion of the taxes owed; nor does he claim that the sum now identified by the defendants as his share, is incorrect, *i.e.*, \$16,564.00. Under these circumstances, the defendants are entitled to partial summary judgment in connection with their effectively unopposed third counterclaim. However, the plaintiff has currently interposed several potentially meritorious and – as yet – unresolved claims, amounts which materially exceed the sums demanded by the defendants’ in their counterclaims (*cf.*, *Illinois McGraw Elec. Co. v John J. Walters, Inc.*, 7 NY2d 874, 876-877 [1959]; *Pronti v. Grigoriou*, 49 AD3d 1135, 1136). In light of these circumstances, and in the exercise of its “wide discretion” in “imposing conditions upon the grant of partial summary judgment” (*see, Robert Stigwood Organisation, Inc. v. Devon Co.*, 44 NY2d 922, 923 [1978]; CPLR 3211[e]), the Court shall stay of execution of judgment pending resolution of the parties’ remaining claims and counterclaims (*see, Bartfield v. RMTS Associates, LLC*, 283 AD2d 240, 241-242; *Moody v. Monacelli*, 225 AD2d 926, 928).

The Court has considered the parties’ remaining contentions and concludes that none warrants an award of relief beyond that **granted** above.


ZYSMAN v MEDREAL, INC., et al

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The foregoing constitutes the decision and order of the Court

A certification conference is scheduled for July 9, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated MAY 18 2009

  
J.S.C.

**ENTERED**

MAY 20 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE