SCAN

SHORT FORM ORDER

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

EXCELSIOR CAPITAL, LLC,

Plaintiff,

INDEX NO.: 008289/2007
MOTION DATE: 05/11/2009
MOTION SEQUENCE: 006

-against-

SUPERIOR BROADCASTING COMPANY, INC., C. ROBERT ALLEN, III and LUKE ALLEN, as Temporary Guardian of C. Robert Allen, III,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affidavit of Anne Marie Fiorentino & Exhibits Annexed	2
Statement of Material Facts Pursuant to Commercial Division Rule 19-a in Support of Defendants' Motion for Partial Summary Judgment	3
Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment	4
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Exhibits to the Affirmation of Edward W. Hayes in Support of Excelsior Capital, LLC's Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment, Exhibits H-1 to H-40, Volume 1 of 2	6
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Motion pursuant to CPLR 3212 by the defendants Superior Broadcasting Company, Inc., C. Robert Allen, III, and Luke Allen, as Temporary Guardian of C. Robert Allen, III, for partial summary judgment dismissing the fifth, sixth, ninth, tenth, thirteenth, fourteenth, seventeenth and eighteenth causes of action.

Between January and July of 2004, Richard Davis, former president and owner of "Davis Vision," either personally of through plaintiff, Excelsior Capital, LLC ["Excelsior" or the "plaintiff"], made a series of five loans to codefendant Superior Broadcasting Company, Inc. ["Superior"], totaling some $18.4 million (A. Cmplt., ¶¶ 1[2]; Davis Dep., 37-39).

The 2004 Excelsior loans are memorialized by four separate promissory notes, each carrying specified interest rates and payment schedules calling for monthly interest installments – to be followed by payment of the principal amounts on variously stated dates certain (A. Cmplt., ¶¶ 3-4; Defs' Exhs. "8-10, "12," "22"). Three of the Superior loans amounting to $13 million, were personally guaranteed by C. Robert Allen, III.

The subject loan transactions can be traced to the relationship which developed in 2003 between the then 43 year-old Davis, and his Sands Point neighbor, then 72-year old C. Robert Allen, III ["Allen"] – whose father and uncle founded the prestigious, "boutique" media investment firm "C. Allen & Company" (A. Cmplt., ¶¶ 15-16; Davis Dep., 13-26; Allen Dep., 10).

The friendship between the two men developed in early 2003, when Davis first spoke to Allen about removing or trimming certain trees located on Allen's property, which had apparently extended onto Davis' adjacent yard (Davis Dep., 45-46).

Thereafter, Davis and Allen developed a close personal relationship – the hallmark of which were the regular and frequent visits made by Davis to Allen's home, where the men engaged in political, literary and historical discussions, as well as lighter fare including backgammon, chess and checkers (Davis Dep. 43, 48; 51-57, 180-181). Although Allen suffered from certain physical disabilities, Davis described Allen as a "brilliant, brilliant individual" (Davis Dep., 180).

During the course of their now regular meetings, Allen allegedly informed Davis that he was a director at Allen & Company and also that he was a billionaire (Davis Dep., 54, 151-152,

534-535 *see,* Pltff's Rule 19A Statement,¶ 15; "Defs'/Pltff's 19A ___"]).

At some point in late 2003, Allen began mentioning the radio business and, in particular, codefendant Superior Broadcasting Company, Inc. Allen described Superior as "his company" – which Davis understood to mean that he (Allen) owned Superior (Davis Dep., 60, 77-78, 136). In fact, Allen and his family collectively held a 90% equity interest in Superior, although none of the Allens held any formal positions with the company at that time (A. Cmplt., ¶ 30; Fiorentino Aff.,¶ 3).

Allen then allegedly informed Davis that Superior owned radio stations and was in the business of operating, managing and/or selling them. Allen also supposedly touted Superior's business success; its sound financial condition and positive cash flow; its ownership of valuable radio stations; and its ability to exploit a supposedly value-enhancing technical process by which a station's signal could be upgraded or re-engineered so as to reach previously unreachable metropolitan markets– a so-called "move in" procedure (Davis Dep., 59-62; 92-93; A. Cmplt.,¶¶ 9, 24; Federal Cmplt., ¶¶ 69-71).

Significantly, and also in late 2003, Allen advised Davis that there were attractive investment opportunities available in Superior and the two engaged in a series of discussions relative to Davis' potential participation in the company (Davis Dep., 61-63). Allen himself had invested vast amounts in Superior – ultimately over $70 million of his personal funds in that entity, and various other related entities (Fiorentino Aff., ¶¶ 3-4).

Davis claims that he made it clear to Allen that he was not interested in an equity interest, but that a loan position would be more consistent with his investment objectives for Excelsior (Davis Dep., 61-62). Additionally, Davis allegedly emphasized and informed Allen that any proposed investment would necessarily have to be conservative and constitute a "very secure position" in terms of any attendant risk (Davis Dep., 63-69).

During these discussions, Allen mentioned that non-party Christopher Devine, then president of Superior, was essentially running the company for him (Davis Dep., 70-74). Allen described Devine – whom he had known for many years – in glowing terms as a "premier" manager and, in fact, the best operator/manager he had ever seen (Davis Dep., 70-74; Pltff's Brief at 4, fn 3). At this point, Allen offered Davis the opportunity to personally extend a loan to

Superior and instructed him to call Devine to discuss the details of the transaction (Davis Dep., 77-78).

Davis considered it an honor that Allen had offered him the loan opportunity. Moreover, he was allegedly reassured by Allen that the risk was minimal; that the investment was good one; and that in any event, he was further protected by virtue of Allen's billionaire status and close ties to C. Allen & Company (Davis Dep., 75, 80; Pltff's 19A Statement, ¶ 18). Davis thereafter made a $400,000.00 personal loan to Superior, which was memorialized by a promissory note dated January 15, 2004, and executed by Devine as Superior's president.

The note required Superior to repay the $400,000.00 debt in quarterly interest payments at a rate of 7.25% – with the final payment due and owing on January 15, 2006 (Defs' Exh., "H-29"). Since Davis' personal relationship and trust in Allen was "beyond any due diligence" that he could have otherwise conducted, he made no inquiry into Superior's financial records (Davis Dep., 78-79).

Shortly thereafter, Allen allegedly approached Davis with yet another investment opportunity, also involving a proposed loan to Superior in the principal sum of $5 million, which in this case was to be made by Davis' investment vehicle, plaintiff Excelsior (Davis Dep., 92–97). In sum, Davis was informed by Allen, Devine and Bruce Buzil, — Superior's other officer – that a lucrative opportunity had arisen in connection with a rural Nevada radio station whose value could be materially enhanced through use of the "move in" process (A. Cmplt., ¶¶ 21-34).

These negotiations ultimately produced the March 2004, $5 million note, whose terms were allegedly proposed by Allen and Devine (Davis Dep., 122-125). The March note provided for a 12% interest rate on the entire outstanding balance to be paid over an 18 month term – with the rate to be adjusted to 17% in the event of a default (Defs' Exh.,"19", Note, ¶ 1; Davis Dep., 121-129).

At the same time, Superior and Excelsior entered into a so-called "subordination" agreement which granted payment priority to the March note over all other Superior obligations. Specifically, Superior agreed that "no other obligations of Superior are or shall become senior" to the March, 2004 note while the note was "outstanding and unpaid" (Davis Dep., 135-142; Pltff's

19A Statement, ¶ 40).

According to Davis, Allen himself had affirmatively proposed that Superior execute the subordination agreement to further reassure Davis that March 2004 loan was secure, *i.e.*, Allen allegedly told Davis that if he (Davis) contributed money to Superior, Davis would "receive his contribution back before" Allen received payment on his own, then outstanding Superior loans (Cmplt., ¶¶ 27-28).

Thereafter, Excelsior made three additional loans to Superior totaling $13 million, as evidenced by promissory notes executed by Devine as president of Superior, *i.e.*, notes dated April 13 ($3 million); June 21 ($5 million); and July 28, 2004 ($5 million).

Significantly, both Allen and Devine executed personal guarantees with respect to the foregoing notes (Defs' Exhs.,"13-15" [Allen]). The March, June and July notes contained automatic extension provisions, pursuant to which the payment of principal would or could be extended for six months in the event the note was not in default.

In separate transactions not at issue here, Excelsior and/or Davis allegedly made additional loans separately exceeding the sum of $21 million, either to Devine and Buzil personally – or to the various entities which they allegedly controlled (Pltff's 19A, ¶ 43).

At some point in March of 2004, Davis requested that Devine purchase a life insurance policy which would benefit Excelsior (Pltff's 19A,¶ 69). Both Devine and Allen agreed and later allegedly assured Davis that the policy had been purchased (*see also*, Pltff's 19A,¶¶ 69-73; Davis, Dep., 341-346, 363).

Superior thereafter made interest payments on the Excelsior loans, but between September of 2005 and February of 2006, it ceased making payments, after which notices of default were served by Excelsior (A. Cmplt., ¶¶ 21-22, 32-3, 46, 51-57). The March 2004 note was allegedly breached in early April, 2006 (Cmplt., ¶ 91), at which juncture, the outstanding sums claimed to be due from Superior amounted to some $18.4 million (A. Cmplt., ¶ 19).

Shortly before the notes were to mature, Allen personally requested that Davis extend the maturity date of the $3 million, April 2004 note and offered him in exchange, a $300,000.00 (10%) fee, together with an increased interest rate of 25% (Davis Dep., 406-409; 434-435). In fact, and according to Davis, Allen had approached him on various occasion with requests that he

extend "all * * * [his] loans" (Davis Dep., 407, 532-533; Pltff's 19A, ¶¶ 59-65).

A $300,000.00 check was later wired to Excelsior – not by Allen or Superior – but by an entity controlled by Devine/Buzil called "3 Point Media" (Davis Dep., 411-412). Davis retained the $300,000.00 and accepted the enhanced interest payments throughout 2005 – although he claims that nothing "formal was in place" and that he accepted the payment with the understanding that the extension would become operative only upon the execution of new and formal documents – which were never forthcoming (Davis Dep., 413, 430, 433, 437, 587, 644-645; Pltff's 19A, ¶¶ 60-61).

Allen and Devine allegedly approached Davis with an offer to extend the $5 million June, 2004 note – an offer to which Davis was agreeable – provided again, that satisfactory documentation was created (Pltff's 19A,¶ 59). Davis later received and retained a $500,000.00, 10% extension fee in the form of a check dated June 20, 2005, which was drawn on the account of yet another Devine-controlled entity, *i.e.*, Lakeshore (Defs' 19A, ¶¶ 61-62; Read Aff., Exh., "32").

However, when the parties discussed the extension in May of 2005, they (he as well) had apparently forgotten that the June note – which otherwise matured in June of 2005 – contained an applicable, "automatic," six-month extension provision (to December of 2005). Accordingly, the discussions were allegedly conducted under the mistaken impression that the note actually matured in June of 2005 (Pltff's 19A, ¶¶ 62-65).

The parties have advanced conflicting allegations and claims with respect to whether the $500,000.00 payment – or a portion thereof – was later treated as an extension fee, or whether instead, the payment was simply applied in some fashion to Superior's then outstanding loan obligations (Defs' 19A, ¶¶ 65-66; Pltff's 19A, ¶¶ 67-68).

The parties' relationship began to deteriorate in September of 2005, when Davis claims to have discovered that Allen and Devine lied to him about Devine's insurance policy, which was never purchased (Pltff's 19A, ¶¶ 67-69; Davis Dep., 341-345).

As a consequence, Davis, Devine and Buzil entered into a written agreement dated September 29, 2005, pursuant to which Devine and Buzil agreed to obtain certain life insurance policies benefitting Excelsior (Hayes Aff., Exh., "66"). Buzil later purchased the agreed-upon life

policy, although Devine was only able to secure accidental death coverage (Pltff's 19A, ¶¶ 74-76).

Less than one month later, on the Yom Kippur holiday (October 13, 2005), Allen contacted Davis and informed that he needed to discus something of importance with him (Davis Dep., 533-532). When Davis arrived at Allen's home, Allen again requested that Davis extend "all the loans that Excelsior Capital made to Superior", as well as other loans not at issue here, which Excelsior and/or Davis had made to Devine, Buzil and the various entities they allegedly controlled (Davis Dep., 533-534; 586).

In an attempt to persuade Davis to consent to the extension, Allen allegedly reminded Davis, *inter alia*, that he had given his word that Davis would never be negatively impacted; that he was a billionaire with vast holdings; that he greatly valued their relationship; and that he (meaning Superior) would continue paying interest during the proposed loan extension period (Davis Dep., 534-535).

Davis claims that he responded by informing Allen (and later Devine), that he had been lied to (with respect to the insurance) and that therefore, the loans would not be extended and will be "due on the maturity dates * * *" (Davis Dep., 537-538; 586-7).

Although Davis claims that he definitively informed Allen that no extensions would be granted, two documents were drafted a month later which nevertheless listed extended maturity dates for the notes. Specifically, in early November, 2005 two, typewritten summaries were created for submission to Lloyds in connection with the proposed Devine/Buzil life insurance policies. The documents – both entitled, "Summary of Notes Payable to Excelsior Capital from Chris Devine, Bruce Buzil and affiliates" – were signed by Davis, Buzil and Devine, and refer to extended maturity dates for the April, June and July notes* (Hayes Aff., Exh., "67").

Subsequently, in January of 2006, Devine sent Davis a check in satisfaction of an unrelated loan, which was returned for insufficient funds (Cmplt.,¶¶ 59-60). Shortly thereafter, Allen, Davis and Devine allegedly met on several occasions to discuss a possible global loan consolidation, although Davis contends that the negotiations apparently failed and the consolidation was never implemented (Cmplt.,¶ 60).

After the Excelsior/Superior loan transactions and ensuing negotiations failed, Davis

allegedly ascertained that despite Allen's representations about being a billionaire director in Allen & Company – Allen had actually been removed from any significant involvement with that entity as early as 2001-2002.

Moreover, Davis claims that when the extension negotiations were on-going Allen's intimate relationship with Devine and investments he had made in Superior, had created severe conflict and consternation among Allen's family members, who ultimately concluded that legal intervention was necessary to avoid a potential financial catastrophe (Federal Cmplt., ¶¶ 136-138; 156-162; Allen Dep. 18 — 19). In February of 2007, and allegedly to staunch further irrevocable injury, Allen's wife brought on order to show cause under the Mental Hygiene Law for the appointment of a temporary guardian over Allen (Hayes Aff., Exh., "16").

In her supporting papers, Mrs. Allen advised that Allen was physically and mentally compromised and, to date, had wasted large portions of a family fortune, originally valued at over $100 million – principally through his trust in Devine and his disastrous investments in Superior, which she described as a "shell" company with no assets (Pet., at 6-7).

According to the petition, Allen was presently incapable of comprehending that the vast sums of money he had invested with Superior were being systematically diverted to various third-party entities dominated by Devine – in which Allen had no ownership interest. Despite all efforts by family members others, Allen was intractable and was unable to comprehend the implications of his conduct (Pet. at 7).

By order dated March 2008, the Court (Asarch, J.), issued an order appointing Allen's son Luke, as "Guardian for the Property Management of C. Robert Allen".

Thereafter, in February of 2009, Luke – as guardian on Allen's behalf – commenced a related action in the Federal District Court for the Eastern District of New York, accusing both Devine and Buzil of concocting a fraudulent scheme to bilk nearly $70 million from the now, 79 year-old Allen – whom the complaint describes as mentally and physically infirm. (Hayes Aff., Exh., "51"; Federal Cmplt.,¶¶ 2-5).

The complaint further alleges that Devine and Buzil fraudulently preyed upon Allen's infirmities and induced him to contribute vast sums of money to Superior by falsely claiming that Superior owned a multitude of radio stations when it allegedly owned none, "did not conduct any

known business" and had been "stripped of all its assets" (Federal Cmplt.,¶¶ 6, 161).

Luke additionally alleged that Devine and Buzil conspired with, and "used" Davis to create an elaborate "shell game" by which they: (1) misappropriated Allen's loan advances to Superior; (2) used those proceeds to pay off their own debts – including loan debts owed to Davis; and (3) then fraudulently reimbursed themselves with Allen's loan money (Federal Cmplt.,¶¶ 6, 119-125, 135).

In 2007, Excelsior commenced this action as against Allen and Superior, setting forth causes of action sounding in unjust enrichment and breach of the Superior notes, the Allen personal guarantees and the March, 2004 subordination agreement.

The defendants have answered, denied the material allegations of the complaint and interposed a number of affirmative defenses.

The defendants Allen and Superior now move for partial summary judgment dismissing the fifth, sixth, ninth, tenth, thirteenth, fourteenth, seventeenth and eighteenth causes of action.

Those branches of the defendants' motion which are to dismiss the causes of action predicated on Allen's personal guarantees – the ninth, thirteenth and seventeenth causes of action – should be denied.

It is settled that since "[a] guaranty is to be interpreted in the strictest manner" the "guarantor's obligation cannot be altered without its consent" (*White Rose Food v. Saleh,* 99 NY2d 589, 603 [2003]. Accordingly, "if the original note is modified without its consent, a guarantor is relieved of its obligation" (*White Rose Food v. Saleh,* supra, at 603; *Bier Pension Plan Trust v. Estate of Schneierson,* 74 NY2d 312, 316 [1989]; *Brown v. Business Leadership Group,* 57 AD3d 212, 213; *Arlona Ltd. Partnership v. The 8th of January Corp.*, 50 AD3d 933, 934; *Davimos v. Halle*, 35 AD3d 270, 272).

"The rationale for discharging a guarantor when the underlying contract is modified is that the modification substitutes a new obligation for the old one, and the guarantor cannot be held responsible for the failure of the principal to perform an obligation other than the obligation originally guaranteed" (*Arlona Ltd. Partnership v. The 8th of January Corp., supra*, 50 AD3d at 934 *see also*, *Bier Pension Plan Trust v. Estate of Schneierson, supra see also*, 63 NYJur2d, Guaranty and Suretyship § 193).

"A contract of guaranty is required to be in writing under the Statute of Frauds" and "[c]ontracts which are within the Statute of Frauds cannot be changed or altered except in the manner which the statute requires in the first instance to make them enforceable" (*M.H. Metal Product Corp. v. April*, 251 NY 146, 150 [1929]; *Ber v. Johnson*, 163 AD2d 817, 818). However, the statute does not protect one who has induced another to incur expense and alter his position to his damage (*M.H. Metal Product Corp. v. supra*).

Further, a "guarantor may * * * by his agreement and conduct place himself in a position where he cannot avail himself of the defense * * *"(*M.H. Metal Product Corp., supra,* at 150 *see also Carrowkeel Inv. Co. v. Breed,* 203 AD2d 506, 507), and similarly, "may consent to the increased risk by creating it" (*U.S. Shoe Corp. v. Hackett*, 793 F.2d 161, 163 [7th Cir. 1986] *see generally, Fehr Bros., Inc. v. Scheinman*, 121 AD2d 13, 22; *Continental Airlines, Inc. v. Lelakis*, 943 F.Supp. 300, 310 [S.D.N.Y.1996], *affd,* 129 F3d 113 [2nd Cir.1997]).

Further, since "[t]he right of a surety to claim a discharge * * * without the consent of the surety, is personal to the surety and may be waived by him"(*Carpenter v. Hogan*, 182 Misc.103, 108 [Supreme Court, Westchester County 1943]). Notably "consent may be given after the transaction" or ratified "by a subsequent affirmative act" (*Carpenter v. Hogan, supra*; *London Leasing Corp. v. Interfina, Inc.*, 53 Misc.2d 657, 660-661 [Supreme Court, Queens County 1967] *see also, Marjax Enterprises, Inc. v. Upstate Hiawatha Plaza Co., Inc.*, 62 AD2d 1159, 1160 *cf., Mutual Life Ins. Co. of N.Y. v. Bainbridge Bldg. Corp.*, ___Misc___, 43 NYS2d 617 [Supreme Court, New York County 1943]; 62 NYJur2d, *Guaranty & Suretyship,* §§ 223-224).

It "is not necessary that the consent of the surety should be in writing" and it need "not be expressly given, but may be implied from the surrounding circumstances or from * * * [the guarantor's] conduct" (*London Leasing Corp. v. Interfina, Inc., supra*, at 660 *accord*, 2 White & Summers UCC § 16-11, Suretyship Defenses, § 3-605 [2008]). It follows that "'if the creditor and principal modify their contract, and the surety consents thereto, he will not be discharged" (*London Leasing Corp. v. Interfina, Inc., supra*, at 660, *quoting from,* Stearns, Suretyship [5th ed., § 6.13]) *London Leasing Corp. v. Interfina, Inc., supra*). Moreover, "[p]arol evidence may be received to establish the fact that the change in the contract was induced by the affirmative act of the defendant" (*M.H. Metal Product Corp., supra,* at 150 *see also, Marjax Enterprises, Inc. v.*

Upstate Hiawatha Plaza Co., Inc., supra; London Leasing Corp. v. Interfina, Inc., supra, at 660; *Carpenter v. Hogan, supra,* at 106).

With these principles in mind, and viewing the evidence "in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]), the Court agrees that issues of fact exist with respect to the Allen's defense that the underlying note obligations were altered without his consent, thereby discharging the guarantees as a matter of law.

In this regard, the evidence submitted supports an inference that Allen's overall course of conduct conveyed the impression that he was a *de facto* Superior principal, and that insofar as Superior was concerned, he exerted authority over Superior's financial affairs – including most particularly, the note transactions at issue here (*cf., Marjax Enterprises, Inc. v. Upstate Hiawatha Plaza Co., Inc., supra*). Indeed, insofar as depicted by Davis, Allen nevertheless consistently placed himself at the epicenter of the Superior/Excelsior loan and "extension" transactions by remaining personally involved in the negotiations and discussions with Davis.

Specifically, and among other things, Davis testified that it was Allen who first approached him with respect to the original investment opportunities in "his" company"; that Allen had been personally involved in first discussing the terms of the original Excelsior loans – including the interest rates and principal amounts; that Allen later initiated and defined the tone of the discussions concerning the alleged extensions; and that – according to Davis – it was Allen himself who first proposed the specific extension terms and conditions which the defendants now claim were later adopted in connection with the April, 2004 note, *i.e.*, the 10% extension fee and the enhanced stated interest rate (Davis Dep., 410-411).

Additionally, Davis has alleged that Allen – who was also Superior's principal creditor – attended meetings during which the proposed consolidation the Superior/Excelsior debts was discussed, thereby further buttressing the conclusion that he was a player and force to be reckoned with in Superior's dealings with the Excelsior notes (Cmplt., ¶ 60). Indeed, it was allegedly Allen – on Superior's behalf – who personally spoke to Davis on Yom Kippur about the loan extensions and who earlier, had also proposed the March, 2004 "subordination," agreement, which – although ostensibly an agreement solely between Excelsior and Superior –

was also executed by Allen (Cmplt., ¶¶ 27-28).

Under these circumstances, and assuming, without deciding, that the parties reached some sort of extension agreement, the Court concludes that questions of fact exist with respect to whether Allen, by his own affirmative conduct, consented to the alleged modifications on which he now relies as a complete defense to plaintiff's guarantee claims. (*See generally, Marjax Enterprises, Inc. v. Upstate Hiawatha Plaza Co., Inc., supra; Fehr Bros., Inc. v. Scheinman, supra*, 121 AD2d at 22; *London Leasing Corp. v. Interfina, Inc., supra*, at 660).

It is settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v. Pomeroy*, 35 NY2d 361, 362 [1974]; *Peerless Ins. Co. v. Allied Bldg. Products Corp.*, 15 AD3d 373). 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). Accordingly, that branch of the defendants' motion which is to dismiss the ninth, thirteenth and seventeenth causes of action, should be denied.

As limited by their brief, the defendants also move to dismiss the plaintiff's unjust enrichment claims, although the arguments advanced have apparently been limited to those unjust enrichment claims arising out of the subordination agreement (*see*, Defs' Brief at 21-22).

With respect to the plaintiff's fifth and sixth cause causes of action based upon an alleged breach of the March, 2004 subordination agreement – and unjust enrichment flowing therefrom – the plaintiffs contend, *inter alia*, that: (1) Superior violated the debt priority provisions of the agreement by making over $2.7 million in payments to Allen and/or Luke, after the March, 2004 note allegedly lapsed in default in April, 2006 (Cmplt.,¶¶ 90-93); and (2) that in 2007, Luke Allen threatened Devine with litigation unless he made additional payments on the outstanding Allen loans – after which Devine paid Luke some $400,000.00, thereby allegedly unjustly enriching Allen and Superior (Cmplt.,¶¶ 95-101).

As to Allen, the plaintiff's breach of contract theory is based on the fact that Allen himself signed the subordination agreement – albeit under a "Superior" caption heading and as a "shareholder" as follows:

"SUPERIOR BROADCASTING, CO.

By: _____

Christopher F. Devine, President

_____

C. Robert Allen, III, a shareholder"

It is settled that "an agent who signs an agreement on behalf of a disclosed principal will not be held responsible for its performance unless there is clear and explicit evidence of the agent's 'intentions to substitute or superadd his personal liability for, or to, that of the principal'" (*Star Video Entertainment, LP v J & I Video Distrib. Inc.*, 268 AD2d 423, 424, *quoting from, Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6 [1964]; *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]).

More particularly,"an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice-once as an officer and again as an individual"(*Salzman Sign Co., Inc. v. Beck, supra*, 10 NY2d at 67; *American Media Concepts, Inc. v. Atkins Pictures, Inc.*, 179 AD2d 446, 448).

The issue presented is what is the significance of the signing of the Subordination Agreement by Allen, as a shareholder. A shareholder does not have the authority to bind a corporation as does an officer, so the question is whether Allen intended to make a personal representation that he would not accept payment on account of the some $70,000,000 due him from Superior until Excelsior was repaid, or whether he was simply seeking to reinforce the obligation of Superior. While the agreement refers to only Superior and Excelsior as parties, Allen testified in his deposition (after the guardianship had been established), that he had "subordinated * * * [his] loans to Davis" (Hayes Exh., "8"; Allen Dep., 163). Based on this conflicting evidence, the court is unable to conclude whether or not Allen's signature was an effort to assure Davis with his personal obligation, or simply a confirmation by the majority stockholder that the corporation agreed to subordinate its other obligations to the March 2004 loan from Excelsior.

While there is lacking "clear and explicit evidence" that Allen intended to "superadd his personal liability" to that of Superior's (*see, Salzman Sign Co. v Beck, supra*; *Harry Kolomick*

Contractors, Inc. v. Shelter Rock Estates, Inc., 172 AD2d 492; *American Media Concepts, Inc. v. Atkins Pictures, Inc.*, *supra*), the unique relationship between Allen and Davis leaves open the possibility that Allen was intending to add the weight of his "billions" to induce Davis to agree on behalf of Excelsior. This is a factual issue which precludes the grant of summary judgment dismissing the breach of contract claim against Allen on the subordination issue.

As to Superior, the defendants assert that since the note must be read in *pari materia* with the subordination agreement, the note's default provisions are governing and define when a payment omission would ripen into an actionable violation of the subordination agreement (Defs' Brief at 18-19).

Insofar as relevant, the note defines a "default" as, *inter alia*, Superior's failure to make a payment within ten "business days of the Maturity Date or Extended Maturity Date * * *"(March, 2004 Note, ¶ 4[a]). A subsequent provision entitled "Consequences of an Event of Default", provides in part that when a default (as defined above) occurs which has not been not "cured" within 10 days of receipt of written notice from Payee [Excelsior] * * * the entire then unpaid principal balance thereof * * * * shall become immediately due and payable" (March, 2004 Note, ¶¶ 4[a], 5).

The defendants contend that since the plaintiff's notice of default relating to the March note was sent on December 13, 2006, the earliest point at which they could be in default was December, 23, 2006. Therefore, any and all nonconforming payments made prior to this date would not constitute violations of the agreement (Defs' Brief at 18-19). Their position is that payments made to Allen, or other creditors, prior to December 23, 2006 did not violate the subordination agreement, since there had been no default on the Excelsior obligations in the absence of a notice of default. The Court disagrees.

The subordination agreement precludes Superior from altering the stipulated payment priority until such time as Superior has satisfied *"all of * * * [its] obligations under the Note * * *"* and similarly provides that while the note is "outstanding and unpaid" no obligations of Superior "are or shall become senior" to the March, 2004 note. Payment on the March 2004 note was due in accordance with the terms of the note, or any extensions thereto. The notice of default provision does not alter that fact, it simply gives the obligor an opportunity to cure the

existing default. Accordingly, that branch of the motion which is to dismiss the fifth cause of action, breach of the subordination agreement against Superior, is denied.

With respect to unjust enrichment (sixth cause of action) as against Allen, the plaintiff has alleged that Allen made representations in connection with the subordination agreement to the effect that he would allegedly subordinate his own pre-existing Superior loans to the March, 2004 Excelsior note (Cmplt., ¶¶ 95-101). Since Superior paid Luke some $400,000.00 in 2007, Allen was supposedly unjustly enriched upon receipt of these funds (Cmplt.,¶¶ 98-100).

"It is well settled that '[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*Sperry v. Crompton Corp.*, 8 NY3d 204, 215 [2007], *quoting from, Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d 415, 421 [1972] *see, State of New York v. Barclays Bank of N.Y.*, 76 NY2d 533, 540-542 [1990]; *Old Republic Nat. Title Ins. Co. v. Luft*, 52 AD3d 491, 492).

Here, the Court has concluded that there is a significant question of fact as to whether Allen, by his signature as shareholder, intended to be personally liable to the plaintiff under the terms of the subordination agreement. If the court ultimately determines that there was no personal contractual obligation by Allen on the subordination agreement, the question then is whether the retention of $400,000 paid by Superior to Luke, on behalf of Allen would be "against equity and good conscience."

Given the possibility that the contract action against Allen on the subordination agreement may not lie, it would be precipitous for the court to dismiss the equitable claim for unjust enrichment. While an unjust enrichment claim is generally barred under the rule that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*Adelaide Productions, Inc. v. BKN Intern. AG, supra*, 38 AD3d 221 *see, EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), the court cannot conclude at this juncture whether or not there is a valid contract claim so as to bar equitable relief. "(w)here there is a *bona fide* dispute as to the existence of a contract or the application of a contract to the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as

breach of contract" (*Old Salem Development Group, Ltd. v. Town of Fishkill*, 301 AD2d 639 *see also*, *Halliwell v. Gordon*, 61 AD3d 932; *Hochman v. LaRea*, 14 AD3d 653, 654-655).

Superior's dismissal theory is predicated solely on the contention that the unjust enrichment cause of action is invalid because it is duplicative of the related, breach of contract claim (Defs' Brief at 21-22). If the breach of contract claim is determined by the court to be untenable, the unjust enrichment cause of action retains viability. Under these circumstances, the Court declines to summarily dismiss the plaintiff's sixth cause of action cause of action sounding in unjust enrichment. The motion to dismiss the sixth cause of action is denied.

The defendants also seek dismissal of the Tenth, Fourteenth and Eighteenth causes of action, which are as follows:

Tenth: Unjust enrichment against Allen and Superior involving the April 13, 2004 loan in the amount of $3,000,000;

Fourteenth: Unjust enrichment against Allen and Superior involving the June 21, 2004 loan in the amount of $5,000,000;

Eighteenth: Unjust enrichment against Allen and Superior involving the July 28, 2004, loan in the amount of $5,000,000.

As previously stated, an unjust enrichment claim is generally barred under the rule that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." (Citations omitted). In this case the plaintiff has alleged breach of contracts against Superior on the April 13, 2004 loan (Seventh Cause of Action); breach of contract on Allen's personal guarantee on the April 13, 2004 loan (Ninth Cause of Action); breach of contract against Superior on the June 21, 2004 loan (Eleventh Cause of Action); breach of contract on Allen's personal guarantee of the June 21, 2004 loan (Thirteenth Cause of Action); breach of contract against Superior on the July 28, 2004 loan (Fifteenth Cause of Action); and, breach of contract on Allen's personal guarantee of the July 28, 2004 loan agreement (Seventeenth Cause of Action).

The Court notes that the Eighth Cause of Action also alleges unjust enrichment against Superior involving the April 13, 2004 note, and may well be no different from the Tenth Cause of Action, except that it does not claim against Allen. No application has been made as to the eighth

cause of action.

The motion to dismiss the Tenth, Fourteenth, and Eighteenth Causes of Action is granted because the claims for unjust enrichment are barred by the claims for breach of contract involving the same subject matter as set forth above. The tenth, fourteenth and eighteenth causes of action differ from the sixth in that there are clear contract and guarantee causes of action of which they are duplicative. The sixth cause of action, as previously noted, is the alternative to a questionable guarantee cause of action and therefore the court has allowed it to remain in the case at this time.

CONCLUSION

The motions to dismiss the Tenth, Fourteenth and Eighteenth Causes of Action, which seek equitable relief on the same set of facts for which breach of contract is alleged, are dismissed. The motion to dismiss the Fifth, Sixth, Ninth, Thirteenth, and Seventeenth Causes of Action is Denied.

This constitutes the Decision and Order of the Court.

Dated: June 3, 2009

J.S.C.