

Lorber v Morovati
2009 NY Slip Op 33279(U)
December 18, 2009
Supreme Court, Queens County
Docket Number: 700164/09
Judge: Robert J. McDonald
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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD

Justice

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MARK LORBER and JACKSON HEIGHTS DENTAL MR Index No.: 700164/09
CENTER, P.C.,

Plaintiff(s)

Motion Date: 12/17/09

- against -

Motion No.: 21

MEHRAN MOROVATI, GILBERT BEROOKHIM, and
JACKSON HEIGHTS DENTAL GROUP, P.C.,

Motion Seq.: 2

Defendant(s).

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The following papers numbered 1 to 8 were read on this motion by the defendants for leave to re-argue, and upon re-argument vacating the prior Order of summary judgment, and stay the enforcement of any money judgment based on the prior Order.

	<u>Papers Numbered</u>
Plaintiffs' Notice of Motion	
Affirmation-Affidavit(s)-Service-Exhibit(s)	1-4
Defendant' Affirmation - Affidavit(s)	
Service - Exhibits(s)	5-7
Reply Affirmation	8

Upon the foregoing papers it is ordered that this motion is determined as follows:

In this motion for re-argument pursuant to CPLR 2221, the defendants request that the Order issued September 25, 2009 be vacated and the defendants should be granted a preliminary injunction staying the enforcement of any money judgment, and this matter be consolidated with an action pending in this Court under Index Number 20872/09 entitled *Jackson Heights Dental Group, P.C. v Robert Kaufman, D.D.S. and Elan Katz, D.D.S.*

The underlying action involves the sale of a dental practice operated under the name Jackson Heights Dental Mr Center, P.C. (hereafter "Mr Center") which was purchased by defendants Dr.

Mehran Morovate and Dr. Gilbert Berookkhim under the name Jackson Heights Dental Group, P.C. (hereafter "Dental Group").

The sale was for the plaintiffs' dental practice located at 85-09 37th Avenue, Jackson Heights, New York. The purchase price was \$230,000.00. The plaintiffs received \$105,000.00 "up front" and a Promissory Note for \$125,000.00 and a personal guarantee from each of the defendants. A copy of that guarantee is attached as part [Exhibit 'b'] of defendants' Exhibit "C". That "G U A R A N T Y" was sworn to individually by "Mehran Morovati" and "Gilbert Borookkhim" who both signed it on June 15, 2008 as "Guarantor". Perhaps more importantly it states on the first page "RE: Loan from Mark Lorber to Jackson Heights Dental Group P.C." It further states that the "Lender" is Mark Lorber.

The action commenced under Index Number 20872/09 is brought by Jackson Heights Dental Group, P.C. and not the individuals named in the note.

A promissory note and personal guarantee were executed by the defendants in favor of the plaintiff on June 15, 2008 as payment. The defendants failed to pay the note and subsequently a motion was made pursuant to CPLR 3213 for summary judgment in lieu of complaint which was based upon an instrument for the payment of money only.

This Court found that the promissory note qualifies as an instrument eligible for treatment under CPLR 3213 when the plaintiff provides proof of the note and evidence of its nonpayment (*Quest Commercial, LLC v Rovner*, 35 AD3d 576). In the instant case the defendants have not refuted the existence of the note and guarantee, as well as the fact that it has not been paid, but instead have asserted various claims sounding in contract (see, *Gateway State Bank v Shangri-La Private Club for Women*, 113 AD2d 791).

The instant action therefore constitutes a "presumptively meritorious claim" entitling the plaintiff to seek an expedited judgment pursuant to CPLR 3213 (*Banco Poplar North America v Victory Taxi Managment, Inc*, 1 NY3d 381, 383). This Court found that the defendants had failed to demonstrate the existence of any material fact in opposition to the instant motion seeking payment of the note, interest, penalties, costs, disbursements and attorney's fees.

The defendants argue that the Court's decision was in error because the "subject contract and monetary instruments must be viewed as integrated". Relying on *Regal Limousine, Inc v Allison Limousine Service, Ltd* [136 AD2d 534] the defendant relies on the language "Although, generally breach of a related contract cannot

defeat a motion for summary judgment on a promissory note, where, as here, the contract and underlying obligation are intertwined, the motion [for summary judgment] must be denied." The rationale for this is to prevent the perpetration of a fraud without allowing the opportunity for redress to the victim. Defendant also relies on *Inpar Building Corporation v Veoukas* [143 AD2d 810] in which the Court found that the contract and a check, which was the subject of the suit, were sufficiently "intertwined" to defeat the summary judgment motion, particularly where the check "itself recites that it is an 'advance'". Even if there were a violation of a restrictive covenant not to compete it would be a defense to the note only if the note was "inextricably intertwined with those covenants" (*Vecchio v Colangelo*, 274 AD2d 469; *Cohen v Marvlee, Inc.*, 208 AD2d 792).

This Court finds that the unambiguous, unconditional guarantee, and the distinction between the parties precludes defendants from relying on the defense of fraud in the inducement (see, *Citibank v Plapinger*, 66 NY2d 90).

In "Point I" counsel recites that this case which involves the sale of a small business which involves an "underlying contract" as well as a note "The notes are never intended to be stand-alone documents, but are rather part and parcel of the same transaction" and the note and purchase of the dental practice was a "classic example of such 'intertwining'".

The general rule is that the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money and in order to defeat such motion the defendant must show that the contract and instrument are "intertwined" (*Micoch v Smith*, 173 AD2d 443). All the plaintiff need do in its summary judgment motion is establish a prima facie case by submitting the note and defendant's default (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381; *Colonial Commercial Corp v Breskel Associates*, 238 AD2d 539). Upon the plaintiff demonstrating defendants' execution of the note and its default in making payment it is entitled to summary judgment, and it is the defendants' burden to demonstrate triable issues of fact with regard to a bona fide defense with regard to that note (*Cutter Bayview Cleaners Inc v Spotless Shirt, Inc.*, 57 AD3d 708). The fact that the defendants demonstrate grounds for an action does not negate the status of the negotiable instrument and its guarantee. To permit the defendants to defeat the summary judgment motion, based on the negotiable instrument which they executed in favor of the plaintiffs, is to negate the entire effect of securing the note and guarantee sought at the time of contract. Because, in the instant case there is not only the note, but there is an enforceable guarantee endorsed by the parties (*Royal Commercial Corp v Kotrulya*, 304 AD2d 742).

Accordingly, the defendants' motion for re-argument of the

plaintiffs' grant of summary judgment against the defendants, and motion to consolidate are denied.

So Ordered.

Dated: Long Island City, N.Y.

December 18, 2009

ROBERT J. MCDONALD
J.S.C.