

**Audi v Cleary**

2010 NY Slip Op 30278(U)

February 8, 2010

Supreme Court, Albany County

Docket Number: 6819-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT  
ANTHONY J. AUDI, JR.,

COUNTY OF ALBANY

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 6819-09**  
**RJI NO. 01-09-98653**

MICHAEL S. CLEARY and JANET CLEARY,

Defendants.

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Supreme Court Albany County All Purpose Term, January 26, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiff commenced this action seeking to collect damages due to Defendants alleged defaults under two notes they executed in his favor. Issue was joined by Defendants, and discovery is ongoing. Plaintiff now moves for summary judgment on both notes. Defendants oppose the motion and cross move for summary judgment on one of the two notes. Because issues of fact remain, both parties' motions for summary judgment are denied.

A note holder demonstrates his prima facie entitlement to summary judgment by "demonstrating that defendant executed the... promissory note and defaulted thereon." (Kamp v.

Fiumera, \_\_AD3d\_\_ [3d Dept. 2010], Kehoe v. Abate, 62 AD3d 1178 [3d Dept. 2009]). Such showing shifts the burden of proof to the non-movant, to demonstrate “the existence of at least one triable issue of fact.” (Estate of Goth v. Tremble, 59 AD3d 839 [3d Dept. 2009]).

On this record Plaintiff demonstrated, and Defendants admitted, the existence of both notes. First, Defendants executed a “Promissory Grid Note”, dated May 5, 2006, in favor of Plaintiff (hereinafter “Grid Note”). Plaintiff alleged such execution in his complaint, and Defendants admitted same in their answer. The Grid Note provides for a principal balance up to \$400,000, with no interest, and a maturity date of June 30, 2006. The starting principal balance of the Grid Note, as set forth on Exhibit “A” attached thereto, was \$325,000. The Grid Note specifically provides that its “principal balance... may be adjusted from time to time upon a written agreement by and between the [Defendants] and the [Plaintiff], which adjustments shall be reflected on Exhibit ‘A’ attached hereto.” The Grid Note’s Exhibit “A” is not modified from its initial \$325,000 principal balance. Second, Defendants executed a “Promissory Note”, dated August 11, 2004, in favor of Plaintiff in the amount of \$25,000 (hereinafter “Note”). Plaintiff alleged the Note’s execution and amount in his complaint, which Defendants admitted in their answer.

Plaintiff failed to demonstrate, however, Defendants’ default under the Grid Note in the amount he claimed. Plaintiff’s conclusory allegation that Defendants owe \$309,481.79 on the Grid Note, as of September 30, 2009, is not supported by any factual allegations. Instead, to establish Defendants’ default, Plaintiff relies on an attached “Grid Note schedule”<sup>1</sup>. The Grid

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<sup>1</sup> Plaintiff properly alleged the “Grid Note schedule” is a business record pursuant to CPLR §4518(a), and Defendants did not object to its consideration.

Note schedule, however, does not begin with a \$325,000 obligation commencing on May 5, 2006. Rather, there are numerous items denominated “loan” prior to May 5, 2006 which cumulatively total \$294,985.25 as of May 2, 2006 (no entry was made for May 5, 2006). The Grid Note schedule items denominated “loan” then, subsequent to May 5, 2006, continue for an additional “loan” amount of \$186,075.39. Such amounts, along with interest and reduced by payments Defendants made, form the basis of Plaintiff’s \$309,481.79 claim.

Interpreting the Grid Note schedule, it appears that the items denominated “loan” form the basis of the principal Plaintiff now claims due under the Grid Note. While Plaintiff may have made these additional “loan[s]” to Defendants, these “loan[s]” did not increase the principal amount due on the Grid Note because they were not “reflected on Exhibit ‘A’”. The Grid Note specifically mandates that any adjustment to its principal balance be made by “written agreement” and such adjustment be reflected on the Grid Note’s Exhibit “A”. As Plaintiff did not support this motion with a written agreement increasing the Grid Note’s principal balance or an adjusted Exhibit “A”, he failed to demonstrate his entitlement to judgment as a matter of law for the amount he seeks.

Turning to Plaintiff’s motion for summary judgment of its cause of action based on nonpayment of the Note, Plaintiff did demonstrate its entitlement to judgment as a matter of law. The Note, by its own terms, was payable in full on November 11, 2004. Plaintiff’s affidavit alleges that Defendants failed to pay any amount due and owing under the Note, either before or after it had come due. As Plaintiff submitted the admittedly executed Note and established Defendants’ default with sworn allegations of fact, he demonstrated his prima facie entitlement to judgment as a matter of law.

With the burden shifted on the Note portion of Plaintiff's motion, Defendants oppose it and cross move for summary judgment dismissing this portion of Plaintiff's complaint. While Defendants demonstrated that an issue of fact exists, they failed to demonstrate their entitlement to judgment as a matter of law.

Defendants' opposition and motion are based upon their allegation that the Note is paid in full. Mr. Cleary's affidavit alleges that he made six payments to Plaintiff, each in the amount of \$4,166.66, in full payment of the \$25,000 amount due under the Note. He alleged such monthly payment arrangement was done pursuant to an agreement with Plaintiff (presumably an oral agreement as no written agreement was attached). Mr. Cleary alleges that Plaintiff directed him to make the checks payable to North East Realty Holdings, LLC, a company owned and operated by Plaintiff. Defendants attached five of the checks, payable to North East Realty Holdings, LLC, and a deposit receipt for the sixth payment. These specific factual allegations of payment, with supporting documentary evidence, rebut Plaintiff's prima facie showing. Such proof does not, however, demonstrate Defendants' entitlement to judgment as a matter of law. Rather, a factual dispute of payment has been squarely framed.

The additional proof Defendants submitted in support of their cross motion also fails to demonstrate their entitlement to judgment as a matter of law dismissing Plaintiff's Note cause of action. First, the document Defendants rely on as showing the "repayment [of the Note] on 8/1/08" does not conclusively demonstrate their entitlement to judgment. It is titled "FOR DISCUSSION PURPOSES ONLY" and states that it "should not be regarded as all inclusive." Such terms raise issues about the document's comprehensiveness, and its CPLR §4547 admissibility. Similarly, Defendants' reliance on an "Agreement", dated October 7, 2008, is also

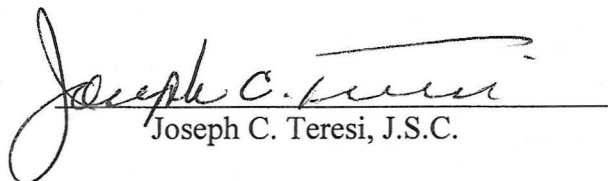
misplaced. The Agreement does not acknowledge Defendants payment of the Note or its interest; nor does it specifically refer to the Note at all. Rather, the Agreement's terms are undefined and ambiguous, conclusively demonstrating nothing relative to Defendants' payment of the Note.

Accordingly, because there are numerous issues of fact relative to both the Grid Note and the Note, both parties' motions for summary judgment are denied.

This Decision and Order is being returned to the attorney for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 8, 2010  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated November 13, 2009, Affidavit of Anthony Audi, dated November 12, 2009, with attached Exhibits A-G.
2. Notice of Cross Motion, dated January 5, 2010, Affidavit of Robert Ganz, dated January 5, 2010, Affidavit of Michael Cleary, dated January 5, 2010, with attached Exhibits 1-4.
3. Affidavit of Anthony Audi, dated January 26, 2010, with attached Exhibit A.
4. Affidavit of Michael Cleary, dated January 27, 2010, with attached Exhibit 5, Affidavit of Janet Cleary, dated January 27, 2010.