

**Delmastro v Rescue Carting Corp.**

2011 NY Slip Op 30725(U)

March 22, 2011

Sup Ct, Suffolk County

Docket Number: 41653-2010

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**COPY**

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 12-21-2010  
Motion Submit Date: 03-15-2010  
Motion Sequence No.: 002 MOTD

FINAL  
 NON FINAL

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**FRANK DELMASTRO,**

**Plaintiff,**

**-against-**

**RESCUE CARTING CORP., and CHRIS DIESSO,**

**Defendants.**

Attorney for Plaintiff

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Plaintiff moves (motion sequence # 002) for Summary Judgment in Lieu of Complaint pursuant to **CPLR § 3213**, based on the Defendants' default on payments due pursuant to a Promissory Note and Guaranty, both executed on April 10, 2009. It is the contention of Plaintiff that the Defendants have defaulted under the Note, Guaranty and an accompanying Security Agreement by making late payments, and ceasing payments altogether over the past year and transferring the secured collateral to third parties. Based on the default, and the terms of the Note and Guaranty permitting acceleration of the total amount due upon such default, Plaintiff seeks judgment against the obligee and guarantor in the amount of \$233,800.00, plus interest and penalties as set forth under the terms of the Note.

Defendants oppose the motion on several grounds, including the assertions that 1) the Note and Guaranty are part of a broader agreement for sale of Plaintiff's waste

container business, which Plaintiff allegedly breached and procured through fraud; and 2) the amounts set forth in Plaintiff's motion as due and owing are incorrect and in dispute. Plaintiff replies by setting forth that in a Settlement Agreement, entered into on August 14, 2009, arising out of certain alleged breaches of the original contract of sale, the parties resolved their dispute, reduced the payments due under the parties' agreements by \$12,000, and Defendants released all other claims, including those arising out of the "Dispute", whether known or unknown at the time of such Release. During oral argument on the motion, Defendant's counsel stated that the Settlement and Release related to certain limited issues and was resolved, having nothing to do with the claims of fraud in the inducement, and a purported abuse of process claim.

The motion raises legal issues concerning 1) when **CPLR § 3213** is appropriate to enforce the terms of a note, executed in conjunction with the terms of a separate contract of sale; and 2) whether the terms of a broad release in a parties' Settlement agreement can be attacked via a claim of fraud, unrelated to the specific matter settled.

On April 3, 2009, Exclusive Carting Inc ("Exclusive") entered into a written agreement with Defendant Rescue Carting Corp ("Rescue") for the sale of the assets of Exclusive's waste container business to Rescue. Frank DelMasto signed the agreement as Exclusive's Shareholder and Chris Diesso as Rescue's President. The Agreement of Sale referred to several other agreements, executed several days later, on August 10, 2009.

The Agreement of Sale provided that Rescue, owned by Chris Diesso was to purchase the assets of Exclusive Carting, owned by Frank DelMasto. The sale included certain equipment, furniture, telephone numbers of the Seller, and the goodwill of the business. The purchase price was \$300,000, payable by the purchaser delivering to the seller \$2,800 at closing and the delivery of a Promissory Note by the Purchaser to the Seller for the remaining \$297,000 secured by a Security Agreement.

Such Agreement of Sale valued the equipment at \$50,000, a Covenant not to compete by DelMasto at \$50,000, goodwill at \$50,000, and the purported telephone numbers of Exclusive at \$150,000. It also stated that at the closing of the deal, the purchaser would deliver a Promissory Note, Security Agreement and a Personal Guaranty by Chris Diesso. The guaranty is defined as a "(g)uaranty of the obligations of the Seller under the Promissory Note".

With regard to the assets, the Agreement of Sale does state that seller makes no

representations with regard thereto and that purchaser will purchase them “as is” in their present condition.

As part of the Agreement of Sale, Frank DelMasto agreed not to establish or be otherwise engaged in the waste business for 5 years within Suffolk County. This restrictive covenant becomes void upon breach of the agreement by the purchaser. The Agreement of Sale may be modified only in writing.

The Promissory Note is made payable to DelMasto as an individual. It calls for the payment of \$297,000 by Rescue to DelMasto plus interest at the rate of 4% and there is a payment schedule annexed to the Note. Late payments are to bear interest at 12%, plus a late payment premium of 3 %. The holder of the note has the power to declare the entire indebtedness under the note due upon default in prompt payment under the terms of the note. Disseo guarantees due and punctual payment of the Note. Like the Note, the Guaranty is made to the individual, DelMasto.

The Security Agreement, between Rescue and DelMasto, individually, gives the Seller a Security Interest in certain Collateral, defined as all assets of the debtor. A separate General Conveyance and Bill of Sale, between Exclusive and Rescue, provides that in accordance with the Agreement of Sale, the Seller conveys to the Purchaser certain assets, listed as three vehicles (2001 Mack, 2001 Ford and 1985 Autocar), a series of containers and three telephone numbers.

Following a dispute between the parties in July 2009, Exclusive, DelMasto, Rescue and Diesso entered into a Settlement Agreement dated August 14, 2009. According to the Settlement Agreement, the dispute arose, from the Seller’s point of view, from a failure to make timely payments under the Note and Guaranty and from the Purchaser’s prospective, from Exclusive’s failure to deliver the proper number of containers. In addition, the Settlement Agreement discusses Purchaser’s purported inability to use certain facilities and containers due to remaining debts of the Seller. To resolve these issues without admitting fault on either side, the parties agreed to reduce the balance due under the Agreement of Sale and under the Promissory Note by a total of \$12,000. As part of the Settlement Agreement, Rescue and Diesso released Exclusive and DelMasto and their assigns “(f)rom any and all claims, debts, liabilities, demands, obligations, costs, expenses, actions and causes of action of every nature, character and description, whether known or unknown, asserted or unasserted, fixed or contingent, that Rescue Releasers, . . . have, may have, or ever have had against the Exclusive Releasees . . . from the beginning of time through the Effective Date, including, but not limited to, any claims arising out of, relating to or that were or could have been alleged with the

Dispute”. The term “Dispute” is defined in the Settlement Agreement as the issues set forth above, relating to payment, the number of containers, the availability of certain facilities and containers due to Exclusive’s existing debts.

Plaintiff seeks Summary Judgment In Lieu of Complaint based on a default in payment on the Note. Defendants take issue with the amount due on the Note. In addition, the Defendants state that Plaintiff engaged in fraud in the inducement and tortious interference with contract. They assert that Plaintiff kept his cell phone number and used it to divert business elsewhere from the start and continuing past October 2009, when DeMasto physically left the business site. Defendants also assert that the trucks sold were in bad condition and not fit for proper purpose.

**CPLR § 3213** permits a party to recover Judgment based upon a default arising from an instrument for the payment of money only. While each case must be viewed in the context of its own facts, there are times when instruments, such as promissory notes, cannot give rise to such claims, because they were not created in a vacuum. Thus, a promissory note and/or guaranty given in exchange for a purchase of a business, must be viewed, along with those other agreements, especially if, by their terms, they are inextricably intertwined. *See v Ach*, 56 AD3d 457, 867 NYS2d 140 (2d Dep’t 2008); *Slavin v Victor*, 168 AD2d 399, 563 NYS2d 407 (1<sup>st</sup> Dep’t 1990 ).

That is clearly the case here. The Promissory Note and Guaranty are given due to the sale of the business by Exclusive to Rescue; the Agreement of Sale specifically refers to such instruments being executed at the closing of the sale. They are all part of a transaction, along with the Security Agreement and the General Conveyance referred to above. As such they do not qualify as instruments for the payment of money only under **CPLR § 3213**, where the Defendants have raised issues concerning fraud in the inducement as well breach of contract.

Where a promissory note, or guaranty, is intertwined as in this case, with a purchase agreement and issues concerning the agreement are raised, the use of **CPLR § 3213** is simply inappropriate. *See, Tibball v Catalanotto*, 269 AD 2d 386, 702 NYS 2d 869 ( 2d Dep’t 2000).

As the Plaintiff has failed to demonstrate entitlement to relief under **CPLR § 3213**, the Defendant shall be permitted to file and serve an answer and counterclaims, such to be served within thirty days following the date of this Decision. However, this Decision

does not resolve the issue of whether the Plaintiff may be entitled to Summary Judgment under **CPLR § 3212**, based on the broad release contained in the August 14, 2009 Settlement Agreement. The issue raised and not fully resolved by the papers before the Court is whether all of the potential claims and/or defenses raised by the Defendants were released by that Agreement, which had broad encompassing language. Thus, it will be necessary for the Defendant to identify whether any of its claims are not those contemplated by the Release, including whether they involve claims of fraud “separate and distinct” from the issue settled by Settlement Agreement. **See, Consurcio Prdipe SA de CV v Vinci SA**, 544 F Supp 2d 178 (SDNY 2008); **DIRECTV Group, Inc. v Darlene Investments, LLC**, 2006 WL 2773024 (SDNY 2006). For this reason, the Court has insufficient information before it to grant Plaintiff Summary Judgment, alternatively, under **CPLR § 3212**, with leave to renew once the allegations are fully set forth.

This constitutes the **DECISION** and **ORDER** of the Court. Counsel are directed to appear for a Preliminary Conference before this Court on May 24 , 2011.

Dated: March 22, 2011  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

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 NON FINAL