SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

HESHY ROZ and HRL EQUITY, LLC,

Plaintiffs,

- against-

E&S DEVELOPMENT AND PROPERTIES LLC, ELIOT SPITZER and MICHAEL STEINBERG a/k/a MORRIS M. STEINBERG,

Defendants.

INDEX NO. 111193/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 5, were read on this motion by plaintiffs for summary judgment, and cross-motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4,5

Cross-Motion: ☒ Yes ☐ No

This is an action by plaintiffs Heshy Roz ("Roz") and HRL Equity, LLC (collectively "plaintiffs") against defendants E&S Development and Properties LLC ("E&S"), Eliot Spitzer ("Spitzer") and Michael Steinberg a/k/a Morris M. Steinberg ("Steinberg") (collectively "defendants"), to enforce a promissory note that was allegedly executed between the parties on March 18, 2008 ("the Note"). Plaintiffs allege that defendants defaulted on the Note by failing to pay them the sum of $475,000 plus interest, pursuant to the terms of the Note. Discovery is complete and the Note of Issue was filed on December 2, 2010. Before the Court is plaintiffs' motion for summary judgment, pursuant to CPLR 3212, seeking: (1) judgment in their favor in the sum of $475,000 plus interest at the default rate of 18% until the judgment is entered, and statutory interest thereafter; (2) preservation of plaintiffs' right to seek sanctions against defendants' counsel, pursuant to 22 NYCRR 130-1.1, for allegedly raising frivolous affirmative

defenses, delaying the case, and filing a frivolous response to plaintiffs' notice to admit; and (3) entry of a separate judgment awarding plaintiffs attorney's fees and costs following a hearing. Defendants oppose the motion and cross-move for summary judgment dismissing the complaint on the basis that the Note is unenforceable for lack of consideration.

BACKGROUND

In support of their summary judgment motion, plaintiffs submit, *inter alia*, the Note; affirmations of Roz and Rabbi Abraham Gurewitz ("Rabbi Gurewitz"); and copies of correspondence between the parties.[1] In opposition and in support of their cross-motion, defendants submit, *inter alia*, Spitzer's affirmation; plaintiffs' discovery responses; and an investment breakdown. The following facts are undisputed.

A. Plaintiffs' Allegations

Roz is the managing member of HRL Equity LLC. He alleges in his affirmation that he entrusted various monies to Spitzer and Steinberg doing business as E&S. Roz purportedly discovered that defendants were not accounting properly to him, and they decided to terminate their relationship.

On March 18, 2008, allegedly in order to avoid any future difficulties, E&S executed the Note in favor of plaintiffs, which was personally guaranteed by Spitzer and Steinberg. The Note was signed by Spitzer and Steinberg individually, and Spitzer also signed as a member and managing member of E&S. Spitzer and Steinberg also initialized each page of the Note.

Under the terms of the Note, defendants agreed to pay plaintiffs the sum of $475,000 within six months (by September 18, 2008), as follows:

> "WHEREAS, this Note evidences a loan (the "Loan") made by the Payee to the Maker in the original principal amount of FOUR HUNDRED and SEVENTY FIVE THOUSAND DOLLARS ($475,000.00) (the "Loan Amount");

[1]The parties submit affirmations rather than affidavits due to their religious beliefs.

> NOW, THEREFORE, FOR VALUE RECEIVED, the Maker promises to pay to the order of the Payee at its addresses stated above or such other place as may be designated in writing by the holders of this Note, in legal tender of the United States of America in immediately available funds, the Loan Amount or so much thereof as shall at any time be outstanding (the "Principal Amount"), together with interest on the Principal Amount to be computed from the date hereof on the basis of a 360-day year at an interest rate of four percent (4.0%) per annum (the "Interest Rate") through the Maturity Date (as defined below).
>
> (a) Maturity Date. As used herein, the term "Maturity Date" shall mean six months, from the execution of this Note.
>
> 2. Defaults.
>
> (a) The occurrence of anyone or more of the following events with respect to the Maker shall constitute an event of default hereunder (an "Event of Default"):
>
> (i) If the Maker shall fail to pay the entire unpaid Principal Amount, together with interest accrued thereon, on the Maturity Date.
>
> (b) The default rate shall not exceed 18% per annum" (Not. of Mot., Ex. A).

In addition, the Note provided for payment of attorney's fees and costs in the event of default, providing at paragraph 2(c): "The Maker shall pay all reasonable costs and expenses incurred by or on behalf of the Payee in connection with the Payee's exercise of any or all of its rights and remedies under this Note, including, without limitation, reasonable attorneys' fees" (*id.*).

The Note also contained a section titled "Miscellaneous" that referenced real estate dealings between the parties, providing at paragraph 4(a) in pertinent part:

> "Heshy Roz and HRL LLC [p]ersonally indemnify Eliot Spitzer, Michael Steinberg, E&S Development, and its affiliate companies in any event of a lawsuit or claim made [sic] Heshy, HRL, or his partners, with respect to any investments made with E&S or its affiliate companies, E&S acknowledges that Heshy Roz and HRL LLC own 20% interest in the properties known as DAGA REALTY LLC AND SYRACUSE HOLDINGS LLC ("The Properties"). Until

> such time as this note is satisfied, Heshy Roz and HRL, LLC shall retain its ownership interests in said properties. Upon satisfaction of this note Heshy Roz and HRL LLC shall relinquish its interests and have no further claims towards E&S Development. This paragraph shall survive even after the payment of the note is complete" (*id.*)

Roz alleges that he made repeated demands for defendants to pay the sums owed under the Note but that they failed to do so. On November 3, 2008, Roz received an email from Spitzer indicating that defendants would pay plaintiffs if they had the money, stating:

> "If I had the money you would have it, no matter how much you stress your point and no matter how much I want this resolved I cant [sic] change the facts. I do not have money until this closing, it is still moving forward but taking added time. We are currently waiting for a 3rd party report which is due on the 15th, at that time the bank will move the closing forward" (*id.*, Ex. B).

Plaintiffs thereafter retained counsel, and on January 13, 2009, plaintiffs' counsel made a written demand for full payment of the Note. When no payment was received, plaintiffs commenced a lawsuit to enforce the Note, but the case was dismissed without prejudice for failure to give proper notice to cure. Plaintiffs sent another demand for payment on April 2, 2009, and defendants again failed to pay.

On August 6, 2009, plaintiffs commenced the present action against defendants to enforce the Note. Defendants, represented by Jeremy Rosenberg, Esq., filed an answer raising an affirmative defense that the Note is unenforceable for lack of consideration, among eighteen other defenses.

In February 2010, Rabbi Gurewitz, who was previously involved in resolving the alleged dispute between Roz and Spitzer, spoke with Spitzer by telephone from Israel. Rabbi Gurewitz asserts in his affirmation that Spitzer acknowledged having signed the Note and stated that he would not contest his signature. Spitzer also allegedly informed Rabbi Gurewitz that he did not have the funds to pay Roz at that time.

B. Defendants' Allegations

In his opposing affirmation, Spitzer, an officer of E&S, states that defendants never received any funds from plaintiffs in the sum of $475,000, nor any other funds, as consideration for executing the Note (*see* Spitzer Aff. at ¶ 3). Spitzer also claims that there is no documentation supporting plaintiffs' position that funds were "loaned" to defendants, and, moreover, that the Note was never finalized because it was part of an executory agreement that was not consummated due to impossibility of performance.

Specifically, Spitzer asserts that in response to defendants' discovery requests for all documentation evidencing the "loan" of $475,000, plaintiffs produced copies of only a few checks dated between June 2003 and April 2004 or checks from four to five years prior to the execution of the Note, which purportedly do not represent any funds loaned to defendants or bear any relation to the Note. Rather, Spitzer claims that the checks produced by plaintiffs reflect monies that plaintiffs invested with defendants in prior real estate ventures.

Defendants also submit an investment breakdown reflecting the various monies that plaintiffs allegedly invested with them. As examples, Spitzer references four real estate ventures: first, a wire transfer in the amount of $400,000 for a property located in Harrisburg, Pennsylvania; second, a check in the amount of $206,250 for a property known as "Ocean Avenue"; third, a check in the amount of $100,000 for a property known as "49th Street"; and fourth, a check in the amount of $250,000 for a property known as "Syracuse Daga." Spitzer claims that plaintiffs recouped their investments and realized returns for the first three ventures. As to the Syracuse Daga venture, however, he claims that there were difficulties yielding a return and plaintiffs demanded that defendants "buy out" plaintiffs' interest in the venture by returning the $250,000. After consulting with Rabbi Gurewitz, defendants purportedly agreed to the buy-out but did not have the funds readily available to consummate the purchase. Therefore, according to Spitzer, the parties agreed to execute the Note whereby defendants

would have a six-month period of time to garner the funds necessary to effectuate the buy-out. Spitzer further alleges that under paragraph 4(a) of the Note, plaintiffs agreed to retain their ownership interest in the property until such time as defendants could gather the requested funds to consummate the purchase, but that the property was later foreclosed upon which rendered performance under the Note impossible.

DISCUSSION

Plaintiffs contend that they are entitled to judgment as a matter of law in the sum of $475,000 plus interest as set forth in the Note, because defendants have not disputed the genuineness of their signatures on the Note and they have no legitimate defense.[2] They also claim entitlement to attorney's fees and costs, and request a separate hearing to determine the amount of attorney's fees and costs to be awarded.

Defendants argue that plaintiffs' summary judgment motion should be denied and their cross-motion for summary judgment dismissing the complaint granted because the Note is unenforceable for lack of consideration. They contend that plaintiffs never "loaned" or advanced any of the funds purportedly underlying the Note, and that plaintiffs' discovery responses demonstrate that any funds forwarded by plaintiffs to defendants were investments into various real estate ventures. They further argue that the Note is nothing more than an executory agreement that became impossible for defendants to perform as a result of the unanticipated foreclosure of the Syracuse Daga property.

In reply, plaintiffs argue that defendants' lack of consideration defense is baseless because the Note recites past consideration in the amount of $475,000, which they claim is valid under General Obligations Law § 5-1105. They further argue that the Note is supported by valid

[2]Plaintiffs submit a copy of defendants' response to plaintiffs' notice to admit, in which plaintiffs sought an admission that the signatures appearing on the Note are genuine. They argue that defendants' response, which was verified by counsel and raised objections to the admissions sought, was frivolous and not verified by defendants themselves thus rendering everything that was requested admitted. Defendants respond that an attorney may properly verify a pleading pursuant to CPLR 3020(d). The Court finds it unnecessary to address the arguments regarding the notice to admit, as this motion may be resolved without reference to any admissions contained therein.

new consideration since paragraph 4(a) contains two promises detrimental to plaintiff's rights, since plaintiffs promised to indemnify defendants in certain actions and promised to relinquish their interest in Syracuse Daga upon payment of the Note. Plaintiffs further assert that the Note is not an executory agreement, and that defendants' arguments regarding impossibility of performance are irrelevant.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

A plaintiff meets its prima facie burden of demonstrating entitlement to summary

judgment for recovery on a promissory note by submitting evidence that the defendant executed the promissory note and failed to make payments in accordance with its terms (*see Cicconi v McGinn, Smith & Co., Inc.*, 35 AD3d 292, 292 [1st Dept 2006]; *Silver v Silver*, 17 AD3d 281, 281 [1st Dept 2005]; *Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept 1993]). The burden then shifts to the defendant to come forward with evidentiary proof in admissible form demonstrating the existence of a triable issue of fact with respect to a bona fide defense (*see Takeuchi v Silberman*, 41 AD3d 336, 337 [1st Dept 2007]; *Silver*, 17 AD3d at 281).

Here, plaintiffs have met their initial burden of establishing entitlement to judgment as a matter of law by submitting the Note signed by defendants, which provided that the defendants were to pay the sum of $475,000 plus interest to plaintiffs within six months, coupled with Roz's affidavit asserting that the defendants failed to make payment in accordance with the terms of the Note (*see Silver*, 17 AD3d at 281; *Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]; *Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2d Dept 2011]). In opposition, however, defendants have raised a triable issue of fact with respect to the bona fide defense of lack of consideration for the Note (*see Samet v Binson*, 79 AD3d 1005, 1005 [2d Dept 2010]).

It is well established that, if "proven at trial, lack of consideration is a perfectly viable defense" (*Fopeco, Inc. v General Coatings Technologies, Inc.*, 107 AD2d 609, 610 [1st Dept 1985]; *see also Manufacturers Hanover Trust Co. v L.N. Properties Inc.*, 174 AD2d 383, 383 [1st Dept 1991]). In this case, although the Note states on its face that value was received, Spitzer states in his affirmation that defendants never received the $475,000 or any other funds from plaintiff in consideration of defendants' execution of the Note. Defendants also submit documentary evidence that, if believed, substantiates their contention that the consideration was not tendered to them (*see Laham v Chambi*, 299 AD2d 151, 152 [1st Dept 2002] [promissory note maker's evidence tending to establish that she received no benefit from contract created factual issue precluding summary judgment on defense of lack of consideration]). Defendants'

investment breakdown and plaintiffs' own discovery responses demonstrate that, with the exception of the Syracuse Daga venture, any funds tendered to defendants pertained to other real estate ventures unrelated to the Note (*cf. Carlin*, 68 AD3d at 656 [defendants made "only conclusory allegations that the loan was not fully funded, and fail[ed] to offer any evidence, documentary or otherwise, to substantiate that allegation"]; *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 [2d Dept 2008]). Indeed, plaintiffs do not dispute that they produced no documentary evidence establishing that defendants did, in fact, receive the funds for the "loan" underlying the Note (*cf. Lamar, D.D.S v Vasile*, 49 AD3d 1218, 1219 [4th Dept 2008] [promissory notes recited that consideration had already been received by defendant at the time of execution "and the record establishe[d] that defendant in fact received that consideration"]).

Furthermore, the Court is unpersuaded by plaintiffs' arguments in their reply that the recitation of past consideration is adequate under General Obligations Law § 5-1105, or, that there is valid new consideration premised upon the language in the "Miscellaneous" section of the Note containing alleged promises by plaintiffs to indemnify defendants for certain claims or to relinquish their interests in the Syracuse Daga venture upon payment of the Note. As this Court has found, there are issues of fact regarding whether any past consideration was actually given to defendants (*see Nachem v Property Markets Group, Inc.*, 82 AD3d 573, 574 [1st Dept 2011] [in addition to being "expressed in writing" past consideration must be "proved to have been given or performed"]; General Obligations Law § 5-1105]).

There are also questions of material fact regarding the Syracuse Daga venture. The Court is unable to determine, as a matter of law, whether the Note was given in consideration of a "loan" for the Syracuse Daga venture, or whether the $250,000 check produced during discovery even pertained to the Note. Notably, Roz contends that the Note was executed in order to avoid any future difficulties between the parties, and Spitzer claims that the Note was an executory agreement that represented a six-month period of time to effectuate a buy-out of the

Syracuse Daga venture. As there are triable issues of material fact in dispute, summary judgment is inappropriate (*see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 [1st Dept 2011] ["issue finding, not issue resolution, is a court's proper function on a motion for summary judgment"]).

To the extent that plaintiffs argue in their reply that there is new consideration based on plaintiffs' purported promise to indemnify defendants for certain claims, this argument is raised for the first time in reply papers and therefore will not be considered *(see Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992] ["the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]; *Alrobaia ex rel. Severs v Park Lane Mosholu Corp.*, 74 AD3d 403, 404 [1st Dept 2010]; *Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-82 [1st Dept 2006]). Were the Court to consider it, the Court would still conclude that there are material issues of fact warranting a trial (*see Rotuba*, 46 NY2d at 231).

Therefore, since triable issues of material fact remain in dispute with regard to the bona fide defense of lack of consideration for the Note, plaintiffs' motion for summary judgment is denied (*see Samet*, 79 AD3d at 1005; *Laham*, 299 AD2d at 151). To the extent that plaintiffs seek sanctions against defendants' counsel or an award of attorney's fees and costs, the Court finds the requests academic. Defendants' cross-motion for summary judgment dismissing the complaint is denied, in view of the remaining factual disputes.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiffs' motion for summary judgment is denied in its entirety; and it is further,

ORDERED that defendants' cross-motion for summary judgment dismissing the

complaint is denied; and it is further,

ORDERED that defendants shall serve a copy of this Order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: July 8, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**