

**Macklowe v Swig**

2013 NY Slip Op 31434(U)

July 2, 2013

Supreme Court, New York County

Docket Number: 150459/2012

Judge: Ellen M. Coin

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: HON. ELLEN M. COIN PART 63**  
**A.J.S.C.**

\_\_\_\_\_  
Harry Macklowe and Linda Macklowe  
-v-  
Kent M. Swig  
\_\_\_\_\_  
INDEX NO. 150459/2012  
MOTION DATE April 11, 2013  
MOTION SEQ. NO. 002  
E-FILED

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for\_

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Reply Affidavits	<u>3</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon the foregoing papers and for the reasons set forth below, it is hereby ORDERED that plaintiffs' motion pursuant to CPLR § 3212 to strike defendant's affirmative defenses and counter-claims and for entry of summary judgment on its claim of defendant's non-payment under the October 30, 2009 loan agreement is granted.

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. (*Epstein v Scally*, 99 AD2d 713 [1<sup>st</sup> Dept 1984]). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a

material issue of fact for trial. (*Indig v Finkelstein*, 23 NY2d 728 [1968]); see also *Vogel v Blade Contr. Inc.*, 293 AD2d 376, 377 [1<sup>st</sup> Dep't 2002]). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. (*McGahee v Kennedy*, 48 NY2d 832, 834 [1979]).

The Court will avoid an unnecessary recitation of the facts underlying this dispute. Suffice it to say that after commencement of an acrimonious divorce proceeding involving their daughter, plaintiffs, who were also defendant's parents-in-law, demanded repayment of a \$200,000.00 loan made to their former son-in-law on October 30, 2009. The loan was witnessed by defendant in a writing entitled "DEMAND PROMISSORY NOTE." The full text of this document is as follows:

DEMAND PROMISSORY NOTE

\$200,000.00

October 30, 2009

FOR VALUE RECEIVED, I, Kent M. Swig. (I) unconditionally promise to pay to the order of Harry and Linda Macklowe, or their successors or assigns, ON DEMAND, the sum of Two Hundred Thousand Dollars (\$200,000.00). being the amount loaned to me as of the date hereof, along with interest calculated and paid at least annually on the unpaid principal balance thereof from time to time. at the federal short term rate in effect from time to time under Section 1275(d) of the Internal Revenue Code of 1986, as amended, compounded annually, and (ii) acknowledge that my liability hereunder is binding on my heirs, executors, administrators, successors and assigns.

The Macklowes agree that they will not encourage or support any Person to or, at any time seek, initiate, or commence any involuntary bankruptcy proceeding against Kent Swig nor shall they demand payment of the this (sic) Demand Promissory Note in such a manner as to cause Kent Swig to file for bankruptcy.

By decision and order dated September 5, 2012, the Court denied plaintiffs' summary judgment motion in lieu of complaint pursuant to

CPLR §3213, having concluded that the note is more akin to a contract with mutual obligations, rather than an instrument for payment of money only, rendering it ineligible for treatment under CPLR §3213 summary proceedings. The Court converted the summary proceeding into a plenary action and directed defendant to serve an answer. On October 15, 2012, defendant e-filed an answer, asserting two counter-claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

At the foundation of both counter-claims lies the allegation that plaintiffs breached the note by "funding Morrison Cohen's secret representation of their daughter []when Morrison Cohen were Mr. Swig's restructuring lawyers putatively representing him in his personal and business restructuring efforts with his Creditors," and arranging and financing a number of unidentified legal proceedings against defendant with the hidden agenda of dwindling his resources and disrupting his relationship with creditors. Defendant estimates the damages to be no less than \$1,000,000.00.

After defendant joined issue, plaintiffs re-filed their summary judgment motion pursuant to CPLR §3212. In opposition, defendant does not deny signing the note, but argues that plaintiffs have not made a prima facie showing of fulfilling their covenant in the second paragraph of the note. In addition, defendant submits an affidavit in which he presents a theory of what might be termed as "constructive payment." Defendant alleges that plaintiff Harry

Macklowe helped his daughter forge defendant's endorsement of a check jointly issued to both Kent and Elizabeth Swig by an insurance carrier for reimbursement of damage to their apartment, enabling her to secretly keep substantial funds that, at the very least, should have been made subject to property distribution in the divorce proceeding.

This argument, however, fails to raise a genuine issue of material fact to rebut plaintiffs' prima facie entitlement to summary judgment. The Court's denial of the first summary judgment motion does not affect plaintiffs' current application, as the Court's prior order merely reflected the procedural limitations of CPLR §3213 and did not concern the respective merits of each side's argument.

Further, the note does not condition repayment on plaintiff's complying with the note's second paragraph, because it is not a condition precedent and is at most an independent promise. "A condition precedent is an 'act or event, other than a lapse of time, which [] must occur before a duty to perform a promise in the agreement arises.'" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685,690 [1995][citations omitted]). Conditions precedent are not favored under New York law, and in the absence of unambiguous conditional language, a condition precedent will not be read into the agreement. (*Ginnett v. Computer Task Group*, 962 F.2d 1085, 1100 [2d Cir. 1992]; see also *Oppenheimer & Co.*, 86 NY2d at

691[noting the unmistakable language of condition as "if, unless and until"])).

The language of the note does not contain any linguistic indicators of conditional repayment. Defendant's counter-claim, together with a damages demand that is entirely incongruent with the amount of the loan, also lends support to the conclusion that the note contains merely an independent promise not to act in such a manner as to precipitate defendant's bankruptcy. (Cf. *Canpartners Invs. IV, LLC v Alliance Gaming Corp.*, 1998 US Dist Lexis 10488, \*8 [SDNY 1998][no cause of action for breach of contract may lie for non-fulfillment of a condition precedent]).

In the alternative, defendant has failed to allege that the demand for payment of this note resulted in his filing for bankruptcy or that any potential judgment that may be issued here will force him into bankruptcy. Nor does he allege that plaintiffs encouraged or aided anyone in commencing an involuntary bankruptcy proceeding.<sup>1</sup>

While the Court understands defendant's frustration with plaintiffs' apparent involvement in their daughter's divorce proceedings, the language of the note does not mandate plaintiffs to oust themselves from defendant's personal life. For this reason, the counterclaims sounding in breach of contract are dismissed as well.

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<sup>1</sup>In furtherance of their showing of prima facie entitlement to summary judgment, plaintiffs submitted affidavits, averring that they have not encouraged anyone to commence involuntary bankruptcy against defendant. (Meister Affirm., Ex. I).

Further, plaintiffs' alleged malfeasance surrounding defendant's portion of the insurance proceeds may not serve as the basis for any type of set-off, because defendant has not asserted an affirmative defense of set-off generally; nor has he asserted a counterclaim against plaintiffs for conversion or aiding and abetting a conversion. (*E.g.*, *Dextra v McDonald*,, 37 Misc 3d 141(A), \_\_\_\* (App Term, 2<sup>nd</sup> Dept 2012)[grant of relief not demanded is discouraged]). The Court's grant of summary judgment on the note will not prejudice defendant's ability to commence an appropriate proceeding to vindicate his alleged rights to any portion of the claimed insurance proceeds.

In accordance with the foregoing, it is hereby ORDERED that the Clerk of Court shall enter judgment in favor of plaintiffs Harry Macklowe and Linda Macklowe and against defendant Kent M. Swig in the amount of \$200,000.00, together with interest at the rate of 9% per annum from April 2, 2010, as calculated by the Clerk, and costs as taxed by the Clerk.

**This constitutes the decision and order of the Court.**

Dated: July 2, 2013

  
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 Ellen M. Coin, A.J.S.C.

Check One:

CASE DISPOSED

NON-FINAL DISPOSITION