

<b>Russack v Russack</b>
2014 NY Slip Op 30816(U)
March 28, 2014
Sup Ct, New York County
Docket Number: 653031/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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IRA RUSSACK,

Index No.: 653031/2012

Plaintiff,

**DECISION & ORDER**

-against-

HARVEY RUSSACK, NOHO'S UCW REALTY LLC,  
& STERLING REAL ESTATE HOLDING CO., INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Ira Russack (Ira) moves for summary judgment against defendants Harvey Russack (Harvey) and Noho's UCW Realty LLC (Noho) pursuant to CPLR 3212. Harvey and Noho oppose and cross-move for summary judgment and to compel discovery. Ira's motion is granted and defendants' cross-motion is denied for the reasons that follow.

*I. Factual Background & Procedural History*

This is a dispute between brothers, Ira and Harvey, and concerns the enforcement of a note. The court declines to address the parties' contentious business history and the family politics the brothers spend much of their briefs discussing since such matters are legally irrelevant. The following facts are undisputed.

On March 10, 2009, Harvey executed a note (the Note) dated as of February 13, 2009, on behalf of himself and his company, Noho. The Note evidenced a \$3.7 million loan made to him by Ira. The Note carried interest at 6% per annum and had an initial maturity date of December

31, 2013. It prohibits oral modifications and is governed by New York law. As security for the Note, Harvey, on behalf of Noho, pledged its lease and 125 shares of stock in 718 Apts., Inc. (the Pledge), which owns commercial co-op unit GF in a building located at 718 Broadway in Manhattan. This security interest was perfected, but subordinated to a senior lien held by Sterling National Bank, an affiliate of non-moving defendant Sterling Real Estate Holding Company, Inc. (collectively, Sterling).<sup>1</sup>

By May 2011, Harvey had not made any payments under the Note. Harvey, however, asked Ira for an additional \$35,000 loan to help pay off his debt to Sterling. He told Ira that by making this payment, Sterling was willing to lend Harvey an additional \$600,000, from which Harvey would pay \$343,000 to Ira on the Note. On May 22, 2011, Harvey executed a written amendment to the Note and Pledge (the Amendment). The Amendment increased the total amount of the Loan by \$35,000 and provided that Harvey must pay \$343,000 to Ira within 3 days of receiving the \$600,000 from Sterling. Harvey's failure to timely pay Ira the \$343,000 is a breach of the Note, entitling Ira to call the Note in full and foreclose on the security. The Amendment states "the Note and Pledge remain unchanged and in full force and effect and neither NoHo nor Harvey have any defenses or offsets of any kind against any of their obligations thereunder."

Harvey received the \$35,000 from Ira and the \$600,000 from Sterling. However, Harvey defaulted on the Note by not paying Ira the required \$343,000. In letters dated June 7 and June 29, 2012, Ira gave Harvey written notice of his default and called the Note. In a letter dated June 30, 2012, Harvey refused payment and surrender of the security.

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<sup>1</sup> Sterling does not object to Ira's motion, and, as Ira concedes, Sterling has first priority on the proceeds from any eventual sale of the security.

Ira commenced this action on August 29, 2012, asserting claims for the amount due under the Note and for a declaratory judgment permitting his sale of the security. Harvey answered and asserted counterclaims. Harvey's defenses are based on a litany of allegations of wrongdoing by Ira related to the parties' business dealings. None of this is relevant to the enforceability of the Note, since the Amendment expressly waives such defenses. In any event, many of the events discussed by Harvey took place long ago and, for the most part, are time-barred. The remaining defenses are incapacitation and economic duress. Harvey also avers that alleged discovery deficiencies warrant denial of summary judgment. None of Harvey's arguments have merit.

## II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to

defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Ira established his *prima facie* case by submitting evidence of Harvey's default, which was his failure to timely pay the \$343,000. The burden then shifted to Harvey to raise a triable issue of fact. He has failed to do so.

Harvey's incapacitation and economic duress defenses fail because he did not promptly repudiate the Amendment. Where, as here, a party challenges a contract on the ground of duress or incapacity, such defenses fail if the party did not promptly repudiate the contract once the conditions of duress abated. *Allen v Riese Org., Inc.*, 106 AD3d 514, 517 (1st Dept 2013). If the party accepts the benefit of the contract, he is bound by it, regardless of the circumstances of its original execution. *Id.*, citing *Foundry Capital Sarl v Int'l Value Advisers, LLC*, 96 AD3d 620, 621 (1st Dept 2012) ("a party cannot claim that it was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement"); *Stacom v Wunsch*, 162 AD2d 170, 171 (1st Dept 1990) ("[A] party seeking to repudiate a contract procured by duress must act promptly lest he or she be deemed to have elected to affirm it."). Even if Harvey's health condition was as severe as he claims, and not the minor asthmatic attack that his medical records indicate had no impact on his cognitive facilities, Harvey's acceptance of the \$635,000 from Ira and Sterling preclude him from challenging the enforceability of the Amendment. Harvey kept the money and did not object until June 2012, more than a year later, when Ira

called the Note. Harvey ratified the Amendment and, therefore, is bound by it.<sup>2</sup> See *Phillips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 (1st Dept 2008). Since, as mentioned earlier, the Amendment waives all other defenses, its validity precludes Harvey's claims relating to Ira's alleged malfeasance before May 2011.

As for Harvey's counterclaims, none of them can be used to set off liability under the Note. The Note expressly precludes doing so. In any event, the claims fail as a matter of law. The unjust enrichment, unfair competition, and fraud claims are not viable where, as here, contracts govern. *Simkin v Blank*, 19 NY3d 46 (2012); *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005); *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (1st Dept 2004). Additionally, much of the alleged conduct forming the basis for Harvey's claims occurred prior to 2006. Recovery is barred by the statutes of limitation. CPLR 213(2) & (8). Finally, since almost all of Harvey's allegations are fraudulent in nature, dismissal would be warranted for failure to provide the particularity required by CPLR 3016(b). Regardless, Harvey failed to state a claim. Accordingly, it is

ORDERED that (1) summary judgment is granted to plaintiff Ira Russack against defendants Harvey Russack and Noho's UCW Realty LLC on the full amount of the Note plus interest and for a declaratory judgment permitting the sale of the pledged assets by plaintiff, (2) said defendants' counterclaims and affirmative defense are dismissed; and (3) said defendants' cross-motion to compel discovery is denied as moot in light of this decision; and it is further

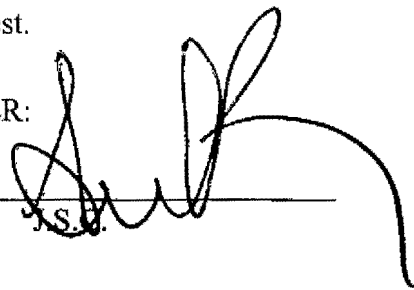
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<sup>2</sup>Harvey's argument that the Amendment is invalid because it was not signed by Ira fares no better. It is undisputed that Harvey signed the Amendment and received the money. A condition precedent is not grounds for breaching when the contract was performed.

ORDERED that within 10 days of the entry of this order on the NYSCEF system, plaintiff shall submit a proposed judgment on notice, which shall direct the Clerk to enter judgment inclusive of statutory pre-judgment interest.

Dated: March 28, 2014

ENTER:

  
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J.S.C.