

**Kehoe v Abate**

2017 NY Slip Op 32807(U)

January 11, 2017

Supreme Court, Rensselaer County

Docket Number: 221382

Judge: Michael H. Melkonian

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF RENSSELAER.

PETER R. KEHOE,

Plaintiff,

-against-

**DECISION**  
**AND**  
**ORDER**

ELDA ABATE and MARIO ABATE,

Defendants.

(Supreme Court, Rensselaer County, Motion Term, November 21, 2016)

Index No. 221382

(RJI No. 41-0317-2007)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Dreyer Boyajian, LLP  
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MELKONIAN, J.:

In this action on a promissory note, plaintiff Peter R. Kehoe ("plaintiff") moves to preclude defendants Elda Abate and Mario Abate ("defendants") from offering evidence or arguing that their signatures on the note are not valid and that payments made to plaintiff between October 1, 2000 and June 22, 2001 were not payments on the note. Plaintiff also moves to strike defendants' demand for a jury trial.

There being no opposition, that portion of defendants' motion which is to preclude defendants from offering evidence or arguing that their signatures on the note are not valid to that payments made to plaintiff between October 1, 2000 and June 22, 2001 were not payments on the note is granted.

This lawsuit arises out of an August 1999 promissory note executed by defendants in which they agreed to repay a loan given to them by plaintiff in connection with the sale of real property in the City of Troy, Rensselaer County from plaintiff to defendant Elda Abate. Plaintiff alleges that defendants made a number of payments on the note, but eventually defaulted.

In May 2007, plaintiff moved for summary judgment in lieu of complaint (CPLR § 3213). In a Decision and Order dated October 26, 2007, this Court (Platkin, J.) denied plaintiff's motion finding that defendants had raised a question of fact as to a bona fide defense to plaintiff's claim—specifically, whether plaintiff (an attorney) served as defendants' attorney in the underlying real estate transaction, causing them to rely on his representations and the attorney-client relationship in executing the note, as well as a document purporting to indicate that Elda Abate was representing herself.<sup>1</sup>

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<sup>1</sup>In opposition to plaintiff's summary judgment motion, defendants submitted the affidavit of defendant Elda Abate in which she alleged, among other things, that plaintiff had represented defendants in the past and that she believed he was still representing them at the closing at which the note in question was signed. She also alleged that she speaks English as a second language, that she does not understand legal terminology and that she merely signed whatever documents plaintiff requested in reliance on plaintiff's representation and expertise. Steven Farer, defendants' former attorney—who represented the mortgage lender at that closing—also submitted an affirmation in which he averred that plaintiff had advised him that he was representing himself and defendants in the real estate transaction. Mr. Farer also submitted copies of documents and correspondence received from plaintiff to corroborate that assertion. Plaintiff responded by submitting an "Acknowledgment of Nonrepresentation" executed by defendant Elda Abate on the date of the

The Appellate Division, Third Department affirmed (62 AD3d 1178 [2009]), finding that “where, as here, the promissory note (signed by both defendants) is ‘inextricably intertwined’ with the underlying real estate transaction (involving only Elda Abate), the sworn statements of Elda Abate and Farer, together with the documents evidencing plaintiff’s alleged representation of defendants and their reliance thereon—which, if proven, could undermine the underlying transaction—are sufficient to present a triable issue of fact effectively defeating the motion as to both defendants.”

In his Note of Issue, plaintiff demanded a non-jury trial; defendants demanded a jury trial. Plaintiff contends that this action is not eligible for jury trial because defendants’ sole affirmative defense (“fraud”) is equitable in nature and defendants did not counterclaim against plaintiff.

It is well settled that a contract clear on its face involves only a question of law, and such a construction is a matter for the court (West, Weir and Bartel Inc. v Mary Carter Paint Co., 25 NY2d 535 [1969]). However, the issue of whether or not plaintiff served as defendants’ attorney in the underlying real estate transaction, causing defendants to rely on his representations and the attorney-client relationship in executing the note thereon, as well as circumstances surrounding the document purporting to indicate that Elda Abate was representing herself are jury questions. Defendants’ allegations, if proved, would void the instrument. *In these circumstances, the Court finds that defendants are entitled to a jury trial*

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closing, which recited that plaintiff had advised her that he did not represent her and that she had “chosen not to retain an attorney to represent her interests.”

on these defenses (see, Bank of New York v. Cheng Yu Corp., 67 AD2d 969 [2<sup>nd</sup> Dept. 1979]; J.P. Morgan Securities Inc. v Ader, 127 AD3d 506 [1<sup>st</sup> Dept. 2015]; see, also, Ferry v Poughkeepsie Galleria Co., 197 AD2d 913 [4th Dept. 1993]; Moser v Devine Real Estate, Inc. (Florida), 42 AD3d 731 [3<sup>rd</sup> Dept. 2007]; Harris v Trustco Bank New York, 224 AD2d 790 [3<sup>rd</sup> Dept. 1996]).

Accordingly, it is ORDERED that plaintiff's motion to strike defendants' jury demand is denied.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendants. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.  
ENTER.

Dated: Troy, New York  
January 11, 2017.



MICHAEL H. MELKONIAN  
Acting Supreme Court Justice

Received  
County Clerks Office  
Feb 03, 2017 04:05P  
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