At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of October 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
P R E S E N T: HON. INGRID JOSEPH, J.S.C

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DAVID LINKER, as Assignee of REBECCA KRAITENBERGER,

Plaintiffs,

-against-

SARA PERLSTEIN,

Defendants.

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Mot. Seq.10, 11
Index No.: 521540/2018

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Motion:

Papers	NYSCEF Nos.
Notice of Motion/Affirmation/Affidavits/Exhibits.....	183 - 189
Notices Cross Motions/Affirmations/Affidavits/Exhibits.....	193 - 195
Opposition/Affirmation/Exhibits Annexed	196
Reply	198
Motions/Memoranda/Affidavit/Affirmations/Exhibits on Reargument.....	106 - 124; 126 - 146; 147 - 150; 151 - 156; 157 - 162

In this matter, plaintiff, David Linker ("plaintiff"), assignee of Rebecca[1] Kraitenberger ("Kraitenberger"), moves pursuant to CPLR § 2221 for leave to reargue (Mot. Seq. 10) his prior motion for summary judgment pursuant to CPLR § 3212 on the ground that the court, in its October 20, 2020 order ("October 2020 order), erred in holding that such motion was

[1]Assignor's first name noted as "Rivkah" on the copy of note included with plaintiff's underlying motion, at Exhibit A, NYSCEF No. 114.

procedurally improper. Defendant Sara Perlstein ("defendant") cross moves (Motion Seq. 11) for modification of the October 2020 order to correct a portion thereof that denied her cross motion to dismiss based upon lack of standing under CPLR § 3211(a)(3), or, alternatively, summary judgment based upon the defendant's affirmative defenses of fraud in the inducement, offset and recoupment, or to suppress plaintiff's use of the defendant's unsigned transcript and a stay of the sixty day period under CPLR § 3116 and leave to submit transcript corrections with reasons for such corrections. Defendant further request that this court modify a portion of the October 2020 order that incorrectly identified defendant as the party that filed a procedurally impermissible "cross cross motion" (under Motion Sequence 9).

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion' " (*Grimm v. Bailey*, 105 AD3d 703, 704 [2d Dept 2013], *quoting* CPLR § 2221[d][2]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Matter of Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 820 [2d Dept 2011]).

In this case, plaintiff initially sought a money judgment against the defendant by the filing of a motion for summary judgment in lieu of complaint. The defendant submitted written opposition to the motion and cross moved to dismiss. A prior judge issued an order that denied both parties' motions and specifically noted that there existed material issues of fact that precluded an award of summary judgment in plaintiff's favor. The instant motion to reargue concerns this court's October 2020 order that (1) denied the plaintiff's successive motion for summary judgment as procedurally impermissible, (2) denied the defendant's cross motion to dismiss and/or for summary judgment, and (3) that denied the plaintiff's request for the imposition of sanctions in document entitled "cross cross motion."

In the October 2020 decision, this court explained that when a motion in lieu of complaint is denied, the action is treated as an ordinary action, such that the moving papers

become plaintiff's complaint and the opposition papers, the defendant's answer, unless the court directs the parties to file pleadings anew. The court further explained that when a motion for summary judgment in lieu of complaint is denied, as it was in this case, the action does not fall within the ambit of matters that are based solely upon an instrument for the payment of money only, because outside proof is needed. The court denied plaintiff's motion for summary judgment on the ground that successive motions for summary judgment are generally not permitted. Plaintiff relied on essentially the same affidavits and documentary evidence presented on the initial motion for summary judgment in lieu of complaint; however, plaintiff's second motion for summary judgment did include exhibits not previously included and the certified but unsigned transcript of the defendant's deposition testimony. Since the Second Department has held that deposition testimony meets the criteria of newly discovered evidence, the court finds that it overlooked an applicable exception regarding successive motions for summary judgment (*see Auffermann v Distl*, 56 AD3d 502 [2d Dept 2008]). Thus, that branch of plaintiff's motion to reargue (Motion Seq. 10) the underlying motion for summary judgment (Motion Seq. 7) is granted. For essentially the same reasons, the court, in its discretion, further grants the defendant's cross motion to reargue (Motion Seq. 11) its prior cross motion (Motion Seq. 8).

This action concerns a demand promissory note that the defendant, Sara Perlstein, allegedly provided to plaintiff's assignor, Rebecca Kraitenberger, on April 10, 2013, to secure the repayment of a loan in the amount of $150,000, with interest of 13% per annum. Plaintiff, in his capacity as assignee, commenced this action against the defendant based upon Kraitenberger's assignment of the demand promissory note to him for value on October 11, 2018, for which plaintiff contends payment in full was duly demanded and not received.

In the successive motion for summary judgment, plaintiff included Exhibits 1 - 11, at NYSCEF Nos 114 - 124. The exhibits include a copy of the discovery demands that were sent to the defendant and a copy of her deposition testimony. Relying on these exhibits, plaintiff argued that the defendant failed to corroborate her defenses of fraud in the inducement, offset and recoupment with documentary or testimonial evidence. Plaintiff highlighted portions of the defendant's transcribed testimony to expose her lack of personal knowledge, inability to set forth a factual basis in support of her defenses, and the discrepancies that exist between her deposition

testimony and the statements in the affidavit that were submitted in opposition to his initial motion for summary judgment in lieu of complaint, which now constitutes the defendant's answer.

The defendant, in her opposition to the motion, alleged that she was fraudulently induced to sign the promissory note based upon a hand shake and understanding that the loan would be offset by a combination of rent arrears and funds for business ventures that the defendant alleges are owed to her by members of the Kraitenberger family. The defendant acknowledges that her attorney received an original transcript of her deposition testimony but argues that such transcript should be suppressed, because an additional copy was not provided.

In addressing the issue concerning the defendant's transcript, the court is guided by CPLR § 3116(a), which provides, in pertinent part, that if a witness fails to sign and return the deposition transcript within sixty days, it may be used as fully as though signed, and no changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination. Moreover, under CPLR § 3116 (e), errors and irregularities are waived unless a motion to suppress the deposition is made with reasonable promptness after such defect is, or with due diligence, might have been ascertained (CPLR § 3116(e)).

Here, plaintiff has established, through is attorney's affirmation, that the defendant's deposition transcript was sent to her counsel on February 24, 2020. The defendant failed to sign and return the certified transcript within the statutory period, and neither the defendant nor her attorney denies receiving the document. In fact, the defendant acknowledges that the document was received. The application to suppress and to stay, made more than six months after the transcript was delivered to her counsel, is not reasonably prompt. Even if the court were to deem the defendant's request reasonably prompt based upon the extensions of time applicable during the COVID-19 crisis, the court finds that defendant failed to identify a single error or inaccuracy in her transcribed testimony, and provided no details as to how any such errors or inaccuracies prejudice her in this case (*see Principale v Lewner*, 187 Misc2d 878 [Sup Court 2001]). Under these circumstances, the court finds that the defendant waived her opportunity to address inaccuracies, if any, in her deposition transcript and failed to meet the criteria to suppress any

alleged improper transcription. For this reason, the defendant's certified transcript may be used as if it were signed. Thus, upon reargument, that branch of the defendant's cross motion to suppress plaintiff's use of her transcript, for a stay and for leave to correct the transcript is denied.

Regarding plaintiff's motion for summary judgment, the court finds that the promissory note on which this action is based constitutes an instrument for the payment of money, because it contains Sara Perlstein's unconditional promise that she will repay Kraitenberger the sum of $150,000, plus 13% annual interest, upon request (*Estate of Hansraj v Sukhu*, 145 AD3d 755, 755 [2d Dept 2016] *quoting Lugli v Johnston*, 78 AD3d 1133, 1134 [2d Dept 2010]). Plaintiff established that he took assignment of the note from Kraitenberger on October 11, 2018, for value, as evinced by Kraitenberger and the plaintiff's affidavits, as well as the agreement that memorializes the assignment. Kraitenberger, in her affidavit, also states that the defendant made monthly interest payment on the note through October 1, 2017 and no payments thereafter although duly demanded. In light of these findings, the court finds that the plaintiff has established prima facie entitlement to judgment as a matter of law on the issue of liability with respect to the promissory note (*Nunez v Channel Grocery & Deli Corp.*, 124 AD3d 734, 724-735 [2d Dept 2015] *quoting Griffon V, LLC v 11E. 36, LLC*, 90 AD3d 705, 706 [2d Dept 2011]).

The defendant failed to set forth with particularity the requisite elements of the defense of fraudulent inducement and did not establish the merits of such defense in opposition to plaintiff's motion for summary judgment. There is no showing of representation of a material existing fact, falsity, scienter, reliance or injury (*Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2d Dept 2009] *citing Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]). At the outset, it should be noted that the defendant disaffirmed the contents of her affirmation in opposition to plaintiff's initial motion for summary judgment in lieu of complaint, which constitutes her answer in this matter (Perlstein tr at p. 34, 70). The defendant also answered, "I would think so," when asked whether the person who gave her the affirmation to sign deceived her (Perlstein tr at p. 72, 73). Regarding the promissory note in issue, the defendant acknowledged that she needed to buy out her brother's ownership interest in certain real property when the need for the $150,000 loan was initially discussed (Perlstein tr p.

19-20). Although the defendant denied ever seeing the promissory note when the document was presented to her during the deposition, she answered "I believe, it is," when asked if her signature was on the bottom of the note (Perlstein tr p. 22). The defendant also stated, "I guess I did," when asked whether she signed the note, and when asked whether "[she] signed [the promissory note] at the recommendation of [her] sons," the defendant answered, "I would assume so" (Perlstein, tr p. 22-24).

Additionally, the defendant failed to establish that she is entitled to an offset against her obligation on the promissory note. The general rule is that the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, unless it can be shown that the contract and the instrument are intertwined and the defenses alleged to exist create material issues of triable fact (*Chervinsky v Rezhets*, 132 AD3d 713 [2d Dept 2015]). In this case, the defendant's claimed offsets relate to decades of business transactions and partnerships that were allegedly formed between the Perlstein and Kraitenberger families, none of which the defendant could establish were intertwined with her obligation under the promissory note. The defendant's allegation that her late husband "bailed out" the Kraitenberger's butcher business is illustrative in this context, because, assuming *arguendo* that such bail out occurred, the defendant showed no nexus between the two matters. The defendant proffered no corroborating documentation, had no personal knowledge regarding such bail out, and admitted that any offset would have accrued prior to her husband's death in 2004 (Perlstein tr at p. 86-90). In fact, the defendant had no knowledge about the business transactions orchestrated by her late husband, or her two sons; did not now how much, if any, money was owed by the Kraitenbergers; and admitted that her only claim against plaintiff's assignor, Rebecca Kraitenberger, related to Rebecca Kraitenberger's father, Mr. Kraitenberger, who the defendant claimed stop tendering rental payments for an office space that he utilized in one of the buildings that she owned (Perlstein tr at p. 94-96, 103, 106). In any event, an offset based on rent arrears would fail, because the defendant did not know the amount of monthly rent being charged and admitted that she transferred 100% ownership interest in the property for which she claims entitlement to an offset to a non-party, JES Realty LLC, on November 19, 2009 (Perlstein tr p. 56, 83).

Based upon the above findings, it is hereby

ORDERED, that plaintiff's motion (Motion Seq. 10) for leave to reargue its previous motion for summary judgment (Motion Seq. 7) is granted and upon reargument, plaintiff's underlying motion for summary judgment (Motion Seq. 7) is granted to the extent that plaintiff, David Linker, as Assignee of Rebecca Kraitenberger, is entitled to a money judgment against defendant, Sara Perlstein, in the amount of $150,000, plus interest of 13% per annum from November 1, 2017, and it is further

ORDERED, that the portion of the October 20, 2020 order that denied plaintiff's motion for summary judgment (Motion Seq. 7) is vacated, and it is further

ORDERED, that the defendant's cross motion (Motion Seq. 11) for modification of the order dated October 20, 2020 is granted to the extent that any reference to Motion Sequence 9 in the October 20, 2020 order, as a "cross cross motion" filed by the defendant, is hereby modified to reflect that such "cross cross motion" was filed by plaintiff, David Linker, as Assignee of Rebecca Kraitenberger. The court's denial of said "cross cross motion" (Motion Seq. 9), as procedurally improper, remains in full force and effect, and it is further,

ORDERED, that the branch of the defendant's cross motion (Motion Seq. 11) for leave to reargue its underlying motion (Motion Seq. 8) for summary judgment against plaintiff based upon her affirmative defenses; to suppress plaintiff's use of her deposition transcript dated February 4, 2020; for a stay and leave to submit corrections to such transcript is granted and upon reargument, those branches of the defendant's cross motion (Motion Seq. 11) are denied.

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Judge