[*1]

Zamore, Zamore & Zamore v Aloyts
2014 NY Slip Op 50139(U)
Decided on January 21, 2014
Supreme Court, Kings County
Demarest, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 21, 2014

Supreme Court, Kings County

Zamore, Zamore & Zamore, Plaintiff,

against

Bella B. Aloyts and Edith K. Kovnat, Defendants.

502332/2013

Attorneys for Plaintiff:

David B. Rosenbaum, Esq.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.

377 Broadway, 7th Floor

New York, NY 10013

Attorney for Defendant Edith Kovnat:

Nicholas Ratush, Esq.

Yoram Nachimovsky, Esq.

299 Broadway, Suite 605

New York, NY 10007

Attorney for Defendant Bella Aloyts:

Malvina Lin, P.C.

1203 Avenue J, Suite 4B

Brooklyn, NY 11230

Carolyn E. Demarest, J.

The following e-filed papers read herein:

*Papers [*2]Numbered*

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*2-4, 6*

Opposing Affidavits (Affirmations)*23-28, 29-36*

Reply Affidavits (Affirmations)*37, 39-43*

Plaintiff's Memoranda of Law*5, 38*

In an action to recover monies owed on a promissory note, Zamore, Zamore & Zamore (plaintiff) moves, pursuant to CPLR 3213, for summary judgment in lieu of a complaint, in its favor against defendants Bella B. Aloyts (Aloyts) and Edith K. Kovnat (Kovnat) (collectively, defendants) in the aggregate sum of $156,311.30, plus accrued interest and legal fees, together with

the costs and disbursements of this action, upon the ground that this action is based upon an instrument for the payment of money only, and that there is no defense thereto.

BACKGROUND

Plaintiff is a partnership duly formed under the laws of the State of New York, and Irwin Zamore (Zamore) is a partner and the principal of plaintiff. Plaintiff was the original sponsor and holder of the unsold shares of 601 Tenants Corp. (601 Tenants), a cooperative housing corporation. 601 Tenants owned and managed the cooperative building located at 601 Brightwater Court, in Brooklyn, New York.

In 2004, defendants sought to open a medical office at the cooperative building. Aloyts, who is a medical doctor, wished to operate a medical practice there, and to also lease this space to other medical professionals. Kovnat, who lives in Germany, was to be an investor in this medical office, and she, along with Aloyts, planned to receive income from the rent paid by the doctors that were going to practice at the medical office once it was established.

In order to establish this medical office, defendants' plan was to purchase unit 1J and the basement space directly below it at the cooperative building. Defendants' intent was that these two units were to be demised as a single space to be converted to, and then occupied, as a commercial medical office. Since unit 1J was a residential unit, it was anticipated that substantial construction would be required for this conversion. Defendants never intended to occupy unit 1J as a residence.

Since Kovnat is a resident of Germany, she had her father, Meier Katz (Katz), [*3]represent her in the transaction to purchase the cooperative units, pursuant to a power of attorney duly given by her to him. Katz asserts that in May 2004, he and Aloyts met with Zamore to discuss the purchase of unit 1J, and that they told him of their intention to buy this unit to set up a medical office and for investment purposes. At that time, Zamore was not only the sponsor of 601 Tenants, but he was also 601 Tenants' chief executive officer and the vice-president and member of 601 Tenants' board of directors.

The purchase of unit 1J and the basement space was negotiated extensively between plaintiff (by Zamore) and defendants. Defendants informed Zamore that unit 1J was not going to be used for residential purposes by them, but would only be purchased if they obtained a lease for the space below the unit and could build a medical office. Defendants assert that although plaintiff was a registered dealer in cooperative shares with the office of the Attorney General of the State of New

York and was obligated to provide disclosure of special risks as the sponsor of the cooperative corporation, Zamore did not disclose that plaintiff, with him as its principal, had a conflict of interest as a seller, sponsor, and a board member, and did not inform them of the special risks involved in the sale. Defendants claim that Zamore represented that as a principal of the sponsor, a board member of 601 Tenants, and an officer of 601 Tenants, he would be able to assist them in obtaining the approvals necessary to effectuate the sale and the subsequent conversion of unit 1J into a medical office.

In order to ensure that they had approval to convert the space into a medical office, Gabriella G. Volshteyn, Esq., who represented defendants as their attorney regarding the purchase of Unit 1J and the basement space, sent a letter dated June 4, 2004 to 601 Tenants, which stated that with respect to defendants' purchase unit 1J, defendants were thereby requesting the approval of 601 Tenants for the premises to be run as a medical facility, including but not limited to physical therapy and rehabilitation, the renting out of part of the basement to be occupied and used as a medical facility, and the building out of the handicapped ramp or hydrologic platform on the right side of the entrance required for the operation of the medical facility. Ms. Volshteyn, Esq. requested that 601 Tenants certify its agreement to this by signing the letter and returning it to her office. According to Katz, Zamore told him and Aloyts that the letter was "as good as signed" and that he had discussed the matter with the cooperative's board and that the board was in agreement to the terms of the letter.

Katz asserts that Zamore represented to him and Aloyts that he would be able to "make things happen with the board," and that he would assist them in getting the board to approve their construction plans and the conversion. Katz further asserts that Zamore represented to them that the board had been apprised that they were buying Unit 1J and renting the basement space below for the purpose of converting this unit into a medical office for which Kovnat intended to collect rent and that the board would not have a problem with this plan. According to Katz, Zamore represented that he had sufficient influence with the board to make the conversion into a medical office possible. Katz [*4]claims that in reliance upon these representations by Zamore that the board was in agreement with the conversion to a medical office, he, on behalf of Kovnat, and Aloyts proceeded with the purchase of unit 1J from plaintiff.

In order to pay for unit 1J, defendants agreed to obtain a purchase money loan from plaintiff in the amount of $147,000. Defendants assert that they only agreed to this loan based upon plaintiff's reassurance that the conversion of unit 1J to a medical office would be approved as planned.

On June 24, 2004, Aloyts and Kovnat, by her father, Katz (as her attorney-in-fact pursuant to the power of attorney), as the purchasers, and plaintiff, by Zamore, its principal, as the seller, executed a Contract of Sale (the Contract of Sale) to purchase the 850 shares allocated to unit 1J. Paragraph 1.12 of the Contract of Sale provided that the purchase price was $210,000, with a contract deposit of $21,000 and that the remaining $189,000 was due at the closing. Paragraph 1.16.1 of the Contract of Sale set forth that the loan terms were that there would be financing of $147,000 and referenced paragraph 45 of the rider to the Contract of Sale. Paragraph 45 of the rider to the Contract of Sale, entitled "Financing," provided that plaintiff would provide financing up to 70% of the purchase price ($147,000), that the loan terms were that there would be eight years of interest only at eight percent per annum, and that "[a] default under the mortgage [would] be deemed as a default under the lease referenced in [p]aragraph 46." Paragraph 46 of the rider to the Contract of Sale, entitled "Contingency," stated that the contract was "subject to the Purchasers obtaining a lease from 601 Tenants . . . prior to closing, for the basement area below the unit upon such terms as can be mutually agreed upon," and that "[a] default under the lease shall be deemed as a default under the mortgage referenced in [p]aragraph 45."

Aloyts asserts that Zamore was well aware of her intention regarding building a medical office, as evidenced by the fact that the rider to the Contract of Sale (as set forth above) expressly contained a contingency for a lease to the basement space and even connected the financing arrangements to this lease contingency. Specifically, the Contract of Sale provided the financing terms regarding the note to be given by plaintiff, as well as the express contingency that defendants must receive a lease from the cooperative board for the basement space below the unit as a condition to closing on such contract. Aloyts further asserts that the relationship between the requirement by plaintiff to provide financing and the lease is evidenced by the time frames placed on the note and the lease since the note was payable and matured only after eight years in order to give her time to complete the construction and then the opportunity to establish her practice and generate income to pay off the note.

On December 9, 2004, defendants executed both the commercial lease for the 950 square feet of basement space and the proprietary lease for unit 1J. Zamore executed the lease for unit 1J on behalf of 601 Tenants, as its vice-president. A rider to the lease for the basement space provided for alterations in which plans were to be prepared and [*5]submitted to 601 Tenants. According to defendants, Zamore was present and involved when the lease for the basement space was signed by Sarah Sadikova, who was then the president of 601 Tenants' board of directors.

The closing of the purchase of cooperative unit 1J from plaintiff, by which defendants acquired the 850 shares of stock allocated to unit 1J and the proprietary lease for unit 1J, took place together with the signing of such proprietary lease and the signing of the lease for the basement area below unit 1J on December 9, 2004. Aloyts asserts that at all relevant times, it was represented to her that Zamore was in a position to participate in the decision of the board. Aloyts states that she personally spoke to Zamore at the closing regarding her and Kovnat's intention to build a medical office in the unit, and that he made express verbal promises that he had sufficient control and influence over the board to ensure that the approval and cooperation from the board would be forthcoming. Aloyts claims that at the closing of unit 1J and the execution of the lease, Zamore reassured her that she and Kovnat had permission to build the medical office.

On December 9, 2004, the same date as the closing and the execution of the leases, plaintiff, in accordance with paragraph 45 of the Contract of Sale, loaned to defendants the principal sum of $147,000 pursuant to the promissory note now at issue, and both Aloyts and Kovnat (by Katz as her attorney-in-fact) executed the note as co-obligors. Paragraph 2 of the note provided that defendants promised to pay the principal sum of $147,000 with interest on any unpaid balance of this principal at the rate of eight percent per annum. Pursuant to paragraphs 3 and 4 of the note, defendants were to make monthly interest payments of $980 with the note maturing after the eighth anniversary of the first payment date, i.e., December 9, 2012. Paragraph 5 of the note provided that in addition to accrued interest of $980 per month, late fees of $150 would be paid by defendants for any payment of interest and principal not paid within 10 days of the due date. Paragraph 8 of the note required defendants to give plaintiff a security interest in the shares of stock allocated to unit 1J and the proprietary lease and provided that if defendants defaulted in any interest payment or failed to pay the principal amount to plaintiff on the maturity date, plaintiff's rights were as set forth in the security agreement in addition to whatever other rights plaintiff had under the note or at law. Paragraph 10 of the note further required defendants to reimburse plaintiff for its reasonable legal fees and court costs in the event of a default by defendants under the note or the security agreement. Pursuant to paragraph 12 of the note, if any payment were not paid when due, plaintiff was not required to present the note or make a demand for payment.

As referenced in paragraph 8 of the note, on December 9, 2004, the same date as the execution of the promissory note, Aloyts and Kovnat (by Katz) executed a security agreement (as referenced in paragraph 8 of the note), which, in order to guarantee that the loan by plaintiff would be repaid when due, gave plaintiff a continuing security interest in all of their right, ownership, and title to their shares of the cooperative corporation and the proprietary lease for unit 1J. [*6]

Construction of the medical office commenced in late 2005 or 2006. Although the lease was signed and the construction plans were approved, Jeff Berger (Berger), who was the president of 601 Tenants' cooperative board, having succeeded Sarah Sadikova, who (as noted above) was the president at the time defendants entered into their leases, decided that his apartment unit, which was located partially above the demised basement unit leased to defendants, was too close to the planned medical office, and he took action to stop defendants' plans. Berger did so with the agreement of 601 Tenants' cooperative board. There were several years of acrimonious litigation and construction was never resumed.

In 2006, defendants, as the plaintiffs therein, brought an action against 601 Tenants and Berger (*Aloyt v 601 Tenants Corp.* [Sup Ct, Kings County, index No. 30043/2006]) (the 601 Tenants action), seeking damages and injunctive relief based upon 601 Tenants and Berger's breach of their leases for commercial space, which were leased for the purpose of conversion to a medical office. The trial of the action took place on September 27, 2010 and continued intermittently until April 25, 2011. After the trial of that matter, the court determined that 601 Tenants and Berger breached the leases and acted in bad faith by revoking and/or pretending that approval of 601 Tenants' board of directors had not been given prior to Berger's tenure as president for such construction and that there had never been permission for construction of the medical office

The court, in its decision and order dated November 28, 2011 in the 601 Tenants action, found that the action of Berger, as the president of 601 Tenants, in falsely representing that there had been no approval for the construction by the "owner," established that 601 Tenants and Berger had effectively breached the basement lease between defendants and 601 Tenants by deliberately thwarting the purpose of this lease. The court found that 601 Tenants and Berger caused substantial damages to defendants in their refusal to cooperate in effectuating the purpose for their leases and by deliberately and intentionally, with full awareness of defendants' rights thereunder, breaching those contracts. The court awarded damages to defendants resulting from the breach of their lease for the basement apartment in the sum of $58,600, which sum included the payment of $16,000 to a contractor, the $21,000 deposit on unit 1J, and $21,600 in maintenance fees, with costs and interest from March 21, 2007. The court observed that there was no rent paid on the basement space since the basement lease provided for a rent concession commencing upon the consummation of the purchase of unit 1J and continuing until defendants commenced their business operation at the demised premises or until the issuance of the certificate of occupancy.

The court, in its November 28, 2011 decision and order, noted that the Contract of Sale had

indicated that there was a loan for at least part of the balance of the purchase price for unit 1J. It further noted that defendants had claimed that they paid $70,560 in mortgage payments on unit 1J, but found that there was no competent evidence offered at the trial of any mortgage payments actually made. Specifically, it found that the $70,560 [*7]in mortgage payments was not corroborated by documentation and that Aloyts did not testify that such payments were made. It, therefore, could not award defendants $70,560 as part of their damages against 601 Tenants and Berger with respect to the breach of the lease for the basement space.

Ultimately, the medical office was never built due to the wrongful actions taken by 601 Tenants' cooperative board of 601 Tenants and Berger.[FN1] In May 2013, plaintiff, who was not a party to the 601 Tenants action, brought this action, pursuant to CPLR 3213, to recover on the note by summary judgment in lieu of a complaint.

DISCUSSION

In order to prevail on a motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, based on a promissory note, a plaintiff is required to present evidence that the defendants executed the note and defaulted thereon (*see Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]; *Kehoe v Abate*, 62 AD3d 1178, 1180 [3d Dept 2009]; *Waehner v Northwest Bay Partners, Ltd.*, 30 AD3d 799, 800 [3d Dept 2006]; *Couch White v Kelly*, 286 AD2d 526, 527 [3d Dept 2001]). Where a plaintiff establishes its prima facie entitlement to summary judgment by submitting a copy of the note signed by the defendant and showing that the defendant was in default under the terms of the note, this shifts the burden to the defendants to raise a triable issue of fact as to a bona fide defense concerning the note (*see Zyskind*, 101 AD3d at 551; *Security Mut. Life Ins. Co. v Member Servs., Inc.*, 46 AD3d 1077, 1078 [3d Dept 2007]; *Waehner*, 30 AD3d at 801).

Plaintiff, in support of its motion, has submitted the affidavit of its general partner, Zamore, and its attorney's affirmation, which both set forth that as of May 2013, defendants owe it the total sum of $156,311.30. Zamore states that defendants have failed to comply with the terms and covenants of the note by defaulting in paying the principal sum of $147,000, plus the monthly installment interest that accrued and became due as of December 9, 2012. Plaintiff does not set forth the payments made by [*8]defendants on the note or the dates that they were made. In calculating the sum of $156,311.30, Zamore, in his May 2013 affidavit, specifies that there is due and owing under the note the principal sum of $147,000, plus accrued monthly interest of $980 for the months of December 2012, January 2013, February 2013, March 2013, April 2013, and May

2013 (prorated), plus late fees for these months of $150 per month, plus legal fees stated to be in the amount of $3,500. No affirmation of services is provided to support plaintiff's request for this amount of legal fees. Plaintiff seeks to recover this sum of money solely based upon the terms of the note, and it has not sought to repossess unit 1J under the security agreement.

In opposition to plaintiff's motion, Aloyts, in her sworn affidavit, points to the fact that Zamore was not only the original sponsor and holder of the unsold shares of the unit, but he was the chief executive officer of 601 Tenants and the vice-president and member of the board of 601 Tenants. She asserts that the fact that Zamore was a member of the board during the relevant time period is evidenced by the court's decision and order dated July 8, 2010 in an action by Zamore (*Zamore v Melkumova*, Sup Ct, Kings County, index No. 11219/2009), in which Zamore, as late as April 17, 2009, claimed to be elected as a director of 601 Tenants. Zamore, in response to defendants' assertions, does not claim that he was not a member of the board of directors of 601 Tenants during this time period.

Aloyts maintains that as the sponsor and vice-president and board member of 601 Tenants, Zamore controlled the cooperative board at the time that unit 1J was purchased and during key relevant times when the board was acting in bad faith and frustrating the purpose for which they purchased it, i.e., to build a medical office. Significantly, the court, in its November 28, 2011 decision and order in the 601 Tenants action, found that any effort by 601 Tenants to distance itself from Berger's deliberate efforts to thwart the purposes of defendants' lease could not succeed since the board was aware of the duly entered lease with them and of the ensuing litigation and took no action to prevent Berger's sabotage of their rights thereunder.

Aloyts notes that the Contract of Sale, which expressly referred to the terms of payment by the purchase money note, was specifically conditioned upon her and Kovnat successfully obtaining a lease to the basement space, which was for the purpose of being permitted to build a medical office by combining the leased premises and unit 1J. She maintains that payment under the note was, therefore, inextricably intertwined with the Contract of Sale, the leases, and the condition that she and Kovnat would construct the medical office.

Kovnat has submitted the affidavit of her father, Katz. Katz explains that Kovnat's reason for entering into the lease and note was for the purpose of the conversion of unit 1J and the basement space into a medical office for investment purposes, and that once the medical office was established, Kovnat was supposed to have her investment returned, be relieved of the liability under the note, and receive certain income from the rent paid by the doctors that were going to practice at

the medical office. Kovnat (through her [*9]attorney and Katz's affidavit) asserts that there are issues of material fact as to the representations regarding the approval of the construction of the medical office that were made by plaintiff (through Zamore) at the initiation of the loan, upon which she and Aloyts relied, and that there were also representations made by plaintiff during the life of the loan, upon which they further relied. Kovnat seeks to interpose a counterclaim for rescission based upon the alleged fraudulent inducement by plaintiff with respect to the execution of the note and the purchase of unit 1J and the alleged actions of plaintiff and the cooperative board which prevented her from converting unit 1J into a medical office, rendering it unusable by for her and Aloyts' intended purpose.

Kovnat's attorney states that plaintiff, as the cooperative's sponsor, is held to a higher standard, and was required to amend the offering plan to reflect that a unit in the cooperative was going to be converted into a medical office. Katz asserts that plaintiff, as the cooperative's sponsor and the vice-president of the cooperative and board member of the cooperative, did not reveal these conflicts of interest and represented that defendants would be able to convert the unit into a medical office. Katz further asserts that plaintiff was a vocal opponent of the conversion process immediately after the closing. Defendants seek discovery, including the deposition of plaintiff and its principal, Zamore, about the representations made by plaintiff to the board at the time of the sale, and its conflict of interest, as a seller/sponsor and vice-president and board member of the cooperative, in connection with the sale.

Defendants assert, as a defense to plaintiff's instant motion, that Zamore (and thereby plaintiff) was an active participant in thwarting their efforts to construct the medical practice. They maintain that the breach of the leases and Zamore's bad faith should defeat plaintiff's right to collect on the note. Defendants state that they have defenses **[FN2]** of breach of the leases, fraud in the inducement, rescission, and breach of the covenant of good faith and fair dealing, which are inextricably linked to the underlying transaction of which the note was only a part.Plaintiff argues, in reply, that neither Zamore's oral statements nor the extrinsic documents can be used to preclude enforcement of its note. It contends that the court cannot consider oral statements made by its principal or defendants because they constitute parol evidence. Plaintiff asserts that while the Contract of Sale contained a contingency that the lease for the basement must [*10]be obtained, defendants obtained that lease and proceeded to closing, satisfying this contingency. Plaintiff argues that there is no contingency stated in the note itself which conditions its repayment upon defendants' ability to establish a medical office. It contends that the note does not make reference to either the lease or the Contract of Sale and that it did not provide that the conversion of the premises to a

medical office was a condition to the repayment of the loan.

The court, however, finds that plaintiff's note does not stand alone but, rather, it is inextricably intertwined with the underlying purchase of the cooperative unit for a specific purpose, which purpose was found to be deliberately thwarted in the 601 Tenants action due to a breach of the leases and acts of bad faith. The covenant of good faith and fair dealing implicit in every contract requires that " neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]).

Notably, the note does not state that the obligations to make the payments provided for in such note are absolute and unconditional and not subject to any defense, set-off, counterclaim, rescission, recoupment, or adjustment whatsoever, and there is no general merger clause or statement that the unenforceability of the underlying liabilities shall not affect or be a defense to the note (*compare Zyskind*, 101 AD3d at 551). Thus, the note does not preclude a fraudulent inducement defense (*see id*.).

Since the note was obtained as a purchase money note in connection with the Contract of Sale and the entry into the leases for the intended purpose of building and operating a medical office, which was interfered with and frustrated and never occurred, the breach of the lease is inextricably intertwined with the amounts owed under the note. Therefore, with respect to plaintiff's action to enforce the note, the court must make reference to the Contract of Sale, the lease for the basement space, and the actions taken by plaintiff's general partner, Zamore, which, defendants assert, constituted bad faith.

It is true that "[a] breach of a related contract is generally not a defense to nonpayment of an instrument for money only" (*Fitzpatrick v Animal Care Hosp., PLLC*, 104 AD3d 1078, 1080 [3d Dept 2013]; *see also Ingalsbe v Mueller*, 257 AD2d 894, 895 [3d Dept 1999]; *A+Assoc. v Naughter*, 236 AD2d 655, 656 [3d Dept 1997]). "However, where the note and the contract are inextricably intertwined' as part of the same transaction, a breach of the related contract may create a defense to payment on the note" (*Fitzpatrick*, 104 AD3d at 1080, quoting *Couch White*, 286 AD2d at 528 [internal quotation marks and citation omitted]; *see also Lorber v Morovati*, 83 AD3d 799, 800 [2d Dept 2011]; *Vecchio v Colangelo*, 274 AD2d 469, 471 [2d Dept 2000]; *Ingalsbe*, 257 AD2d at 895; *A+Assoc.*, 236 AD2d at 656). Thus, "[w]hile generally the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, that rule

does not apply where . . . the contract and instrument are intertwined" (*Lorber*, 83 AD3d at 800; *see also Sarantopoulos v E-Z Cash ATM*, Inc., 35 [*11]AD3d 708, 709-710 [2d Dept 2006]; *Cohen v Marvlee, Inc.*, 208 AD2d 792, 792 [2d Dept 1994]; *Vecchio*, 274 AD2d at 471; *Inpar Bldg. Corp. v Veoukas*, 143 AD2d 810, 811 [2d Dept 1988]).

Here, the promissory note is "inextricably intertwined" with the underlying Contract of Sale for the purchase of the shares of unit 1J and the basement space, and the proprietary lease for unit 1J and the lease for the basement space, which were found to be breached (*see A+Assoc.*, 236 AD2d at 656). Indeed, as discussed above, the very purpose of the purchase of unit 1J and the execution of the note to finance this purchase was defeated by the breach of the leases, which resulted in defendants' inability to construct the medical office.

The assertions of Aloyts and Katz as to plaintiff's alleged representations, by its partner, Zamore, and their reliance thereon, if proven, would undermine the underlying transaction. The sworn statements of Aloyts and Katz, together with the documents, including the Contract of Sale, the security agreement, the leases, and the letter dated June 4, 2004, and the court's November 28, 2011 decision and order in the 601 Tenants action, are sufficient to raise triable issues of fact so as to defeat plaintiff's motion (*see Lorber*, 83 AD3d at 800; *Kehoe*, 62 AD3d at 1180-1181; *Couch White*, 286 AD2d at 528; *Ingalsbe*, 257 AD2d 894, 895 [1999]).

Plaintiff, in reply, nevertheless asserts that the court should disregard Katz's affidavit because Kovnat's power of attorney, which Katz used to execute the Contract of Sale, was limited to the purchase of unit 1J and the lease of the basement and the closing of the Contract of Sale. Plaintiff contends that, therefore, the affidavit of Katz cannot be used as a basis to oppose its summary judgment motion. This contention is wholly without merit. The court notes that the power of attorney provides that Katz was granted authority thereunder to act as Kovnat's attorney-in-fact with respect to "claims and litigation," as well as "real estate transactions," "all other matters," and the purchase of unit 1J and the lease of the basement. In any event, Katz, in submitting his affidavit, is not acting pursuant to the power of attorney on Kovnat's behalf, but, rather, is stating what occurred based upon his own personal knowledge due to his own involvement in the transaction and the conversations and personal dealings he had with Zamore.

Plaintiff further argues that because defendants never joined it as a party nor claimed that it breached the note or that it was in any way connected to their claim against 601 Tenants and Berger in the 601 Tenants action, they are precluded by the doctrines of res judicata and collateral estoppel from raising the defenses to repayment of the note which they now seek to assert. This argument is

devoid of merit. The doctrine of res judicata dictates that, "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Further, under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims [*12]arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

Here, plaintiff was not a party to the 601 Tenants action, and the doctrine of res judicata only applies to parties and those in privity with them (*see Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 92-93 [1st Dept 2013]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-474 [1st Dept 2011]). To the extent that plaintiff is arguing that it is in privity with 601 Tenants by contending that the doctrine of res judicata is applicable to this action as concerns the November 28, 2011 decision and order in the 601 Tenants action, plaintiff appears to be effectively conceding that it is bound by the court's determination that it breached the lease and thwarted and frustrated defendants' ability to construct the medical office.

Although plaintiff is arguing that such a breach of a lease by it would not preclude its recovery on the note because such recovery involves a different claim, the claim in this action on the note is raised by plaintiff, not defendants. Defendants are simply seeking to assert defenses to this claim by plaintiff based upon the already established breach of the lease since the lease is directly related to the reason the note was executed and given to plaintiff. Consequently, plaintiff cannot rely upon the doctrine of res judicata to avoid the defenses raised by defendants.

Collateral estoppel similarly applies to parties and to those in privity with the parties in the prior action (*see Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 922 [1st Dept 2010]). "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see also Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). "[C]ollateral estoppel allows the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided'" (*Ryan*, 62 NY2d at 500, quoting *Gramatan Home Invs. Corp.*, 46 NY2d at 485). "What is controlling is the identity of the issue which has necessarily been decided in the prior action or

proceeding" (*Ryan*, 62 NY2d at 500). Here, there was no issue decided against defendants in the 601 Tenants action which is controlling or would bar any defenses raised by defendants. Thus, the doctrine of collateral estoppel does not bar any defenses raised by defendants in response to plaintiff's claim against them.

Plaintiff additionally argues that defendants cannot assert any defenses because they would be time-barred. Plaintiff asserts that the Statute of Limitations for breach of the Contract of Sale accrued prior to October 10, 2006, when defendants commenced the 601 Tenants action, and that, therefore, any claims based upon a breach of the Contract of Sale or breach of the lease would have expired on October 10, 2012 (*see* CPLR 213 [2]). [*13]It also asserts that any claims alleged by defendants based upon negligence (which do not appear to be alleged by defendants) would have expired on October 10, 2009 (*see* CPLR 214). Defendants, however, previously interposed a claim of breach of the lease in the 601 Tenants action which was resolved in their favor, and the issue now presented is the extent to which plaintiff participated in the thwarting of the leases so as to preclude or offset its recovery on its note. The court further finds that consideration of the issue of the Statute of Limitations, at this juncture, would be premature, prior to the interposing of a formal complaint and answer containing counterclaims.

Plaintiff also argues that Kovnat's counterclaim is premature since it is based upon documents extrinsic to the note and parol evidence, which cannot be litigated in this action pursuant to CPLR 3213 based solely upon the terms of the note. Plaintiff contends that this counterclaim cannot defeat its motion for summary judgment since it is for rescission of the note based upon breach of the lease and the Contract of Sale, and not based upon the terms of the note itself. However, "where it appears that the transactions upon which the counterclaim is based are inseparable from and may constitute a defense to the main claim," it may be interposed in response to a motion pursuant to CPLR 3213 (*Harris v Miller*, 136 AD2d 603, 603 [2d Dept 1988]). The court thus rejects plaintiff's argument in view of the fact that Kovnat's counterclaim relates to a defense to plaintiff's note and they are inextricably intertwined.

In view of the existence of material triable issues of fact, plaintiff's motion for summary judgment in lieu of complaint must be denied (*see Lorber*, 83 AD3d at 800; *Sarantopoulos*, 35 AD3d at 709-710; *Cohen*, 208 AD2d at 792; *Vecchio*, 274 AD2d at 471; *Inpar Bldg. Corp.*, 143 AD2d at 811). Where, as here, a motion pursuant to CPLR 3213 is denied, the moving and answering papers may be deemed the complaint and answer, respectively, unless the court orders otherwise. Since defendants have specifically requested permission to interpose an answer and

counterclaims, plaintiff shall be directed to serve and file a formal complaint, and defendants shall be directed to serve an answer with counterclaims, and this action shall proceed as an ordinary contested action (*see Menicucci Villa & Associates, PLLC v Alovic*, 36 Misc 3d 140[A], 2012 NY Slip Op 51460[U], *1 [App Term 2012]; *Capital Constr. Mgt. of NY, LLC v East 81st*, LLC, 28 Misc 3d 259, 265 [Sup Ct, NY County 2010]; *Emperor Indus., Inc. v Rothbaum*, 17 Misc 3d 1125[A], 2007 NY Slip Op 52142 [U], *3 [Sup Ct, NY County 2007]).

CONCLUSION

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is denied. Plaintiff is directed to serve and file a formal complaint within 20 days after service of a copy [*14]

of this decision and order with notice of entry, with defendants' respective answers, including any counterclaims, to be served within 20 days after the service of the complaint.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Aloyts asserts that construction also could not be restarted because after the November 28, 2011 decision and judgment was rendered in their favor in the 601 Tenants action and before she and Kovnat could restart construction, major systems of the building, including the portion of the premises that was covered by the lease were completely devastated by Hurricane Sandy (in October 2012) as was much of the Brighton Beach area. Aloyts further asserts that she also has had a "falling out" with Kovnat and Katz with respect to another real estate project, in which Kovnat commenced litigation against her (*Kovnat v Aloyts*, Sup Ct, Kings County, 16209/2012). She maintains that the dispute between her and Kovnat "spilled over into the ownership of the unit," and that although she and Kovnat (through Katz) shared the initial down payment equally, thereafter, every interest payment under the note, all of the construction costs, and all of the legal fees were paid solely by her.

Footnote 2: Aloyts also asserts that she also recently learned that before she purchased unit 1J and entered into the lease, Zamore and the board had many conversations regarding the fact that the unit was considered to be uninhabitable due to vibrations and noise from the boiler system and that,

as a result, there was a longstanding argument between Zamore and the board regarding permitting the unit to be used for a commercial purpose. She states that this conflict and defect were actively concealed from her and since she never slept in the unit, she was not aware of this problem.

Return to Decision List