

SUPREME COURT-STATE OF NEW YORK
I.A.S. PART 28-NASSAU COUNTY

PRESENT:

HON: LEONARD B. AUSTIN
Justice of the Supreme Court

Motion R/D: 6/7/00
Submission Date: 6/7/00
Motion Sequence No.:001/MOT D

BONNIE QUINN,

Plaintiff,

-against-

Attorney for Plaintiff
David W. Chefec, P.C.
99 Jericho Turnpike
Jericho, New York 11753

ERNST BARTELS, MARK GOLDMAN,
EXECUTIVE COMMERCIAL AND
RESIDENTIAL CORP. AND EXECUTIVE
MORTGAGE BANKERS, LTD.,

Defendants.

Attorney for Defendant (Bartels)
Ernst Bartels, *Pro Se*
548 Maude Street
South Hempstead, New York 11550

Attorney for Defendant (Goldman)
Mark Goldman, *Pro Se*
585 Stewart Avenue, Suite 790
Garden City, New York 11550

Attorney for Defendant (Executive)
Executive Commercial and
Residential Corp. a/k/a Executive
Mortgage Bankers, Ltd., *Pro Se*
500 Bi-County Boulevard
Farmingdale, New York 11735

Upon the following papers read on Plaintiff's motion seeking summary judgment in lieu of complaint pursuant to CPLR 3213:

- Notice of Motion;
- Plaintiff's Affidavit and Counsel's Affirmation in Support and supporting papers;
- Mark Goldman's Affidavit in Opposition to Summary Judgment; and
- Mark Goldman's Memorandum of Law;

BACKGROUND

Three promissory notes are involved in this case. On June 1, 1994, Plaintiff loaned Defendant Ernst Bartels ("Bartels") and Dean Graber ("Graber") the sum of \$75,000.00. On January 30, 1995, Plaintiff loaned Bartels an additional \$75,000.00. Bartels agreed to repay Plaintiff by executing promissory notes. Each note provided for interest at ten (10%) percent per annum payable as interest only and becoming fully due forty-eight (48) months later.

On December 1, 1997, these two (2) notes were consolidated into and superceded by a single third note, which was made by Defendants Executive Commercial Residential Corp. a/k/a Executive Mortgage Bankers, Ltd. ("Executive"), and Bartels, in the amount of \$150,000.00. As of February 1, 2000, the December 1, 1997 note became due and owing. In this new note, Graber was deleted as an obligor. Defendant Mark Goldman ("Goldman") executed the December 1, 1997 note as a guarantor.

Plaintiff made several demands for payment, followed by an attorney's formal demand sent to all Defendants. Since no moneys have been paid to date, Plaintiff demands that a judgment be entered for the principal sum plus interest. Although the December 1, 1997 note makes no provision therefore, Plaintiff also seeks legal fees in the amount of \$5,000.

The only papers in opposition were filed by Goldman, claiming that summary judgment should not be awarded to Plaintiff because Goldman was coerced into signing the third note as a guarantor. Approximately three and one-half years ago, Bartels and Graber retained Goldman for the purpose of

representing Executive in loan closings. As time passed, and especially in 1997, Goldman became more involved in Executive's affairs, and less focused on his personal law practice, then representing Executive in extensive contract negotiations, lease negotiations, employee disputes, vendor disputes, and more. No increase in compensation was granted. As a result of his increased involvement with Executive, Goldman allegedly allowed his law practice to deteriorate.

Prior to December 1, 1997, Goldman alleges that Bartels confronted him and ordered him to prepare the third note in the amount of \$150,000.00, and personally guarantee it, if he wished to continue representing Executive. Since his law practice had deteriorated, Goldman felt he had no choice but to personally guarantee the third note. For these reasons, Goldman asserts that summary judgment should not be granted in favor of Plaintiff.

DISCUSSION

An aggrieved party is permitted to seek an expedited determination on a claim when it involves enforcement of "an instrument for the payment of money only." CPLR 3213. See Interman Industrial Prod. Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151, 371 N.Y.S.2d 675 (1975); and Nasti Sand Co. v. Alman Landscaping Corp., 34 A.D.2d 554, 309 N.Y.S.2d 697 (2nd Dept. 1970). Only where the instrument is clear and unambiguous with respect to the payment of money can a summary judgment be granted. Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136, 295 N.Y.S.2d 752 (1st Dept. 1968), *aff'd.* 29 N.Y.2d 617, 324 N.Y.S.2d 410 (1971). See also Gittleson v. Dempster, 148

A.D.2d 578, 539 N.Y.S.2d 46 (2nd Dept.), *lv. app. den.*, 74 N.Y.2d 603, 542 N.Y.S.2d 518 (1989).

Here, Plaintiff has made a prima facie showing that the December 1, 1997 note is for the payment of money only, and that payments due have not been made. Thus, the motion meets the criteria laid out in CPLR 3213. Plaintiff's motion for accelerated judgment is **granted**.

With regard to the claim for attorney's fees, the first two (2) notes, dated June 1, 1994 and January 30, 1995, include the following provision for the payment of counsel fees in the event of a default by the makers:

It is further agreed and understood that in the event of a default in the payment of the note executed on the day herewith, the Maker shall be responsible for and shall pay all of the Payee's attorneys' fees and any and all other costs of the Payee in connection with the collection of the monies due hereunder.

However, no similar provision is included in the third note dated December 1, 1997. Therefore, the claim for attorney's fees is **denied**.

Finally, without specificity Plaintiff calculates interest due from the earlier notes. This is impermissible. The clear, unambiguous language of the December 1, 1997 note is that it supercedes the prior notes. Hence, whatever interest was due thereunder was either paid or subsumed therein. Interest at ten (10%) percent per annum is calculated to the date of this Order as follows:

12/1/97 – 11/30/98	\$15,000.00
12/1/98 – 11/30/99	\$15,000.00
12/1/99 – 5/31/00 6 months @ \$1,250.00 per month	\$ 7,500.00
6/1 – 6/15/00 ½ month @ \$1,250.00 per month	\$ 625.00
Total interest due	\$38,125.00

Finally, regarding Goldman's claim that he was coerced by Bartels into personally guaranteeing the third note, this claim is more properly brought by Goldman against his co-defendants. Goldman is free to commence an action for indemnification, if he is so advised. However, as to this Plaintiff, she permitted the third note to supersede the two earlier notes, waived counsel fees and released Graber in consideration of the terms and conditions of the third note, including Goldman's personal guarantee. Goldman's claim does not raise triable issues of fact so as to defeat accelerated summary judgment herein.

Accordingly, it is,

ORDERED, that the portion of Plaintiff's motion for summary judgment in lieu of complaint as to the note principal and interest therein is **granted**; and it is,

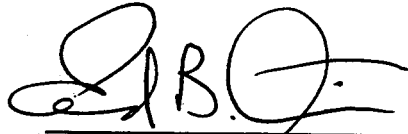
ORDERED, that the portion of Plaintiff's claim for attorney's fees in the amount of \$5,000.00 is **denied**; and it is,

ORDERED, that Plaintiff shall be entitled to enter judgment in the principal sum of \$150,000.00 together with interest in the sum of \$38,125.00 for a total of \$188,125.00 plus costs and disbursements as taxed by the Clerk of the Court.

QUINN V. ERNST BARTELS
Index No. 006680-00

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
June 22, 2000

A handwritten signature in black ink, appearing to read 'L.B. Austin', written over a horizontal line.

Hon. LEONARD B. AUSTIN, J.S.C.