

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

MARTIN KLEINMAN, x

Plaintiff,

- against -

JOSEPH S. KLEINMAN and
BLIMA KLEINMAN,

Defendants. x

Index
Number 18514 2007

Motion
Date December 5, 2007

Motion
Cal. Numbers 9, 10

Motion Seq. Nos. 1, 2

The following papers numbered 1 to 37 read on this motion by plaintiff for summary judgment in lieu of complaint pursuant to CPLR 3213 for the principal sum of \$300,000.00, together with attorneys' fees and costs and disbursements; this cross motion by defendant Blima Kleinman to void the subject promissory note, to join this action for trial with the matrimonial action, Kleinman v Kleinman, Index No. 11358/2007, pursuant to CPLR 602(a), or for leave to deem the cross-motion papers to constitute an answer with affirmative defenses, counterclaims and cross claims, to award punitive and exemplary damages against plaintiff Martin Kleinman and defendant Joseph Kleinman "for fraud," and to award costs and expenses, including attorneys' fees; and this motion by plaintiff for a protective order quashing the subpoenas duces tecum issued by defendant Blima Kleinman, for an award of reasonable attorneys' fees and costs in connection with the motion, pursuant to 22 NYCRR 130-1.1 and the subject note, and to impose sanctions against defendant Blima Kleinman and her counsel, pursuant to 22 NYCRR 130-1.1; and this cross motion by defendant Blima Kleinman to compel the nonparty law firm of Mallow, Konstam & Hager, P.C. to comply with the subpoena duces tecum, or in the alternative, to compel plaintiff to produce those documents demanded in the proposed notice to produce; this cross motion by the nonparty Mallow, Konstam & Hager, P.C. for a protective order quashing the subpoena issued by defendant Blima Kleinman, for an award of attorneys' fees in relation to this cross motion and to impose sanctions upon defendant Blima Kleinman and her counsel.

Papers
Numbered

Notices of Motion - Summons - Affidavits - Exhibits.....	1-12
Notices of Cross Motion - Affidavits - Exhibits..	13-25
Answering Affidavits - Exhibits.....	26-37

Upon the foregoing papers it is ordered that the motions numbered 9 and 10 on the motion calendar for December 5, 2007 are joined for determination as follows:

In this action to recover on a promissory note, plaintiff moves for summary judgment in lieu of complaint, pursuant to CPLR 3213. In support of the motion for summary judgment in lieu of complaint, plaintiff offers, among other things, his affidavit, and a copy of the promissory note dated May 16, 2006, a demand notice, and the affidavits of service of the copy of the summons and notice of motion. Plaintiff avers that defendant Joseph S. Kleinman, his son, and defendant Blima Kleinman, Joseph's wife, executed and delivered to him a promissory note dated May 16, 2006, payable to him "in full on demand" in the principal amount of \$300,000.00. Plaintiff also avers that he served defendants with a notice dated June 27, 2007, demanding the balance due under the note. Plaintiff further avers that defendants are in default under their obligations under the note by failing to pay the principal amount due in accordance with the terms of the note and the June 27, 2007 demand for payment. Plaintiff admits that defendant Blima Kleinman provided him with notice of dishonor on or about July 4, 2007.

At the outset, the court notes that defendants Joseph S. Kleinman and Blima Kleinman are presently involved in a divorce proceeding, entitled Joseph S. Kleinman v Blima Kleinman, (Supreme Court, Queens County, Index No. 11358/2007). Defendant Joseph S. Kleinman has not appeared in the instant action. Nevertheless, the law firm of Mallow, Konstam & Hager, P.C., the counsel representing defendant Joseph S. Kleinman in the matrimonial action, has appeared herein, by notice of cross motion, in an effort to quash the subpoena duces tecum served upon it by defendant Blima Kleinman.

Counsel for plaintiff and defendant Blima Kleinman entered into a stipulation dated September 24, 2007, consenting to adjourn the return date of plaintiff's motion for summary judgment in lieu of complaint until October 24, 2007, and providing that defendant Blima Kleinman serve her opposition papers by overnight mail on October 10, 2007. Although defendant Blima Kleinman's opposition papers were untimely served, pursuant to the stipulation, the motion for summary judgment thereafter was adjourned by the court,

to November 7, 2007, and subsequently, that motion and the cross motion by defendant Blima Kleinman, along with the separate motion by plaintiff and cross motions by defendant Blima Kleinman and Mallow, Konstam & Hager, P.C. regarding the subpoenas duces tecum and sanctions were adjourned, pursuant to stipulations dated November 5, 2007 and November 13, 2007, and the motions and cross motions were submitted on December 5, 2007 (CPLR 2004). Plaintiff was given the opportunity to submit reply papers and did so. Furthermore, counsel for defendant Blima Kleinman has offered a reasonable excuse for her delay in serving the opposition papers, and under such circumstances, the court shall accept them and consider them in an exercise of its discretion.

In support of his motion for summary judgment in lieu of complaint (see CPLR 3213), plaintiff has established a prima facie entitlement to judgment as a matter of law with respect to defendant Blima Kleinman, by producing the promissory note executed by defendants and demonstrating that defendants defaulted in payment thereon (see Gross v Fruchter, 230 AD2d 710 [1996]; Silber v Muschel, 190 AD2d 727 [1993]).

Plaintiff is not a holder in due course (see Uniform Commercial Code §3-305), and therefore, is subject to all defenses available in an action on a simple contract (see Uniform Commercial Code §3-306[b]). Defendant Blima Kleinman has raised triable issues of fact relative to her arguable defenses of incapacity at the time of the execution of the subject note, fraud in the inducement, conspiracy to commit fraud, unconscionability and lack of consideration (see Lackmann Food Service, Inc. v E & S Vending Co., Inc., 125 AD2d 366 [1986]). Defendant Blima Kleinman asserts that the promissory note itself is the product of fraud committed by defendant Joseph S. Kleinman in collusion with plaintiff in anticipation of Joseph's divorce action against Blima. She further asserts this action is in furtherance of the fraudulent scheme, designed to deprive her from recovering her share of the equitable distribution of marital assets at the time of divorce, or later to divest her of any assets which may be awarded to her as part of any equitable distribution in the matrimonial action (see generally Russell v Russell, 128 AD2d 515 [1987], appeal dismissed 70 NY2d 783 [1987]). It is notable that defendants Joseph S. Kleinman and Blima Kleinman are joint and several obligors on the subject note, defendant Joseph S. Kleinman is in default in the action, and plaintiff admittedly has agreed to pay Joseph's legal fees in the pending matrimonial action. The motion by plaintiff for summary judgment in lieu of complaint is denied.

That branch of the cross motion by defendant Blima Kleinman for summary judgment in her favor, declaring the promissory note to be void is denied inasmuch as issues of fact exist about the claimed invalidity of the note and the existence of any

consideration to support it (see Zuckerman v City of New York, 49 NY2d 557 [1980]). That branch of defendant Blima Kleinman's cross motion to award punitive and exemplary damages against plaintiff Martin Kleinman and defendant Joseph Kleinman "for fraud," and to award costs and expenses, including attorneys' fees is denied at this juncture.

Plaintiff's time to serve and file a complaint is extended until 20 days after service upon him of a copy of the order, with notice of entry, and defendant Blima Kleinman shall serve her answer within 20 days after service of the complaint.

With respect to the motion by plaintiff and the cross motion by nonparty Mallow, Konstam & Hager, P. C. for a protective order, and the cross motion by defendant Blima Kleinman to compel Mallow, Konstam & Hager to comply with the subpoena duces tecum, defendant Blima Kleinman served two subpoenas duces tecum dated October 11, 2007 upon nonparties, i.e. Mallow, Konstam & Hager, P.C. and Margo Spitzer, M.D., Blima Kleinman's treating psychiatrist.

To the extent plaintiff sought to quash the subpoena duces tecum served upon Dr. Spitzer (see generally McDaid v Semegran, 16 Misc3d 1102(A) [2007]); Matter of MacLeman, 9 Misc3d 1119(A) [22005]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2304:1, at 275), Dr. Spitzer has already produced the items sought. That branch of the motion by plaintiff seeking a protective order to quash the subpoena duces tecum served upon Dr. Spitzer is denied as moot.

With respect to the subpoena duces tecum served upon Mallow, Konstam & Hager, P.C., CPLR 3120(2) requires a minimum of 20 days notice be given when serving a subpoena duces tecum. Defendant Blima Kleinman, however, made the subpoena duces tecum returnable on October 15, 2007, only four days after the date of the subpoena. Under such circumstances, that branch of the motion by plaintiff, and that branch of the cross motion by Mallow, Konstam & Hager, P.C., for a protective order quashing the subpoena duces tecum issued to Mallow, Konstam & Hager, P.C. is granted, and the cross motion by defendant Blima Kleinman to compel Mallow, Konstam & Hager, P.C. to comply with the subpoena duces tecum is denied.

That branch of the motion by plaintiff for an award of reasonable attorneys' fees and costs in connection with the motion, pursuant to 22 NYCRR 130-1.1, and to impose sanctions against defendant Blima Kleinman and her counsel, pursuant to 22 NYCRR 130-1.1, is denied. That branch of the cross motion by Mallow, Konstam & Hager, P.C. seeking an award of attorneys' fees in relation to its cross motion and to impose sanctions upon defendant Blima Kleinman and her counsel is denied.

With respect to the alternative branch of the cross motion by defendant Blima Kleinman to compel plaintiff to produce certain documents is denied as premature. Defendant Blima Kleinman is free to serve such proposed notice to produce, and if plaintiff fails to respond to or comply with such notice, she then may move to compel a response or compliance (CPLR 3124).

That branch of the cross motion by defendant Blima Kleinman to join this action for trial with the matrimonial action, Kleinman v Kleinman, Index No. 11358/2007, pursuant to CPLR 602(a), is granted. A separate index number, request for judicial intervention and note of issues shall be filed for each action.

The title for the actions combined for joint trial shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JOSEPH KLEINMAN, x

Plaintiff, Action No. 1

- against - Index No. 11358/2007

BLIMA KLEINMAN,

Defendant. x
MARTIN KLEINMAN, x

Plaintiff, Action No. 2

- against - Index No. 18514/2007

JOSEPH S. KLEINMAN and
BLIMA KLEINMAN,

Defendants. x

A copy of this order with notice of entry shall be served on all parties to the actions joined for trial, the Clerk of Queens County, and at the time of the filing of the notes of issue, on the Clerk of the Trial Term Office.

Dated: March 3, 2008

J.S.C.