

**MEMORANDUM**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

-----X  
**MARIO TARRICONE and VINCENT TARRICONE,**  
**Plaintiff(s),**

**-against-**

**JB TEXTILE, INC., JAMES SON, individually and**  
**DYNAMITE BEVERAGE HOUSE, Inc. As successor**  
**interest to JD TEXTILE, Inc.,**

**Defendants.**

**Dated: March 5, 2007**

**Index No. 25630/06**  
**Motion Date: 2/28/06**  
**Motion Cal. No. 58**

-----X  
Plaintiffs' motion pursuant to CPLR§3213 is granted.

This is an action to recover on a promissory note brought by motion for summary judgment in lieu of complaint pursuant to CPLR§3213. According to plaintiffs, on January 27, 2006, defendants executed three instruments in connection with their purchase of a business from plaintiffs. The first instrument indicates that Defendants James Son and JB Textile, Inc. entered into an agreement requiring defendants to, inter alia, pay plaintiffs \$635,000 over a period of thirty-six months at an interest rate of 5.28634%, resulting in an interest-only monthly payment of \$2,797.36 in the first year and three annual balloon payments of \$211,666.67. The second instrument indicates that Defendants James Son and JB Textile, Inc. entered into an agreement requiring defendants to, inter alia, pay plaintiffs \$500,000 over a period of thirty-six months at an interest rate of 5.28634%, resulting in an interest-only monthly payment of \$2,202.64 in the first year and three annual balloon payments of \$166,666.66. The third instrument indicates that Defendants James Son guaranteed the payment of money required to plaintiffs pursuant to Note 2.

Plaintiffs claim that defendants defaulted prior to the making of any principle payments on Notes 1 and 2, and plaintiffs have demanded payment in full of all amounts due under the Notes. Despite these demands, defendant have refused to pay the outstanding balance under the Notes. As such, plaintiffs claim that defendants are in breach of the terms of the Notes and they owe plaintiffs on Note 1, the sum of six hundred thirty-five thousand (\$635,000.00) dollars with interest thereon from September 1, 2006; (b) on Note 2, in the sum of five hundred thousand (\$500,000.00) dollars with interest thereon; and (c) on the Guarantee in the amount of five hundred thousand (\$500,000.00) dollars with interest thereon from September 1, 2006, against James Son in his individual capacity only, together with the costs and disbursements of this action.

Plaintiffs have submitted copies of the Promissory Notes and the Personal Guaranty, and an affidavit of plaintiff Vincent Tarricone, indicating the above stated facts. This proof is sufficient to establish plaintiff's initial burden of demonstrating its entitlement to judgment as a matter of law. Sacco v Sutera, 266 AD2d 446,(2d. Dept. 1999.) Therefore, it became incumbent upon the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact with respect to a bona fide defense. *Id.*

Defendant opposes this motion on the ground that the promissory note is not an instrument for the payment of money only within the meaning of CPLR§3213. Defendants also claim that plaintiffs used inappropriate assurances to defendants to induce them to attend the closing without their attorney and to sign and execute the Notes and Guaranty. Based on these allegations that they were fraudulently induced to enter the contract, they claim that the Notes and Guaranty should be rescinded. They have submitted an affidavit of James Son that indicates, inter alia, that during negotiations for the sale of plaintiffs' distribution business, plaintiffs made inaccurate representations regarding their having an exclusive license to distribute Arizona beverages, about their annual sales, and about their lease agreement. Defendants also claim, inter alia, that plaintiffs insisted on closing this deal very quickly and stressed that any contract signed would not be binding. Defendants claim that plaintiffs actions led to them signing the agreements with neither appropriate legal consultation nor proper due diligence being made.

Regarding the Notes and guarantee, contrary to defendants contention, the promissory note in this case is an instrument for the payment of money only within the meaning of CPLR§3213. CPLR 3213 provides in pertinent part, "When an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." It is well settled that "an instrument qualifies for CPLR 3213 treatment ... if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms". Interman Indus. Prods. v R. S. M. Electron Power, 37 NY2d 151 155 (1975); East New York Savings Bank, v. Baccaray et al., 214 AD2d 601,(2d Dept. 1995 ).

Furthermore, § 3-104 of the Uniform Commercial Code ("UCC") states in pertinent part:

(1) Any writing to be a negotiable instrument within this Article must be signed by the maker or drawer; and contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article. . .

A writing which complies with the requirements of this section is . . . a "note" if it is a promise other than a certificate of deposit.

In the present case, the subject notes and guarantee contain an unequivocal and

unconditional promise by the defendants to pay to the plaintiffs the money for the services provided. The notes define a default as the failure to make the agreed upon payments and sets forth the consequences of a default-one of them being the acceleration of payments on the total amount owed. Therefore, defendants have failed to establish the existence of any triable issues of fact or meritorious defense regarding the subject instruments being for the payment of money only. CPLR 3213.

Similarly unavailing are defendants claims that the instruments were the result of plaintiffs fraud. It is well settled that "[a] contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed . A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties ... 'Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing' ... However, a court may permit the introduction of extrinsic evidence if the contract is ambiguous ... Whether a contract is ambiguous is a question of law for the court" Kailasanathan v Mysorekar, 234 A.D.2d 425, 426 (2d Dept 1996), quoting W.W.W. Assocs. v Giancontieri, 77 N.Y.2d 157 (1990.) JJFN Holdings, v Monarch, 289 AD2d 528 (2d Dept 2001.) Finally, the existence of a merger clause is evidence that the parties intended the writing to be final and complete. Jarecki v. Shung Moo Louie, 95 NY2d 665 (2001) Its purpose is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing. *Id.*

Here, merger clauses existed in all of the instruments. Paragraph 7 of each promissory note specifically states, "[t]his note may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change, modification, termination, waiver, or discharge is sought." Paragraph 7 of the personal guaranty states, "[t]his personal guaranty represents the entire agreement of the parties. No amendment or waiver of any provision...is effective unless in writing and signed by [plaintiffs]." Thus, defendants' claim that the notes and guaranty were signed in reliance on Plaintiffs' statements that, in essence, the contracts were not binding without defendants' attorney's approval, is in direct contradiction to this clause. As such, this claim is extrinsic to the subject instruments and are not admissible under the parol evidence rule. Contrary to defendants' assertion, its defenses of duress, undue influence and fraud and misrepresentation do not preclude the granting of this motion. Judarl L.L.C. v. Cycletech Inc., 246 A.D.2d 736 (3rd Dept 1998.) This is especially so, given the terms of the contract that prohibited defendants from relying upon any extra-contractual oral communications. Thereby rendering any claims of reliance upon plaintiffs' oral statements about the contract not justified. See, Valassis Communs, Inc. v Weimer, 304 AD2d 448 (1<sup>st</sup> Dept 2003.) Furthermore, defendants cannot establish reasonable reliance upon alleged misrepresentations regarding the business since they failed to verify the information provided by plaintiffs regarding the company's sales, license agreements and lease. *Id.*

Finally, defendants' objection to jurisdiction on the grounds that James Son is not a resident of New York is without merit. According to Paragraph 12 of the Personal Guaranty of Payment, " In the event the secure party brings any action hereunder in any court of record of the state governing this personal guaranty, the guarantor consents to and confers personal jurisdiction over the guarantor by such courts and agrees that service of process may be made upon the guarantor by mailing a copy of such process to guarantor." As such, defendant has consented to the this court's jurisdiction by virtue of this contract clause.

Based on the above, plaintiffs' motion for summary judgment in lieu of complaint is granted.

Settle Judgment

.....  
**ORIN R. KITZES, J.S.C.**