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| **Huntington Vil. Dental, PC v Rathbauer** |
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| 2014 NY Slip Op 51545(U) |
| Decided on September 26, 2014 |
| Supreme Court, Suffolk County |
| Whelan, J. |
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Decided on September 26, 2014

Supreme Court, Suffolk County

**Huntington Village Dental, PC, Plaintiff,**

**against**

**John F. Rathbauer, JOHN RATHBAUER, DMD, PC and JOHN F. RATHBAUER, DMD, LLC, Defendants.**

34620-12

GARFUNKEL WILD, PC

Attys. For Plaintiff

111 Great Neck Rd.

Great Neck, NY11021

KIRSCHENBAUM &

KIRSCHENBAUM, P.C. Attys. For Defendants

200 Garden City Plaza

Garden City, NY 11530

Thomas F. Whelan, J.

Upon the following papers numbered 1 to *15*read on these*separate motions for summary judgment* ; Notice of Motion by the plaintiff, supporting affidavits, *1 - 3*; Opposing papers, exhibits and memo of law *5-6*; Reply papers*7-8*; Separate Notice of Motion and supporting papers by defendants with memo of law *9-10*; Opposing papers *11-13*; Reply papers wit memo of law*14-15*; Other _____; it is,

***ORDERED*** that this motion (No.003) by the plaintiff for summary judgment is considered under CPLR 3212 and is denied; and it is further

***ORDERED*** that the separate motion (#004) by the defendants for summary judgment dismissing the plaintiff's complaint and for summary judgment on the defendants' First and Second counterclaims is granted only to the limited extent set forth below.

This action arises out of the purchase of a dental practice by the plaintiff from

defendant John F. Rathbauer, DMD, LLC (hereinafter "LLC") that was evidenced by an Agreement of Sale, a Promissory Note and a Bill of Sale, each dated June 14, 2010. Also executed on that date was a lease of the entire first floor of a building owned by defendant John F. Rathbauer, DMD, P.C. (hereinafter "PC") where the dental practice sold was housed. As originally constituted, Paragraph 7 of the Promissory Note addressed a default in payment on the part of the plaintiff. Upon such default, the seller was entitled to send a notice of default, with or without a notice of an acceleration of all principal amounts then due which was payable not less than 90 days from the date of the notice. The terms of Paragraph 7 were enlarged by a hand written insertion to provide as follows: "After the 90 days, if the loan is still in default, ownership of the practice and assets * shall revert back to the seller with credit to purchaser for all sums paid to date".

As per the sale documents, defendant Rathbauer was employed by the plaintiff for the calendar year following the closing. Within weeks of the closing, the plaintiff charged the defendants with breaching certain of their obligations under the terms of the sale documents including a failure to turnover full and complete patient lists, clinical quality copies of e-rays and practice management documents and data which the plaintiff purchased from the defendant LLC. In July of, 2012, some two years after the closing of the sale of the business and one year after the defendant left the plaintiff's employ, the plaintiff stopped making the installment payments due under the terms of the promissory note. It commenced this action in November of 2012 by the filing of a summon with notice and it immediately moved for preliminary injunctive relief which was denied by order of this court dated January 28, 2013.

In the complaint served, the plaintiff seeks recission of the promissory note and other sale documents on the grounds that the defendants have materially breached their obligations under such documents and/or by reason of the defendants' engagement in acts of fraudulent inducement. The plaintiff also seeks money damages by reasons of such conduct and by reason of the defendants' engagement in acts of tortious interference with the plaintiff's contractual relations with its patients. In addition, the plaintiff demands declaratory relief pronouncing it free from breaching its obligations under the sale documents and excusing it from further performing any continuing obligations thereunder and declaring that the hand written "take back", reacquisition/reverter provisions included

in the Agreement of Sale are null and and void. The breaches complained of include, among other things, a failure to turn over assets of the Rathbauer practice such as patient lists, dental records, x-rays and inventory as purportedly required by the terms of the Agreement of Sale and Bill of Sale and the disparagement of the competency of plaintiff's staff. The acts of fraudulent inducement include misrepresentations as to the value, viability and size of the practice at issue. The plaintiff, who stopped making the installment payments due under the terms of the note in July of, 2102, contends that the defendants' material breaches of the terms of the Agreement of Sale and the unenforceability of the "take back" provisions in paragraph 7 of the note warrant a recission of the sale transaction, damages and declaratory relief excusing its performance under the documents and relieving it from any liability for its breach under the terms of any of the sale documents.

Issue was joined by service of a joint answer by the defendants. It contains eight affirmative defenses and two counterclaims. In the First counterclaim, declaratory relief in the form of a declaration of the validity and enforceability of the contractual "take back" provisions of the promissory note or money damages for breach due to the plaintiff's failure to pay in accordance with its terms is demanded while recovery of money damages by reason of the plaintiff's failure to pay amounts due under the terms of the Agreement of Sale is the subject of the Second Counterclaim.

The plaintiff now moves for "an immediate judgment in Plaintiff's favor". The motion is opposed by the defendants who separately move for summary judgment dismissing the plaintiff's complaint and for judgment on two of their counterclaims. For the reasons stated below, the plaintiff's motion is denied while the defendants' motion is granted to the extent stated below.

First considered is the plaintiff's motion in which it seeks, in the first instance, summary judgment on its claims for recission of the sale transaction. It predicates its demand for this relief upon two grounds, namely, the defendant's material breach of its obligations under the sale documents and the defendants' acts of fraudulent inducement. The plaintiff alternatively requests summary judgment on its declaratory judgment claim in which it seeks a declaration that it was relieved of any obligation to make the monthly

installments due under the subject promissory note due to the defendants' material breach its obligations under the loan documents. The reply papers of the plaintiff include a nuanced claim for partial summary judgment and an immediate trial on damages (*see* footnote 2 on page 8 of the affirmation of plaintiff's counsel in reply).

It is well established that a party moving for summary judgment must demonstrate a prima [*2]facie case of its entitlement to judgment as a matter of law by tendering evidentiary proof in admissible form sufficient to eliminated all questions of fact from its claim (*see* CPLR 3212[b]; ***Alvarez v Prospect Hosp***., 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Temple-Ashram v Satyanandji***, 84 AD3d 1158, 923 NYS2d 664 [2d Dept 2011]). Where such a showing is made, it is incumbent upon those opposing the motion to demonstrate that material questions of fact exist which require a trial of the claims (*see* ***Vega v Restani Constr. Corp***., 18 NY3d 499, 503, 942 NYS2d 13 [2012]). For the reasons stated below, this motion is denied.

" As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual or technical breach, but ... only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' " (***Wiljeff, LLC v United Realty Management Corp***., 82 AD3d 1616, 920 NYS.2d 495 [4th Dept 2011], *quoting* ***Lenel Sys. Intl., Inc. v Smith***, 34 AD3d 1284, 1285, 824 NYS2d 553 [4th Dept. 2006, [internal quotation marks omitted]; *see* ***Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.***, 199 NY 268, 284, 92 NE 747 [1910]; ***Lenel Systems Intern., Inc. v Smith***, 106 AD3d 1536, 966 NYS2d 618 [4th Dept 2013]; ***Smolev v Carole Hochman Design Group, Inc***., 79 AD3d 540, 913 NYS2d 79 [1st Dept 2010]; ***RR Chester, LLC v Arlington Bldg. Corp***., 22 AD3d 652, 803 NYS2d 100 [2d Dept 2005]). A finding of a material breach must be premised upon proof that the departure from the terms of the contract or *defects in its performance* pervaded the whole of the contract so as to defeat the object that the parties intended (*see* ***Miller v Benjamin***, 142 NY 613, 617, 37 NE 631 [1894]; ***Fitzpatrick v Animal Care Hosp., PLLC***., 104 AD3d 1078, 962 NYS2d 474 [3d Dept 2013]; ***Robert Cohn Assoc., Inc. v Kosich***, 63 AD3d 1388, 1389, 881 N.Y.S.2d 235 [3d Dept 2009]; ***Mortgage Elec. Registration Sys.,***

***Inc. v Maniscalco***, 46 AD3d 1279, 848 NYS2d 766 [3d Dept 2007]; ***O'Herron v Southern Tier Stores, Inc.***, 9 AD2d 568, 189 NYS2d 323 [3d Dept 1959]).

The remedy of rescission is thus an "extraordinary remedy" that is only appropriate "when a breach may be said to go to the root of the agreement between the parties (*see* ***MBIA Insurance Corp. v Countrywide Home Loans, Inc.***, 105 AD3d 412, 413, 963 NYS2d 21 [1st Dept 2013]). The issue of whether a purported breach by an obligee under a note constitutes a material breach of such note or related agreements that would suspend the payment obligations of the obligor thereunder is generally a question of fact (*see* ***Wiljeff, LLC v United Realty Mgt. Corp.,*** 82 AD3d 1616, *supra*; ***RR Chester, LLC v Arlington Bldg. Corp.***, 22 AD3d 652, 803 NYS2d 100 [2d Dept 2005]; ***Garofalo Elec. Co., Inc. v New York Univ.,*** 300 AD2d 186, 754 NYS2d 227 [1st Dept 2002]; ***J.C. Drywall & Acoustical Contr., Inc. v West Shore Partners***, 187 AD2d 564, 590 NYS2d 216 [2d Dept 1992]).

A party seeking summary judgment on a contract recission claim must establish, in the first instance, that a material breach occurred, that it lacks an adequate remedy at law and that the status quo may be substantially restored in the event that rescission is granted (*see* ***Rudman v Cowles Communications***, 30 NY2d 1, 13, 330 NYS2d 33 [1972]; ***Loreley Financing (Jersey) No. 3 Ltd. v Citigroup Global Markets Inc.***, 119 AD3d 136, 987 NYS2d 299 [1st Dept 2014]; ***Pramco III, LLC v Partners Trust Bank***, 52 AD3d 1224, 860 NYS2d 775 [4th Dept 2008]). Where a contract [*3]has been materially breached, the non-breaching party "may elect to continue to perform the agreement and give notice to the other side rather than terminate it" (***Syracuse Orthopedic Specialists, P.C. v Hootnick***, 42 AD3d 890, 839 NYS2d 897 [4th Dept 2007], *quoting* ***Capital Med. Sys. v Fuji Med. Sys., U.S.A.***, 239 AD2d 743, 746, 658 N.Y.S.2d 475 [3d Dept 1997]). "When performance is continued and such timely notice is given, the nonbreaching party does not waive the right to sue for the alleged breach ... However, by choosing not to terminate the contract at the time of the breach, the nonbreaching party surrenders his [or her] right to terminate later based on that breach' " (***Syracuse Orthopedic Specialists, P.C. v Hootnick***, 42 AD3d 890, *supra*, quoting ***Albany Med. Coll. v Lobel***, 296 AD2d 701, 702—703, 745 NYS2d 250 [3d Dept 2002]; ***1602 Avenue Y Inc., v Markowitz***, 274 Ad2d 506, 711 NYS2d 473 [2d Dept 2000] (*landlords waived their right to terminate*

*leases and were estopped from seeking such termination as the landlords accepted the benefits of the lease*s).

Upon its review of the record adduced here, the court finds that the plaintiff failed satisfy its initial burden, as prima facie proof of each of the three elements necessary for a recission claim based on a material breach is lacking. While the record contains some evidence of slight, causal and/or technical breaches of the sale documents by the defendants, including the warranty with respect to the company status of the plaintiff, the record is devoid of proof that any such breach was material and substantial enough that it defeated the object of the parties in making the contract and effectively relieved the plaintiff of its payment obligations under the note and all other obligations under the terms of the sale documents (*see* ***Fitzpatrick v Animal Care Hosp., PLLC***., 104 AD3d 1078, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Maniscalco***, 46 AD3d 1279, *supra*). In addition, the undisputed fact that the sale closed in 2010 and the parties operated in accordance with the transactional documents for a period of two years after the closing militates against any finding that the remedy of recission remains available to the plaintiff. Nor did the moving papers include due proof of a lack of an adequate remedy at law or that the status quo at the time of the sale, some four years ago, may be substantially restored. Summary judgment on the plaintiff's claims for recission due to the defendants' purported material breaches of the transactional sales documents is thus denied.

Also denied is the plaintiff's demand for summary judgment on claims for recission on its tort claim sounding in fraudulent inducement. This claim rests upon the following allegations: that defendant Rathbauer made numerous false representations about the value and the value of the Rathbauer practice during pre-contract negotiations that proved to be false when measured by the profits which the practice generated after the sale; that defendant Rathbauer falsely attributed the trend in the decline in his practice and/or profits over the 2007-2009 period to defendant Rathbauer's ill health rather than to a declining active customer base and he represented that the customer base would improve after the sale. In addition, defendant Rathbauer allegedly made statements regarding the "health" of his practice and the size of his client base which were false.

"Fraudulent inducement involves a misrepresentation of present fact, not of future

intent, collateral to a contract' and used to induce the defrauded party to sign the contract" (***Sabo v Delman***, 3 NY2d 155, 159—60, 164 NYS2d 714, 716 [1957]). To maintain a cause of action for fraudulent [*4]inducement of contract, a plaintiff must show "a material representation, known to be false, made with the intention of inducing reliance, upon which [it] actually relie[d], consequentially sustaining a detriment" (***Frank Crystal & Co., Inc. v Dillmann***, 84 AD3d 704, 925 NYS2d 430 [1st Dept 2011]; quoting ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC***, 19 AD3d 273, 275, 798 NYS2d 14 [1st Dept 2005]; *see also* ***Channel Master Corp. v Aluminum Ltd. Sales***, 4 NY2d 403, 406, 176 NYS2d 259 [1958]; ***Fromowitz v W. Park Assoc., Inc***., 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]; ***Introna v Huntington Learning Ctrs., Inc***., 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]). In cases wherein a party asserts a fraud cause of action based upon a claim that it was fraudulently induced to enter into a contract "the misrepresentations alleged must be more than merely promissory statements about what is to be done in the future: they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them" (***McGovern v T.J. Best Bldg. and Remodeling Inc***., 245 AD2d 925, 666 NYS2d 854 [3d Dept 1997], *quoting* ***Laing Logging, Inc. v International Paper Co.***, 228 AD2d 843. 644 NYS2d 91 [3d Dept 1996]. "[R]epresentation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud" (***Consolidated Bus Transit, Inc. v Treiber Group, LLC***, 97 AD3d 778, 948 NYS2d 679 [2d Dept 2012]; quoting ***Platus Corp. Pension Plan v Nazareth***, 271 AD2d 422, 423, 705 NYS2d 649 [2d Dept 2000]). Nor will "general allegations that the defendant entered into a contract while lacking the intent to perform support [a] claim" of fraudulent inducement (***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 318, 639 NYS2d 283 [1995]; ***Fromowitz v W. Park Assoc., Inc***., 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]).

It is well established that a contract induced by fraudulent representation is voidable, and that the defrauded party has several remedies. Upon discovery of the fraud, the defrauded party may: (1) rescind the contract by promptly tendering back all that he [or she] has received under it and then may bring an action at law upon the rescission to recover back what he [or she] has paid, or (2) defend an action brought against him [or her] on the contract, setting forth the fraud and rescission as a defense; or (3) he or she may bring an action in equity for rescission. These remedies are based upon a

disaffirmance of the contract (*see* ***VisionChina Media Inc. v Shareholder Representative Services, LLC***, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; ***Wood v Dudley***, 188 App Div 136, 140, 176 NYS 494 [1st Dept 1919]). However, recission rights are lost by abandonment when the defrauded party, now cognizant of the fraud, elects to continue with the contract and accepts its benefits thereby affirming it (*see* ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc***., 88 AD2d 461, 466, 453 NYS2d 750 [2d Dept 1982]; *see also* ***Bernstein v Cooke***, 103 AD3d 725, 478 NYS2d 294 [1st Dept 1984]). Although the recovery of damages collateral to the recission is likewise lost by an affirmance, such affirmance does not effect a waiver of recovery of fraud damages or deprive the defrauded party of the ability to recover compensation for the aftermath of the fraud, as the common law action for damages based on fraud proceeds upon an affirmance of the contract (*id*., at 467; *see* ***Goldsmith v National Container Corp***., 287 NY 438, 40 N.E.2d 242 [1942]; ***Vail v Reynolds***, 118 NY 297, 23 N.E. 301[1903]).

Accordingly, a defrauded party may, upon discovering fraud, "tender return of the property and seek rescission or he may retain the property and seek recovery of damages deriving from the [*5]fraud" (***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc***., 88 AD2d 461, *supra*). "[H]e [or she] may not, however, affirm the transaction, keep the property and at the same time recover the costs of acquiring and maintaining it" (***VisionChina Media Inc. v Shareholder Representative Services, LLC***, 109 AD3d 49, 57, *supra*; ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc***., 88 AD2d 461, 466, *supra*).

"To prevail on a claim of fraud, a plaintiff must show that it actually relied on the purported fraudulent statements and that its reliance was reasonable or justifiable" (***KNK Enterprises, Inc. v. Harriman Enterprises, Inc***. 33 AD3d 872, 824 NYS2d 307 [2d Dept 2006]), and "a party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence" (*id*.; *see* ***East 15360 Corp. v Provident Loan Socy. of NY***, 177 AD2d 280, 575 NYS2d 856 [1st Dept 1991]). Where the facts allegedly misrepresented are not matters peculiarly within the knowledge of the presenter of such facts and the claimant has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he or she cannot claim justifiable reliance on misrepresentations of his adversary (*see* ***Danann Realty Corp.***

***v Harris***, 5 NY2d 317, 320—321, 184 NYS2d 599 [1959]; ***DiBuono v Abbey, LLC***, 95 AD3d 1062, 944 NYS2d 280 [2d Dept 2012]; ***Urstadt Biddle Prop., Inc. v Excelsior***, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]).

Here, the court finds that the plaintiff failed to establish, prima facie, the existence of each of the elements of its fraud in the inducement claim against the defendants. Most of the complained of representations are not actionable due to their futuristic, promissory nature and there is no proof of any justifiable or reasonable reliance upon false statements of present facts on the part of the plaintiff. In addition, the plaintiff's conduct in continuing to perform under the terms of the sale documents for a period of two years following the closing of the sale, with knowledge of the purported misrepresentations, effected a waiver of its recission rights. The plaintiff's demands for summary judgment on its fraud claims for recission are thus denied. To the extent that the motion may fairly be characterized as one seeking summary judgment on the plaintiff's claim for recovery of damages due to fraud on the part of the defendants, it is denied as the plaintiff's submissions contain insufficient proof in support thereof.

The court further denies the plaintiff's demands for summary judgment on its claims for a declaration that it that it was relieved of any obligation to make the monthly installments due under the subject promissory note due to the defendants' material breach its obligations under the loan documents and thus cannot be held liable for any such breach. As indicated above, the record is devoid of any proof of a material breach of the transactional sales documents on the part of the defendants. All other relief demanded by the plaintiff on its motion, including the nuanced claim for partial summary judgment and an immediate trial on damages are also denied for want of due and sufficient proof of its entitlement to such relief.

Next considered are those portions of the defendants' separate motion in which they seek summary judgment dismissing the plaintiff's complaint. As indicated above, a party moving for summary judgment must establish a prima facie case of its entitlement to judgment as a matter of [*6]law by tendering evidentiary proof in admissible form which demonstrates the absence of any issue of triable fact (*see* CPLR 3212[b]; ***Alvarez v Prospect Hosp***., 68 NY2d 320, 324, *supra*; ***Winegrad v New York Univ. Med. Ctr***., 64

NY2d 851, 853, *supra*; ***Temple-Ashram v Satyanandji***, 84 AD3d 1158, *supra*). Where such a showing is made, it is incumbent upon those opposing the motion to demonstrate that material questions of fact exist which require a trial of the claims (*see* ***Vega v Restani Constr. Corp***., 18 NY3d 499, 503, *supra*).

Here, the defendants' submission established, prima facie, that the plaintiff's claims for recision of the sales agreement and its demands for declaratory relief which are advanced in the first and second causes of action in the complaint are without merit. Breaches, if any, of the defendant's obligations under the terms of the Agreement of Sale were not substantial or of such a magnitude that they defeated the intent and objectives of the parties in making the contract so as to relieve the plaintiff of its payment obligations under the note and all other obligations under the terms of the sale documents (*see* ***Fitzpatrick v Animal Care Hosp., PLLC***., 104 AD3d 1078, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Maniscalco***, 46 AD3d 1279, *supra*). Summary judgment dismissing the plaintiff's First cause of action is thus awarded to the defendants.

The defendants are further awarded summary judgment in their favor on the plaintiff's Second cause of action for declaratory relief and the court hereby declares that: the plaintiff breached the payment provisions of the Agreement of Sale by failing to remit the monthly installment due in July of 2012 and thereafter and, as a result thereof, the plaintiff is in default under such terms of such Agreement and under the terms fo the promissory note. The defendants' entitlement to such relief arises from the plaintiff's admitted breach of the terms of the promissory note which occurred in July of 2012 when the plaintiff stopped making the monthly installments called for by the terms of such note and the dismissal of the plaintiff's causes of action for recision as set forth herein.

The court, however, finds and so declares, that the defendants are not entitled to enforce the "take back" or reverter provisions of the promissory note. The moving papers failed to establish the defendants' prima facie showing of its entitlement to such relief as no proof of the enforceability of such provisions was submitted (*see* EPTL Article 6; *see also* RPAPL §1953; §1954). The court thus denies those portions of the defendants' motion wherein they seek summary judgment on those portions of their First counterclaim wherein they seek a declaration of their entitlement to possession of the dental practice and assets it

delivered to the plaintiff under the terms of the "take back" or reacquisition/reverter forfeiture provisions of the promissory note that were inserted by hand at the closing.

The court denies those portions of the defendants' motion wherein they seek dismissal of the plaintiff's Third cause of action in which it seeks damages by reason of the non-material breaches of the Agreement of Sale that are the subject of such cause of action. The defendants' moving papers failed to establish, prima facie, that as a matter of law, these claims of the plaintiff are lacking in merit. For these same reasons, the court denies those portions of the defendants' motion in which they seek dismissal of the plaintiff's Seventh cause of action in which the plaintiff seeks damages by reason of the defendants' purported interference with contractual relations.

The court grants those portions of the defendants' motion wherein they seek summary judgment dismissing the Fourth, Fifth and Sixth causes of action wherein the plaintiff seeks recision, declaratory relief and damages due to acts of fraudulent inducement on the part of the defendants. The moving papers sufficiently demonstrated that the complained of representations are not actionable due to their futuristic, promissory nature and that the there was no justifiable reliance upon any false statement of present facts on the part of the plaintiff. The Fourth cause of action sounding in recision based on fraud is thus dismissed as is the Sixth cause of action in which the plaintiff demands money damages as a result of the purported fraud. With respect to the plaintiff's Fifth cause of action for declaratory relief, the court awards the defendants' summary judgment thereon in the form of the following declaration: that the plaintiff breached the payment provisions of the Agreement of Sale by failing to remit the monthly installment due in July of 2012 and thereafter and, as a result thereof, the plaintiff is in default under such terms of such Agreement and under the terms fo the promissory note. However, the court declares, for the reasons advanced above, that defendants are not entitled to enforce the "take back' or reverter provisions of such note.

Left for consideration are the remaining portions of the instant motion by the defendants wherein they seek summary judgment on those portions of their First Counterclaim wherein they demand damages for the plaintiff's breach of its obligations to pay under the terms of the promissory note. It is well established that in an action to

recover damages for breach of a promissory note or credit agreement, a prima facie case is made by the claimant upon due proof of the existence of the underlying note or credit extension agreement and a failure on the part of the defendants to make payment in accordance with the terms of such note or other contracts (*see* ***Clemente Bros. Contracting Corp. v Hafner-Milazzo,*** 100 AD3d 677, 954 NYS2d 156 [2d Dept 2012]; ***Signature Bank v Galit Props., Inc.,***80 AD3d 689, 915 NYS2d 138 [2d Dept 2011]***; Provident Bank v Giannasca***, 55 AD3d 812, 866 NYS2d 289 [2d Dept 2008]; ***New York Community Bank v Fessler,*** 88 AD3d 667, 668, 930 NYS2d 601 [2d Dept 2011]; ***Verela v Citrus Lake Dev., Inc.***, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]; ***North Fork Bank Corp. v Graphic Forms Assoc., Inc.***, 36 AD3d 676, 828 NYS2d 194 [2d Dept 2007]). Where such a showing is made, the answering defendants targeted by such motion must demonstrate, by due proof in admissible form, the existence of genuine questions of fact with respect to a bona fide defense to avoid the granting of the plaintiff's motion (*see* ***Imperial Capital Bank v 11-13-15 Old Fulton D***, 88 AD3d 652, 930 NYS2d 267 [2d Dept 2011]; ***JPMorgan Chase Bank, N.A. v Galt Group, Inc.,***84 AD3d 1028, 923 NYS2d 643 [2d Dept 2011]; ***Gullery v Imburgio,***74 AD3d 1022, 905 NYS2d 221 [2d Dept 2010]; ***Verela v Citrus Lake Dev., Inc.***, 53 AD3d 574, *supra*; ***Quest Commercial LLC v Rovner***, 35 AD3d 576, 825 NYS2d 766 [2d Dept 2006]).

Upon its review of the record, the court finds that the plaintiff's default in its payment obligations under the terms of the promissory note that occurred in July of 2012 is not in dispute. It was thus incumbent upon the plaintiff to raise a triable issue of fact as to its possession of a bona fide defense. A review of the plaintiffs' opposing papers reveals that no such question of fact was raised as to its default in payment. It is well established that an obligor's claim of an obligee's material breach of one or more contemporaneous and integrated notes and/or contracts may relieve such obligor of its duty to perform under the terms of such note or contract and provide a defense [*7]to the obligee's claim for breach since the obligor's claim casts doubt upon the validity or enforceability of such note or contract (*see* ***Nau v Vulcan Rail & Constr. Co.***, 286 NY 188, 197 36 NE 106 [1941]; ***131 Heartland Blvd. Corp. v C.J. Jon Corp.,*** 82 AD3d 1188, 921 NYS2d 94 [2d Dept 2011]; ***Smolev v Carole Hochman Design Group, Inc.***, 79 AD3d 540, 913 NYS2d 79 [1st Dept 2010]; ***Mortgage Elec. Registration Sys., Inc. v Maniscalco***, 46 AD3d 1279, 848 NYS2d 766 [3d Dept 2007]; ***Sharper Prop. Enter., Inc. v Hubbard***, 12 AD3d 494,

785 NYS2d 89 [2d Dept 2004]). Where there is no claim that casts doubt upon the validity of note or contract, as in the case of a non-material breach of integrated contracts or in the case of a breach of a separate and independent collateral contract between the parties, the obligor has no defense to the obligee's claim for breach of its contract, but instead, is left with a potential set-off against the damages recoverable by the obligee in an amount equal to the damages recoverable by the obligor (*see* ***131 Heartland Blvd. Corp. v C.J. Jon Corp.***, 82 AD3d 1188, *supra*; ***Gelmin v Sequa Capital Corp.***, 269 AD2d 492, 707 NYS2d 108 [2d Dept 2000]; ***Harris v Miller***, 136 AD2d 603, 523 NYS2d 586 [2d Dept 1988]; ***Umansky v Seaboard Indus., Inc.***, 45 AD2d 1051, 358 NYS2d 22 [2d Dept 1974]).

Here, the plaintiff's claims that the defendants' materially breached and/or fraudulent induced the plaintiff into entering the Agreement of Sale, both of which bear upon the validity or enforceability of the note, provides no liability defense to the defendants' First counterclaim for breach of the promissory note, as the plaintiff's material breach and fraudulent inducement claims, upon which it relies to defeat the defendants' motion, have been dismissed. A review of the plaintiff's submissions in opposition reveals a failure to establish its possession of any bona fide defense to the corporate defendant's claim for recovery of amounts due under the terms of the promissory note. The defendants' are thus awarded partial summary judgment on the issue of the plaintiff's liability for amounts due under the terms of the promissory note.

The foregoing summary judgment is limited to the issue of the plaintiff's liability under the defendants' First counterclaim to recover amounts due under the terms of the promissory note, as no proof of the amounts due as principal, interest or late fees was submitted by the defendants. In addition, the plaintiff's claims for recovery of damages for the defendants' non-material breaches of the Agreement of Sale set forth in its Third cause of action and its claims for damages in tort under its Seventh cause of action remain viable. Accordingly, recovery under these claims, if any, may be set-off against recovery of amounts due the defendants' under the promissory note. A trial on the issue of the corporate defendant's damages on its First counterclaim of the type contemplated by CPLR 3212(c) and a severance of such claim, if necessary, shall be the subject of a further order of the court.

The moving papers of the defendants further established that by failing to pay amounts due under the terms of the promissory note, the plaintiff breached the purchase price and payment terms set forth in Agreement of Sale. Nevertheless, the defendants' recovery of the unpaid purchase price amounts set forth in the Agreement of Sale is duplicative of the defendants' recovery of the unpaid amounts due under the terms of the promissory note, except for the demand of recovery of counsel fees. That demand is posited only under the terms of the Agreement of Sale as no reference to such fees is set forth in the note. Since, however, the moving papers failed to demonstrate the defendants' [*8]entitlement to the recovery of attorneys fees under the Agreement of Sale, summary judgment on the Second Counterclaim is denied.

In view of the foregoing, the plaintiff's motion for summary judgment (#003) is denied while the separate motion by the defendants for summary judgment in their favor is granted only to the extent set forth above.

Dated" September 26, 2014_____

THOMAS F. WHELAN, J.S.C.

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