Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

NEW YORK STATE SUPREME COURT
ROCKLAND COUNTY

348 REALTY ASSOCIATES, LLC,

Plaintiff,

against

JAV CONSULTING, INC. *and*
UNIVERSAL AUTOMOTIVE SERVICES, INC.

Defendants.

Index No. 2007-11272

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: June 3, 2008

MICHAEL A. BURGER, ESQ.
DAVIDSON FINK LLP
Attorneys for Plaintiff
28 EAST MAIN STREET, SUITE 1700
ROCHESTER, NEW YORK 14614
TEL: 585.546.6446

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted in support of the Plaintiff's accompanying order to show cause directing Defendants to show cause why Plaintiff should not be granted the relief recited therein, including without limitation an order granting Plaintiff summary judgment *inter alia*, canceling and discharging of the Mortgage recorded in the Rockland County Clerk's Office under Instrument Number 2006-00034327 ("mortgage"), and further canceling the promissory note it allegedly secures as to Plaintiff.

STATEMENT OF FACTS

The facts of this case are set forth in the Verified Complaint ("Petition") dated December 6, 2007, the accompanying affirmations of Michael A. Burger dated February 13, 2008 and June 3, 2008, and the exhibits annexed thereto, and the accompanying affidavits of Joel Friedberg, Plaintiff's general manager, dated February 13, 2008 and June 3, 2008, and the exhibits annexed thereto and the papers submitted by Defendants in support of their February 7, 2008 cross-motion to dismiss.

On August 24, 2005, Plaintiff, 348 Realty Associates, LLC ("LLC") was formed through the New York Secretary of State's office. Evidence of this filing was and has been readily available to the public on the Secretary of State's web site (http://www.dos.state.ny.us/) since 2005 and continuing through the date of Defendants' alleged mortgage and until the present time. Friedberg aff. dated Feb. 13, 2008 ¶¶ 18-19.

The purpose of the LLC was to own and operate the commercial office building and real property located at 348 Route 9W, Palisades, New York ("property"). Friedberg aff. dated Feb. 13, 2008 ¶ 9.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

On September 1, 2005, Joel Friedberg was named as Plaintiff's general manager pursuant to the LLC's operating agreement. Friedberg aff. dated Feb. 13, 2008 ¶ 1; Verified Petition ¶¶ Fifth and Sixth. At this time, one Dr. Albert E. "Mark" Markarian ("Markarian") held a non-managerial, nonpublic, contingent membership interest in the LLC. Verified Petition ¶ Fifth and Exhibit 2.

On September 22, 2005, exercising his authority on behalf of the LLC, Mr. Friedberg granted a first mortgage to Paragon Federal Credit Union. Friedberg aff. dated Feb. 13, 2008 ¶¶ 21-22. This mortgage, signed by Mr. Friedberg, was duly filed and recorded with the Rockland County Clerk's office as a public record on November 14, 2005. Friedberg aff. dated Feb. 13, 2008 ¶¶ 21-22. Any subsequent diligent title search would have naturally included this mortgage.

On June 2, 2006, Defendants arranged a $250,000.00 loan ("loan") for Markarian in exchange for his execution of various self-serving documents prepared by Defendants, their lawyers and/or their title insurer, all purporting to grant a mortgage ("mortgage") on the property, as security. Burger aff. dated Feb. 13, 2008 ¶¶ 5-7; Burger aff. dated June 3, 2008 ¶¶ ???.

At the time, the LLC was unaware of and did not approve the loan to Markarian or the mortgage he purportedly granted. Friedberg aff. dated Feb. 13, 2008 ¶ 3, 30, 33; Verified Petition ¶¶ Fifth, Eleventh. Markarian had no authority of any kind to grant such a mortgage. Friedberg aff. dated Feb. 13, 2008 ¶ 10; Verified Petition ¶ Eleventh. The LLC never received any funds of any kind from Defendants. Friedberg aff. dated Feb. 13, 2008 ¶ 31; Verified Petition ¶ Twelfth. The LLC never made any payments on the alleged note. Friedberg aff. dated Feb. 13, 2008 ¶ 32.

The LLC was unaware of the loan because Defendants never contacted the LLC's offices at the address publicly filed with the Secretary of State (which office is approximately one block from Defendants' office where the closing took place). Friedberg aff. dated Feb. 13, 2008 ¶¶ 27-28. Defendants never called the LLC's lawyer and registered agent, also listed on the Secretary of State's public filing. Friedberg aff. dated Feb. 13, 2008 ¶¶ 18, 29. Defendants ignored the first

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

mortgage from Paragon Federal Credit Union, bearing Joel Friedberg's signature on behalf of the LLC, despite the fact that same had been duly recorded with the Rockland County Clerk's office for over six months before the loan. Friedberg aff. dated Feb. 13, 2008 ¶ 22.

In short, Defendants, sophisticated commercial hard money lenders, aggressively negotiated a $250,000.00 loan to Markarian, on exceedingly "lender-friendly" terms, without the slightest indication from the LLC that Markarian had authority to act for or bind it. Verified Petition at Exhibit 3. Instead, Defendants now claim to have relied only on Markarian's own words and conduct as evidence of his authority to act.

Long after the loan closed, the LLC learned of it for the first time while negotiating with a prospective buyer who brought the loan to the LLC's attention. Verified Petition ¶ Fifteenth; Friedberg aff. dated Feb. 13, 2008 ¶ 33.

On July 23, 2007, Plaintiff duly demanded discharge of the subject mortgage. Verified Petition ¶ Sixteenth. Defendants failed or refused to honor our demand, the instant Verified Petition was filed on December 11, 2007 and, on February 7, 2008, filed a Cross-Motion to Dismiss the Petition (supporting papers hereinafter cited as "MTD").

On April 1, 2008, the Court denied both motions and, holding that Plaintiff's should proceed by action rather than special proceeding, converted the Petition to a Complaint, and directed Defendants to answer. Burger aff. dated June 3, 2008 at exhibit 1. On or about April 28, 2008 Defendants served an Answer with Counterclaims. On May 23, 2008, Plaintiff served its Verified Reply. See "PLEADINGS" filed herewith under separate cover.

On May 12, 2008, a telephone conference was held among counsel for Petitioner and Respondents, JAV Consulting, Inc. and Universal Automotive Services, Inc. and the Court. At the conference, the participants agreed to a discovery schedule. Burger aff. dated June 3, 2008 ¶ 10.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

Plaintiff LLC is in the process of marketing the subject premises for sale and the mortgage encumbering the property is impeding that process because no transfer of the real property may be affected until the mortgage at issue is discharged. Verified Complaint ("Petition") at ¶¶18, 19. Friedberg aff. dated June 3, 2008 ¶¶ 6-9. The Court further indicated that it would entertain an application for an expedited summary judgment motion but directed that that any such motion should be brought by Order to Show Cause and provide that such motion not stay discovery. Burger aff. dated June 3, 2008.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

DISCUSSION

POINT ONE:

THERE ARE NO MATERIAL ISSUES OF FACT BEFORE THE COURT

The party claiming an agency relationship has the burden of proving it and establishing the scope of the agent's authority. The agent's declarations are insufficient to prove agency or the scope of the alleged agent's authority. *See, e.g., Lippincot v. East River Mill & Lumber Co.*, 79 Misc. 559, 561, 141 N.Y.S. 220 (City Ct. 1913); *see also New York Times Co. v. Glynn-Palmer Associates, Inc.*, 138 Misc. 2d 862, 864, 525 N.Y.S.2d 565, 568 (City Civ. Ct. 1988); *Nomura Securities Intern., Inc. v. E*Trade Securities, Inc.*, 280 F. Supp. 2d 184, 196 (S.D. N.Y. 2003); *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F. Supp. 1356, 1370 (S.D. N.Y. 1993), *aff'd*, 29 F.3d 821 (2d Cir. 1994), *aff'd*, 54 F.3d 765 (2d Cir. 1995) (applying New York law); *see, e.g., Goldenberg v. Bartell Broadcasting Corp.*, 47 Misc. 2d 105, 108 (NY Sup 1965). NY PRAC. COMM § 69:17.

Defendants have failed to meet their burden of proving that Markarian had apparent authority to grant a mortgage on behalf of the LLC.

No issues of material fact exist. Defendants' proof, taken as true, fails to establish apparent authority. This matter is ripe for summary adjudication. CPLR 3212; *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 560-61 (1980).

POINT TWO

THE MORTGAGE IS STATUTORILY VOID UNDER LLCL § 412(C)

New York Limited Liability Company Law section 412(c) makes Markarian's alleged "apparent authority" <u>irrelevant</u>: pursuant to LLCL § 412(c), Markarian's alleged attempt to

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

mortgage the subject premises "does not bind the limited liability company" unless Markarian was "authorized ***in fact*** by the limited liability company" to perform such an act "that is not apparently for the carrying on of the business of the limited liability company in the usual way". LLCL § 412(c) (emphasis added).

The statute reads as follows:

§ 412. Agency of members or managers

(a) Unless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority.

(b) If the articles of organization of a limited liability company provide that management shall be vested in one or more managers:

(1) no member, solely by reason of being a member, is an agent of the limited liability company for the purpose of its business except to the extent that authority has been delegated to such member by the manager or managers or by the provisions of the operating agreement; and

(2) every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company binds the limited liability company, unless (A) the manager acting has in fact no authority to act for the limited liability company in the particular matter and (B) the person with whom he or she is dealing has knowledge of the fact that the manager has no such authority.

(c) *An act of a member or manager that is not apparently for the carrying on of the business of the limited liability company in the usual way does not bind the limited liability company unless authorized* ***in fact*** *by the limited liability company in the particular matter.*

(d) No act of a member, manager or other agent of a limited liability company in contravention of a restriction on authority shall bind the limited liability company to persons having knowledge of the restriction.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

Limited Liability Company Law § 412 (McKinney's 2008) (emphasis added).

This creates a simple, black-letter rule of law placing the burden on a third party who wishes to rely on an alleged LLC agent when the transaction is "not apparently for the carrying on of the business of the limited liability company in the usual way". LLCL § 412(c). The specific statute, LLCL § 412, must prevail over the general common law governing the apparent authority doctrine, *See* POINT THREE, *infra*, to the extent that the statute is more restrictive.

Obviously, putting the LLC's chief asset up to collateralize a quarter million dollar personal loan, is not "carrying on of the business of the limited liability company in the usual way" (especially when the money does not benefit the LLC).

Defendants cannot carry their burden of proving that they *reasonably* relied upon Markarian's claim of authority. *See Phoenix Elec. Contracting, Inc. v. Lehr Const. Corp.*, 219 A.D.2d 467, 468 (1st Dep't 1995).

POINT THREE

DR. MARKARIAN DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO MORTGAGE THE SUBJECT PREMISES

Dr. Markarian did not have actual authority to mortgage the subject premises and Plaintiff possesses no documents or information to the contrary. Friedberg aff. dated June 3, 2008 ¶ 30; Friedberg aff. dated Feb. 13, 2008 ¶¶ 10 through 14; VERIFIED PETITION.

Under New York State law, the legal doctrine of apparent authority will bind a principal to a deal made by its agent as long as the *principal* clothed the agent with apparent authority. *Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 551 (1997); *Hallock v. State*, 64 N.Y.2d 224, 231 (1984) ("Essential to the creation of apparent authority are words or conduct of the *principal*,

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction.") (emphasis added).

An agent can never, "by his own acts imbue himself with apparent authority". *Hallock*, 64 NY2d at 231. It is well settled black letter law that "the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal--not the agent." *Id.* (internal quotations omitted) (citations omitted).

"Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable". *Id.* "A principal . . . is not liable for loss caused to another by reason of his reliance upon a deceitful representation of an agent unless the representation was authorized or apparently authorized." *Ernst Iron Works v. Duralith Corp.*, 270 N.Y. 165, 170 (1936) (citation omitted).

Defendants contend that they were justified in relying upon their stale memories of Markarian's affiliation with the property in 2001 or 2002 and their outdated impression (created solely by Markarian) that Markarian was the property's "day-to-day" manager (Vaccaro MTD aff. ¶ 8). Even assuming that this is true, it is unreasonable to assume that a person who once 'appeared to be' the day-to-day property manager has the power to pledge the premises as collateral for a $250,000.00 loan. Defendants feebly cite a "tour" of the property for office rental space rental several years earlier as their basis for believing that Markarian owned the property and the LLC, but ignore the fact that the LLC was not created until the late summer of 2005.

Defendants had absolutely no contact of any kind with Plaintiff LLC. Given the ease with which Defendants could have contacted Plaintiff LLC it is reasonable to infer that Defendants did not want anything, including the truth, to get in the way of their aggressive, if not predatory, hard money loan.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

The single case cited by Defendants in support of their motion to dismiss on the grounds that Markarian had "apparent authority", actually proves just the opposite. *Merrell-Benco Agency, LLC v. HSBC Bank USA*, 20 A.D.3d 605 (3rd Dep't 2005) cites *Hallock, supra,* with approval and notes that apparent authority may only be granted by the *principal* and never the agent. In finding that apparent authority existed, the *Merrell-Benco* court noted that the principal specifically permitted its agent "to hold himself out to both the world and the agency's employees as president/member/managing member and/or owner of this agency." *Id.* at 608.

The principal in *Merrell-Benco* further clothed its agent with apparent authority by authorizing the agent to file official documents on the principal's behalf, and sign company checks, ultimately becoming the sole signatory on its corporate accounts. *Id.* at 609. Neither *Merrell-Benco* nor *Hallock*, nor any other New York State case has ever held that the mere fact that someone claims to be the president of a corporation automatically imbues them with the authority necessary to bind it. In exchange for a quarter of a million dollars (and most likely smaller sums as well), lots of equally unauthorized people would claim "apparent authority" to sign virtually anything to collect such a handsome prize.

When one "deals with agents or officers of [a limited liability entity], he is bound to know their powers and the extent of their authority." *Alexander v. Cauldwell*, 83 N.Y.480 (1881) ("Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made with in [*sic*] the scope of their authority."); s*ee also Traitel Marble Co. v. Brown Bros., Inc.*, 159 A.D.485, 487 (1st Dep't 1913); *Goldenberg v. Bartell Broadcasting Corp.*, 47 Misc.2d 105, 112 (NY Sup. Ct. NY Cty. 1965).

While Defendants carefully claimed that Markarian presented them with no operating agreement, they do not claim to have asked him whether one existed. It would be standard practice to ask an LLC member to sign an affidavit stating that no operating agreement exists or

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

that a true and accurate copy is attached. *See* LLCL § 417. Indeed, Defendants' "Certificate of Authority" (signed by Markarian) refers to "the" Operating Agreement and its contents yet Defendants never bothered to obtain a copy, let alone read it. Guberman aff. Exhibit B. If Defendants had actually obtained and read "the" Operating Agreement, they would have known that Markarian had no authority to act. Verified Petition at Exhibit 2.

Defendants shrewdly point to the "Meeting of the Shareholders" resolution as evidence of Markarian's authority. Firstly, LLC's do not have shareholders; LLCs have members. LLCL § 102(q). Upon information and belief, such resolution was drafted by Defendants or their agents themselves and presented to Markarian to sign at the closing table. Burger aff. dated Feb. 13, 2008 ¶¶ 5-7; Burger aff dated June 3, 2008 ¶¶ 26-27.

Failing to read an operating agreement when dealing with the alleged agent of an LLC constitutes gross negligence in and of itself. But the failure to look at readily available public records and communicate with the LLC's main office and general manager or registered agent constitutes at least willful ignorance and recklessness. The Department of State's website lists the LLC's correct address, as opposed to the fabricated one listed in Defendants' papers. The Department of State's website further lists the registered agent and attorney for the LLC. Defendants never contacted the LLC, its agent or its attorney. Friedberg aff. dated Feb 13, 2008 ¶¶ 24-29.

Defendants' claim to a course of dealing with the LLC over a period of six years is spurious since the LLC was *first created* on August 24, 2005, *less than a year before Defendants' alleged June 2006 loan to Markarian*. Vaccaro MTD aff. ¶ 2; Friedberg aff. dated Feb 13, 2008 ¶ 18.

Conspicuously absent from Defendants' papers are any indication that they requested LLC tax returns, a credit check or D&B report as part of its due diligence in contemplation of this $250,000.00 commercial loan transaction. Defendants fail to provide the $250,000.00 check or

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

wire transfer payable to the LLC. Also conspicuously absent are copies of any LLC checks or payments allegedly made by the LLC to "ratify" the mortgage. As set forth in the affidavit of Joel Friedberg, general manager of the LLC, Defendants provide no evidence of any transfer of funds between Defendants and the LLC because none exist. Friedberg aff. ¶¶ 31-32; Verified Petition ¶ Twelfth.

Also missing from Defendants' motion to dismiss (MTD) papers are any contemporaneous claims that they saw LLC business cards, LLC letterhead, LLC bank statements or credentials (*e.g.*, check signing authority), an office bearing Markarian's name and LLC title, or any other indicia of authority imbued *by the LLC* purporting to authorize Markarian to act for the LLC.

Indeed, Defendants admitted through the affidavit of Anthony Vaccaro supporting their motion to dismiss (MTD) that prudent lending practices would dictate communicating with other individuals or entities with an interest in the mortgaged premises. Vaccaro MTD aff. ¶ 26. Based on the information contained in the Department of State printout alone, it would appear that Mr. Vaccaro did not try very hard to find the individuals with an interest in the LLC or the real property at issue. Friedberg aff. dated Feb. 13, 2008 ¶ 18.

As a matter of public record, the September 22, 2005 Paragon mortgage granted by the LLC's general manager Joel Friedberg and recorded in the Rockland County Clerk's office on November 14, 2005, was more than sufficient to inform Vacarro that *someone*, other than Markarian, had an interest in the LLC and the real property it owns. Friedberg aff dated Feb. 13, 2008 ¶ 22; Friedberg aff dated June 3, 2008 ¶¶32-33, 36-37; *see generally* RPL § 291.

Remember that Defendants are sophisticated commercial lenders with attorneys and title closers; they cannot now claim to be unwitting ingénues. Defendants must know that apparent authority assumes more than a willingness to sign on the dotted line and accept a quarter of a

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

million dollars in cash, no questions asked. Defendants exercised willful ignorance rather than due diligence. Defendants should not be given the opportunity to even be heard alleging that they are the victims of a scam which they apparently perpetrated.

Defendants needed to do little else other than open their eyes to have avoided their current predicament about which Plaintiff knew nothing at all. Defendants claim to have merely "relied on Markarian's sworn statements" which statements Defendants and their coterie of closing professionals drafted for him to sign (without a lawyer). *See* Guberman MTD affidavit at ¶ 3, Vaccaro MTD affidavit at ¶ 18, Sherman MTD affirmation at ¶¶ 3-5. However, Defendants' goal was not to find the truth or make a fair deal; their goal may have been to close a high interest commercial loan with draconian default provisions so that Defendants could cash in on a $4 million piece of collateral. It seems at least as likely that Defendants true goal was to get a usurious yield on what appears to have been a thinly-veiled personal loan also collateralized by Markarian's daughter's personal property, by creating an arguable (albeit implausible) claim that the loan should be deemed "commercial" *and thus conveniently not subject to consumer usury rates.*

Of course, to Defendants, the documents would appear to "be in order". Sherman MTD aff ¶ 10. Upon information and belief, Defendants effectively created, selected, and insisted upon those documents. Burger aff. dated Feb. 13, 2008 ¶¶ 5-7; Burger aff. dated June 3, 2008 ¶¶ 12-13.

Even if we were to suspend disbelief and suppose that Defendants got taken in by the oldest con in Brooklyn, they still do not have any legal claim to the Bridge or its lucrative and elusive "toll booth". The LLC did not con anyone.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

POINT FOUR

JUSTICE REQUIRES CANCELLATION OF THIS MORTGAGE

The equities balance strongly in favor of Plaintiff LLC who received no "windfall" or benefit of any kind. Indeed, Defendants admit the allegation in paragraph 10 of the complaint that the proceeds of the $250,000.00 loan "were disbursed to Markarian and Rhona Zeytoonian." Friedberg aff. dated June 3, 2008 ¶ 11; Defendants' Verified Answer at ¶ 7 (*see* "PLEADINGS" filed herewith under separate cover).

Defendants' purported mortgage was dated June 2, 2006. Since that time, Plaintiff has received a total of sixty-three thousand dollars ($63,000.00) from Dr. Markarian (including any entity in which Dr. Markarian allegedly held an interest). Friedberg aff. dated June 3, 2008 ¶ 13.

None of the payments received by Plaintiff from or on behalf of Dr. Markarian since June 2, 2006 referenced Defendants' alleged loan in any way. Friedberg aff. dated June 3, 2008 ¶ 14. All of the payments from or on behalf of Dr. Markarian to the LLC since June 2, 2006 were payments towards Dr. Markarian's pre-existing obligations to the LLC. Dr. Markarian's obligations arose from agreements that pre-dated Defendants' alleged mortgage (*e.g.*, the LLC Operating Agreement dated Sept. 1, 2005, annexed to the Verified Complaint ["Petition"], as exhibit 2). Friedberg aff. dated June 3, 2008 ¶ 15.

The LLC received no benefit or windfall from Defendants' loan. Only Dr. Markarian benefited by making the payments necessary for him to maintain his membership interest in the LLC. If Dr. Markarian defaulted, he stood to lose his membership interest. Indeed, this is exactly what happened. The LLC, on the other hand, had a remedy at its disposal upon Dr. Markarian's default: the purchase of Dr. Markarian's LLC interests at an acceptable price. The LLC had no

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

incentive at all to borrow from Defendants or take out a second mortgage. Friedberg aff. dated June 3, 2008 ¶¶ 18 - 19.

According to Defendants, Markarian and his family made out all right--but money in Markarian's pocket is of no benefit to the LLC, despite Markarian's nominal and contingent former membership interest which has long since expired. Friedberg aff. dated Feb 13, 2008 ¶¶ 10-13; Friedberg aff. dated June 3, 2008 ¶¶ 15-21.

In a motion for summary judgment on the pleadings, the parties are compelled to lay bare affirmative proof to demonstrate that genuine triable issues of fact exist. "Since the defendant failed to lay bare and reveal his proof, as it was incumbent upon him to do in opposition to the plaintiff's establishment of its entitlement to summary judgment, the Supreme Court properly granted summary judgment to the plaintiff." *Hoot Group, Inc. v. Caplan*, 9 A.D.3d 448 (2d Dep't 2004); *Jaliman v. Selendy*, 7 Misc.3d 1007(A), 801 N.Y.S.2d 235 (N.Y.Sup. 2005) (table).

This Defendants have failed to do, despite the ease with which they could prove their "windfall" theory. Indeed, Defendants admit in their Verified Answer that no monetary instrument exists purporting to pay two hundred and fifty thousand dollars ($250,000.00) to "348 Realty Associates, LLC. Friedberg aff. dated June 3, 2008 ¶ 11; *see* "PLEADINGS" filed herewith under separate cover. Defendants further admit that they gave all of the money to Dr. Markarian and his daughter, Rhona Zeytoonian.

The LLC is the innocent victim of predatory and/or inept money lenders and their "Mark". Defendants unreasonably assumed the risk that the signatory to their documents was not actually empowered to act. Defendants should not now be heard to cry foul because they lost one of their gambles. Defendants unreasonably relied on Markarian's assertions to their detriment but Plaintiffs were in no way enriched by that reliance.

Defendants should not now look to Plaintiff to clean up their mess.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

POINT FIVE

A NOTE ON PROBITY

While Plaintiffs would prefer to view the subject transaction as the butchered victim of sloth and haste, various red badges of outright fraud cannot be ignored.

Defendants apparently engineered this entire transaction, right down to the contrived LLC minutes. Beyond shrewd document drafting however, Defendants' true intent and knowledge of Markarian's dubious authority is betrayed by their insistence that Markarian's daughter also mortgage her personal property to secure the loan. Defendants admit that they knew the value of this property was in excess of four million dollars (and they were no doubt salivating to run up penalties and interest upon the slightest default). Why would they seek a mortgage on Markarian's daughter's personal property or other "additional property" unless they suspected that the mortgage that Markarian was "granting" was suspect. See Vaccaro MTD affidavit at ¶¶ 19 and 23. Defendants were hedging their bets. It is respectfully submitted that this is not the reasonable behavior of reputable commercial lenders. Defendants are the puppet masters of their own fate.

Vaccaro makes several other unsupportable assertions. Vaccaro claims that Markarian "held himself out to be the sole member" of the LLC "at all times up to and during the closing" yet the hastily drawn mortgage document listed Markarian's alleged entity as a "corporation" and Markarian's title as "President". These obvious errors were corrected by hand at the closing.

Take a look at the mortgage attached to the Verified Petition as Exhibit 3. On the first page, the typewritten word "corporation" is crossed out and the words limited liability company written in by hand; on the last page, underneath Markarian's signature, the word "President" is crossed out and the word "Member" handwritten in. This document flatly refutes Defendants' claim that Markarian held himself out as the "President" or "sole member" of the LLC. Atty

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

Rhedrick aff. ¶ 25. Instead, Defendants must have put so many papers in front of Markarian for him to sign and initial and sign and initial that Markarian did not catch all of their mistakes and inaccurate assumptions.

Vaccaro goes on to assert that he has been engaged in business dealings with "348 Realty Associates, LLC" for approximately "six years". Vaccaro MTD aff. ¶ 2. This is an outright sworn falsehood submitted to this Court for Defendants' direct pecuniary gain. 348 Realty Associates, LLC was not created until August 24, 2005, less than a year before Vaccaro issued his high pressure loan. In fact, Vaccaro admits that he entered into negotiations with "Markarian", that he introduced "Markarian" to a loan officer, and that "Markarian" did not close on that loan. Vaccaro MTD aff. ¶¶ 3-6.

Vaccaro must have known when he signed his affidavit under oath and with the advice of his attorney, that at the time of Vaccaro's alleged dealings with Markarian, the LLC did not even exist.

Similarly, when Vaccaro went on his alleged tour of the property with Markarian and concluded that he was a "business manager," the LLC also had not yet come into existence. Vaccaro MTD affidavit at ¶ 8.

Vaccaro does not explain just how this "closing" was conducted because he was "not consistently in the room where the closing was held". If, as Vaccaro claims in ¶ 13 of his MTD affidavit, he ordered a title report and insurance from Heights Abstract, he would certainly have become aware that Mr. Friedberg signed on behalf of the LLC in granting a first mortgage to Paragon Federal Credit Union in September of 2005. But of course Vaccaro's self-serving claim that the title company sought documents from the LLC (Vaccaro MTD affidavit at ¶ 14) is utter nonsense. No one ever requested documents from the LLC. See Friedberg affidavit at ¶¶ 23-24.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

On September 22, 2005, the LLC granted a first mortgage to Paragon Federal Credit Union (Paragon). This was recorded as a **public document** well before Defendants' alleged loan.

The LLC, by its managing member Mr. Joel Friedberg, signed the Paragon mortgage on behalf of 348 Realty Associates, LLC. Friedberg aff. dated Feb. 13, 2008 at exhibit 2; Friedberg aff. dated June 3, 2008 ¶ 33. Mr. Friedberg signed immediately under the boldfaced words "348 Realty Assocs., LLC Mortgagor". Dr. Markarian and his wife, Rose Markarian, signed merely as guarantors (and the word "Guarantor" appears conspicuously under their signature lines). Friedberg aff. dated June 3, 2008 ¶ 33.

Upon information and belief, Defendants evidently failed to request or obtain a payoff statement from Paragon before they made a two hundred and fifty thousand dollar ($250,000.00) loan to Dr. Markarian. For all Defendants knew, there might have been no equity left to secure their purported mortgage. Friedberg aff. dated June 3, 2008 ¶ 34.

Furthermore, any competent prospective second mortgage lender inspects the first mortgage to ensure that their subordinate mortgage will not constitute an event of default. Yet, Defendants and their agents (an experienced lawyer and title closer), experienced practitioners, elected to ignore the first mortgage at their own considerable—and unjustifiable—risk. Friedberg aff. dated June 3, 2008 ¶ 35.

A cursory review of the Paragon mortgage would have instantly prompted questions as to Dr. Markarian's authority. The Paragon mortgage would have likewise prompted Defendants to call the LLC or its lawyer on the telephone to inquire about Dr. Markarian. Friedberg aff. dated June 3, 2008 ¶ 36.

Under the 348 Realty Assocs., LLC Mortgagor signature line bearing Mr. Friedberg's signature is his typed name and a parenthetical also identifying him as the managing member of JD Venture Capital, LLC. This clearly tracks the Operating Agreement at § 5.1.1. which reads: "Joel

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

Friedberg, as a managing member of JD [Venture Capital, LLC], is hereby appointed to serve as the . . . 'General Manager'". **Verified Complaint (Petition)** at exhibit 2, p. 15. Friedberg aff. dated June 3, 2008 ¶ 37.

Obviously, once upon a time, Dr. Markarian held a previous interest in the premises under an entirely different entity called 2083 Center Associates, LLC and even that interest was not exclusive—it was shared with his wife, Rose. Friedberg aff. dated June 3, 2008 ¶ 38.

Defendants must have wrongly assumed that Dr. Markarian's prior interest not only continued but that Rose's interest had also miraculously disappeared, magically vesting such former interest in her husband. But make no mistake: the Markarians (*plural*) legally and publicly conveyed the subject property from their entity to 348 Realty Assocs., LLC, on September 22, 2005, almost 9 months before Defendants' loan deal. **Verified Complaint ("Petition")** at Exhibit 1. Friedberg aff. dated June 3, 2008 ¶¶ 39-40 .

Defendants were reckless.

Thus Defendants preposterous claim that they were "never in a position to gain information that would prove" that Markarian had no authority at all is more nonsense. Rhedrick MTD aff. ¶ 5. Defendants have no legitimate excuse for ignoring the public records readily available at the Rockland County Clerk's office or on the New York State Department of State's website listing the entity's correct and official address, the entity's date of creation (August 24, 2005), the entity's lawyer and the registered agent of the entity. Friedberg aff. dated Feb. 13, 2008 ¶¶ 18-19, 21-22 Defendants have presented no evidence that Markarian was ever the day-to-day managing member of the LLC and Mr. Friedberg's affidavit flatly refutes such a claim. Friedberg aff. dated Feb. 13, 2008 ¶ 12.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=0b7d64ea-de4d-4a76-ab00-f99e2e61d5c1

CONCLUSION

This mortgage was not an act in the usual course of the LLC's business and thus it is void absent actual authority which Markarian simply did not have. LLCL § 412(c) is controlling and dispositive. The mortgage must be discharged. The note must be canceled as to Plaintiff, at least.

Defendants got what Markarian had to give: namely, nothing at all. Defendants recklessly chose to lend money based on a smile, a handshake, and obviously suspect pledges that were not Markarian's to make. This is not a case of 20/20 hindsight. Markarian's lack of authority to act was plain to see back in June of 2006.

The relief sought in the Verified Complaint ("Petition") and accompanying June 2008 Order to Show Cause for summary judgment should be in all respects granted.