DOCKET NO.: MMX-CV-05-4003196-S	**:**	**SUPERIOR COURT**
LISA BRAULT	**:**	**J.D. OF MIDDLESEX**
VS.	**:**	**AT MIDDLETOWN**
R. JAMES GRAYDON, ET AL	**:**	

PLAINTIFF'S PRETRIAL MEMORANDUM

I. INTRODUCTION

On July 20, 2001, plaintiff Lisa Brault ("Brault") loaned defendants $500,000. On May 24, 2002, defendants executed a Note for $500,000 accompanied by a mortgage on a vacation property that they owned.. Defendants did not make the payments that the Note required, but seek to avoid foreclosure by claiming that (1) the Note and mortgage lacked consideration, and (2) the parties entered an accord, which defendants claim they satisfied. On June 5, 2006, this court ruled that, based on the undisputed facts and law, defendants' antecedent debt to plaintiff was sufficient consideration to support the Note, and that, in any event, the mortgage is valid regardless of the alleged absence of consideration. Plaintiff respectfully submits this Pretrial setting forth the anticipated testimony and evidence, and applicable law, for the Court's reference during the trial of this action.

II. ANTICIPATED TESTIMONY AND EVIDENCE

Defendant Linda Grayden, who is plaintiff's sister, is a college graduate, who has been employed in the financial and investment industry since she graduated from college. Defendant R. James Graydon, who is Linda Grayden's husband, is a board certified surgeon. Plaintiff did not complete high school, but obtained a GED in 1975. In July 2001, plaintiff was a 50% partner with her father, Melvin Werthheim in a private corporation known as Accumail. Plaintiff's salary at that time was $63,800. As a 50% owner of the corporation, plaintiff was also able to take her distribution of profits from the corporation during the year.

In or around July 20, 2001, plaintiff's sister asked plaintiff to loan defendants $500,000. Linda explained that she and her husband were experiencing financial difficulties, and that they would lose their vacation home if she did not loan them the money. In order to induce plaintiff to loan defendants the money, Linda assured plaintiff that the debt was secure because the vacation home was certain to appreciate substantially, and that, if plaintiff loaned them the money, Linda and her husband would "make it worth her while." Plaintiff acquiesced to her sister's request, and gave defendants $70,000 out of her personal bank account, and $430,000 out of the Accumail account as her distribution of profits from the company that year. Plaintiff declared that $430,000 distribution as income to her in her 2001 year tax return and paid taxes on that money. In 2002, plaintiff purchased her father's 50% interest in Accumail and became the sole owner.

On May 2002, the parties executed a Note to formalize and establish the terms of the loan going forward, and defendants delivered to plaintiff a mortgage on the vacation property to secure the debt. Pursuant to the Note, plaintiff gave defendants at least two more years, and up to five years, to repay the principal of the loan, provided that defendants paid plaintiff 5% interest on the principal amount due each year. Pursuant to the Note, if defendants failed to pay the interest when

due, plaintiff would be entitled to a late charge equal to 5% of the amount overdue and plaintiff could accelerate the Note and demand payment in full. The Note also provided that, if defendants failed to make the payments due upon maturity or acceleration, interest on the total amount due would accrue at the rate of 10%, and that plaintiff would be entitled to recover her costs of collection, including reasonable attorney fees. The Note further provided that plaintiff's agreement to extend any payment under the Note would not affect the defendants' liability under the Note. Finally, defendants' acknowledged in the Note that the Note was valid, that their obligation under the Note were binding on them, and that the terms of the Note could not be modified or amended except by a written instrument. The Mortgage incorporated all of the terms of the Note by reference.

Plaintiff sold Accumail to a third party in 2003. Defendants failed to make their first $25,000 interest payment due to plaintiff in May 2003, claiming that they were still in financial straights. In light of the parties' relationship and in an act of good faith, plaintiff did not accelerate the Note at that time. In May 2004, defendants also did not make any payment to plaintiff, again on the ground that they were experiencing financial difficulties. By November 2004, defendants had still not made any of the required payments. In an act of good faith, plaintiff again refrained from accelerating the Note, even though defendants' default, and the other terms of the Note, authorized her to do so at this time. Instead, plaintiff requested, through her attorney, that defendants simply pay the outstanding interest and late fees of $52,500, which defendants failed to do.

In March 2005, three and half years after plaintiff had loaned defendants the money, when defendants had still not made a single payment of interest or principal to plaintiff, she called her sister and asked her sister whether the defendants had any intention to fulfill their obligations under the Note. Notwithstanding their claimed financial problems, plaintiff's sister responded that she was

too busy preparing for a trip to Europe to discuss the matter. Accordingly, on March 16, 2005, plaintiff demanded that defendants repay the $500,000 in principal and $116, 666.66 in interest and late fees due on the loan, in addition to $2,500 in legal fees. Plaintiff also orally demanded from her sister that she and her husband fulfill their obligations under the Note. Defendants objected to the demand, claiming that the interest and late fees to which they had agreed in the Note, were excessive.

At around the same time, plaintiff engaged in a discussion with her father, whom she believed to be in financial straights, himself. Plaintiff stated that she intended to sue the defendants to enforce the Note and mortgage, and that, when she received the sums that defendants owed her, she would give her father $200,000. Plaintiff's father was distraught about the impending lawsuit between his daughters and asked for permission to talk to the defendants about the dispute. Plaintiff told her father that, if he wished, he could try to persuade them to fulfill their obligations to her. Plaintiff did not authorize her father to compromise her claim, and she never stated to him that she would be willing to waive the $116,666 in interest and late fees due to her in order to resolve the dispute.

On or about March 20, 2005, plaintiff's father called the defendants and, unbeknownst to plaintiff, left a message in which he requested that defendants send him two checks, one made out to him in the sum of $200,000, and one made out to plaintiff in the sum of $300,000, and that he would have plaintiff's attorney "draw up the papers." Plaintiff's father's failure to include the request for interest and late fees due was inadvertent. Plaintiff, whom defendants knew was represented by legal counsel in connection with her claim against them, never represented to defendants that her father was authorized to compromise her claim or that he was authorized to direct her attorney to take any action on her behalf.

On or about March 20, 2005, defendants sent two checks to plaintiff's father – one made out to him, in the sum of $200,000, and one made out to plaintiff, in the sum of $300,000. However, defendants requested that plaintiff and her father **not** deposit the checks because they were drawn on a loan account, and the defendants would begin to incur interest on this loan when the checks were paid. Shortly thereafter, plaintiff's father presented plaintiff with the check made out to her in the sum of $300,000 and told her that defendants had also sent him a check for $200,000. Plaintiff father indicated that defendants' were offering these payments to plaintiff in order to resolve the dispute, and also presented plaintiff with a release form, which defendants had provided to him. Plaintiff responded that defendants owed her substantially more money, that this payment would not be sufficient to resolve the dispute, and that she would not sign a release. Defendants never contacted plaintiff to authorize her to deposit the payment they had remitted, and neither plaintiff nor her father ever deposited the checks. After plaintiff refused to sign the release, defendants also did not demand that plaintiff return the checks.

On June 9, 2005, plaintiff initiated the above captioned action. In their Answer, defendants claimed, for the first time, that:

(a) even though they acknowledged in the Note and Mortgage that these instruments were valid and binding on them, these instruments were not, in fact, valid because the consideration for them was an antecedent debt, a position that this Court rejected in its ruling on defendants' motion for summary judgment; and

(b) even though defendants knowingly accepted checks from plaintiff drawn on the Accumail account, and even though defendants acknowledge in the Note and Mortgage that plaintiff was personally entitled to repayment of these checks, they believed that plaintiff was not personally entitled to be repaid, because the checks were drawn on the Accumail account and she was not

authorized to issue the checks, a specious claim that defendants have now agreed to withdraw.

Defendants also assert that the telephone message from plaintiff's father created a binding accord, and that defendants satisfied the accord when they sent the checks to plaintiff's father, which they asked plaintiff and her father not to deposit.

III. APPLICATION OF THE LAW TO THE FACT

A. THE PRIMA FACIE ELEMENTS FOR A FORECLOSURE ARE PRESENT

To successfully establish a prima facie case in a foreclosure action, the plaintiff must "prove by a preponderance of the evidence that it [is] the owner of the note and mortgage and that [the defendant has] defaulted on the note." Salomon Brothers Realty Corp. v. Noll, 2002 WL 653811 at * 2 (Conn.Super.) (March 27, 2002) (West,. J.), quoting, Webster Bank v. Flanagan, 51 Conn.App. 733, 750-51 (1999). It is a matter of undisputed fact that plaintiff is the owner of the note and mortgage in this case. It is also beyond dispute that defendants have defaulted on the Note because the Note required them to make annual interest payments each year beginning in May 2003, and required defendants to pay plaintiff the full principal and interest due on the note on demand at any time after May 2004, and defendants have failed to make a single payment of principal and interest on the Note.

B. DEFENDANTS CANNOT ESTABLISH AN ACCORD OR SATISFACTION

"An accord is a contract between creditor and debtor for the settlement of a claim by some performance other than that which is due. Satisfaction takes place when the accord is executed ... Without a mutual assent, or a meeting of the minds, there cannot be a valid accord." Salomon Brothers, at * 3. "To prove an accord and satisfaction, the defendant must show that at the time of the agreement there was a good faith dispute over the existence of a debt or over an amount owed, and that the debtor and the creditor negotiated a contract of accord to settle the

claim ... The accord must be a new agreement based on new consideration ... The proponent must be able to show that there was a meeting of the minds, and that the offer by the debtor was clearly tendered as full satisfaction of the debt and that the payment was knowingly accepted." Id.

Defendants cannot prove any of the elements of either an accord or satisfaction because (1) the statute of frauds precludes the alleged oral accord; (2) there was no good faith dispute or consideration; (3) Mr. Wertheim did not have authority to enter an accord on plaintiff's behalf and there was no meeting of the minds between the parties; and (4) there was no satisfaction.

1. The Statute of Frauds Precludes The Alleged Oral Accord

"An agreement to forbear from foreclosing a mortgage involves an interest in real property; therefore, such an agreement is within the purview of the Statute of Frauds and *must be in writing.*" Morequity Inc. v. Keleina, , 2004 WL 2829333 at *3 (Conn.Super.), 38 Conn. L. Rptr. 206 (November 4, 2004) (Brunetti, J.) (emphasis in original) (holding alleged oral agreement to forbear from enforcing terms of mortgage was invalid and unenforceable);[1] Sunset Mortgage v. Agolio, 2006 WL 1102715 at *2-3 (Conn.Super.) (April 7, 2006) (Jones, J.) (same); Source One v. Dziurzinski, 1996 WL 366379 (Conn.Super.), 17 Conn. L. Rptr. 29 (May 22, 1996) (Hickey, J.) (alleged oral agreement to release mortgage is invalid and unenforceable and is thus no defense to a foreclosure action). A party may not even present testimony purporting to establish an oral agreement purporting to modify its obligations under a mortgage. Hicks v. Bruhne, 2006 WL 760191 at *2 (Conn.Super.) (March 9, 2006) (Spallone, J.)

[1] General Statutes § 52-550(a) governs the statute of frauds and provides that any "agreement ... [must be] made in writing and signed by the party ... to be charged ... upon any agreement for the . . . interest in or concerning real property ... or upon any agreement for a loan in an amount which exceeds fifty-thousand dollars." Moreover, the "statute of frauds requires any modification to the note and mortgage to be in writing." Saunders v. Stigers, 62 Conn.App. 138 (2001).

In this case, defendants claim that there was an oral accord whereby plaintiff, through her father, agreed to completely waive her right to interest, late fees, and attorney fees under the Note, to forbear from foreclosing on the Mortgage and to release her interest in their property evidenced by the Mortgage. Pursuant to the foregoing cases, this alleged agreement relates to both the loan and plaintiff's interest in the defendants' real property, which the statute of frauds prevents defendants from enforcing, and from even offering testimony to prove.

2. There Was No Good Faith Dispute and No Consideration

"[An] accord is an agreement; but there is no agreement, without a consideration; and receiving part only, is no consideration for an agreement not to collect the rest; it is a nude pact." Troj v. Lane, 1998 WL 175947 at * 1 (Conn.Super.), 21 Conn. L. Rptr. 652 (April 3, 1998) (Thim, J.), quoting, Warren v. Skinner, 20 Conn. 559, 561 (1850) and W.H. McCune, Inc. v. Revzon, 151 Conn. 107 (1963). In Warren, supra, the defendant owed the plaintiff $197.32 plus interest pursuant to a Note. The defendant asserted, and presented evidence to show, that the parties had entered an accord whereby the plaintiff agreed to accept half the principal owed in full satisfaction of the debt. The Connecticut Supreme Court affirmed the trial court's decision that, even if such an agreement existed, the accord was not enforceable because the defendants' payment of only part of the debt due did not constitute consideration to support an agreement by the plaintiff to release its claim of right to the remaining amount due.

As in Warren, supra, the purported accord that defendants allege in this case – *viz*. that plaintiff agreed to accept only $500,000 of the more than $666,000 in liquidated damages due to her under the terms of the Note, is a "nude pact" that is not supported by any consideration.

3. Mr. Wertheim Did Not Have Authority To Compromise Plaintiff's Claim and There Was No Meeting of the Minds

"A common intention or meeting of the minds of the negotiating parties themselves is essential to the making of an accord, and where one party understands an agreement of settlement to be one thing, and the other party understands it to be another, there is no meeting of the minds of the parties." Savings Bank of Rockville v. Garofalo, 1997 WL 120334 (Conn.Super.) (February 28, 1997) (Hammer, S.T.R.) (emphasis in original). An agreement for an accord by a party's representative is not enforceable unless the party, herself, consented to the accord and expressly authorized her representative to bind her – and this is so regardless of what the party's representative believes her intentions to be. Id. Moreover, the mere retention of a representative, such as an attorney, to act on that parties' behalf regarding a matter does not create actual or apparent authority in that representative to bind the party to an accord. Id. (holding that accord to which parties' attorneys agreed was not enforceable against plaintiff where the plaintiff had not given her attorney express authority to enter into a compromise on her behalf); MJDR, LLC v. Town of Vernon, 2003 WL 21977186 (Conn.Super.) (July 31, 2003) (Scholl, J.) (settlement agreement between attorneys was not binding on defendant where there was no evidence that the defendant gave her attorney authority to compromise her claim or that the defendant[2] held her attorney out as having authority to bind her to a resolution of her claims.); Windsor Housing Authority v. Fonsworth, 2000 WL 949596 (Conn.Super.), 27 Conn. L. Rptr. 386 (June 28, 2000) (Tanzer, J.) (same, regarding plaintiff's attorney); Stark v. Gyle,

[2] "[T]o create apparent authority, the *principal must manifest to the third party* that he 'consents to have the act done on his behalf by the person purporting to act for him." Windsor Housing Authority v. Fonsworth, 2000 WL 949596 at *3 (Conn.Super.), 27 Conn. L. Rptr. 386 (June 28, 2000) (Tanzer, J.), quoting, 1 Restatement (Second), Agency § 27, p. 103 (1958).

1991 WL 135317 (Conn.Super.) (July 11, 1991) (Dranginis, J.) (same).

In this case, there was no meeting of the minds. Plaintiff never intended to, or agreed to, waive her right to interest, late fees, and attorney fees in exchange for defendants' payment of $300,000 to her and payment of $200,000 to her father. Indeed, plaintiffs father has testified that (1) plaintiff never told him that she would waive her right to interest, late fees and attorney's fees in exchange for defendants' payment of the principal of the loan; (2) that he understood that plaintiff expected defendants to pay the interest due under the Note; and (3) because of the foregoing, his failure to mention the interest due in his telephone message to the defendants was an inadvertent mistake on his part. Accordingly, plaintiff refused to sign the release that defendants provided to her father – of which defendants were obviously aware - and refused to cash their check to her for $300,000 – of which defendants were also aware.

Moreover, plaintiff did not authorize her father to bind her to a resolution of her claims, and never manifested to defendants that she consented to her father entering an accord on her behalf. To the contrary, plaintiff had retained legal counsel to act on her behalf with respect to her claims, and defendants were well aware of this fact. Accordingly, there was no meeting of the minds, and Mr. Werthheim did not, and could not, create a binding accord by his telephone message to the defendants.

Plaintiff anticipates that defendants will argue that plaintiff is nevertheless bound by the alleged accord because she failed to return the check to them. However, plaintiff had no obligation to return the check to the defendants in order to avoid being bound by the alleged accord. See Herbert S. Newman and Partners, P.C. v. CFC Construction Limited Partnership, 1994 WL 673255 (Conn.Super.), 13 Conn. L. Rptr. 154 (November 28, 1994) (DeMayo, T.R.) (“failure to return a check tendered in satisfaction of an accord does not necessarily amount to an

acceptance of the debtor's terms of the accord"), citing, Kelly v. Kowalski, 186 Conn. 618 (1982) (plaintiff's retention of defendant's checks, purportedly issued in accordance with disputed accord did not bar plaintiff's suit for the remainder of the indebtedness, particularly where defendants did not demand that the plaintiff return the checks, and could not show they were prejudiced by the retention.); Schoonmaker v. Lawrence Brunoli, Inc., 265 Conn. 210 (2003) (affirming verdict against defendant where defendant claimed that plaintiff's retention of defendant's checks constituted acceptance and satisfaction of an alleged accord.); Olean v. Treglia, 190 Conn. 756 (1983) (stating that "[t]he defendants have cited no authority for their argument that retention of checks is inconsistent with a finding of default, and our case law is to the contrary," where lender retained but did not cash defendants payments, which were for an amount that was less than the amount due.);

4. There Was No Satisfaction

Finally, there was no satisfaction. In order to enforce an accord, the defendants must establish that the tendered full performance of their obligations under the accord, and that plaintiff knowingly accepted their payment. Source One, supra; Salomon Bros., supra. Here, defendants did not tender full performance of the alleged accord. Although defendants sent the plaintiff a check, at the same time, they requested that she not deposit the check and never authorized her to deposit the check.

C. THE NOTE IS SUPPORTED BY CONSIDERATION AND THE MORTGAGE IS VALID REGARDLESS OF CONSIDERATION

On June 5, 2006, this court ruled that, based on the undisputed facts and law, defendants' antecedent debt to plaintiff was sufficient consideration to support the Note, and that, in any event, the mortgage is valid regardless of the alleged absence of consideration. This ruling is correct, and it

is the law of the case. Rood v. Canteen Corp., 1997 WL 88139 at * 1 (February 18, 1997) (Rittenband, J.) (Refusing to consider argument that plaintiff has an adequate remedy at law where "Judge Potter, in his Memorandum of Decision . . . on Canteen's motion to strike, has already ruled on the issue . . . finding that there was no adequate remedy at law and that the plaintiff had the right to bring this action. Judge Potter's decision is the law of the case unless the court finds it clearly erroneous.")

IV. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court enter judgment in her favor and against defendant.

PLAINTIFF,

By: _____

Alan J. Rome
GERSTEN CLIFFORD & ROME, LLP
214 Main Street
Hartford, CT 06106
Tel. No.: (860) 527-7044
Juris No.: 304302

ORDER

The above objection is sustained/overruled this _____ day of _____, 2006.

THE COURT,

By: _____
Judge/Clerk/Asst Clerk

CERTIFICATION

This is to certify that a copy of the foregoing was faxed to and was sent by first class mail, postage prepaid, on December 26, 2007, to all counsel and pro se parties or record, to wit:

Kerry Marc Wisser, Esq.
Weinstein & Wisser, P.C.
29 South Main Street, Suite 207
West Hartford, CT 06107

_____
Alan J. Rome
Comm. of Superior Court