Shine On Car Wash Corp. v Horseshoe Hill Rd. Corp.
2016 NY Slip Op 30642(U)
April 12, 2016
Supreme Court, Kings County
Docket Number: 504553/2015
Judge: Carolyn E. Demarest

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of April, 2016.

PRESENT:

HON. CAROLYN E. DEMAREST
Justice.

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SHINE ON CAR WASH CORP.,

Plaintiff,

- against -

Index No. 504553/2015

HORSESHOE HILL ROAD CORP.,

Defendant.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2-9 16-23
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	25-29 30
Affidavit (Affirmation)	
Other Papers	

In this action to recover monies owed on a promissory note, plaintiff Shine On Car Wash Corp. (plaintiff) moves, under motion sequence number one, pursuant to CPLR 3213, for summary judgment in lieu of complaint based upon the non-payment of such note. Defendant Horseshoe Hill Road Corp. (defendant) cross-moves, under motion sequence number two, for an order denying plaintiff's motion for summary judgment in lieu of complaint, and granting it an order amending the caption of this action to reflect its

consolidation with an action that was commenced by it, Henry Ferris (Ferris), and Shine On Corp. (Shine On) on May 29, 2015 in the Supreme Court, Westchester County (*Ferris v Yoon*, Sup Ct, Kings County, index No. 51220/2015) (the Fraud Action).

BACKGROUND

Plaintiff is a corporation which is co-owned by John Yoon (John) and Elizabeth Yoon (Elizabeth) (collectively, the Yoons), who are also its officers, with Elizabeth as president. Plaintiff owned a car wash business operated by the Yoons at premises located at 86-01 Rockaway Boulevard in Ozone Park (the premises). 8603 Rockaway Holding, Inc. (Rockaway), a corporation also co-owned by the Yoons, has been the owner of the premises since May 15, 2013 and continues to own them. During February 2014, the Yoons and plaintiff decided to sell the car wash business, and listed the assets and operations for sale with a broker.

Ferris saw advertisements for the sale of the car wash business disseminated by the Yoons and the broker, listing the amount of its annual income, as well as future income projections based upon that income. According to Ferris, in reliance upon the information in the advertisements, he made inquiries of the Yoons, both directly and through the broker, concerning the possible purchase of the business. During and after February 2014, the Yoons showed Ferris the actual physical plant of the car wash business. At that time, the Yoons, in response to Ferris' request for verification of the alleged oral representations as to the income and expenses of the car wash business, allegedly gave Ferris monthly reports (the

monthly reports), which were represented by John to reflect the "actual income" generated by plaintiff's business operations for the period of approximately one year, from March 2013 through February 2014. The monthly reports showed plaintiff's income for the separate categories cash revenue, account revenue from business charge accounts, and credit card revenue. The monthly reports listed the ratio of cash revenue to credit card revenue as frequently five to one and as high as ten to one, and almost always higher than three to one. The gross income for all categories of income set forth in the monthly reports for the entire year totaled $740,063.90. According to Ferris, the Yoons verbally confirmed to him that plaintiff's income was in conformity with the monthly reports.

Ferris alleges that, based upon the representations as to plaintiff's gross annual income and projected income contained in the advertisements and as shown by the monthly reports, he made an offer to the Yoons to purchase all of plaintiff's business assets used in the operation of its retail car wash business and to obtain a lease for the premises on or about September 25, 2014. Thereafter, Ferris caused to be formed and became an officer, director, and shareholder of both Shine On and defendant.

On October 7, 2014, Shine On, by Ferris, as president, executed a Contract of Sale of Business (the contract), which was also executed by Elizabeth, on plaintiff's behalf. The contract provided that it was between plaintiff, as the seller, and Shine On, as the purchaser.[1]

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[1]The printed language in the contract, which stated that the purchaser was the "corporate designee of Henry Ferris," was crossed out and replaced with the name of Shine On, which was initialed by the parties.

It set forth that plaintiff agreed to sell and the purchaser agreed to purchase all of the assets of the car wash business located at the premises, including all of its chattels, merchandise, and stock in trade contained in the premises, together with all fixtures and equipment commonly used therein, and the company name of Shine On Car Wash.

Paragraph 2 of the contract provided that the purchase price was $700,000, payable by: (1) a down payment of $70,000, (2) the sum of $280,000 to be paid at the closing by bank or certified check payable to plaintiff, (3) the sum of $350,000 by the execution and delivery by the purchaser of a promissory note to the order of plaintiff, payable in 144 consecutive monthly installments of $3,415.48 each, inclusive of principal and interest at the rate of six percent per annum.

Paragraph 2 of the contract further provided that the promissory note to be executed by the purchaser would be dated as of the date of the closing and would contain an acceleration clause, allowing for the acceleration of the principal balance of the note upon the occurrence of a default continuing for 30 days after 10 days' notice to the purchaser of a default which had gone uncured or undefended, with a grace period of seven days and a late charge of five percent of the amount past due.

Paragraph 3 of the contract set forth that as security for the payment of the promissory note assumed by the purchaser, the purchaser agreed to execute and deliver to plaintiff a purchase money security agreement covering the fixtures, chattels, and equipment located

in the premises. This paragraph also required the purchaser to perfect a lien on such security by executing and delivering to plaintiff a UCC-1 financing statement.

Paragraph 4 of the contract provided that plaintiff had agreed to have the landlord (i.e., Rockaway) give a lease to the purchaser on the terms set forth in a lease annexed to the contract. It further provided that the contract was subject to plaintiff's delivery of a fully executed lease to the purchaser at the time of the closing.

While the contract, in paragraph 8, stated that the closing of the transaction was to take place on October 15, 2014, the closing actually took place on October 7, 2015, the same date that all of the relevant documents, i.e, the contract, the promissory note, the security agreement, the lease, and the UCC-1 financing statement, were dated. Although the contract designated Shine On as the purchaser, since Ferris was the president of both defendant and Shine On, the parties elected at the closing to have defendant be the owner and operator of the fixtures of plaintiff's business and the tenant under the lease with Rockaway. Therefore, defendant, rather than Shine On, by Ferris, as its president, executed the promissory note, the security agreement, and the lease, and defendant's name appears on the UCC-1 financing statement.

At the October 7, 2014 closing, defendant purchased plaintiff's assets and business operations for the sum of $700,000, and executed the 30-year lease with Rockaway for its occupancy and operations at the premises. At such closing, defendant paid $350,000 by a bank check and executed the promissory note, dated October 7, 2014, as the maker,

obligating it to pay plaintiff, as the note holder or lender, $350,000, and also executed the security agreement, dated October 7, 2014.

Paragraph 1 of the promissory note provided that defendant, as the borrower, promised to pay plaintiff, the sum of $350,000, together with interest at the rate of six percent per annum in monthly installments of principal and interest of $3,415.48, commencing on December 1, 2014 and each and every month thereafter on the 1st day of the month, until November 1, 2026 (the maturity date) when the entire principal balance, together with interest thereon, would become due and payable.

Paragraph 2 (A) of the promissory note set forth that in the event that any payment due thereunder was not received by the 10th day after the due date of a monthly payment, a late charge in the amount of 2.5% for an overdue payment would be charged by plaintiff. Paragraph 2 (B) of the promissory note provided that if defendant did not pay plaintiff the full amount of each monthly payment on the date it was due, it would be in default. Paragraph 2 (C) of the promissory note further provided that if defendant were in default, plaintiff would send it a written notice that if it did not pay the overdue amount by a certain date, immediate payment of the full amount of unpaid principal and all interest owed on that amount, could be demanded and that such certain date must be at least 30 days after the date on which the notice was mailed to defendant. Paragraph 2 (D) of the promissory note stated that upon defendant's default under the note, interest would be charged at the rate of 12% per annum. Paragraph 2 (G) of the promissory note provided that if plaintiff required defendant

to pay immediately in full due to its default, plaintiff would have the right to be paid for all of its costs and expenses in enforcing such note and/or security agreement, including reasonable attorneys' fees.

Defendant made the first three payments (i.e., for December 2014, January 2015, and February 2015), and, thereafter, failed to make any further payments, claiming that the promissory note was fraudulently induced by plaintiff and the Yoons. According to defendant, shortly after the closing, it was observed that the monthly totals of revenue being generated by the car wash business substantially varied from what the Yoons and plaintiff had orally represented and had shown in the monthly reports. Specifically, defendant claims that the actual cash revenue of plaintiff's car wash business, as prorated and compared to the income set forth in the monthly reports, showed that the total revenue set forth therein had been exaggerated by more than 20% and that the cash revenue, relative to account and credit card revenue, was only two to nearly three times higher, as opposed to being five to ten times higher as had been represented in the monthly reports.

Defendant claims that, beginning in February through April 2015, it had recovered forensic evidence from plaintiff's computer, which plaintiff had left behind after the closing of the purchase of its business, which showed that manipulations had been made by plaintiff and the Yoons as to its income for the car wash business. Defendant, Ferris, and Shine On state that although plaintiff and the Yoons had "erased" these manipulations, they were still contained in the memory of the computer. Defendant, Ferris, and Shine On explain that they

were able to retrieve them by their expert, Innovative Control Systems, which monitors and maintains computer systems and was able to penetrate the computer's memory to uncover data and generate reports which showed the actual income, as input by the Yoons and plaintiff on a daily basis before they manipulated it. Defendant, Ferris, and Shine On assert that this forensic evidence from the computer showed that some time prior to or during the due diligence period, and in response to Ferris' demand for written verification of plaintiff's income, the Yoons and plaintiff had manipulated the data on the computer to generate the monthly reports so as to embellish and grossly overstate the amount of cash receipts. Defendant, Ferris, and Shine On note that the Yoons and plaintiff were able to manipulate the amount of cash receipts since there is no paper backup for such receipts, as opposed to the credit card income, which necessarily had a paper trail and, therefore, could not be manipulated. They assert that, during April 2015, this forensic evidence retrieved from plaintiff's computer disclosed that the actual gross income for plaintiff's car wash business from March 1, 2013 through February 28, 2014 was approximately $607,465.43, rather than $740,063.90, as represented by the Yoons orally and by the written monthly reports. They point out that they could not independently verify the amount of cash receipts and had relied upon the monthly reports when determining the value and worth of plaintiff's business and the lease prior to entering into the contract for the purchase of plaintiff's assets and the lease of the premises. Ferris also asserts that certain employees of plaintiff had reported to him

that they actually observed the Yoons "working feverishly to erase records in the computer system" before the closing on October 7, 2015.

After making two payments on the promissory note, defendant stopped making payments thereunder, beginning with the payment due in March 1, 2015, based upon its claim that the contract had been fraudulently induced by false misrepresentations as to the value of plaintiff's business and its income. By a letter dated March 15, 2015 (the notice of default), Elizabeth informed defendant and Ferris that, pursuant to the promissory note, they had defaulted on the payment due on March 1, 2015 in the amount of $3,415.48, and that demand was thereby being made for that payment of $3,415.48, plus a 2.5% late charge, in the total amount of $3,500.86. She further stated, in the notice of default, that notice was thereby given that the interest rate upon default on the remaining balance of the loan would be increased to 12% per annum so that the remaining 141 monthly payments would be $4,596.97 per month. Defendant did not make the payment demanded by the notice of default, nor did it make any further payment under the promissory note.

Consequently, on April 17, 2015, plaintiff commenced this action against defendant by notice of motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Plaintiff seeks summary judgment in its favor against defendant for the sum of $346,676.08 plus 12% interest from March 1, 2015, together with the attorneys' fees and costs incurred by it in this action.

Thereafter, on May 29, 2015, defendant, Ferris, and Shine On commenced the Fraud Action against plaintiff, the Yoons, and Rockaway in the Supreme Court, Westchester County. The complaint in the Fraud Action alleged five causes of action. Defendant, Ferris, and Shine On's first cause of action for fraud in the inducement sets forth a claim for rescission of the contract, the lease, the promissory note, and the security agreement. They seek to have returned to them all of the proceeds paid toward the purchase of the assets and operations of plaintiff's business, plus their costs in entering into and closing on the contract, including the taxes and legal fees paid. Their second, third, and fourth causes of action sought reformation of the contract based upon a claimed mistake of fact. Their fifth cause of action alleges a claim of unjust enrichment and seeks to recover damages of not less than $500,000. They assert, in this cause of action, that plaintiff, the Yoons, and Rockaway were unjustly enriched as a result of the sale of plaintiff's car wash business and the payments received from Ferris and the obligations assumed by them under the lease, the promissory note, and the security agreement, which, they claim, far exceed the actual value received at the closing of the transaction.

Defendant, Ferris, and Shine On, simultaneously with the commencement of the Fraud Action in the Supreme Court, Westchester County, moved, by order to show cause, to consolidate the Fraud Action with the present action. Plaintiff, the Yoons, and Rockaway opposed that motion and cross-moved to dismiss the Fraud Action, pursuant to CPLR 3211 (a) (1) and (7), or, in the alternative, to transfer and consolidate that action with the present

action. By a decision and order dated October 6, 2015, Justice Francesca E. Connolly granted that branch of defendant, Ferris, and Shine On's motion which sought consolidation, and ordered the Fraud Action to be transferred to the Supreme Court, Kings County, and consolidated with the instant action, pursuant to CPLR 602 (b), for joint discovery and trial. She also granted leave to plaintiff, the Yoons, and Rockaway to make a new motion to dismiss in the consolidated action.

On October 29, 2015, defendant cross-moved in the present action to deny plaintiff's motion for summary judgment in lieu of complaint based on the promissory note in view of the fraud claims raised in the Fraud Action. On November 2, 2015, plaintiff, the Yoons, and Rockaway moved, in this court, to dismiss the Fraud Action, pursuant to CPLR 3211 (a) (1) and (7). By a decision and order decided herewith, the court denied plaintiff, the Yoons, and Rockaway's motion with respect to their first cause of action for fraudulent inducement and their fifth cause of action for unjust enrichment, and granted their motion with respect to their second, third, and fourth causes of action which sought reformation based upon mistake. The court must now determine plaintiff's motion and defendant's cross motion in the present action.

DISCUSSION

The note at issue is an instrument for the payment of money only within the meaning of CPLR 3213. In order "[t]o establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the

defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms" (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]; *see also Quest Commercial, LLC v Rovner*, 35 AD3d 576, 576 [2d Dept 2006]). The burden then shifts to the defendant "to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense" (*Gullery v Imburgio*, 74 AD3d 1022, 1022 [2d Dept 2010]).

In support of its motion, plaintiff asserts that it has made a prima facie showing of its entitlement to summary judgment in lieu of complaint by showing the existence of the promissory note signed by Ferris, as president of defendant, on October 7, 2014, the date of the sale of the car wash. It further asserts that it has established the failure to pay the note according to its terms since the note required defendant to make monthly payments of $3,414.58 on the first of each month beginning on December 1, 2014 through November 1, 2026, and defendant only made the first three payments and then defaulted by failing to make any further payments. Elizabeth has submitted her affidavit, in which she attests that payments were made in accordance with the note for the first three months, but that defendant then failed to make the payment due on March 1, 2014 and has been in default since that time. She states that she mailed the notice of default to defendant on March 15, 2015, and the outstanding amounts were not paid as demanded therein. With respect to plaintiff's acceleration of the note, the notice of default did not provide notice, pursuant to paragraph 2 (C) of the note, that the full amount of principal and interest owed would be

accelerated and become immediately due and payable 30 days after that notice was mailed (*see Superior Fid. Assur., Ltd. v Schwartz*, 69 AD3d 924, 925, 926 [2d Dept 2010]). However, plaintiff accelerated the note by the commencement of this action and it is undisputed that defendant has defaulted under the note by failing to make the payments required thereunder.

Defendant, however, in opposition, asserts that a triable issue of fact exists as to its defense of fraudulent inducement with respect to the related contract of the sale of plaintiff's car wash business, for which the purchase money note was given. While plaintiff argues that this fraudulent inducement defense should be dismissed based upon merger clauses in the contract, and, therefore, should not prevent the granting of its motion, the court, in its decision and order in the Fraud Action (decided herewith by a separate decision and order), has ruled that the merger clauses in the contract relied upon by plaintiff do not preclude the defense of fraudulent inducement or the use of parol evidence to establish defendant's reliance upon certain representations allegedly made by plaintiff and its principals, the Yoons (*see Black Rock, Inc. v Z Best Car Wash, Inc.*, 27 AD3d 409, 409-410 [2d Dept 2006]; *Cleangen Corp. v Filmax Corp.*, 3 AD3d 468, 469 [2d Dept 2004]; *Culinary Connection Holdings v Culinary Connection of Great Neck*, 1 AD3d 558, 559[2d Dept 2003], *lv denied* 3 NY2d 601 [2004]).

Fraudulent inducement may properly be raised as a defense to payment of a promissory note (*see Black Rock, Inc.*, 27 AD3d at 409-410; *Cleangen Corp.*, 3 AD3d at

469). "'Promissory notes given in exchange for purchase of a business cannot be viewed in a vacuum where genuine issues of fact exist as to whether the transaction was induced by misrepresentation . . . , even where the obligation is termed unconditional'" (*Sce v Ach*, 56 AD3d 457, 459 [2d Dept 2008], quoting *Slavin v Victor*, 168 AD2d 399, 399 [1st Dept 1990]; *see also Su Nam Bu v Sunset Park Deli of NY Corp.*, 36 Misc 3d 1233[A], 2012 NY Slip Op 51584[U], *3 [Sup Ct, Kings County 2012]; *Delmastro v Rescue Carting Corp.*, 2011 NY Slip Op 30725[U] [Sup Ct, Suffolk County 2011]).

Notably, the note does not state that the obligation to make the payments provided for in such note is absolute and unconditional and not subject to any defense, set-off, counterclaim, rescission, recoupment, or adjustment whatsoever, nor is there any statement that the unenforceability of the underlying liabilities shall not affect or be a defense to the note (*see Zyskind*, 101 AD3d at 551). Thus, the note does not preclude a fraudulent inducement defense (*see id.*).

It is true that "[a] breach of a related contract is generally not a defense to nonpayment of an instrument for money only" (*Fitzpatrick v Animal Care Hosp., PLLC*, 104 AD3d 1078, 1080 [3d Dept 2013]; *see also Ingalsbe v Mueller*, 257 AD2d 894, 895 [3d Dept 1999]; *A+Assoc. v Naughter*, 236 AD2d 655, 656 [3d Dept 1997]). However, here, defendant does not merely allege the breach of a related contract, but, rather, it alleges a fraudulent inducement defense with respect to a related contract for the sale of the car wash business for which the purchase money note was given in order to finance that purchase. It has been

expressly held that where a note and a contract are inextricably intertwined as part of the same transaction, a defense to the related contract may create a defense to payment on the note (*see Jason J. Weindorf, CPA, P.C. v Wightman*, 133 AD3d 822, 822 [2d Dept 2015]; *Oseff v Scotti*, 130 AD3d 797, 800 [2d Dept 2015]; *Fitzpatrick*, 104 AD3d at 1080; *Lorber v Morovati*, 83 AD3d 799, 800 [2d Dept 2011]; *Kehoe v Abate*, 62 AD3d 1178, 1180-1181 [3d Dept 2009]; *Sarantopoulos v E-Z Cash ATM, Inc.*, 35 AD3d 708, 709-710 [2d Dept 2006]; *Couch White v Kelly*, 286 AD2d 526, 528 [3d Dept 2001]; *Vecchio v Colangelo*, 274 AD2d 469, 471 [2d Dept 2000]; *Ingalsbe*, 257 AD2d at 895; *A+Assoc.*, 236 AD2d at 656). Thus, "[w]hile generally the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, that rule does not apply where . ... the contract and instrument are intertwined" (*Lorber*, 83 AD3d at 800; *see also Cohen v Marvlee, Inc.*, 208 AD2d 792, 792 [2d Dept 1994]; *Vecchio*, 274 AD2d at 471; *Inpar Bldg. Corp. v Veoukas*, 143 AD2d 810, 811 [2d Dept 1988]).

Here, the promissory note is inextricably intertwined with the underlying contract (*see A+Assoc.*, 236 AD2d at 656; *Zamore, Zamore & Zamore v Aloyts*, 42 Misc 3d 1222[A], 2014 NY Slip Op 50139[U], *11 [Sup Ct, Kings County 2014]). Since the note was obtained as a purchase money note in connection with the contract, which defendant claims was fraudulently induced, it does not stand alone, but, rather, defendant's claims regarding the fraudulent inducement of the contract are inextricably intertwined with the amounts owed under the note. Therefore, with respect to plaintiff's action to enforce the note, the court must

make reference to the contract and address the issue of whether it was fraudulently induced. Indeed, Ferris' assertions as to plaintiff's alleged representations, through its principals, the Yoons, and in the monthly reports, and his and defendant's reliance thereon, if proven, would undermine the underlying transaction. Thus, defendant's claim that the underlying contract, for which it gave the promissory note, was fraudulently induced by false representations is sufficient to raise triable issues of fact so as to defeat plaintiff's motion (*see Lorber*, 83 AD3d at 800; *Kehoe*, 62 AD3d at 1180-1181; *Couch White*, 286 AD2d at 528; *Ingalsbe*, 257 AD2d at 895).

Consequently, plaintiff's motion for summary judgment in lieu of complaint must be denied (*see Kehoe*, 62 AD3d at 1180-1181; *Black Rock, Inc.*, 27 AD3d at 409-410; *Green Apple Mgt. Corp. v Aronis*, 22 AD3d 462, 462 [2d Dept 2005]). Upon the denial of plaintiff's motion for summary judgment in lieu of complaint, "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise" (CPLR 3213). Thus, plaintiff's motion and defendant's answering papers are deemed to be the complaint and answer, respectively (*see Kitovas v Megaris*, 133 AD3d 720, 721 [2d Dept 2015]; *Rodrigues v Samaras*, 117 AD3d 1022, 1024 [2d Dept 2014]).

Turning to defendant's cross motion insofar as it seeks to amend the caption of this action, defendant cites to CPLR 1007, noting that it permits a defendant to implead third parties in an action where they are liable, in whole or in part, to the defendant for the alleged damages suffered by it. It further asserts that since Justice Connolly already joined this

action with the Fraud Action in her October 6, 2015 decision and order, it would be expedient for both actions to be placed under one caption under the index number assigned to the Fraud Action, i.e., index number 512220/2015. It seeks to have the caption reflect, under the sole index number 512220/2015, the title of the Fraud Action, with defendant, Ferris, and Shine On named as plaintiffs, and the Yoons, plaintiff, and Rockaway named as defendants, and with a third-party action asserted by plaintiff and defendant named as a third-party defendant.

Defendant's argument that it should be impleaded as a third-party defendant, plaintiff should be named as a third-party plaintiff in the Fraud Action and only the Fraud Action should remain, is rejected. Such an impleader is procedurally improper since pursuant to CPLR 1007, a defendant may proceed against a person as a third-party defendant only where it is "not a party" to the action, and where it "is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." Here, defendant is already a party to this action, and this is not a situation where plaintiff is seeking to hold defendant liable for any part of defendant, Ferris, or Shine On's claims against it.

Pursuant to CPLR 602 (a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." "[C]onsolidation is favored by the courts in serving the interests of justice and judicial

economy" (*Government Empls. Ins. Co. v Bailey*, 251 AD2d 627, 628 [2d Dept 1998]). "'[T]he interests of justice and judicial economy are better served by joint trials wherever possible'" (*Waldbaum's Supermarkets*, 134 AD2d 568, 569 [2d Dept 1987], quoting *Megyesi v Automotive Rentals*, 115 AD2d 596, 596 [2d Dept 1985]). "Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist" (*Mattia v Food Emporium*, 259 AD2d 527, 527 [2d Dept 1999]; *see also American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2d Dept 2012]; *Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540 [2d Dept 2007]; *Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2d Dept 2006]).

Here, as found by Justice Connolly, this action and the Fraud Action involve common questions of law and fact which should be joined for trial (*see Scotto v Kodsi*, 102 AD3d 947, 948 [2d Dept 2013]; *American Home Mtge. Servicing, Inc.*, 92 AD3d at 622; *Lorber*, 83 AD3d at 800). Specifically, defendant's claim of fraudulent inducement is raised as both a defense in this action on the note and the basis for the relief of rescission requested in the Fraud Action. Thus, inasmuch as both this action and the Fraud Action "involve common questions of law and fact and a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts" and since plaintiff did not establish that a joint trial would prejudice a substantial right, an order granting a joint trial, as ordered by Justice

Connolly, was warranted (*Mas-Edwards*, 59 AD3d at 540-541; *see also Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]; *Mattia*, 259 AD2d at 527).

Pursuant to CPLR 602 (b), "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." However, "when two actions are pending in different counties, the motion to consolidate may be made in either county . . . and in ordering consolidation of two actions into one, the court incidentally and necessarily must fix the venue of the remaining action" (*Perinton Assoc. v Heicklen Farms, Inc.*, 67 AD2d 832, 833 [4th Dept 1979]). In this regard, Justice Connolly found that considering that plaintiff was the first to invoke its rights under the contractual forum selection clause by commencing this action in Kings County, it was appropriate to remove the Fraud Action to Kings County for consolidation with this action on the note. She, therefore, transferred the Fraud Action to this court and consolidated it with this action for joint discovery and trial. The court finds that the consolidation of these actions for joint discovery and trial is appropriate (*see Lorber*, 83 AD3d at 801).

With respect to such consolidation, the court notes that this is a consolidation for joint trial, as opposed to a true consolidation of actions, as sought by defendant, where the captions merge and only one action and one caption remains, with both parties becoming both plaintiff and defendant (*see Rogin v Rogin*, 90 AD3d 507, 508 n [1st Dept 2011]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005];

Bass v France, 70 AD2d 849, 849-850 [1st Dept 1979]; *Padilla v Greyhound Lines*, 29 AD2d 495, 497-498 [1st Dept 1968]). Thus, as found by Justice Connolly, a joint trial of this action and the Fraud Action should be granted (*see* CPLR 602 [a]; *Rogin*, 90 AD3d at 508 n; *First Natl. Bank of Nev.*, 74 AD3d at 742; *Mas-Edwards*, 45 AD3d at 541 *Geneva Temps, Inc.*, 24 AD3d at 335; *Bass*, 70 AD2d at 850; *Padilla*, 29 AD2d at 497-498). In consolidating these actions for joint trial, the actions shall each retain their separate captions and separate index numbers, and separate notes of issue shall be filed for each action (*see MCC Funding LLC v Diamond Point Enterprises, LLC*, 36 Misc 3d 1206[A], 2012 NY Slip Op 51212[U], *10 [Sup Ct, Kings County 2012]). Accordingly, an order amending the caption only so as to reflect the joinder of these actions for joint trial, by listing the titles of both actions and their index numbers in the caption, is granted.

CONCLUSION

Plaintiff's motion for summary judgment in lieu of complaint is denied, and the court deems the moving and answering papers to plaintiff's motion to be the complaint and answer, respectively. Defendant's cross motion is granted to the extent that there shall be a joint trial of this action and the Fraud Action, and the caption is hereby deemed amended so as to reflect this joinder. The parties shall appear for preliminary conference in Commercial Part 11, Court Room 541 at 10 AM on May 12, 2016.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST