

**Strong v Thomas**

2013 NY Slip Op 33795(U)

July 12, 2013

Supreme Court, New York County

Docket Number: 652524/12

Judge: Barbara R. Kapnick

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**  
**J.S.C.** Justice

PART 39

Index Number : 652524/2012  
STRONG, LESLIE E  
vs.  
THOMAS, GAIL E  
SEQUENCE NUMBER : 002  
RENEWAL

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 7/12/13

  
\_\_\_\_\_, J.S.C.  
**BARBARA R. KAPNICK**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

-----X  
LESLIE ELLIOT STRONG, M.D., P.C. and,  
LESLIE ELLIOT STRONG, M.D.

Plaintiffs,

**DECISION/ORDER**  
Index No. 652524/12  
Motion Seq. No. 002

- against -

GAIL THOMAS, MD, PH.D, P.C.; GAIL  
ELIZABETH THOMAS, M.D., P.H.D.; JAMES  
MOORE; and MANHATTAN BREAST HEALTH,  
P.C.,

Defendants.

-----X  
**BARBARA R. KAPNICK, J.:**

In this motion, plaintiffs move by order to show cause for an order, pursuant to CPLR 2221, granting them leave to renew their prior motion for summary judgment in lieu of complaint (motion sequence no. 001).

After hearing oral argument on the record on January 9, 2013 on motion sequence no. 001, this Court denied plaintiffs' motion for summary judgment in lieu of complaint and directed that a complaint be filed, based on plaintiffs' failure to furnish the Court with the operative promissory note, after representing to the Court on the record that such note did not exist. Instead, plaintiffs relied on an earlier, canceled and superceded note as the basis of their motion for summary judgment in lieu of complaint. The Court stated the following on the record:

. . . there was a promissory note entered

into on June 4, 2010 in the principal sum of \$675,000. Payments were to be made in 59 equal monthly payments beginning on January 1, 2011 in the amount of \$13,050 and then, obviously, it goes on for a few pages. I'm not going to read the whole thing.

There was also a second note that was called the working capital promissory note in the principal sum of \$75,000 with interest at the rate of 6 percent and that required 11 monthly payments of \$6,455. Then there was a guarantee signed also on the same day, June 4, 2010, by both Dr. Gail Thomas, one of the defendants in this case, and her husband, James Moore, as guarantors to secure the obligations of Manhattan Breast Health, PC, which was the corporate defendant.

The problem, although no one wants to talk about it too much, is that, apparently, the defendants made one or two payments and then stopped making payments. I don't think there's any real dispute about that in the papers. So, the parties, in less than a year, specifically, in April of 2011, signed an amendment to the purchase/sale assets agreement. That was signed by Dr. Strong and by Dr. Thomas and by Mr. Moore.

I don't have to read it into the record again but it does say that these two, the promissory note and the working capital promissory note, would be canceled and superseded and a new **consolidated promissory note** would be executed in the face amount of \$713,000, would have an interest rate of 6 percent per annum from March 1, 2011 with the first payment due on April 1<sup>st</sup> and the payment schedule was changed and the date was changed from the original notes, as I've indicated.

**Despite the fact that plaintiff's counsel has indicated that there was never a consolidated promissory note, I'm sorry, but your clients, with or without attorneys, signed this document that said that this would be cancelled and the last paragraph of the**

amendment, paragraph 9, says amendment to security agreement and guarantee. It says that all references to the \$675,000 promissory note and \$75,000 working capital promissory note in the security agreement and the guarantee shall be deemed references to the consolidated promissory note. The guarantors consent to the substitution of the consolidated promissory note for the other two notes.

**Apparently, none of this happened.** So, now you'd like to go back to the terms of the original note, which, I'm sorry to say, your clients negotiated and negotiated that they would be canceled and there[] [would] be a new note. Now, if they never did a new note, I'm sorry for them but I'm really bound in summary judgment in lieu of complaint. . . .

(Tr. 17:4-19:3, Jan. 9, 2013 (emphasis added).)

Now, on their order to show cause to renew, which was brought on January 15, 2013, just six days after the first motion was denied, plaintiffs state that at the time of the filing of their motion for summary judgment in lieu of complaint:

[p]laintiffs['] counsel was unaware that a fully executed[,] signed Consolidated Promissory Note existed. It was not until the Court's decision that the document was necessary[,] that counsel for Plaintiffs contacted Plaintiffs' prior transactional counsel in Pennsylvania[,] who structured and negotiated the Amendment to Purchase-Sale of Assets Agreement and pressed for the document. It was at that time the document was located and provided.

(Pls.' Mem. of Law in Supp. 1.)

CPLR 2221(e) provides that a motion for leave to renew: "(1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination . . .; **and** (3) shall contain reasonable justification for the failure to present such facts on the prior motion."

Here, plaintiffs have not offered any reasonable justification for their failure to present the Consolidated Promissory Note on the original motion, especially when they were seeking summary judgment in lieu of complaint pursuant to the alleged terms of that note. It is not reasonable that plaintiffs or their attorneys failed to make any attempt to locate the Consolidated Promissory Note prior to bringing their motion for summary judgement in lieu of complaint and that they only first made such efforts after their original motion was denied.

Accordingly, the motion for leave to renew is denied. Plaintiffs shall file and serve a complaint within thirty (30) days and defendants have thirty days thereafter to answer or otherwise move with respect to the complaint.

This constitutes the decision and order of this Court.

Dated: 7/12, 2013

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**