

**Parker Note Acquisition, LLC v 70 Parker Ave.
Props., Inc.**

2015 NY Slip Op 32305(U)

December 7, 2015

Supreme Court, New York County

Docket Number: 652405/14

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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PARKER NOTE ACQUISITION, LLC and
JACOB FRYDMAN,

Plaintiffs,

Index No. 652405/14
Motion Sequence No. 001

-against-

70 PARKER AVENUE PROPERTIES, INC.,
PETER FRANCESE and MARY FRANCESE,

Defendants.

-----X

HON. ROBERT R. REED, J.:

In this declaratory judgment action, the parties dispute their rights and remedies under a promissory note. The complaint asserts a single cause of action for declaratory judgment, seeking a declaration that plaintiffs have “a bona fide meritorious claim for fraud against Defendants,” and that, therefore, “any sums remaining due and unpaid under the [promissory note] are deemed paid in full.” Complaint, ¶ 40. In their answer, defendants assert a single counterclaim for declaratory judgment, seeking a declaration that plaintiffs are in default and directing that the underlying note and mortgage be conveyed back to defendants.

Plaintiffs now move for summary judgment on their declaratory judgment claim and for an order dismissing defendants’ counterclaim. Defendants do not cross-move for any affirmative relief, but in their opposition papers request that the court grant reverse summary judgment dismissing the complaint and issue sanctions against plaintiffs for forum-shopping and prosecuting a frivolous action.

I. Factual Background

Defendant 70 Parker Avenue Properties, Inc. (70 Parker) owned the commercial real

property located at 58-70 Parker Avenue, Poughkeepsie, New York (Property). On March 1, 2010, 70 Parker sold the Property to nonparty Parker Avenue Associates, LLC (PAA), an entity allegedly controlled by nonparty Joseph Spiezio (Spiezio). The purchase price for the Property was \$1,875,000, and PAA issued to 70 Parker a \$1,500,000 "Mortgage Note" secured by the Property, obligating PAA to make monthly payments until maturity on March 31, 2015 (PAA Note & Mortgage). Complaint, exhibit B. As part of this transaction, 70 Parker and PAA entered into a lease agreement, whereby 70 Parker leased a portion of the Property from PAA.

The relationship between 70 Parker and PAA quickly deteriorated, and they withheld their respective rent and mortgage payments. After PAA commenced a landlord-tenant eviction proceeding against 70 Parker in Poughkeepsie, the parties entered into a global settlement resolving their dispute. Complaint, exhibit D at 3. Under the settlement, PAA waived past due rent payments and 70 Parker waived past due mortgage payments, with both waivers applying to payments owed through March 31, 2011. *Id.* 70 Parker provided an estoppel statement, dated March 31, 2011, stating that "[a]ll monetary obligations for the basic monthly principal and interest payments owed to the mortgagee by the mortgagor for the period from the inception of the debt through the date of March 31, 2011 are deemed and declared satisfied." Complaint, exhibit A. PAA and 70 Parker entered into a new, one-year lease agreement dated April 1, 2011, which authorized either party to terminate the lease without cause on 90 days notice. Complaint, exhibit D at 3. By letter dated April 13, 2011, 70 Parker notified PAA that it was terminating the new lease agreement effective July 31, 2011. *Id.* at 4. After receiving this early termination notice, PAA failed to make the May 1, 2011 monthly mortgage payment. *Id.*

On May 5, 2011, plaintiff Parker Note Acquisition, LLC (Parker Acquisition) and 70

Parker entered into a “Contract of Sale of Note and Mortgage” (Contract), whereby 70 Parker sold and assigned the PAA Note & Mortgage to Parker Acquisition for the purchase price of \$1,050,000. Complaint, exhibit B. The Contract stated that defendants Peter and Mary Francese are the “sole directors, shareholders and officers of Seller [70 Parker].” *Id.*, § 3. Under the Contract, 70 Parker, and Peter and Mary Francese, represented and warranted to Parker Acquisition, among other things, as follows:

“(i) [70 Parker] is the present holder of the Spiezio Note and Spiezio Mortgage¹ . . . (iii) that interest has been paid through March 2011, and that Seller [70 Parker] has not accepted any interest in advance for any period beyond March, 2011; . . . (v) that to the best knowledge of the Seller and in view of all circumstances known to the Seller from the time of the transaction between Seller and the maker of the Spiezio Note and Spiezio Mortgagee – Parker Avenue Associates, LLC, the maker of the Spiezio Note and Spiezio Mortgagee – Parker Avenue Associates, LLC, has no defenses or offsets to said Spiezio Note and Spiezio Mortgage and that all the provisions of said Spiezio Note and Spiezio Mortgage are in full force and effect; . . . and (viii) to the best knowledge of the Seller and in view of all circumstances know [sic] to the Seller from the time of the transaction between Seller and the maker of the Note and Mortgagee – Parker Avenue Associates, LLC, that Parker Avenue Associates, LLC, has no claims, whether by way of defense, set off, counterclaim or otherwise against Seller and/or Peter Francese and Mary Francese. This section shall survive the Closing.”

Complaint, exhibit B, § 3.

Sections 7 and 8 of the Contract dealt with events of default. Section 7 provided:

“In the event that a Default by Purchaser [Parker Acquisition] (as defined in Section 8) has occurred and continues uncured beyond the cure period as set forth in Section 8 of this Agreement, Seller may, upon written Notice to Purchaser, Purchaser’s attorney and

¹ The term “Spiezio Note and Spiezio Mortgage” is synonymous with the PAA Note & Mortgage

Seller's attorney, instruct Seller's attorney to re-assign the Spiezio Note and Spiezio Mortgage to the Seller and Purchaser's Attorney to deliver the original Spiezio Note and original Spiezio Mortgage to Seller, and immediately upon the issuance of said notice instructing the re-assignment and delivery of the instruments to the Seller by the Escrow Agents, and all liability of the Purchaser under the Parker Note and all obligations of Jacob Frydman, the Guarantor, shall immediately cease and be of no further force and effect. . . . This section shall survive the Closing."

Complaint, exhibit B, § 7. Section 8 provided:

"Event of Default and Escrow Agreement - A 'Default by Purchaser' is defined as the failure of the Purchaser to make timely payments as required under the Parker Note given by Purchaser to the Seller, but only if said failure to pay continues for a period of more than sixty (60) days after written Notice by Seller to Purchaser has been sent to Purchaser in accordance with the notice provisions herein. In the event of a Default by Purchaser has occurred and continues uncured beyond the cure period as set forth in the prior sentence, Seller may at its option elect to either: (i) prosecute a claim against Purchaser or Purchaser's individual guarantor, Jacob Frydman, for all unpaid obligations owed to Seller under the Parker Note, or (ii) may deliver an affidavit to the Seller's attorney and Purchaser's attorney (collectively the 'Escrow Agents') with a copy to Purchaser and Jacob Frydman certifying the details of the Default by Purchaser and that same remains uncured at the time of the making of the affidavit, and attaching proof of service of the default Notice as required herein, and the Escrow Agents shall then be bound to immediately transfer, convey and release back to the Seller the Re-assignment instruments being held in escrow to restore the Seller as the mortgagee and note holder under the original Spiezio Note and original Spiezio Mortgage for 58-70 Parker Ave property being sold to Purchaser under this agreement. There can be no defenses or counterclaims asserted by Purchaser to avoid any action by Seller to enforce its rights under this provision for a default by Purchaser other than a bona fide claim of fraud against the Seller or its principals provided that if a fraud claim is asserted and is not meritorious then Purchaser or its Guarantor shall be obligated to pay Seller all attorneys fees, costs and expenses incurred by Seller to enforce its rights hereunder; and provided further, that if such claim of fraud is meritorious, then any sums remaining due and unpaid under the Parker Note shall be deemed paid in full, and

Seller shall be obligated to pay Purchaser and Guarantor all attorneys fees, costs and expenses incurred by Purchaser and guarantor to enforce their rights hereunder. The provisions of this section shall survive the Closing."

Id., § 8.

Of the \$1,050,000 purchase price, Parker Acquisition paid \$100,000 up front and executed a new note, dated May 6, 2011, in favor of 70 Parker in the amount of \$950,000, requiring Parker Acquisition to make monthly payments of \$5,000 to 70 Parker beginning June 6, 2011 (Parker Note). *Id.*, § 2; Frydman aff, exhibit E. The Parker Note defined "Default" as "the failure of the Purchaser [Parker Acquisition] to make timely payments as required under the Parker Note given by Purchaser to the Seller [70 Parker] if said failure to pay continues for 60 days after written Notice by Seller to Purchaser, with a copy to Jacob Frydman." Frydman aff, exhibit E. The Parker Note provided:

"In the event of a Default by Purchaser, Seller may prosecute a claim against Purchaser or Purchaser's individual guarantor, Jacob Frydman, for all unpaid obligations owed to Seller under the Parker Note or, at Seller's option, Seller shall be entitled to deliver an affidavit to the Escrow agent from Seller, by its agents or from Seller's attorney specifying the details of how a default in payment has occurred together with proof of service of the default Notice as required herein, and the Escrow agent shall then be bound to immediately transfer, convey and release back to Seller the Re-assignment instruments being held in escrow to restore the Seller as the mortgagee and note holder under the original Spiezio Note and Spiezio Mortgage for 58-70 Parker Ave property being sold to Purchaser under this contract. There can be no defenses or counterclaims asserted by Purchaser to avoid any action by Seller to enforce its rights under this provision for a default by Purchaser other than a bona fide claim of fraud against the Seller or its principals provided that if a fraud claim is asserted and is not meritorious then Purchaser or its Guarantor shall be entitled to all attorneys fees, costs and expenses incurred by Seller to enforce its rights hereunder."

Id. at 2. The Parker Note was “secured by an escrow agreement providing for a re-assignment of the Spiezio Mortgage” (Complaint, exhibit B, § 2 [ii]), and defendants claim that “the original, executed Re-assignment was to be held in escrow by Robert Levine, an attorney with Levine & Levine, and released to [defendants] upon a default in payment by [Parker Acquisition].” Francese aff, ¶ 28 and exhibit H (defendants submit a copy of the “Re-Assignment of Mortgage” executed by Parker Acquisition, which 70 Parker claims was held in escrow). Levine is Parker Acquisition’s attorney in the Dutchess County foreclosure action, as well as “Escrow Agent” under the Contract. Francese aff, ¶¶ 59-60, 69 and exhibit C at 2.

At the closing of the transaction, Parker Acquisition requested that 70 Parker send PAA a default notice concerning PAA’s failure to make its April 2011 payment. Frydman aff, ¶ 30; Francese aff, ¶ 30. 70 Parker sent PAA the following default notice, dated May 6, 2011: “Please accept this letter as our default notice to Parker Avenue Associates, LLC pursuant to the provisions of the above referenced Note and Mortgage, of failure to pay the Monthly payment due for the month of April 2011.” Complaint, exhibit C. By letter dated May 18, 2011, Parker Acquisition also notified PAA of its defaults, including its failure to make its April 2011 payment. Frydman aff, exhibit G.

Parker Acquisition claims that it commenced foreclosure proceedings against PAA on May 29, 2012.² Frydman aff, ¶ 33. Parker Acquisition maintains that PAA asserted defenses and counterclaims in the foreclosure proceeding, based upon wrongs allegedly committed by 70 Parker, and asserted offsets against the PAA Note & Mortgage. *Id.*, ¶ 34. Parker Acquisition

² Based upon a notice of cross motion submitted by defendants as documentary evidence. Spiezio was also named as a defendant in the foreclosure action.

claims that, as a result, PAA has delayed the foreclosure action for several years, failed to pay any sums due under the PAA Note & Mortgage, failed to insure or pay taxes on the Property, failed to maintain the Property, permitted the Property to be vandalized and stripped of copper plumbing and HVAC infrastructure, operated a pay parking facility on the Property and kept all the proceeds therefrom, and stole insurance proceeds. *Id.*

Parker Acquisition claims that it made every payment due under the Parker Note from May 5, 2011 through March 1, 2014, when it discovered that PAA commenced a second lawsuit against 70 Parker, and Peter and Mary Francese, in Dutchess County under index number 6519/2011 (PAA Action). Frydman aff, ¶¶ 39, 43; Complaint, exhibit D. In the PAA Action, PAA sought to recover damages for 70 Parker failing to leave the leased premises in good and clean condition, and sought to pierce the corporate veil to recover damages from Peter and Mary Francese directly. *Parker Ave. Assoc., LLC v 70 Parker Ave. Props., Inc.*, Sup Ct, Dutchess County, Nov. 18, 2013, Forman, J., index No. 6519/2011. 70 Parker asserted a counterclaim based upon PAA's alleged failure to make five monthly payments due under the purchase money mortgage, including payments for December 2010, and January, February, March, and May 2011. *Id.* at 2.

PAA moved for summary judgment dismissing the counterclaim in the PAA Action. In its decision, the court stated that, “[p]ursuant to the terms of their global settlement, Plaintiff [PAA] and 70 Parker made the required monthly mortgage and rent payments on April 1, 2011.” *Id.* at 4. The court also stated that, “[b]y letter dated April 13, 2011, 70 Parker notified [PAA] that it was terminating the new lease agreement effective July 31, 2011. After receiving this early termination notice, [PAA] failed to make the May 1, 2011 monthly mortgage payment.”

Id. The court granted PAA's motion for summary judgment dismissal, reasoning that:

“70 Parker assigned the note and mortgage to Parker Note Acquisition LLC on May 6, 2011, nearly five months before this action was commenced. The Assignment was not limited, nor did it reserve any enforcement rights or other interest in the note and mortgage for the benefit of 70 Parker. Rather, the Assignment transferred all of 70 Parker's right, title and interest in the note and mortgage to Parker Acquisition. Therefore, 70 Parker lacked standing to assert a counterclaim to collect any payments that were allegedly due under the note and mortgage on the date that this action was commenced.”

Id. at 5. The court held that summary judgment was also warranted based upon 70 Parker's estoppel statement, which “unmistakably and unequivocally state[d] that all monthly payments due under the mortgage are deemed and declared satisfied from the inception of the debt through March 31, 2011,” thereby precluding 70 Parker “from asserting a claim for any payments that allegedly came due prior to that date.” *Id.* at 5-6.

By letter dated March 5, 2014, Parker Acquisition notified 70 Parker that Parker Acquisition discovered the court's ruling in the PAA Action. Parker Acquisition's notice stated that “the Court found that all payments due through March 31, 2011 were deemed satisfied and the April 1, 2011 payment was indeed payment in advance for April interest.” Frydman aff, exhibit C at 3. Parker Acquisition's notice provided that “[o]ne of the central issues in our foreclosure case against the mortgagor is whether [PAA] defaulted in the payment of interest due for March 2011 following its settlement with 70 Parker.” *Id.* Parker Acquisition's notice stated:

“Consistent with the representations and warranties we took the position in our acceleration notice, that Parker Avenue Associates' payment dated April 1, 2011 was for March interest. Parker Avenue Associates took the position, however, that the Estoppel

Statement confirmed that all interest through March was paid. Therefore the check dated April 1, 2011 was payment for April interest in advance so that the next payment would not be until May 31, 2011 for May's interest. The determination of this issue is critical to whether our notice of default and acceleration were proper, and may be dispositive as to our claims.

...

"This morning I spoke to Peter Franchese to advise him of my concerns that the representations and warranties made in Section 3 of the Agreement, and on which we relied may have actually been false and fraudulent in that, at the time of the making of the Section 3 representations and warranties, Seller, and Peter Franchese and Mary Franchese knew that the maker of the Spiezio Note and Spiezio Mortgage - Parker Avenue Associates, LLC, had defenses and claims for offsets, and had defenses, set offs and/or counterclaim against Seller and/or Peter Franchese and Mary Franchese. And if in fact the April 1st payment was indeed an interest payment for April, that the Seller accepted interest in advance for a period beyond March 2011.

"Based on the foregoing, I believe that any sums remaining due and unpaid under the Parker Note are now deemed paid in full."

Id. Defendants claim that, at the time that Parker Acquisition sent this letter, it owed 70 Parker at least \$785,000 under the Parker Note. Franchese aff. ¶ 31.

By letter dated May 14, 2014, 70 Parker denied the claims of fraud. Franchese aff, exhibit O. 70 Parker also stated that it considered Parker Acquisition's March 5, 2014 letter a "notice of default under the Parker Note." *Id.*

By letter dated July 10, 2014, Parker Acquisition reiterated its fraud claim and its position that "any sums remaining due and unpaid under the Parker Note have been deemed paid in full for the reasons asserted in [its] March 5, 2014 letter." Frydman aff, exhibit F. Parker

Acquisition rejected 70 Parker's suggestion that any default existed under the Parker Note, and

enclosed a check for \$15,000 “under protest so as to ‘cure’ any claimed default asserted in [70 Parker’s] May 14, 2014 letter, and in order to give the parties the opportunity to meet and confer to determine if a consensual resolution is achievable.” *Id.* 70 Parker responded by letter dated July 18, 2014, stating that 70 Parker “does not accept the check” sent under protest by Parker Acquisition. *Id.*, exhibit G.

Parker Acquisition commenced the instant declaratory judgment action on August 5, 2014.

On October 31, 2014, Peter Francese, as president of 70 Parker, executed a “Satisfaction of Mortgage” in favor of PAA, certifying that the \$1,500,000 PAA Note & Mortgage is paid and consenting to its discharge. Frydman aff. exhibit A.

II. Legal Analysis

Parker Acquisition seeks summary judgment on its sole cause of action for declaratory judgment, arguing that defendants’ conduct demonstrates a bona fide and meritorious fraud claim under the Contract, requiring that “any sums remaining due and unpaid under the Parker Note” to “be deemed paid in full.” Complaint, exhibit B, § 8. Parker Acquisition argues that its fraud claim is supported by three fraudulent misrepresentations made by defendants, under sections 3 (iii), (v), and (viii) of the Contract, and by defendants executing the Satisfaction of Mortgage in favor of PAA when defendants no longer owned the PAA Note & Mortgage.

“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001. “The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation,

scienter, reliance and damages. Plaintiff must show not only that he actually relied on the misrepresentations, but also that such reliance was reasonable.” *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98 (1st Dept 1997) (internal citation omitted).

A. Misrepresentations

1. Section (iii) of the Contract

Under section 3 (iii) of the Contract, defendants represented “that interest has been paid through March 2011, and that Seller [70 Parker] has not accepted any interest in advance for any period beyond March, 2011.” Complaint, exhibit B. As part of the transaction whereby 70 Parker assigned and sold to Parker Acquisition the PAA Note & Mortgage, 70 Parker sent the May 6, 2011 default notice to PAA based upon its purported “failure to pay the Monthly payment due for the month of April 2011.” Complaint, exhibit C. The court in the PAA Action determined that, “[p]ursuant to the terms of their global settlement, Plaintiff [PAA] and 70 Parker made the required monthly mortgage and rent payments on April 1, 2011.” Complaint, exhibit D at 4. However, the parties do not specify when they entered into the global settlement, whether the April 1, 2011 payment was a present or future payment, or how subsequent payments were to be applied. Thus, notwithstanding the court’s statement in the PAA Action, plaintiffs fail to make a prima facie showing that PAA’s April 1, 2011 payment constituted “interest in advance” for the period beyond March 2011, in violation of section 3 (iii) of the Contract. Nor is it clear to the court how the April 1, 2011 payment identified by the court in the PAA Action was to be applied. Therefore, while the issue of the making of a payment on April 1, 2011 was necessarily raised and decided by the court in the PAA Action, as is argued by plaintiffs (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]), the legal

significance of that payment in the instant action merely raises a factual issue.

2. Sections 3 (v) and (viii) of the Contract

Under section 3 (v) of the Contract, defendants represented “that to the best knowledge of the Seller . . . Parker Avenue Associates, LLC . . . has no defenses or offsets to said Spiezio Note and Spiezio Mortgage and that all the provisions of said Spiezio Note and Spiezio Mortgage are in full force and effect.” Complaint, exhibit B. Similarly, section 3 (viii) of the Contract provided that, “to the best knowledge of the Seller . . . Parker Avenue Associates, LLC, has no claims, whether by way of defense, set off, counterclaim or otherwise against Seller and/or Peter Francese and Mary Francese.” *Id.*

In the PAA Action, the court stated that, on April 13, 2011 – more than three weeks before 70 Parker entered into the Contract with Parker Acquisition – “70 Parker notified [PAA] that it was terminating the new lease agreement effective July 31, 2011,” and that, “[a]fter receiving this early termination notice, [PAA] failed to make the May 1, 2011 monthly mortgage payment.” Complaint, exhibit D at 4. Indeed, PAA’s claims, defenses, and offset came to fruition five months later, when PAA commenced the PAA Action. *Id.* at 5. However, the court’s decision in the PAA Action was issued in November 2013, more than two years after the parties entered into the Contract and Parker Note. PAA’s subsequently-filed lawsuit, and the court’s after-the-fact ruling in the PAA Action, fail to make a prima facie showing of 70 Parker’s knowledge at the time that the parties entered into the Contract and the Parker Note. Nor do plaintiffs make a prima facie showing that 70 Parker’s lease termination constituted notice of claims, defenses, or offsets, as the new lease between 70 Parker and PAA authorized either party to terminate it without cause on 90 days notice. Complaint, exhibit D at 3. In short, plaintiffs

fail to make a prima facie showing that 70 Parker had knowledge of PAA's claims, defenses, or offsets against defendants as a result of breaches of the new lease or the circumstances surrounding its termination.

Parker Acquisition represents, in the affidavit of plaintiff Jacob Frydman, Parker Acquisition's manager, that when Parker Acquisition commenced foreclosure proceedings against PAA on May 29, 2012, PAA asserted defenses and counterclaims based upon wrongs allegedly committed by 70 Parker, and asserted offsets against the PAA Note & Mortgage. Frydman aff, ¶¶ 33-34. As discussed above, however, PAA's defenses and counterclaims in the subsequently-filed foreclosure action fail to show, prima facie, that 70 Parker had knowledge of such claims, defenses, or offsets at the time that the parties entered into the Contract and the Parker Note. For the foregoing reasons, plaintiffs' summary judgment motion is denied, as they fail to make a prima facie showing of defendants' misrepresentations. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (plaintiffs' failure to make a prima facie showing "requires denial of the motion, regardless of the sufficiency of the opposing papers").

B. Reliance & Scierer

Plaintiffs claim that they relied upon defendants' misrepresentations, and that they "were thereby induced to purchase what they reasonably believed to be a defaulted note and mortgage, which would give [Parker] Acquisition the right to seek enforcement and commence a foreclosure action to gain title to the property for lack of payment." Frydman aff, ¶ 66. Defendants counter that plaintiffs knew the relevant underlying facts when the parties entered into the Contract and Parker Note. Francese aff, ¶¶ 33-53. Similarly, defendants' fourth affirmative defense claims that plaintiffs had "full knowledge of all of the material facts when it

agreed to purchase the Mortgage.” Answer, ¶ 44. The fifth affirmative defense claims that plaintiffs could not have relied upon any representations made by defendants, because plaintiffs “had full and complete access to all documents relating to the mortgage that it purchased,” including access to “all documents relating to payments made on said mortgage, to all disputes relating to said mortgage, and to all legal proceedings regarding the mortgage, at the time that Plaintiff agreed to purchase said mortgage from Defendants.” *Id.*, ¶¶ 45.

Defendants submit an email from Jacob Frydman to defendants’ attorney, Daniel McCabe, Esq. Francese aff, exhibit A; *see also* Complaint, exhibit B, §§ 1, 10; Francese aff, ¶ 35. This email is dated May 10, 2011, four days after the closing on the Contract and the Parker Note. In this email, Frydman stated: “Please see attached. Apparently Mr. Spiezio is taking the position that since his April 1st check was dated after the March 31st Estoppel [sic], he does not owe money for April, and the next payment is due June 1st for May.” Francese aff, exhibit A. Daniel McCabe responded to Frydman the same day, stating, in pertinent part, as follows:

“yes, Spiezio is playing games. He obviously is trying to draw a stilted conclusion from the estoppel - further buoyed by the fact that he sent his payment in for April just as he agreed to do at our settlement. I probably have some emails that would further give evidence of his intent then that he is trying to re-interpret now.”

Id. Daniel McCabe’s response email copied “Levine” and another recipient whose email address is illegible in the exhibit submitted by defendants. *Id.* Defendants also submit an email from Spiezio to Daniel McCabe, Esq., copied to Frydman and two other individuals (one of which is illegible, and the other appears to be a “levinelevinelaw” email address). Spiezio’s email was dated May 12, 2011, two days after the email exchange between Frydman and Daniel McCabe, Esq., and stated as follows:

"Dan

"Thank you for your explanation and the estoppel and mortgage speak for themselves and your opinion is not based upon law or fact, but it is your opinion.

"My position is very clear and my approach to the cancellation of your clients lease was also.

"The mortgage is paid for April and your clients lease is cancelled.

"It is clearly not appropriate for you to hold any payment for rent. We also have no insurance certificate from the tenant on the property unless you are holding that also.

"As for posturing, that is laughable based upon what you and your client have done with the new mortgagee who I showed the building to as a customer for lease and then purchase. If that was not a cunning and exploitive way to proceed then nothing is.

"I guess you feel you will be better served by posturing with the new guy on the block, but only time will tell.

"As for the new mortgagee we will comply with any and all appropriate demands.

"As for your tenant allowing me access, please be advised that we will be showing the property starting tomorrow and we will be removing any items that were not to be used by your client."

Francese aff, exhibit A.

70 Parker's Estoppel Statement, dated March 31, 2011, stated that "[a]ll monetary obligations for the basic monthly principal and interest payments owed to the mortgagee by the mortgagor for the period from the inception of the debt through the date of March 31, 2011 are deemed and declared satisfied." Complaint, exhibit A. The Estoppel Statement expressly provided that "[n]othing in this statement . . . makes any representation about . . . all payments due and owing on said mortgage debt from mortgagor to mortgagee from April 1, 2011 into the

future, nor the past, accrued or ongoing obligations of mortgagor to pay all real estate taxes and insurance on the premises.” *Id.* In the Contract, 70 Parker represented that it “has not accepted any interest *in advance* for any period beyond March, 2011” (Complaint, exhibit B, § 3 [iii] [emphasis added]), but it is silent with respect to future payments made for April 2011.

Moreover, based upon the papers before the court, it is not clear when 70 Parker and PAA entered into their global settlement, or the extent to which plaintiffs knew about that settlement or participated in it as part of their negotiations with 70 Parker concerning acquisition of the PAA Note & Mortgage.

70 Parker and PAA clearly had different understandings as to how the April 2011 payment would be applied. The emails among Jacob Frydman, Daniel McCabe, and Spiezio, and the lack of information concerning the application of PAA’s April 2011 payment, raise factual issues as to whether plaintiffs knew all of the material facts. Specifically, factual issues exist as to whether plaintiffs had access to all relevant documents relating to their purchase of the PAA Note & Mortgage, including documents relating to payments on the PAA Note & Mortgage and disputes and legal proceedings relating thereto, at the time that they entered into the Contract and issued the Parker Note. The issue of plaintiffs’ knowledge, in turn, raises a factual issue as to whether plaintiffs reasonably relied upon any purported misrepresentations by defendants. *Brunetti v Musallam*, 11 AD3d 280, 281 (1st Dept 2004) (the issue of “reasonable reliance” is “not subject to summary disposition”). At a minimum, a factual issue exists as to whether plaintiffs had “means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fail[ed] to make use of those means.” so as to preclude their claim of “justifiable reliance on [defendants’] misrepresentations.” *Stuart Silver Assoc.*, 245 AD2d at 98-99.

A factual issue likewise exists regarding the element of scienter, as it is unclear, based upon the circumstances under which the Contract and Parker Note were executed, whether 70 Parker intentionally withheld information concerning its global settlement with PAA, the application of the April 2011 payment, and 70 Parker's underlying dispute with PAA and PAA's resulting claims, defenses and offsets. *On Ling Lam v Wing Woh Lung Co.*, 181 AD2d 495, 497 (1st Dept 1992) (denying summary judgment where factual issues existed "regarding the circumstances under which the second lease was executed, particularly with respect to scienter and reliance"). Accordingly, plaintiffs' summary judgment motion is denied for the additional, independent reason that factual issues exist on the elements of reasonable reliance and scienter, two necessary elements of plaintiffs' underlying fraud claim.

C. Defendants' Counterclaim and Plaintiffs' Additional Fraud Claim Based upon the Satisfaction of Mortgage

The combined "seventh affirmative defense and first counterclaim" aver that plaintiffs failed to make payments, thereby constituting a default under section 7 of the Contract, and that plaintiffs failed to cure their default. Answer, ¶¶ 49-53. As a remedy, defendants' counterclaim seek a declaration that plaintiffs are in default, that no defense or counterclaim exists to their default, and "that the Escrow Agents shall immediately transfer, convey and release back to Defendant an original Re-Assignment of the Spiezio Note and Spiezio Mortgage," and, "in the event that said Escrow Agents fail to comply with said declaration, that the Court appoint a receiver to effectuate the judgment to be entered in favor of Defendants" and "that said receiver be authorized and directed to execute a re-assignment of the Spiezio Mortgage and the Spiezio Note to Defendant." Answer, ¶ 59.

Here, 70 Parker sent Parker Acquisition a default notice by letter dated May 14, 2014, thereby triggering the 60-day cure period under section 8 of the Contract. Francese aff, exhibit O. On July 10, 2014, Parker Acquisition sent 70 Parker \$15,000 (presumably covering three monthly payments under the Parker Note). Frydman aff, exhibits E and F. By letter dated July 18, 2014, 70 Parker admitted that it received the \$15,000 payment on July 11, 2014, within the 60-day cure period, but 70 Parker nevertheless stated in this letter that it “does not accept the check,” noting that the check was sent “under protest” and with Parker Acquisition “disavowing any default under the Parker Note or the Contract.” *Id.*, exhibit G. 70 Parker provides no legal basis for unilaterally creating a default by refusing a payment made within the contractual cure period, but merely claims in Peter Francese's October 31, 2014 affidavit that plaintiffs’ “attempted cure was deficient in amount, and was accompanied by a letter denying that [Parker Acquisition] was in default and disavowing all of [Parker Acquisition's] obligations under the Parker Note.” 10/31/14 Francese aff, ¶ 4. Nevertheless, defendants have already taken steps indicating their purported reclaimed ownership of the PAA Note & Mortgage, which plaintiffs claim constituted an additional act of fraud by defendants.

Specifically, plaintiffs submit a “Satisfaction of Mortgage,” executed by 70 Parker on October 31, 2014, nearly three months *after* plaintiffs commenced the instant action. Frydman aff, exhibit A. The Satisfaction of Mortgage certifies that the \$1,500,000 PAA Note & Mortgage is paid and provides 70 Parker's consent to its discharge. *Id.* The Satisfaction of Mortgage acknowledges that the PAA Note & Mortgage were assigned to Parker Acquisition on May 5, 2011, and represents that the PAA Note & Mortgage were “assigned back to 70 Parker . . . by a Re-Assignment of Mortgage dated May __, 2011 and recorded on _____, in the

Office of the Clerk of the County of Dutchess as Document No. 01-2014-_____.” *Id.*

The Satisfaction of Mortgage, on its face, does not appear to have been recorded. Moreover, based upon the evidence before the court, it is not clear whether this document was delivered to, or relied upon by, PAA. As such, the legal significance of the Satisfaction of Mortgage is unclear at this juncture in the litigation. Indeed, the legal significance of this document will likely be determined by the outcome of the instant action (or, possibly, by the outcome of the foreclosure proceeding in Dutchess County).

Plaintiffs argue that, based upon the assignment of the PAA Note & Mortgage to Parker Acquisition, without 70 Parker retaining any beneficial interest or rights – a legal conclusion already established by the court in the PAA Action – 70 Parker’s execution of the Satisfaction of Mortgage was fraudulent. *Parker Ave. Assoc. LLC*, Sup Ct, Dutchess County, Nov. 18, 2013, Forman, J., index No. 6519/2011 at 4-5. In opposition, consistent with their seventh affirmative defense and counterclaim, defendants claim that plaintiffs’ default in payments under the Parker Note entitled defendants to reclaim ownership of the PAA Note & Mortgage, thereby entitling defendants to enter into a settlement agreement with PAA. Defendants claim that “that settlement was presented to the Dutchess County Supreme Court as a further defense to the prior, pending foreclosure proceeding,” and that “[a] determination of those issues will necessarily impact most, if not all, of the issues subsequently presented to this Court by the Plaintiff.” *Francese aff*, ¶ 72.

Notwithstanding the parties’ tortured procedural posturing in this action and the Dutchess County action(s), the validity of the Satisfaction of Mortgage and whether it constitutes evidence of an additional fraud will hinge upon whether one of the parties defaulted under the Contract

and the Parker Note, and the efficacy of plaintiffs' underlying fraudulent inducement claim, neither of which have been established as a matter of law. Accordingly, plaintiffs' motion for summary judgment on its underlying fraud claim is denied to the extent it is based upon the Satisfaction of Mortgage. Based upon the existence of the same factual issues discussed above, plaintiffs' motion for summary judgment dismissing defendants' counterclaim is likewise denied.

D. Defendants' First Affirmative Defense

Defendants' first affirmative defense claims that Dutchess County is the proper venue for this action, because the Property is located in Dutchess County, where there is a prior, related action pending. Answer, ¶ 41. CPLR 3211 (a) (4) permits a party to "move for a judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

As discussed above, defendants do not move for any affirmative relief based upon the existence of actions pending in Dutchess County. Although the record before the court contains limited information about Parker Acquisition's foreclosure action against PAA, the court notes that legal and factual issues in the instant action may overlap with issues presented in the foreclosure action in Dutchess County. In opposition to Parker Acquisition's instant motion, 70 Parker submits a copy of PAA and Spiezio's cross motion in Parker Acquisition's foreclosure action. In that cross motion, dated March 13, 2015, PAA and Spiezio affirmatively moved for summary judgment dismissing the foreclosure proceeding with prejudice, and to compel Parker Acquisition's attorneys "to turn over and deliver the original Reassignment of Mortgage and

Mortgage Note they are holding in escrow to 70 Parker,” or, alternatively, to authorize the receiver “to execute a Receiver’s Reassignment of the March 1, 2010 Mortgage and Mortgage Note from Plaintiff Parker Note Acquisition, LLC to 70 Parker Avenue Properties, Inc.”

Francese aff, exhibit C. According to defendants, that cross motion remains sub judice before the Supreme Court in Dutchess County in the action captioned *Parker Note Acquisition, LLC v Parker Ave. Assoc. LLC et al.* (under index number 3020/2012).

While the court makes no determination as to whether the foreclosure action – or any other lawsuit pending among Parker Acquisition, Jacob Frydman, 70 Parker, Peter and Mary Francese, Parker Avenue Associates LLC, or Spiezio – involve the same parties for the same cause of action as the instant action, the parties may make such motions or seek consolidation of these actions if so advised. The court makes no determination as to the likelihood of success of any such motions.

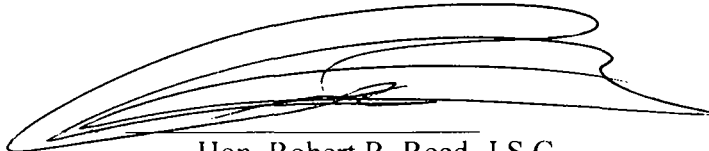
Accordingly, it is hereby

ORDERED that plaintiffs' summary judgment motion is denied; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 581,
111 Centre Street, on December 10, 2015, at 2:30 PM.

Dated: December 7, 2015

ENTER:

A handwritten signature in black ink, appearing to read "Robert R. Reed", is written over a horizontal line. The signature is stylized and somewhat cursive.

Hon. Robert R. Reed, J.S.C.