

**Italiano v Grossman**

2018 NY Slip Op 33134(U)

October 23, 2018

Supreme Court, New York County

Docket Number: 150811/2017

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN

PART IAS MOTION 58EFM

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INDEX NO. 150811/2017

ALFRED ITALIANO, ROSALYN ITALIANO

MOTION DATE 06/12/2018

Plaintiff,

MOTION SEQ. NO. 005

- v -

KENNETH GROSSMAN,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for DISMISS

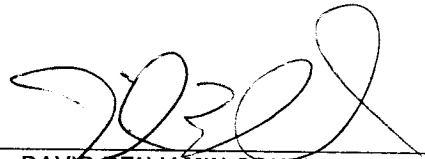
Upon the foregoing documents, it is

Defendant's motion to dismiss the second cause of action and for sanctions is denied. Plaintiffs' cross-motion for sanctions is also denied. The parties agree that defendant loaned plaintiffs' children (and in-law's) \$230,000, that \$150,000 was evinced by a promissory note of which \$100,000 was guaranteed by plaintiffs and secured by a \$100,000 mortgage on plaintiffs' residence. The first cause of action seeks a declaration that the mortgage is void and unenforceable. The second cause of action seeks a declaration that to the extent the mortgage is not void and is enforceable, that it only be subject to a maximum of \$38,000 due to payments of \$68,000 on the loan. The guarantee states "[A]nything in this guaranty to the contrary notwithstanding, the guarantors' liability to the lender under the terms of this guaranty shall not exceed the first one hundred thousand (\$100,000) dollars due under the promissory note, inclusive of pro-rated accrued interest/ and attorneys' attorneys' fees." According to plaintiffs, the \$230,000 was all one loan and according to defendant the guarantee was given on one of a series of loans. Defendant argues that under relevant law, unless otherwise required by agreement or valid instruction, in the case of multiple loans, a creditor has the right to apply

payments to either loan as the creditor sees fit. Here, he claims to have applied the payments to the \$80,000 for which there was no note and which was not secured by the mortgage. On this basis, defendant seeks dismissal of the second cause of action. Plaintiffs do not dispute that a creditor would have such right but argue that there was only one loan as demonstrated by defendant consistently referring to the \$230,000 as a loan or debt in the singular, and defendant only claiming for the first time on this motion that there were two loans. Because of the clear language of the guarantee, plaintiffs also seek sanctions for the filing of the instant motion. In opposition to the sanctions cross-motion, defendant points out that the debtor in this case filed an affidavit where he describes the transaction as an initial \$150,000 loan memorialized in a promissory note, followed by an additional \$80,000 loan, which is undocumented.

As the parties clearly dispute whether the \$230,000 was part of a single loan or multiple loans, and giving plaintiffs all favorable inferences, the motion to dismiss is denied. If this were a single loan evinced in part by the promissory note, the limitation in the guarantee would limit plaintiffs' liability. Defendant only argues that he could allocate the payments to the debt he sees fit in the instance of multiple loans and does not advance an argument that it could similarly do so if the \$230,000 was one single loan. He does not argue that he could allocate within the same debt to the portion that is not secured rather than the secured portion. Accordingly, it is ORDERED that defendant's motion to dismiss and for sanctions is denied.; and it is further ORDERED that plaintiffs' motion for sanctions is denied as this Court does not find that defendant has engaged in frivolous practice in filing the instant motion.

10/23/2018  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER

**HON. DAVID B. COHEN**  
J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE