

New York Commercial Division Round-Up

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[Holding A Note That References Another Document? It Still May Permit You To Obtain Summary Judgment in Lieu of Complaint](#)

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In [Zyskind v. FaceCake Marketing Technologies, Inc., Index No. 651240/10 \(Sup. Ct., NY County, Dec. 15, 2010\)](#) ("FaceCake Marketing"), Justice Bernard J. Fried granted summary judgment in lieu of complaint to plaintiffs Beryl Zyskind and Joel Gold, holding that ten notes issued to them (the "Notes") on account of investment loans they made to the defendant, FaceCake Marketing Technologies, Inc. ("FaceCake"), were instruments "for the payment of money only."

On September 28, 2004, Beryl Zyskind and Joel Gold (the "Plaintiffs") each executed separate, identical stock purchase agreements with FaceCake (the "Agreements"). Under the terms of the Agreements, Plaintiffs each promised to invest \$625,000 in FaceCake. In exchange for each investment, Zyskind and Gold were to receive a corresponding note and FaceCake stock.

Pursuant to the Agreements and in exchange for each investment loan made by Zyskind and Gold, FaceCake issued the Notes to the Plaintiffs, totaling \$650,000. Each Note recited a sum certain to be paid to the holder of the Note. Each Note also contained an unconditional promise to pay and a waiver of all defenses to enforcement of the Note, stating that "[t]he obligations to make the payments provided for in this Note are absolute and unconditional and not subject to any defense, set-off, counterclaim, rescission, recoupment, or adjustment whatsoever."

The Notes also referenced obligations – representations and warranties – Plaintiffs made under the Agreements, stating, "This Note was issued by [FaceCake] pursuant to the Agreement, dated as of September 28, 2004 between Holder and [FaceCake]. In connection with the Agreement, the Holder made representations and warranties to [FaceCake] upon which [FaceCake] is relying in connection with the Transaction evidence [by this note]."

Under [CPLR 3213](#), to prevail on a motion for summary judgment in lieu of complaint, the plaintiff must submit proof of the agreement, its unconditional terms of repayment, and default by the defendant. The agreement sued upon must clearly be for the payment of money only, that is, it must contain the defendant's explicit acknowledgment of a debt and must suffice to prove the debt by itself. The instrument and evidence of failure to pay constitute a prima facie case of summary judgment in lieu of complaint. Once plaintiff has met its burden, it is incumbent upon defendant to establish, by admissible evidence, that a triable issue of fact exists. [FaceCake Marketing](#) at 3.

FaceCake argued that the Plaintiffs did not establish a prima facie case because the Notes referred to the obligations contained in the Agreements and therefore did not qualify as agreements or instruments for the payment of money only. FaceCake argued that the language in the Notes indicated that the Notes were issued to

the Plaintiffs based upon obligations that are not clear from the face of the Notes and require reference to the Agreements.

Relying on [*First Interstate Credit Alliance, Inc. v. Sokol*](#), 179 A.D.2d 583, 684 (1st Dep't 1992), Justice Fried held that an instrument that contains more than an unconditional promise to pay money is not necessarily disqualified as being for the payment of money only. The mere presence of additional provisions in the [note] does not constitute a bar to [CPLR 3213](#) relief, provided that the provisions do not require additional performance as a condition precedent to repayment, or otherwise alter the defendant's promise of payment. [*FaceCake Marketing*](#) at 4.

Thus, the Court held, the Notes, even though they contained more than an unconditional promise to pay money, were nonetheless "for the payment of money only." Justice Fried noted that the Notes contained unconditional promises to pay a sum certain and there was no dispute that FaceCake defaulted on the Notes. The reference to the Agreements contained in the Notes did not add to or alter FaceCake's payment obligations. The Agreements merely provided background for the obligations described in the Note by referring to the holder's primary obligation. Therefore, the reference to the Agreements does not prevent the Notes from being enforceable for the payment of money only. [*Id.*](#) at 4-5.

This case demonstrates that summary judgment in lieu of complaint can be granted even if the obligations evidenced by an agreement or note which contains more than simply an unconditional promise to pay money, so long as the additional information in the agreement or note does not alter or impose additional obligations for repayment. Thus, holders and issuers of notes should be aware that so long as a note contains an unconditional promise to pay money and nothing in another agreement alters or adds to the repayment obligations, it will be an instrument for the "payment of money only" under [CPLR 3213](#).

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