STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 1, 2014)

SMM NEW ENGLAND CORP., Plaintiff,	:	
v.	:	**C.A. No. PB 14-0004**
INNERCITY RECYCLING SERVICE LLC and KENNETH A. SERAPIGLIA, Defendants.	:	

DECISION

SILVERSTEIN, J. SMM New England Corp. (Plaintiff) brings this suit against Innercity Recycling Service LLC (Innercity) and Kenneth A. Serapiglia (Serapiglia) for alleged breach of contract, or in the alternative, money had and received. Plaintiff asserts that Innercity and Serapiglia (collectively Defendants) have defaulted under the terms of an on demand promissory note. Currently before the Court is Plaintiff's Motion for Summary Judgment pursuant to Super. R. Civ. P. 56 as to both counts (Motion). Defendants oppose Plaintiff's Motion as to both counts.

I

Facts and Travel

Serapiglia is the President of Innercity, a Rhode Island corporation located in Cranston. In or about March 2012, Serapiglia was contacted by Plaintiff's then-president, Anthony Izzo (Izzo). Izzo and Serapiglia had previously known one another when Serapiglia worked for Izzo's family business. Izzo informed Serapiglia that Plaintiff would fund Serapiglia to start a new metal recycling business if Serapiglia would agree to an exclusive supplier contract with Plaintiff. Serapiglia's new business would act as a "feeder yard" to Plaintiff.

At Izzo's direction, Serapiglia began looking for a location for this new business. On or about April 26, 2012, Serapiglia caused Innercity to be incorporated.[1] Plaintiff assisted Defendants in securing the requisite permits from the City of Cranston to operate Innercity. Between March and August 2012, Defendants had multiple discussions with representatives of Plaintiff regarding the terms of any agreement between the two parties. Defendants claim that Plaintiff promised to loan whatever amounts were necessary to get Innercity up and running. Also during this time, discussions took place regarding the exclusive dealer contract and pricing to be paid by Plaintiff to Defendants for scrap metal.

Frequently, Plaintiff asked Defendants for a buyout number for Innercity.[2] Plaintiff claimed that a buyout number was necessary in order for Plaintiff to lend money. Defendants continuously told Plaintiff that they could not accurately calculate a buyout number because Defendants could not accurately value Innercity's worth. This continued to be the case even after Plaintiff suggested a $500,000 buyout price. Defendants never agreed to any buyout number that was proposed nor did they ever supply such a number.

On or about August 14, 2012, Plaintiff advanced $50,000 to Defendants. Plaintiff informed Defendants that the money was for the purpose of bringing the office location up to code and to get Innercity operational. Plaintiff also conditioned the money upon Defendants' promise to exclusively sell scrap to Plaintiff. Defendants inquired about the repayment terms, to which Plaintiff advised them that they would not have to pay until Innercity started making

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[1] As noted above, Serapiglia and Innercity are collectively referred to as Defendants. Importantly, Serapiglia often acted simultaneously on behalf of Innercity, as its President, and in his individual capacity. Thus, when referring to Defendants, the Court is essentially referring to Serapiglia in both capacities.

[2] The buyout number was the price at which Defendant Serapiglia would be willing to sell the Corporate Defendant Innercity to the Plaintiff.

money. Defendants do not recall signing any documentation prior to receiving this $50,000 installment.

Innercity began operating on or about August 23, 2012. In September 2012, Defendants met with representatives of Plaintiff. Plaintiff provided Defendants with a contract to review regarding money loaned by Plaintiff, as well as the exclusive supplier agreement. Defendants claim that the contract did not contain a buyout provision or a provision extending the exclusive relationship for ten years after repayment of the loan. Defendants informed Plaintiff that the contract looked fine but that Defendants wished to go over it with an attorney before signing. Plaintiff asked that Defendants return the signed contract as soon as possible. Defendants later signed the contract, after having it reviewed by an attorney, and returned it to Plaintiff, who also signed (September 2012 Contract). Despite asking for a copy of the contract, Defendants were never provided with one.

On or about September 10, 2012, Plaintiff advanced an additional $25,000 installment to Defendants. Again, Defendants do not recall signing any documentation regarding this specific installment. The same can also be said of a $30,000 installment advanced on or about October 3, 2012.

In October 2012, Plaintiff called Defendants to inform them that Plaintiff required a new contract to be signed to represent the additional money loaned subsequent to the signing of the September 2012 Contract. Plaintiff did not inform Defendants that the contract language would change in any way from the September 2012 Contract, previously reviewed and signed. On or about October 5, 2012, Defendants met with Plaintiff at Plaintiff's office. Plaintiff presented Defendants with a contract that had "sign-here" stickers on certain pages. The agreement executed was a "Supplier and Loan Agreement," signed by Plaintiff's Director of Operations and by Serapiglia, both individually and on behalf of Innercity. Exhibit A of the Supplier and Loan Agreement was a Term Promissory Note (Note) in favor of Plaintiff as "Lender" with a principal balance of $80,000.[3] The Note was similarly signed by Serapiglia, both individually and on behalf of Innercity.

As Plaintiff flipped through the Supplier and Loan Agreement to the "sign-here" stickers, Defendants either signed or initialed where told to do so, without reviewing the terms of the document. In fact, it was never suggested by Plaintiff that Defendants read the contract, and Defendants presumed that there was no need to review the contract as they understood the only change from the September 2012 Contract was the amount of money loaned. Plaintiff did not advise Defendants that the loan was subject to repayment terms of the Note, or that the Note was payable on demand.[4] When Defendants informed Plaintiff that they would not be able to make the monthly payments as provided in the contract, Defendants claim that Plaintiff told Defendants that as long as Defendants continued to exclusively sell scrap to Plaintiff, Defendants would not have to worry about the payments until Defendants could afford to make the payments. Plaintiff did point out to Defendants handwritten changes respecting the date, the amount of the loan and a notation as to the amount of the monthly payment due to repay the loan. Additionally, when Defendants inquired about some of the additional documents in the Supplier and Loan Agreement, Plaintiff told them that the documents were required by Plaintiff's offices in New York or New Jersey in order to loan money, and that Defendants should not worry about it. Defendants were informed that the contract would be retyped with the handwritten changes.

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[3] The Supplier and Loan Agreement had six exhibits. Besides the Note, there was a Revolving Note, Security Agreement, License Collateral Assignment, Lease Collateral Assignment, and Pledge Agreement.

[4] On the first page of the Note, the term "on demand" appears in bold, italicized, and underlined font.

After Defendants reviewed a corrected copy of the October 5, 2012 contract, Defendants noticed several provisions which they claim they never agreed to, such as a buyout provision. Defendants contacted Plaintiff the next day to inform Plaintiff of their concern. Plaintiff informed Defendants that the language was necessary for Plaintiff's office in New York or New Jersey, and that Defendants should not worry as long as Defendants continued to exclusively sell to Plaintiff. Besides the funds mentioned previously, additional funds were disbursed as follows: \$20,000 on October 16, 2012; \$20,000 on November 1, 2012; and \$5000 on December 24, 2012. Again, Defendants do not recall any separate documentation upon receipt of these funds.

Defendants continued to sell to Plaintiff through early 2013. Defendants consistently failed to turn a profit. In or about March 2013, Defendants requested additional funds from Plaintiff in order to help with cash flow issues. Plaintiff provided Defendants with advances of \$6000 and \$10,000. Defendants were to repay these advances with scrap as opposed to monthly payments. After Defendants made a payment with scrap, Defendants would occasionally request another advance. Defendants signed an "Advance Agreement" as to every advance received from Plaintiff for the purpose of purchasing scrap.

Later in March 2013, Defendants and Plaintiff agreed to consolidate the amounts that had been loaned after the October 5, 2012 agreement, thereby increasing the amount of monthly payments Defendants were obligated to make. This agreement amended the Note by increasing the principal balance to \$150,000.[5] Defendants signed documentation reflecting this consolidation. Again, Defendants were told to not worry about payments until they could afford to start making the payments.

[5] Besides the amendment to the principal balance and amount of monthly repayments due, the Note otherwise remained the same.

In June 2013, Defendants discovered a discrepancy between the amounts of scrap metal that they had purchased from customers versus the amount they had sold to Plaintiff.[6] Defendants calculated the discrepancy to be approximately 95,000 pounds for the period between January and May 2013. The dollar amount for this discrepancy was calculated to be approximately $117,000. After investigating the matter, Defendants concluded that Plaintiff was manually changing the weights recorded for the scrap to adjust for either gross or net weight of the load, adjust the tare weight,[7] or adjust for nonconforming metal. This practice always resulted in a reduced payment made to Defendants. Defendants attempted to resolve these issues with Plaintiff but were never able to do so.

On or about June 27, 2013, Defendants received a letter from Plaintiff stating that Defendants were behind on the loan repayments and requested that Defendants remit payment to Plaintiff. Defendants contacted Plaintiff, who told Defendants not to worry about the letter but that sending in one payment would help the situation. Defendants decided to remit the amount requested in the letter and has since made all monthly payments as set forth in the Note. Defendants have made payments totaling $19,742.84 on the Note. Also during this time, Defendants informed Plaintiff that they were not satisfied with the Supplier and Loan Agreement and wished to go back to the September 2012 Contract.

Defendants ceased selling scrap metal to Plaintiff in November 2013. Plaintiff demanded payment on the Note in writing on December 6, 2013. On January 10, 2014, Plaintiff filed this action against Defendants. Defendants unsuccessfully attempted to remove the suit to federal

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[6] Defendants were able to calculate this discrepancy as they exclusively sold scrap to Plaintiff during this time.

[7] Tare weight is the weight of the truck after the load is dumped.

court, arguing that it was a compulsory counterclaim of a suit brought by Defendants and other scrap metal dealers against Plaintiff. Before the Court is Plaintiff's Motion.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in a light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Indus. Nat'l Bank v. Peloso, 121 R.I. 305, 307-08, 397 A.2d 1312, 1313 (1979). "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

III

Discussion

A

Breach of Contract

Plaintiff claims that Defendants defaulted under the Note by breaching the obligation to pay the Note upon demand by Plaintiff. In support of their Motion, Plaintiff asserts that the Note should be enforced according to its terms. In opposition to the Motion, Defendants assert several reasons why Defendants are not liable. Defendants assert (1) the defense of fraud in the factum; (2) the defense of fraud in the inducement; and (3) that an issue of fact exists as to whether Defendants' breach is excused under the Supplier and Loan Agreement.

A plaintiff claiming breach of contract must prove that "(1) an agreement existed between the parties, (2) the defendant breached the agreement, and (3) the breach caused (4) damages to the plaintiff." Barkan v. Dunkin' Donuts, Inc., 627 F.3d 34, 39 (1st Cir. 2010) (citing Petrarca v. Fid. & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005)).

1

On Demand Provision

Plaintiff argues that pursuant to the terms and conditions of the Note, which clearly included an "on demand" provision, Plaintiff is able to demand payment from Defendants at any time, and that Defendants are obligated to make payment. Plaintiff asserts that to prevail on its claim it only needs to "produce the [N]ote and produce evidence that the opposing party signed it." Thompson Trading, Ltd. v. Allied Breweries Overseas Trading Ltd., 748 F. Supp. 936, 946 (D.R.I. 1990). Here, Plaintiff points to the Note, signed by Serapiglia, both individually and on behalf of Innercity, as evidence that Defendants signed the Note. Additionally, Defendants do not contest the authenticity of the signatures. Furthermore, Plaintiff asserts that Defendants acknowledge that payment has been demanded pursuant to the Note. (Defs.' Answer ¶ 14.)

Defendants argue that the "on demand" provision of the Note was not included in the September 2012 Contract, and that they did not know that the term was included in the Note. However, Defendants do not contest the terms of the Note, which is signed by Defendants and clearly includes an "on demand" provision in bold, italicized, and underlined font. Instead, Defendants assert various defenses that would bar the entry of summary judgment, as addressed infra.

Here, Plaintiff has introduced evidence of the Note signed by Defendants. Defendants have not contested the authenticity of the signatures on the Note. The Note contains a payable "on demand" provision. Plaintiff has demanded payment from Defendants, and Defendants have not paid. It is clear that Plaintiff has made out a case for breach of contract, see Thompson Trading, 748 F. Supp. at 947, assuming none of Defendants' defenses are applicable. See Westerly Hosp. v. Higgins, 106 R.I. 155, 160, 256 A.2d 506, 509 (1969) (quoting Binder v. Benson, 225 Md. 456, 461, 171 A.2d 248, 250 (1961) ("'[T]he usual rule is that if there is no fraud, duress or mutual mistake, one who has the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his signature as to all of its terms.'"). The Court now turns to Defendants' asserted defenses.

2

Fraud in the Factum

Defendants argue that the ability of Plaintiff to enforce the Supplier and Loan Agreement, and thus the Note, is negated because the execution is tainted by fraud in the factum. Defendants assert that they knew they were signing a Supplier and Loan Agreement, however, they believed that Supplier and Loan Agreement was the same—except as to the amount loaned—as the September 2012 Contract. Defendants also contend that they had no opportunity to learn the essential terms of the Supplier and Loan Agreement, as Plaintiff merely flipped through to the "sign here" tabs.

Plaintiff argues Defendants are bound to the terms of the Supplier and Loan Agreement, even if Defendants were not aware of the terms when they signed. Plaintiff asserts that Defendants' mere ignorance is not enough to establish the defense of fraud in the factum, but rather, there must be excusable ignorance. See 12 Am. Jur. 2d Bills and Notes § 534 (2014) (stating that there "must not have [been] a reasonable opportunity to learn of the character or essential terms of the instrument."). Plaintiff contends that, at best, Defendants can show that they did not take the time to read the Supplier and Loan Agreement, which is insufficient to make out a fraud in the factum defense.

Fraud in the factum applies when an "obligor [] sign[s] the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms[.]" G.L. 1956 § 6A-3-305(a)(1)(iii). The comments to § 6A-3-305 explain further that:

> "The test of the defense is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the intelligence, education, business experience, and

> ability to read or understand English of the signer. Also relevant is the nature of the representations that were made, whether the signer had good reason to rely on the representations or to have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to the signer, or any other possibility of obtaining independent information, and the apparent necessity, or lack of it, for acting without delay."

Here, it is obvious that Defendants did not avail themselves of the opportunity to read the Supplier and Loan Agreement prior to signing the document. As one commentator has found:

> "It is a well-settled rule that where one voluntarily signs a negotiable instrument, supposing it to be an obligation of a different character, but has full means of information in the premises and neglects to avail himself or herself thereof, relying on the representations of another, he or she cannot set up such ignorance and mistake as a defense against an innocent holder for value before maturity. Thus, one who signs a note without reading it is deemed to be negligent, and fraud would not be a defense to an action on the note by a holder in due course.
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> "In order to establish fraud in the factum as a defense under the Uniform Commercial Code, the defendant must prove that he or she lacked knowledge as to the true character of the paper signed or its essential terms and that he or she did not have a reasonable opportunity to obtain such knowledge." 12 Am. Jur. 2d Bills and Notes § 534 (2014)

This result is consistent with the "long [] settled principle that 'a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.'" Shappy v. Downcity Capital Partners, Ltd., 973 A.2d 40, 46 (R.I. 2009) (quoting Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007).

Therefore, the Court finds that the defense of fraud in the factum is not available to Defendants when they had a reasonable opportunity to read the Supplier and Loan Agreement before signing it and manifesting their assent. The Court finds this especially true when Defendants had previously taken the time to have the September 2012 Contract reviewed by a lawyer. Clearly, the Defendants understood the significance of entering into such contracts and cannot claim that they did not have an opportunity to learn of the essential terms before signing the Supplier and Loan Agreement. Accordingly, Defendants had a reasonable opportunity to avail themselves of the essential terms of the Note. Defendants' failure to do so does not amount to excusable ignorance as required to make out a defense of fraud in the factum. See § 6A-3-305(a)(1)(iii).

3

Fraud in the Inducement

Defendants further argue that Plaintiff fraudulently induced Defendants into signing the Supplier and Loan Agreement. Defendants contend that Plaintiff assisted them throughout the process of setting up Innercity, and therefore, Defendants relied upon Plaintiff when entering into the Supplier and Loan Agreement. Defendants assert that Plaintiff had them sign the Supplier and Loan Agreement under the guise that the only change from the September 2012 Contract was the amount of money loaned. Defendants suggest that Plaintiff had a duty to disclose the differing terms in the Supplier and Loan Agreement.

Plaintiff counters this argument in two ways: Plaintiff argues (1) that it made no affirmative representations to Defendants upon which Defendant could have been misled, and (2) that even if Defendants did rely on a statement made by Plaintiff, the reliance was not reasonable considering the plain and unambiguous language of the Supplier and Loan Agreement.

"Fraud in the inducement is defined as '[m]isrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken.'" Bourdon's, Inc. v. Ecin Indus., Inc., 704 A.2d 747, 753 (R.I. 1997) (quoting Black's Law Dictionary, 661 (6th ed. 1990)). "[A] claim of fraudulent inducement grounded on concealment, as opposed to an affirmative misrepresentation, 'will not lie absent a duty to speak.'" See W. Reserve Life Assurance Co. v. Caramadre, 847 F. Supp. 2d 329, 337 (D.R.I. 2012) (citing Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268–69 (D.R.I. 2000)); see also McGinn v. McGinn, 50 R.I. 236, 240, 146 A. 636, 638 (1929) ("[M]ere silence in the absence of a duty to speak is not fraudulent[.]").

Here, Defendants were not fraudulently induced to sign the Supplier and Loan Agreement by Plaintiff. Defendants assert that they would not have signed the Note had they known that it contained a payable on demand provision. However, it is clear that the Note contains the term "on demand" in bold, italicized, and underlined font. Defendants additionally had the opportunity to review the document when signing it, and thus the term was not concealed by Plaintiff.

Moreover, Defendants have only baldly asserted that Plaintiff owed a duty to speak about the alleged concealed terms. Defendants attempt to create a fiduciary duty type relationship between the parties by alleging that Defendants relied upon Plaintiff, and that this was not an "arm's length" transaction. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." See Restatement (Second) Torts § 874. Additionally, "'[a] 'fiduciary relation' arises whenever confidence is reposed on one side, and domination and influence result on the other'" or "'when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.'" Lyons v. Midwest Glazing, 265 F.

Supp. 2d 1061, 1076 (N.D. Iowa 2003) (quoting Econ. Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 647-48 (Iowa 1995)).

However, no such relationship between the parties exists, and no duty arose for the Plaintiff to disclose the terms of the Supplier and Loan Agreement. In Restatement (Second) Torts, § 551(2)(e), a duty to disclose will exist when one party "knows that the other is about to enter into [a transaction] under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." Plaintiff had no reason to believe that the clear, unambiguous, and highlighted language of the Note would not have alerted Defendants regarding the repayment terms or that Defendants were entering into the Note under a mistake as to its terms. Accordingly, Defendants were not fraudulently induced by Plaintiff into signing the Supplier and Loan Agreement, including the Note.

4

Supplier and Loan Agreement

Defendants next argue that the Supplier and Loan Agreement should be considered part of the same document as the Note, and therefore, a question of fact exists as to whether Plaintiff's alleged breach of the Supplier and Loan Agreement excuses performance by Defendants under the Note. Defendants assert that the Supplier and Loan Agreement was executed during the same transaction as the Note, on the same day, and that the Note is an exhibit to the Supplier and Loan Agreement, and therefore, the documents should be read together.

Plaintiff argues that the Note is not conditioned upon compliance with the Supplier and Loan Agreement. Therefore, Plaintiff asserts that any alleged set-off or defenses that Defendants have under the Supplier and Loan Agreement are irrelevant to the enforcement of the Note.

In Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996), our Supreme Court stated:

> "It has long been a general rule in this jurisdiction that instruments executed 'at the same time, for the same purpose and in the course of the same transaction . . . are to be considered as one instrument and are to be read and construed together.' Old Kentucky Distributing Corp. v. Morin, 50 R.I. 163, 165, 146 A. 403, 404 (1929); see also Maderios v. Savino, 418 A.2d 839, 842 (R.I. 1980) (promissory notes executed as part of single transaction construed together to determine the mutual rights and obligations of the parties). Moreover, instruments referred to in a written contract may be regarded as incorporated by reference and thus may be considered in the construction of the contract."

Similarly, the Supplier and Loan Agreement at issue here was executed at the same time and for the same purpose as the Note. In fact, the Note was an exhibit to the Supplier and Loan Agreement. Additionally, one of the conditions of default under the Note is any "default in the observance or performance of any covenant or agreement . . . executed by Borrower in favor of Lender, including, without limitation, the . . . Supplier and Loan Agreement[.]" Furthermore, the Note provides that the parties waived the right to a trial by jury with respect to "any claim based hereon, arising out of, under or in connection with . . . the Supplier [and Loan] Agreement[.]" It cannot be disputed that the two documents are to be considered part of a single transaction, and therefore, must be considered together. See Maderios, 418 A.2d at 842.[8]

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[8] If the Note were negotiated to a third party, a separate issue would arise as to whether that third party would receive holder in due course status pursuant to § 6A-3-302. The question for the Court would then be whether the provisions in the Note were enough to put the third party on notice of potential claims or defenses arising from the Supplier and Loan Agreement. See First Nat'l Bank of Linton v. Otto Huber & Sons, Inc., 394 F. Supp. 1284 (D.S.D. 1975) (finding that purchaser of a promissory note had been informed about nonperformance of an underlying contract to the promissory note, such that purchaser should have been on notice that the

Defendants would have the Court find that because the Supplier and Loan Agreement and the Note were part of the same transaction, any defenses that the Defendants may have under the Supplier and Loan Agreement are equally applicable to the Note. See § 6A-3-117 ("To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation."); see also Ingram v. Brookins, 597 So. 2d 385 (Fla. Dist. Ct. App. 2d Dist. 1992) (finding that question of whether maker's continued payment of note was contingent on holder's performance of all terms of buy–sell agreement executed coincident with execution of note created genuine fact issue precluding summary judgment). Defendants assert that Plaintiff materially breached the Supplier and Loan Agreement by paying Defendants significantly less than Defendants assert it was owed and defrauding Defendants by manually adjusting the weights of the scrap.

Defendants alleged breaches by Plaintiff under the Supplier and Loan Agreement have created a question of fact as to whether performance by Defendants is negated in some manner under the Note. See Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010) ("Generally, whether a party materially breached his or her contractual duties is a question of fact.") (citing Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 158 (R.I. 2001)). As any defense to the Supplier and Loan Agreement can also be a defense to the Note, see § 6A-3-117, and there exists

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promissory note contained irregularities). However, there is no such issue here, where the Plaintiff is the lender and had reason to know of the potential claims or defenses held by Defendants arising from the Supplier and Loan Agreement. See § 6A-3-302(a)(2) (stating that party will not be considered a holder in due course when the party takes instrument with knowledge of a § 6A-3-305(a) claim); Sec. 6A-3-305(a)(3) (stating that the right to enforce an instrument is subject to "[a] claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument[.]"); see also Program Aids Co. v. W. R. Bean & Son, Inc., 1967 WL 8945 (N.Y. Sup. Ct. May 10, 1967) (holding that plaintiff had reason to know of a defense arising out of a sales contract to which plaintiff was a party, thereby defeating holder in due course status).

a question of fact as to a breach of the Supplier and Loan Agreement, entry of summary judgment is precluded. See Palmisciano, 603 A.2d at 320.

B

Money Had and Received

Plaintiff's second count seeks redress through a claim of money had and received. An action for money had and received exists "[w]hen one person has in his possession money which in equity and good conscience belongs to another, [and] the law [] create[s] an implied promise upon the part of such person to pay the same to him to whom it belongs[.]" Evangelista v. Antonio De Cubellis, Inc., 79 R.I. 142, 146-47, 85 A.2d 69, 71 (1951).

Furthermore, the action for money had and received has morphed into the more modern action of unjust enrichment. See 66 Am. Jr. 2d Restitution and Implied Contracts § 156 (2014); see also Cappalli v. BJ's Wholesale Club, Inc., 904 F. Supp. 2d 184, 197 (D.R.I. 2012) ("This claim, [money had and received], is essentially one of unjust enrichment."). "The doctrine of unjust enrichment is equitable in its nature, and generally it is applied to permit a recovery where one person has received a benefit from another and the retention thereof would be unjust under some legal principle recognized in equity." R.I. Hosp. Trust Co. vs. R.I. Covering Co., 96 R.I. 178, 179-80, 190 A.2d 219, 220-21 (1963). To recover for unjust enrichment, a claimant must prove: "(1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" Dellagrotta v. Dellagrotta, 873 A.2d 101, 113 (R.I. 2005) (quoting Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997)). Our Supreme Court has said that "[t]he most significant requirement . . . is that the enrichment to the defendant be unjust." R & B Elec. Co. v. Amco Constr. Co., Inc., 471 A.2d 1351, 1356 (R.I. 1984) (internal quotations omitted).

Money had and received is a "vehicle for equitable recovery where no rights on an enforceable contract exist." Cappalli, 904 F. Supp. 2d at 198. The Court, having found that the allegations of fraud are not supportable, finds that the Supplier and Loan Agreement (and the Note) are valid and enforceable contracts. Therefore, the Court denies summary judgment as to the count of money had and received. See Café La France, Inc. v. Schneider Sec., Inc., 281 F. Supp. 2d 361, 375 (D.R.I. 2003) (holding that, under Rhode Island law, unjust enrichment is available only "in the absence of an enforceable contract"). No showing has been made that Defendants have unjustly received money from Plaintiff, particularly in light of an enforceable agreement between the parties.

IV

Conclusion

Based on the foregoing analysis, this Court denies summary judgment in favor of Plaintiff as to both counts. Counsel for Defendants may present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**SMM New England Corp. v. Innercity Recycling Service LLC and Kenneth A. Serapiglia**
CASE NO:	**PB 14-0004**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 1, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**

ATTORNEYS:

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