



Analysis
As of: Dec 05, 2012

**Morse, Zelnick, Rose & Lander, LLP, Respondent, v Ronnybrook Farm Dairy, Inc.,
Appellant.**

6878, 106421/09

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST
DEPARTMENT**

**92 A.D.3d 579; 939 N.Y.S.2d 365; 2012 N.Y. App. Div. LEXIS 1321; 2012 NY Slip Op
1353**

**February 23, 2012, Decided
February 23, 2012, Entered**

PRIOR HISTORY: *Morse, Zelnick, Rose & Lander, LLP v. Ronnybrook Farm Dairy, Inc., 2011 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct., Apr. 14, 2011)*

Concur--Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam and Manzanet-Daniels, JJ.

CORE TERMS: conditions precedent, repayment, letter agreement, summary judgment, promissory note, nonparty

OPINION

[*579] [**366] Appeal from order, Supreme Court, New York County (Judith Gische, J.), entered April 19, 2011, which granted plaintiff's motion for summary judgment, deemed an appeal from the judgment, same court and Justice, entered May 3, 2011, in favor of plaintiff in the amount of \$115,885.42, and, so considered, said judgment unanimously reversed, on the law, with costs, and the judgment vacated.

HEADNOTES

Bills, Notes and Checks--Promissory Note--Satisfaction of Conditions Precedent to Payment of Note

COUNSEL: [***1] Feldman & Associates, PLLC, New York (Stephanie R. Feldman of counsel), for appellant.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for respondent.

JUDGES: Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

There is a triable issue of fact as to whether the preconditions to the payment of plaintiff's note have been satisfied. The May 25, 2000 promissory note, which is the basis for this action, and the May 25, 2000 letter agreement must be read together (*see e.g. BWA Corp. v Alltrans Express U.S.A., 112 AD2d 850, 852, 493 NYS2d 1 [1985]*). The letter agreement provides that "the repayment of the note held by [plaintiff] shall be

subordinate and subject to the repayment of the notes . . . or the payment of any Liquidation Preference on the Series A Preferred Shares." Unlike the [***2] note, the letter agreement does not merely contain a subordination clause. Rather, it also contains conditions precedent to the payment of plaintiff's note. The letter agreement further provides that "[a]fter the notes have been repaid in full or after [nonparty] Sofisco and [nonparty] Osofsky have received the entire Liquidation Preference with respect to the Series A Preferred Shares that they hold, [defendant] shall repay the note held by [plaintiff]." Thus, one of the conditions precedent to repayment on the note is payment in full of the Sofisco and Osofsky notes.

Defendant submitted the affidavit of its president, stating that the Osofsky note has not been satisfied. It was error for the motion court to assume that conversion of the Sofisco and Osofsky notes into Series A Preferred Shares is the same as repayment of the notes. Were that the case, there would not be any need for the letter agreement to provide a choice of two conditions precedent, namely, repayment of the notes *or* payment of the entire Liquidation Preference on the Series A [*580]

Preferred Shares. "A reading of the contract should not render any portion meaningless . . ." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]). [***3] Thus, since it is unclear whether the conditions precedent have been met, plaintiff is not entitled to summary judgment (*see Citicorp Intl. Trading Co., Inc. v. Western Oil & Ref. Co., Inc.*, 790 F Supp 428, 434 [SD NY 1992]).

In light of the above disposition, it is unnecessary to reach defendant's arguments that plaintiff's summary judgment motion should have been denied because heightened standards apply to transactions between attorneys and their clients, and plaintiff may have violated the Code of Professional Responsibility. In any event, these arguments are unpreserved and may not be raised for the first time on appeal (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313, 714 NYS2d 34 [2000]). Concur--Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam and Manzanet-Daniels, JJ. [**Prior Case History: 2011 NY Slip Op 31006(U).**]