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DOCKET NO. CV-05-4003196	:	**SUPERIOR COURT**
LISA BRAULT	:	**J. D. OF MIDDLESEX**
VS.	:	**AT MIDDLETOWN**
JAMES R. GRAYDON and LINDA GRAYDON	:	**JUNE 5, 2006**

MEMORANDUM OF DECISION

FACTS

On June 15, 2005, the plaintiff, Lisa Brault commenced an action by service of process against the defendants, R. James Graydon and Linda Graydon. The plaintiff's claim is in a single count that seeks foreclosure on a mortgage that the plaintiff obtained in conjunction with a promissory note that the defendants gave to the plaintiff.

This action arises out of the following facts that, in this motion for summary judgment, are viewed in a light most favorable to the non-moving party, the plaintiff. On July 20, 2001, the plaintiff loaned $500,000.00 to the defendants. On May 24, 2002, the defendants executed a note for $500,000.00 and delivered it to the plaintiff. The note was accompanied by a mortgage on the parcel of land known and designated as 9 Mohegan Avenue, Old Saybrook, Connecticut. The note provided that the loan have a March 30, 2007 maturation

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date, that the plaintiff could call the loan after March 1, 2004 with 90 days notice and that the loan would carry an annual interest rate of 5%. The note also provided for annual installment payments of interest. The plaintiff retains ownership of both the note and mortgage and claims that installment payments have not been made. The plaintiff is seeking foreclosure of the mortgage, possession of the premises, a deficiency judgment, appointment of a receiver for collection of all rents and royalties, attorney's fees, interest, damages and ejectment.

On March 6, 2006 the defendants filed a motion for summary judgment, a memorandum of law, an affidavit of the defendants' counsel, Kerry M. Wisser and copies of excerpts from the January 25, 2006 deposition of the plaintiff and the January 12, 2006 deposition of the plaintiff's attorney, Allan Koerner. On March 27, 2006, the plaintiff filed an objection to the motion for summary judgment, a memorandum of law, copies of excerpts from the January 25, 2006 deposition of R. James Graydon, the January 26, 2006 deposition of Linda Graydon and the aforementioned January 12, 2006 and January 25, 2006 depositions of Allan Koerner and the plaintiff.

STANDARD FOR SUMMARY JUDGMENT

"The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." *Wilson* v. *New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989). "However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) *Kakadelis* v. *DeFabritis*, 191 Conn.

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276, 282, 464 A.2d 57 (1983). "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Larobina* v. *McDonald*, 274 Conn. 394, 399, 876 A.2d 522 (2005).

DISCUSSION

The defendants argue that the note and mortgage that the plaintiff's action relies on are unenforceable contracts. The defendants contend that, under Connecticut contract law, in order for a court to enforce a promissory note or foreclose on a mortgage, a plaintiff must demonstrate that the note and mortgage were supported by consideration. The defendants assert that no genuine issue of material fact exists and the court may not make a finding that the note and mortgage are enforceable contracts as a matter of law because the note and mortgage were created approximately six months after the plaintiff loaned the defendants the $500,000.00. Under the defendants' view, no new consideration was given at the later date.

The plaintiff claims that a genuine issue of material fact remains as to whether the note and mortgage were supported by consideration. She argues that, under the Uniform Commercial Code and Connecticut case law, an antecedent debt may serve as consideration for a note and mortgage that are subsequently provided. She further argues that she loaned $500,000.00 to the defendants and she was given a promissory note and mortgage to secure

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this debt. She argues that the debt was consideration for the note and mortgage. In the alternative, the plaintiff argues that in addition to the antecedent debt, further consideration flowed to the defendants in the note. Specifically, the plaintiff argues that the note postponed the plaintiff's right to immediately recall the note. Also, according to the plaintiff, the note reduced the applicable annual interest rate to five percent, from the statutory legal interest rate of eight percent.

In general, "[s]omething given before a promise is made, and therefore without reference to it . . . does not constitute legal consideration." *Gilbert* v. *Namin*, Superior Court, judicial district of New London at Norwich, Docket No. 0117037 (April 30, 1999, *Mihalakos, J.*) (24 Conn. L. Rptr. 424, 424), citing *Sandelli* v. *Duffy*, 131 Conn. 155, 157, 38 A.2d 437 (1944).

"[However,] negotiable paper taken in payment of an antecedent debt is taken for a valuable consideration, within the meaning of the law merchant. . . . This is equally true where the paper is taken as security for an antecedent debt. . . . Moreover, [t]here is a presumption that every negotiable instrument has been issued for a valuable consideration and that every party whose signature appears on the instrument has become a party for value. . . ." (Citations omitted; internal quotation marks omitted.) *Gilbert* v. *Namin*, supra, 24 Conn. L. Rptr. 424., citing *Brush* v. *Scribner*, 11 Conn. 388, 392, 29 Am. Dec. 303 (1836); *Bridgeport City Bank* v. *Welch,* 29 Conn. 475, 476, (1861); *Molk* v. *Micklewright*, 151 Conn. 606, 201 A. 2d 183 (1964).

In relevant part, General Statutes § 42a-3-303 states: "(a) An instrument is issued or

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transferred for value if: . . . (3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due; . . . (b) . . . If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration."

"[A] mortgage to secure an antecedent debt is perfectly valid as between the parties, and as against all others who had at the time no equitable interest in the property. . . . The mortgagee for an antecedent debt acquires a lien upon the property to the extent only of the mortgagor's equitable interest at the time." *Millard* v. *Green*, 94 Conn. 597, 606, 110 A. 177 (1920).

In *Gilbert* v. *Namin*, supra, 24 Conn. L. Rptr. 424., a promissory note that indicated that the defendant owed the plaintiff $75,000.00 was drafted by the parties after the transfer of funds had taken place. There, the defendant claimed that the note was not supported by consideration because it hadn't been executed at the time when the funds were exchanged. The court rejected the defendant's argument and held that the defendant had failed to demonstrate a lack of consideration by simply pointing out a lack of contemporaneity between the note and the exchange of funds.

Similarly, in this case, the defendants motion for summary judgment relies on the argument that the note and mortgage given to the plaintiffs lacked consideration because they were given in exchange for a preexisting debt that arose six months prior. The defendants' argument is unpersuasive. The claimed antecedent debt, under Gen. Stat. § 42a-3-303 and the relevant case law, is valid consideration for the note that the defendants gave to the

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plaintiff. Furthermore, consistent with *Millard* v. *Green*, supra, 94 Conn. 597, the mortgage that the defendants delivered to secure the note is valid regardless of consideration. The defendants' motion for summary judgment is denied.

The Court, By

Kevin E. Booth, Judge