

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2008 CA 0012**

**MAPP CONSTRUCTION, LLC**

**VERSUS**

**SOUTHGATE PENTHOUSES, LLC; R.W. DAY DEVELOPMENT,  
LLC; ROBERT W. DAY; JANICE E. DAY; AND LIONSWAY, LLC**

**Judgment Rendered: June 6, 2008**

**Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Docket Number 544,997**

**Honorable Timothy Kelley, Judge Presiding**

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R. Gray Sexton  
Daniel Crocker  
Baton Rouge, LA**

**And**

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**And**

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Day Development LLC; Robert W.  
Day; Janice E. Day; and Lionsway  
LLC**

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**BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.**

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*July*  


**WHIPPLE, J.**

In this suit arising out of a Settlement Agreement and Release and two related promissory notes, defendants appeal from a judgment granting the motion for partial summary judgment filed by plaintiff, MAPP Construction, LLC (“MAPP”); ordering defendant, Southgate Penthouses LLC, to pay the unpaid balance on the two promissory notes; ordering defendants, Robert Day and Janice Day, to execute certain documents related to their business, Lionsway LLC, to effectuate a change in ownership; and recognizing defendants, R.W. Day Development LLC and Robert W. Day, as guarantors of the debt of Southgate Penthouses LLC. For the following reasons, we reverse and remand for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

On August 21, 2003, MAPP, as general contractor, entered into two written contracts with owners, Southgate Residential Towers LLC and Southgate Penthouses LLC, for the construction of a large apartment complex and penthouses located on Nicholson Drive in Baton Rouge, Louisiana. The contracts were valued at \$31,192,532.00 and \$4,964,687.00 respectively. On that same date, Southgate Penthouses LLC and MAPP also entered into a “Fee Agreement,” wherein Southgate Penthouses LLC agreed to pay MAPP the sum of \$500,000.00 for the redemption of MAPP’s interest in Southgate Residential Towers LLC.

On June 14, 2004, Southgate Penthouses LLC and MAPP also entered into a contract for the performance of specified change orders valued at \$4,593,560.63 (“the Change Order Contract”). Thereafter, on February 3, 2005, to resolve a dispute over the actual value of certain change orders (identified as CPR Nos. 1-129), MAPP and Southgate Penthouses LLC

entered into an “Agreement in Principal [sic].”<sup>1</sup> Later, on August 22, 2005, the parties entered into a “Settlement Agreement and Release,” which formalized their resolution of the dispute over the enumerated change orders and superseded the Agreement in Principal.<sup>2</sup>

Pursuant to paragraph number 1 of the Settlement Agreement and Release, Southgate Penthouses LLC agreed to pay MAPP the sum of \$5,000,000.00 “minus an amount **to be determined** for backcharges,” in full settlement of all of MAPP’s claims for “additional compensation under any contract or agreement with Southgate Penthouses LLC, and Southgate Residential Towers LLC,” including CPR Nos. 1-129. (Emphasis added). Attached to the Settlement Agreement and Release was a list of backcharges, which the Southgate defendants contended should be applied as a credit against the settlement amount and the value of which the parties agreed to negotiate in good faith. The Settlement Agreement and Release also provided for the possibility of certain credits for other claims by Southgate Penthouses LLC.

The Settlement Agreement and Release further provided as follows:

The parties hereby acknowledge that this Agreement is executed to avoid any additional negotiation or litigation arising out of or in any way involving the change orders, except as to the amount and validity, if any, of the claimed backcharges referenced in Paragraph No. 1. MAPP represents that Note #1 represents a novation of its earlier claims for change orders through the Effective Date, and that any action by MAPP to collect on such claimed backcharges shall be to file a suit and claim on Note #1 and to assert and enforce any and all conventional and legal security rights that might exist, including but not limited to those referenced herein.

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<sup>1</sup>MAPP contended that the total amount due for the change orders was approximately \$5,500,000.00, whereas Southgate contended that the total amount due was approximately \$4,600,000.00 minus certain backcharges and construction claims.

<sup>2</sup>While the Settlement Agreement and Release was entered into on August 22, 2005, the document provided for an effective date of February 3, 2005, the date the Agreement in Principal had been executed.

On the same date that the Settlement Agreement and Release was executed, Southgate Penthouses LLC also executed a promissory note (“Promissory Note No. 1”) in favor of MAPP for the principal sum of \$5,000,000.00 plus interest, “which is equivalent to the Settlement Amount” as defined in the Settlement Agreement and Release, “less all payments of principal previously paid to MAPP in accordance with [the] Settlement Agreement, **less such additional credits as are provided for in [the] Settlement Agreement.**” (Emphasis added). Promissory Note No. 1 set forth a payment schedule whereby Southgate Penthouses LLC agreed to make consecutive monthly installments, “until the total amount of principal and interest is paid in full.” Promissory Note No. 1 also contained a Default and Acceleration clause that provided as follows:

MAPP shall have the right, at its option, to declare this Note to be in default and to insist upon immediate payment (to accelerate the maturity) of this Note if MAKER fails to make any payment due under this Note as and when due, and such failure continues for a period of fifteen (15) days following receipt by MAKER of written notice of default from MAPP.

Additionally on that date, Southgate Penthouses LLC executed a second promissory note (“Promissory Note No. 2”) in favor of MAPP in the principal sum of \$500,000.00, representing the balance owed to MAPP under the Fee Agreement. This note was non-interest bearing and provided that Southgate Penthouses LLC would make consecutive monthly payments on the note, beginning after the total amount of principal and interest was paid on Promissory Note No. 1, “until the total amount of principal is paid in full.” Promissory Note No. 2 also contained a Default and Acceleration clause, providing as follows:

MAPP shall have the right, at its option, to declare this Note to be in default and to insist upon immediate payment (to accelerate the maturity) of this Note if MAKER fails to make

any payment due under this Note as and when due, and such failure continues for a period of ten (10) days or more.

Subsequent to the execution of the Settlement Agreement and Release and the two promissory notes, Southgate Penthouses LLC became delinquent on several payments on Promissory Note No. 1 and ultimately failed to make any further payments on the note subsequent to the December 2005 payment. Accordingly, MAPP sent written notice to Southgate Penthouses LLC and the alleged guarantors of the note that the note was in default and that payment of the note had been accelerated.

When Southgate Penthouses LLC failed to pay, MAPP instituted this suit, seeking, among other things, to recover from Southgate Penthouses LLC the full balance due on Promissory Note No. 1, with interest and attorney's fees of 25% of the principal and interest due, and the \$500,000.00 balance due on Promissory Note No. 2, with interest and attorney's fees of 25% of the principal and interest due. MAPP further sought judgment against R.W. Day Development LLC in the amount of \$2,500,000.00, pursuant to a Continuing Guaranty Agreement; judgment against Robert Day in the amount of \$1,000,000.00, pursuant to an alleged personal guaranty agreement; and a mandatory injunction commanding Robert and Janice Day to execute documents to effect a transfer of 100% of their combined interest in Lionsway LLC to MAPP, pursuant to certain terms in the Settlement Agreement and Release. Defendants filed an answer, raising numerous defenses.<sup>3</sup>

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<sup>3</sup>The defenses that were raised included failure of consideration, impossibility of performance, the presence of a suspensive condition, lack of clean hands, an unliquidated damages claim, compensation and offset, accord and satisfaction, breach of agreement and lack of specific performance, estoppels, and any defenses of the guarantors. Robert Day, Janice Day, and Lionsway LLC filed a reconventional demand against MAPP, seeking damages for MAPP's alleged wrongful filing of a notice of lis pendens against real estate owned by Lionsway LLC.

Thereafter, MAPP filed a motion for partial summary judgment, contending that, as a matter of law, it was entitled to judgment in its favor: ordering payment of the balance of the two promissory notes; issuing a mandatory injunction requiring Robert Day and Janice Day to execute documents to effectuate a transfer in membership ownership of Lionsway LLC to MAPP; recognizing the continuing guaranty agreement of R.W. Day Development LLC and rendering judgment against it in the amount of \$2,500,000.00, with interest; and recognizing the personal guaranty of Robert W. Day and granting judgment in favor of MAPP and against Robert Day in the amount of \$1,000,000.00, with interest.

Defendants opposed the motion, contending that Promissory Note No. 1, unlike most promissory notes, did not contain an unconditional promise to pay a sum certain. Rather, they contended that the note specifically provided for the “reduction of the principal payments” by credits provided for in the Settlement Agreement and Release, which credits had not yet been determined. Defendants further asserted that the “credits” provided for “clear[ly]” included credits relating to warranty claims and claims relating to the alleged failure of MAPP to complete the work in accordance with the terms of the construction contracts. Alternatively, defendants contended that the term “credits” in Promissory Note No. 1 and in the Settlement Agreement and Release was ambiguous, thereby precluding summary judgment.

Following a hearing on the motion, the trial court rendered judgment, granting the motion for partial summary judgment and: (1) ordering Southgate Penthouses LLC to pay MAPP the unpaid balance on Promissory Note No. 1 in the amount of \$2,774,325.80, together with accrued interest in the amount of \$295,522.70 and interest at the contractual rate of 8% from

June 2, 2007, until the entire balance is paid; (2) ordering Southgate Penthouses LLC to pay MAPP the unpaid principal balance of Promissory Note No. 2 in the amount of \$500,000.00, together with legal interest from the date of judicial demand until paid; (3) ordering Robert W. Day and Janice E. Day to appear before the trial court and execute an “Act of Sale” and documents to amend the Articles of Incorporation and the Operating Agreement of Lionsway LLC, to effectuate the change in membership ownership; (4) recognizing R.W. Day Development LLC as liable as guarantor of the debt of Southgate Penthouses LLC, in the amount of \$2,500,000.00, with legal interest from the date of judicial demand until paid by Southgate Penthouses LLC, and further ordering that if such sum was not paid by Southgate Penthouses LLC, R.W. Day Development LLC must immediately remit the amount of the guaranty; and (5) recognizing Robert W. Day as liable as guarantor of the debt of Southgate Penthouses LLC, in the amount of \$1,000,000.00, with legal interest from the date of judicial demand until paid by Southgate Penthouses LLC, and ordering that if such sum was not paid by Southgate Penthouses LLC, Robert W. Day must immediately remit the amount of the guaranty.<sup>4</sup>

From this judgment, defendants suspensively appeal, contending that the trial court erred in granting MAPP’s motion for partial summary judgment on the promissory notes: (1) where LSA-C.C. art. 1901 and Buck’s Run Enterprises, Inc. v. MAPP Construction, Inc., 99-3054 (La. App. 1<sup>st</sup> Cir. 2/16/01), 808 So. 2d 428, specifically allow the parties to agree

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<sup>4</sup>The trial court designated the judgment as a final judgment pursuant to LSA-C.C.P. art. 1915(B)(1). In denying a subsequent writ application by defendants, this court held that the August 16, 2007 judgment granting MAPP’s motion for partial summary judgment was a final, appealable judgment, citing LSA-C.C.P. art. 1915(A)(1). MAPP Construction, LLC v. Southgate Penthouses, LLC, 2007 CW 1683 (La. App. 1<sup>st</sup> Cir. 9/17/07)(unpublished).

to an offset and reduction of the principal amount due under the promissory note; (2) where computation of the amount of the offset is a suspensive condition that must occur prior to the time that the principal amount can be computed and paid; (3) where Southgate Penthouses LLC pleaded and provided supporting facts to show a failure of consideration in the making of the promissory note; and (4) where Southgate Penthouses LLC pleaded and provided supporting facts to show that MAPP's defective construction made the promissory note impossible to perform by Southgate Penthouses LLC. Defendants further contend on appeal that the trial court erred: (1) in granting specific performance of the transfer of property, due to MAPP's lack of clean hands and lack of performance; and (2) in granting MAPP's motion for summary judgment against Robert W. Day as guarantor where there was no written guaranty by Robert W. Day.

#### **SUMMARY JUDGMENT**

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of an action, and the procedure is favored. LSA-C.C.P. art. 966(A)(2); Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So. 2d 880, 883. Once the moving party has properly supported the motion for summary judgment by submitting affidavits or pointing out the lack of factual support for an essential element in the opponent's case, the non-moving party must produce evidence of a material factual dispute. Otherwise, the granting of summary judgment will be mandated. See Samaha, 977 So. 2d at 883. As consistently noted in LSA-



C.C.P. art. 967, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence which will establish that material facts are still at issue. Hunter v. Tensas Nursing Home, 32,217 (La. App. 2nd Cir. 10/27/99), 743 So. 2d 839, 841, writ denied, 99-3334 (La. 2/4/00), 754 So. 2d 228.

In determining whether summary judgment is appropriate, appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Samaha, 977 So. 2d at 882-883.

### **DISCUSSION**

Defendants raise several challenges to the trial court's grant of partial summary judgment on the promissory notes. First, they contend that Southgate Penthouses LLC filed a claim against MAPP for breach of contract and warranty based upon MAPP's alleged failure to perform the work under the contracts in a workmanlike manner, free from defects. According to defendants, both the Promissory Note No. 1 and the Settlement Agreement and Release provide for "credits" that were to reduce the principal amount due, and their warranty claims against MAPP constitute such a "credit" or "offset." Defendants contend that these "credits" are to be determined by the arbitrator or court and that, because their alleged damages for breach of the construction contracts (i.e., their "credits") have not yet been determined, the amount due and payable under Promissory Note No. 1 cannot be determined and is not a liquidated amount. Thus, defendants assert, the trial court erred in granting summary judgment.

Additionally, defendants aver that the contract provisions are unclear and susceptible to differing interpretations, and summary judgment is not appropriate where there is a question as to what was intended by certain

provisions of a contract. Specifically, they contend that several interpretations may be given to the meaning of the term “credits,” and because the contracts fail to define the term, the meaning of the contracts is unclear. Thus, defendants argue, there exists a genuine issue of material fact as to the parties’ intent.

In a suit on a promissory note, the plaintiff generally must merely produce the note in question to make out a prima facie case. The burden then shifts to the defendant to prove any affirmative defenses, such as a claim that the amount due on the note should be reduced by certain credits. Long v. Long, 2004-938 (La. App. 5<sup>th</sup> Cir. 1/25/05), 895 So. 2d 34, 39; Colonial Mortgage & Loan Corp. v. James, 2001-0526 (La. App. 4<sup>th</sup> Cir. 3/6/02), 812 So. 2d 817, 820.

In support of its motion for partial summary judgment, MAPP relied upon, among other evidence, the two promissory notes and the Settlement Agreement and Release. Accordingly, it established a prima facie case showing its entitlement to collect the face amount on the notes. Gulf Coast Bank & Trust Company v. Donnaud’s Inc., 99-1228 (La. App. 5<sup>th</sup> Cir. 4/25/00), 759 So. 2d 268, 272. However, as noted above, Promissory Note No. 1 provides that Southgate Penthouses LLC promises to pay to MAPP:

the principal sum of FIVE MILLION and NO/100 DOLLARS (\$5,000,000.00) plus interest at the rate set forth below, which is equivalent to the Settlement Amount, as defined in that certain Settlement Agreement and Release executed on August 22, 2005, by and between MAPP Construction, LLC, Southgate Residential Towers LLC and Southgate Penthouses LLC (the “Settlement Agreement”) less all payments of principal previously paid to MAPP in accordance with Settlement Agreement, **less such additional credits as are provided for in Settlement Agreement.**

(Emphasis added). Thus, reference must be made to the Settlement Agreement and Release to determine the actual amount due under Promissory Note No. 1.

Pursuant to paragraph number 1 of the Settlement Agreement and Release, Southgate Penthouses LLC agreed to pay MAPP the sum of \$5,000,000.00 “minus an amount to be determined for backcharges,” in full settlement of all of MAPP’s claims for “additional compensation under any contract or agreement with Southgate Penthouses LLC, and Southgate Residential Towers LLC,” including CPR Nos. 1-129 and “all of Southgate’s backcharge claims.” Attached to the Settlement Agreement and Release was a list of backcharges, which the Southgate defendants contended should be “applied as a credit” against the settlement amount and the value of which the parties agreed to negotiate in good faith.

The Settlement Agreement and Release further provided that the release and the calculation of the amount due specifically excluded any claims relating to various lawsuits that had been filed, claims relating to certain alleged construction defects, any future warranty claims, and claims for additional compensation for CPR Nos. 130 and above. Pursuant to the Settlement Agreement and Release, these excluded amounts were to be separately negotiated by the parties, and if they were unable to agree, the parties agreed to submit the disputed issues to arbitration, as provided in the construction contracts.

Nonetheless, while the Settlement Agreement and Release provided that the above disputed issues and sums were specifically excluded from the calculation of the amount due, the Settlement Agreement and Release further provided as follows:

Should an arbitrator determine that additional amounts are due, **such amounts shall increase the Settlement Amount** by Southgate Penthouses LLC, or if awarded consistent with the HUD Contract, then Southgate Residential Towers LLC. Should an arbitrator determine that **credits** are due, **such amounts shall decrease the Settlement Amount**. The **arbitrator, or court, shall determine if such credits reduce the settlement amount**, or is [sic] to be considered as a payment under paragraph 4.<sup>5</sup>

(Emphasis added).

In reviewing these provisions of Promissory Note No. 1 and the Settlement Agreement and Release, it appears that a question of fact remains as to whether the parties contemplated the possibility of two different types of credits to reduce the Settlement Amount and, consequently, the amount due on Promissory Note No. 1. The Settlement Agreement and Release clearly contemplates a “backcharge credit” to be negotiated in good faith by the parties. Additionally, the agreement provides that “credits” for other disputed issues between the parties may also reduce the Settlement Amount. While the Settlement Agreement and Release provides that the calculation of the amount due “specifically excludes” those other disputed issues, such as lawsuits filed by MAPP’s subcontractors, defective construction claims, and warranty claims, the agreement further provides that should an arbitrator determine that credits are due for these disputed claims, “such amounts shall decrease the Settlement Amount” and that the arbitrator or court “shall determine if such credits reduce the settlement amount.”

Offset or “compensation” takes place by operation of law when two parties owe each other sums of money and these sums are liquidated and presently due. In such a case, compensation extinguishes both obligations to the extent of the lesser amount. LSA-C.C. art. 1893. Generally, an unliquidated claim for damages cannot be pleaded in compensation against a

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<sup>5</sup>Paragraph 4 sets forth a payment schedule, providing for various contingencies.

liquidated claim based on a promissory note. American Bank v. Saxena, 553 So. 2d 836, 844-845 (La. 1989); Johnson v. Drury, 99-608 (La. App. 5<sup>th</sup> Cir. 6/2/00), 763 So. 2d 103, 110.

However, while a liquidated sum cannot be offset by an unliquidated sum by operation of law, LSA-C.C. art. 1901 provides that compensation may also take place by agreement of the parties, even though the requirements for compensation by operation of law are not met. Defendants argue that pursuant to the holding in Buck's Run Enterprises, Inc. and the provisions of LSA-C.C. art. 1901, a liquidated sum represented by the amount set forth in Promissory Note No. 1, can be offset by an unliquidated sum, in this case the construction defect and warranty claims, by agreement of the parties. They aver that this is precisely what the parties herein agreed to by providing that the Settlement Amount could be reduced by various "credits."

In opposition to the motion for partial summary judgment, defendants offered the affidavit of Robert Day, the managing member of Southgate Penthouses LLC, who signed both promissory notes, and the Settlement Agreement and Release on behalf of Southgate Penthouses LLC. In his affidavit, Day attested that at all times during the negotiation of Promissory Note No. 1 and the Settlement Agreement and Release, the parties agreed that it was their intention that Promissory Note No. 1 would be reduced by warranty claims and MAPP's obligation to complete its contractual obligations. Day further attested that this reduction to the principal amount of the promissory note was defined as a "credit" in both the promissory note and the Settlement Agreement and Release. Additionally, Day attested that the amount of the warranty claims and the claims relating to completion of the project are in excess of the amount that had been sued upon by MAPP in

this litigation. Thus, defendants assert, because the amount of the offset or “credits” has not been determined, summary judgment is inappropriate.

In Buck’s Run Enterprises, Inc., the contractor asserted the affirmative defense of setoff to a claim by a subcontractor for a sum allegedly due pursuant to the subcontract. Specifically, the contractor claimed that the subcontractor had defaulted on another project, resulting in damages that exceeded the amount it owed the subcontractor on the subcontract at issue therein. The subcontract specifically authorized the contractor to withhold an amount sufficient to secure it with regard to any breach by the subcontractor under any other agreement. Buck’s Run Enterprises, Inc., 808 So. 2d at 430.

The subcontractor argued that setoff was not appropriate because the amounts claimed by the contractor on the other project were not liquidated, but, rather, were disputed. In reversing the trial court’s grant of summary judgment in favor of the subcontractor, this court noted that, even if the setoff amounts claimed by the contractor were not liquidated at that time, the contractual provision regarding withholding of payment might allow the contractor to withhold sums under the subcontract at issue for work on another contract. Thus, this court concluded that the evidence of the unliquidated claim under a separate contract was sufficient to create doubt as to whether the subcontractor was entitled to collect on the claim under the subcontract at issue and, thus, was sufficient to preclude summary judgment. Buck’s Run Enterprises, Inc., 808 So. 2d at 433.

In the instant case, we likewise conclude that the question of what credits should be applied to reduce the amount due on Promissory Note No. 1, where the parties apparently contractually agreed to some credits, i.e., setoff or compensation, is sufficient to preclude summary judgment. At

best, the Settlement Agreement and Release, referenced in Promissory Note No. 1 for the determination of the amount due on the promissory note, is ambiguous as to what credits would reduce the Settlement Amount, and consequently, the amount due on Promissory Note No. 1. Summary judgment is rarely appropriate where a question remains as to the meaning of or intent behind certain provisions of a contract. Lacrouts v. Succession of Longo, 2004-1938 (La. App. 1<sup>st</sup> Cir. 9/23/05), 923 So. 2d 717, 719. Because the contract provisions herein relating to “credits” that reduce the promissory note amount are unclear and susceptible to multiple, inconsistent interpretations, we cannot agree with the trial court that MAPP was entitled to judgment in its favor “as a matter of law.”<sup>6</sup> See Lacrouts, 923 So. 2d at 719.

Because we find merit to the assertions by defendants that a genuine issue of material fact remains regarding the credits to be applied to the principal sum due on Promissory Note No. 1, we must accordingly conclude that summary judgment was inappropriate. Thus, we pretermitt discussion of defendants’ remaining arguments.

### **CONCLUSION**

For the above and foregoing reasons, the August 16, 2007 judgment granting MAPP’s motion for partial summary judgment is reversed. This matter is remanded to the trial court for further proceedings, to be conducted as expeditiously as possible, consistent with the views expressed herein. Costs of this appeal are assessed against plaintiff, MAPP Construction, LLC.

### **REVERSED AND REMANDED.**

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<sup>6</sup>Additionally, because the payment provisions of Promissory Note No. 2 are not triggered until repayment of Promissory Note No. 1, we must likewise conclude that, for the reasons set forth above, MAPP was not entitled to summary judgment in its favor for the principal amount of Promissory Note No. 2.