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Cullen and Dykman Succeeds in Obtaining a Reversal on Appeal in Suit on Note and Guarantees

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The firm represented a major financial institution, commencing an action in New York State Supreme Court, County of Nassau, by filing a motion for summary judgment in lieu of complaint based on amounts owed by Defendants on a promissory note and guarantees. In response, Defendants' attorney filed a cross-motion seeking an order changing the venue of the case and consolidating it with a separate foreclosure action pending in a different county.

Citing New York State's election of remedies statute, RPAPL 1301(3), and the existence of a separate foreclosure action against the same borrower, the lower court issued an order denying Plaintiff's motion for summary judgment since copies of mortgages from the foreclosure action had not been submitted. The lower court stated that if those mortgages secure future advances, Plaintiff would have commenced a separate action on a part of the mortgage debt. The lower court also granted Defendant's cross-motion to consolidate the two actions and transfer venue on condition that the Defendants waive the defense of improper service in the foreclosure action.

On appeal, the Appellate Division, Second Judicial Department, held that on its motion for summary judgment in lieu of complaint, Plaintiff established its *prima facie* entitlement to judgment as a matter of law by submitting the signed promissory note and loan agreement, along with an affidavit asserting that the Borrower failed to repay the loan in accordance with the terms of the note. The Appellate Division also held that the lower court "should not have, sua sponte, concluded that a triable issue of fact existed as to whether the plaintiff had complied with RPAPL 1301(3), since the defendants never raised that affirmative defense in their opposition papers and, thus, by their failure to do so, waived it".

The Appellate Division further held that there was no basis to consolidate this action with the separate foreclosure action and that Plaintiff properly selected the venue "pursuant to a forum selection clause in the subject promissory note."

This appellate decision resulted in a complete reversal of the lower court's decision on all issues and demonstrates Cullen and Dykman's dedication to preserving its financial institutional clients' rights at each and every stage of litigation.

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