At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of October, 1998

P R E S E N T:

HON. JOSEPH J. DOWD,
Justice.

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REMINGTON INVESTMENTS, INC., as assignee of F.D.I.C. as Receiver for COMMUNITY NATIONAL BANK AND TRUST COMPANY OF NEW YORK,

Plaintiff(s),

- against -

Index No. 46079/95

BOBOVER YESHIVA BNEI ZION, INC., MOSES BLUM, MOSES EINHORN, JACOB KEMPLER, SNAPSE "SIDNEY" STURM and SOL WEINREICH,

Defendant(s).

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The following papers number 1 to 11 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 3 10
Opposing Affidavits (Affirmations)	4 - 8
Reply Affidavits (Affirmations)	9 11
_____ (Affirmations)	
Other Papers	

Upon the foregoing papers in this action to collect upon a promissory note and guarantees thereof, plaintiff moves for summary judgment in its favor in the principal sum

of $190,000 plus past due and accrued interest and attorney's fees. Defendants cross-move for summary judgment dismissing the complaint against them.

Plaintiff is the assignee and owner of a loan evidenced by a promissory note in the original principal amount of $250,000 dated October 10, 1991 executed by defendant Bobover Yeshiva Bnei Zion, Inc. (the "Yeshiva"), a non-profit religious organization, in favor of Community National Bank and Trust Company of New York ("Community"). Such note was assigned to plaintiff by the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Community, following Community's failure and closure. Plaintiff alleges that the Yeshiva defaulted on its obligations pursuant to the note and is presently indebted to it in the principal amount of $190,000 thereunder. Plaintiff, by its instant motion, seeks to recover this sum plus past due and accrued interest as well as its reasonable attorney's fees incurred in the collection of the sums due under the note, as provided by the terms of the note. Additionally, plaintiff alleges that defendants Moses Blum, Moses Einhorn, Jacob Kempler, Snapse "Sidney" Sturm, and Sol Weinreich ("the individual defendants") executed guarantees, wherein they promised to pay the debts owed by the Yeshiva, and seeks, by this motion, a judgment against them, pursuant to those guarantees, in the amount owed by the Yeshiva.

In opposition to plaintiff's motion and in support of their cross motion, the individual defendants assert that the guarantees, which were executed by them between December 1983 and June 1986, only applied to loans which were subsequently repaid by the Yeshiva, and

that these guarantees were terminated in writing long before October 1991, when the subject note was executed. Naftali Halberstam, the Rabbi of the Yeshiva, has submitted his affirmation, stating that he had received a letter confirming that the guarantees were terminated in 1987, but that this letter was destroyed in a fire at the Yeshiva in 1992. In addition, the individual defendants (except for Sol Weinreich who is deceased) have each submitted an affirmation stating that the guarantees were terminated in the latter part of 1987.

In response, plaintiff asserts that the guarantees provide that they can only be modified by a writing and that the D'Oench, Duhme doctrine, as set forth in D'Oench, Duhme & Co. v FDIC (315 US 447) and codified and expanded by statute in 12 USC § 1823(e), requires that an "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it" must be: (1) in writing, (2) executed by the depository institution, (3) approved by the loan committee, and (4) continuously an official record of the depository institution. Plaintiff contends that since it is an assignee of the FDIC and the individual defendants have not demonstrated the existence of a writing abrogating the guarantees which is an official record of Community, 12 USC § 1823(e) and the D'Oench, Duhme doctrine bar the individual defendants' defense that the guarantees had been terminated.

Plaintiff's contention, however, is without merit. The individual defendants have submitted documentary evidence satisfying the aforementioned requirements and establishing that the personal guarantees executed by the individual defendants had been abrogated in 1987 and, therefore, did not apply to the loans made to Yeshiva subsequent to

that time, including the October 1991 note (see, FDIC v McFarland, 33 F3d 532, 536). Specifically, the individual defendants have submitted a credit memo dated December 16, 1987 and a loan offering sheet dated September 7, 1988, each of which is signed by Robert Bromberg, a vice-president of Community, and state that there are no guarantors of the loan. They have also submitted minutes of the Credit Committee executed by Mr. Bromberg, as Secretary of the Committee, and another loan offering sheet dated August 17, 1989, signed by both an officer of Community and a representative of the loan committee, which both explicitly state that there are no guarantees of the loan. Additionally, the individual defendants have submitted letters from Community, requesting financial statements from the Yeshiva, but no personal financial statements; a loan sheet signed by Frank Segreto, a vice-president of Community, indicating that there are no guarantors; a loan offering sheet dated May 5, 1991, signed by Mr. Segreto and two other officers, including representatives of the loan committee, indicating that there were no guarantors of the loan; and Community's internal loan history card of the subject loan dated March 1992, reflecting that there were no guarantees for this particular loan. Moreover, the assignment by the FDIC to plaintiff of the October 1991 promissory note makes no reference to any personal guarantees made in connection with the loan.

The court finds that based upon the foregoing, the individual defendants have demonstrated that there were no personal guarantees in effect with respect to the subject October 1991 note, and plaintiff has failed to raise any material and triable issue of fact with

respect thereto. Thus, defendants' motion insofar as it seeks summary judgment dismissing the complaint as against the individual defendants must be granted, and plaintiff's motion for summary judgment as against the individual defendants must be denied (see, CPLR 3212[b]).

In turning to plaintiff's motion as against the Yeshiva, the court notes that Judiciary Law § 489, the statutory codification of the ancient doctrine of champerty, prohibits a corporation from "taking an assignment of . . . any claim . . . with the intent and for the purpose of bringing an action or proceeding thereon" (see also, Elliott Assocs. v Republic of Peru, 12 F Supp 2d 328, 351[SD NY]). Said statute was enacted "[t]o prevent the resulting strife, discord and harassment which could result from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon" (Fairchild Hiller Corp. v McDonnell Douglas Corp., 28 NY2d 325, 329). "Violation of th[is] statute has been held to be a defense to an action by the assignee" (18 NY Jur 2d, Champerty and Maintenance, § 6; see also, Ehrlich v Rebco Ins. Exch., 225 AD2d 75, 78).

"[T]o fall within the statutory prohibition [of Judiciary Law § 489], the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose" (Fairchild Hiller Corp. v McDonnell Douglas Corp., supra, at 330). The Yeshiva argues that plaintiff purchased the note for the sole and primary intent and purpose of bringing this action. It asserts that plaintiff is in the business of purchasing claims and litigating, and has submitted records revealing that within the past few years, plaintiff has

commenced over 50 actions in the New York Metropolitan area. The Yeshiva also points out that following the August 28, 1995 execution of the bill of sale to plaintiff by the FDIC, plaintiff sent letters dated October 24, 1995 to the Yeshiva and the individual defendants, demanding payment on the note and requiring them to respond within 10 days. The Yeshiva claims that it never received this letter and that this letter must have been returned to plaintiff because it utilized an old address. Nevertheless, no subsequent efforts were apparently made by plaintiff to confirm that this letter was sent to the correct address or was actually received, and the complaint is dated November 30, 1995, only 37 days from the date of the demand letters.

In response to the Yeshiva's argument, plaintiff asserts that it is in the business of investing in loans, that it acquired the subject loan for the purpose of collecting the sums due thereunder, and that it does not commence suit in every case in order to enforce its rights pursuant to the loans that it purchases.

The court notes that "the question of intent and purpose of the purchaser or assignee of a claim is usually a factual one to be decided by the trier of facts" (Fairchild Hiller Corp. v McDonnell Douglas Corp., supra, 28 NY2d, at 330). "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented . . . [and t]his drastic remedy should not be granted where there is any doubt as to the existence of such issues" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404; see also, Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441).

Here, Yeshiva has sufficiently established that a material and triable issue of fact exists as to whether plaintiff received the assignment of the subject note for the sole and primary purpose of bringing an action thereon, and thus, whether the assignment was champertous. Such issue precludes a grant of summary judgment in plaintiff's favor against the Yeshiva (see, Aubrey Equities v SMZH 73rd Assocs., 212 AD2d 397, 398).

The court also finds that summary judgment in plaintiff's favor against the Yeshiva is, in any event, precluded at this juncture pursuant to CPLR 3212(f). CPLR 3212(f) provides that a motion for summary judgment should be denied where "it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." Thus, summary judgment in favor of a party is not appropriate where further discovery is needed and outstanding, and facts are in that party's exclusive knowledge or control (see, Firesearch Corp. v Micro Computer Cont. Corp., 240 AD2d 365, 366; United Soccer Club v Capital Dist. Sports & Ent., 238 AD2d 777, 780; Busby v Ticonderoga Cent. Sch. Dist., 222 AD2d 882; Yu v Forero, 184 AD2d 506, 507).

In the case at bar, the Yeshiva has adequately demonstrated that it needs to depose plaintiff in order to secure information within plaintiff's exclusive knowledge relevant to the champerty issue and its other defenses. Furthermore, the Yeshiva asserts that it needs additional documents in plaintiff's exclusive possession which are pertinent to its defenses. While plaintiff argues that it has disclosed all of the material in its possession related to the subject loan, the Yeshiva contends that there are additional relevant documents which have

not yet been produced by plaintiff and points out that documents relied upon by plaintiff in support of its instant motion for summary judgment were not produced by plaintiff in response to defendants' document request.

In view of the court's determination herein, it is unnecessary to reach defendants' remaining arguments in opposition to plaintiff's motion or their argument concerning the calculation of interest.

Accordingly, plaintiff's motion for summary judgment in its favor is denied. Defendants' cross motion for summary judgment dismissing the complaint is granted with respect to the individual defendants and is denied with respect to the Yeshiva.

This constitutes the decision and order of the court.

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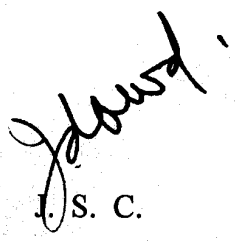

J. S. C.