

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 08-01645

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

COR ROUTE 5 COMPANY, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ALFRED SARACENE, DEFENDANT-RESPONDENT.

MANNION & COPANI, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (WILLIAM J. LEBERMAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 24, 2007. The order, among other things, denied plaintiff's motion for summary judgment in lieu of complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly denied plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 seeking to recover the amount due on a promissory note executed by defendant. Although plaintiff met its initial burden by submitting the note and evidence of defendant's default (*see LaMar v Vasile* [appeal No. 4], 49 AD3d 1218; *Di Marco v Bombard Car Co., Inc.*, 11 AD3d 960), defendant raised a triable issue of fact with respect to his defense of contract modification (*see generally Rose v Spa Realty Assoc.*, 42 NY2d 338, 343; *Ford Motor Credit Co. v Sawdey*, 286 AD2d 972, 973).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court