SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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DANIEL IZHAKY

Plaintiff,

- v -

DE LAGE LANDEN FINANCIAL SERVICES, LLC,

Defendant.

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INDEX NO. 159213/2023

MOTION DATE 11/22/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

In September 2023, plaintiff Daniel Izhaky commenced this unjust enrichment and civil conspiracy action against defendant De Lage Landen Financial Services, LLC (hereinafter, "De Lage"). Plaintiff alleges that De Lage enriched itself at plaintiff's expense when it assigned its nearly $2.8 million judgment against plaintiff to his wife, with whom he was embroiled in a divorce action. Plaintiff claims that De Lage's conspiracy with his wife permitted her to work an end-run around a divorce order issued by this court's Matrimony Part that granted them an equal share in their jointly owned apartment. In motion sequence 001, De Lage moves for dismissal pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7). Plaintiff opposes the motion in its entirety. For the following reasons, De Lage's motion is granted.

BACKGROUND

On October 29, 2010, De Lage obtained a judgment against plaintiff individually and against his business, Tribeca Technology Solutions Inc., for $1,562.928.91. (NYSCEF doc. no. 10, 2010 Judgment.) Thereafter, De Lage obtained a lien against plaintiff and his wife's two jointly owned marital apartments in New York City. According to plaintiff, both he and De Lage knew that it could not, or at the very least would be very difficult to, foreclose on the apartments or otherwise enforce the judgment since plaintiff's wife, Nina, was not a judgment debtor yet still a joint owner. (*See* NYSCEF doc. no. 2 at ¶ 12-14, complaint ["Unless plaintiff's and Nina's divorce ended with the parties being divorced…Defendant could not foreclose;" "Without Plaintiff and Nina being divorced, as long as Nina was alive, she would remain the joint owner of the Marital Apartments with Plaintiff;" "If Plaintiff predeceased Nina... Nina would become sole owner of the Apartments so that Defendant could never collect on the judgment."]) Plaintiff alleges that, "notwithstanding the difficulties that defendant faced in collecting the balance owing on the Judgement," he was actively negotiating with it. (*Id.* at ¶ 15.) Under a proposed agreement, De Lage would consider the judgment satisfied in return for "a substantial discount

of the then-current balance owing." (*Id.*) Those settlement negotiations appear to have ended with plaintiff rejecting De Lage's offer and wishing it "Good Luck" in collecting judgment. (NYSCEF doc. no. 25, emails between De Lage and plaintiff dated September 6-9, 2019.)

As indicated above, around this same time, plaintiff was involved in a bitterly contested divorce litigation against his now ex-wife. He alleges that this court issued an order in their divorce proceeding, whereby he and his ex would each receive a 50% share of the net proceeds from the future sale of their marital apartments and that plaintiff's judgment would be paid "off the top" of the sale price. (NYSCEF doc. no. 2 at ¶16-17.) [1] On October 6, 2020, De Lage obtained a renewal judgment against plaintiff for $2,838,234.89. (NYSCEF doc. no. 13, renewal judgment.) Plaintiff alleges that, while he was in active negotiations, De Lage conspired with his ex-wife by assigning its approximately $2.8 million judgment to her for significantly less than its face value. (NYSCEF doc. no. 15, assignment of renewal judgment.) Having purchased plaintiff's debt obligations through her newly formed company Rockledge Properties, LLC, his ex-wife then obtained a court order to sell the marital apartments. Once the properties were sold, she charged plaintiff the $2.8 million face value of the judgment—not the amount by which she procured it from De Lage—directly from *his share* of the proceeds. (NYSCEF doc. no. 2 at ¶ 22.) Thus, according to plaintiff, his ex-wife conspired with De Lage to circumvent the court order to split the marital apartment's proceeds in half. (*See* NYSCEF doc. no. 21 at 5, plaintiff memo of law in opp.) Moreover, he asserts that De Lage was unjustly enriched through its assignment to Nina since, without such assignment, De Lage could not have otherwise collected on the judgment. [2]

In July 2021, plaintiff commenced a separate action against his ex-wife that challenged the validity of De Lage's assignment under various theories, including fraud, fraudulent concealment, civil conspiracy, and negligent misrepresentation. (*See* NYSCEF doc. no. 16, complaint against Nina Hizhaky and Rockledge.) Pursuant to a hearing on the record dated June 9, 2022, Justice Katz, who was also overseeing their divorce, dismissed plaintiff's action in its entirety, specifically finding that his ex-wife and plaintiff had not committed a fraud on the court. (NYSCEF doc. no. 17, Katz Order dismissing complaint; NYSCEF doc. no. 19, hearing transcript.) Indeed, from the transcript and moving papers therein, it appears that Justice Katz had ordered the sale of the marital apartments with full knowledge of De Lage's assignment to Rockledge. (*See Dan Izhaky v Nina Izhaky*, NYSCEF index no. 654157/2021, NYSCEF doc. no. 7 at 24, March 16, 2021 matrimonial hearing [The court: "You claim that some LLC that she's a principal or controls in some way purchased the De Lage judgment… [But] De Lage could have sold the judgment to anyone. I mean, that's what credit cards sell their judgments to collection agencies for a fraction of the dollar…So I don't think it's illegal, even if what happened happened."].) Plaintiff commenced the instant action against De Lage, who was not named in the previous action. As described above, he asserts causes of action for unjust enrichment and civil conspiracy, both of which De Lage now moves to dismiss under CPLR 3211 (a) (1) based upon

[1] The Court has not seen a copy of this order. Nonetheless, the Court takes plaintiff's allegation of its contents as true as is required on a CPLR 3211 (a) (7) motion.

[2] This assumes either that (1) plaintiff and his wife were not going to get divorced and sell the marital property, since if they did, plaintiff admits that De Lage would receive the debt owed "off the top"; or (2) if they did not get a divorce, plaintiff himself was never going to pay down the judgment.

documentary evidence, (a) (5) for collateral estoppel, and (a) (7) for failure to state a cause of action.[3]

DISCUSSION

On a motion to dismiss under CPLR 3211 (a) (1), courts may grant such relief only where the "documentary evidence" is of such nature and quality—"unambiguous, authentic, and undeniable"—that it utterly refutes plaintiff's factual allegation, thereby conclusively establishing a defense as a matter of law. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806, 806-807 [2d Dept 2017]; *VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019 ["A paper will qualify as 'documentary evidence' if...(1) it is 'unambiguous,' (2) it is of 'undisputed authenticity,' and (3) its contents are 'essentially undeniable'"].) The First Department explained that the documentary evidence must "definitely dispose of the plaintiff's claim." (*Art & Fashion Group Corp. v CyclopsProd., Inc.* 120 AD3d 436, 438 [1st Dept 2014].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The Court is not required to accept factual allegations that consist of bare legal conclusions or that are inherently incredible. (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016].) A court' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

To adequately plead a cause of action for unjust enrichment, a plaintiff must allege facts that demonstrate: (1) the opposing party was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered. (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012].) The Court of Appeals has explained that the theory of unjust enrichment contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between parties." (*Id.*, citing *IDT Corp. v Morgan Stanley Dead Witter & Co.*, 12 NY3d 132, 142 [2009].) It is available only in "unusual situations, when though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable running from the defendant to the plaintiff." (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012].)

Here, plaintiff has failed to demonstrate that De Lage was unjustly enriched, that its "enrichment" was at his expense, or that De Lage assigned its rights to Nina under circumstances in which equity and good conscience cannot permit it to retain the moneys received. General Obligations Law § 13-103 provides, "A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred" (NY CLS Gen Oblig § 13-103); meanwhile, Gen Oblig. Law § 13-105 states that, "where a claim or demand

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[3] While defendant's notice of motion describes the motion as being one for dismissal under CPLR 3212 (a) (1), (a)(5), and (a) (7) (*see* NYSCEF doc. no. 5, notice of motion), all parties recognized that the motion was intended under CPLR 3211.

can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding." (NY CLS Gen Oblg. Law § 13-105.) As De Lage argues, these two statutes permit it to assign its interest in the judgment against plaintiff to whomever and for his ex-wife to enforce said judgment against him. Plaintiff does not dispute this point—nor could he, given that he unsuccessfully attempted to do precisely the same as his ex-wife and purchase the liability at a significantly reduced rate.

Instead, plaintiff contends that De Lage was enriched because "by [De Lage's] own admission, it had been unable to collect on the judgment against plaintiff." (NYSCEF doc. no. 21 at 11.) However, this argument does not demonstrate that De Lage was *unjustly* enriched. In essence, his argument is that, though De Lage had a valid and enforceable judgment against him, plaintiff—through either an inability or unwillingness to pay (helped by the fact that De Lage's lien was tied to property jointly owned by his wife)—had frustrated De Lage's attempt to enforce the judgment to such an extent that De Lage could not assign it, or at least not to plaintiff's ex-wife. Considering the original value of the loan that the judgment was intended to satisfy and the interest that accrued in the nearly ten subsequent years, it is of little doubt that De Lage was not "enriched" by assigning it to his ex-wife for an amount that, by plaintiff's own account, was of lesser value than the judgment. [4] Nor can plaintiff argue that De Lage's assignment was "unjust" considering that, intentionally or not, he created De Lage's predicament in attempting to enforce the judgment. For these same reasons, he has not, and cannot, demonstrate that De Lage's assignment was against equity and good conscience. Though the Court is sympathetic to his financial position, plaintiff's moving papers reveal that he had not reduce his liability for nearly 10 years and that De Lage's obligations had ballooned to $2.8 million in 2021 even after De Lage attempted to negotiate with him. As such, the Court finds that, under these circumstances, plaintiff has not and cannot establish "an equitable running from the defendant to the plaintiff." (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012].) Lastly, the Court's holding aligns with Justice Katz's orders requiring the sale of plaintiff and his ex-wife's marital apartments even in light De Lage's assignment and his dismissal of plaintiff's six causes of action against his ex-wife.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant De Lage Landen Financial Services, LLC's motion to dismiss pursuant to CPLR 3211 (a) (1) and (a) (7) is granted and the complaint is dismissed with prejudice; and it further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

This constitutes the Decision and Order of the Court.

[4] It should be noted that, according to plaintiff, the only party who ended up with a windfall after the assignment was plaintiff's wife, against whom plaintiff's legal claims have already been dismissed with prejudice.

4/24/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE