

Smith v GTFM, Inc.

2006 NY Slip Op 30591(U)

July 25, 2006

Supreme Court, New York County

Docket Number: 102364/05

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED Justice **FBEM** PART 60

JAMES TODD SMITH professionally known as
LL Cool J,
Plaintiff,

INDEX NO. 102364-05

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

GTFM, INC., F.U.B.U., INC., and FUBU
The Collection, LLC,

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE
MEMORANDUM DECISION FILED HEREWITH.

FILED
JUL 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/25/06

Bernard J. Fried
BERNARD J. FRIED c.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
JAMES TODD SMITH professionally known as
LL Cool J,

FBEM

Plaintiff,

- against-

Index No.: 102364/05

GTFM, INC., F.U.B.U., INC., and FUBU
The Collection, LLC,

Defendants.
-----X

Appearances:

For Plaintiff:

ROBERT S. MELONI, P.C.
1350 Avenue of the Americas
New York, NY 10019

By: Robert S. Meloni
Ronald W. Adelman

For Defendants:

DAVIDOFF MAUTO
& HUTCHER LLP
605 Third Avenue
New York, NY 10158

By: Charles Klein
Of Counsel: Ella Kohn

FRIED, J.:

James Todd Smith, a celebrity, rap artist, and actor, professionally known as LL Cool J, seeks to recover damages, of not less than \$250,000, from defendants, designers, manufacturers, and sellers of urban clothing, for their alleged breach of a written endorsement and promotions agreement. Defendants move to dismiss the complaint (CPLR 3211 [a] [7]), and for summary judgment (CPLR 3212).¹

According to the complaint, on or about November 1, 1996, Smith entered into an

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In addition, plaintiff moved to compel discovery, and defendants moved for a protective order. Those motions were denied, on the record, at oral argument, and the parties were instructed to complete a preliminary conference order and to commence discovery (Tr., at 34:7-13).

FILED
JUL 26 2006
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NEW YORK

agreement with F.U.B.U., Inc.² (the 1996 Agreement), to provide specific services to promote the corporation's then-fledgling clothing line, and to abide by certain enumerated restrictions. In exchange for these promises, F.U.B.U., Inc. (FUBU) promised to pay Smith, as royalties (Royalty Payment[s]), a percentage of the adjusted gross revenues of FUBU, and any "Related Company," derived from sales of FUBU merchandise (1996 Agreement, ¶ 4).

In the next few years, FUBU experienced meteoric success. Plaintiff claims that he learned that control over the FUBU brand and merchandise had been transferred from FUBU to GTFM, Inc., and sought to renegotiate the 1996 Agreement. In 1998, the parties executed a written amendment to the 1996 Agreement (the 1998 Amendment), containing a stock option for 10% of FUBU's shares in GTFM, Inc. In the event that Smith exercised the option, then, in addition to GTFM, Inc. shares, he was also to receive a distribution of 1% of the gross revenues (Gross Revenues)³ of GTFM, Inc. (the 1% Distribution Payment[s]), for as long as he owned the GTFM, Inc. stock.

Smith alleges that he exercised the stock option in 2001,⁴ and entered into a shareholders agreement, dated November 1, 2001 (Shareholders Agreement), with the original shareholders of GTFM, Inc. FUBU the Collection, LLC, as successor to FUBU, is

²F.U.B.U. Corp answered the complaint stating that it was misnamed in the complaint as "F.U.B.U., Inc."

³Gross Revenues are specifically defined in the 1998 Amendment as the:

"actual proceeds obtained by GTFM or a Related Company from the sale of F.U.B.U. Merchandise, less any deductions for credits, discounts or returns and excluding any monies obtained from licensing royalty fees paid by third-party licensees (companies or individuals not having a common shareholder with GTFM, [FUBU] or their shareholders)"

(1998 Amendment, ¶ 3). A "Related Company" is defined as: "any company in which the shareholders of the Company or GTFM directly or indirectly own shares or by a parent or subsidiary of [FUBU]" (*id.*).

⁴

Smith claims that it was through the Shareholders Agreement that he formally exercised his option to become a GTFM, Inc. shareholder entitling him to the 1% Distribution Payments (Pl. Memo. of Law, at 7).

one of those shareholders (Shareholders Agreement, at 1). There is no dispute that Smith currently owns 4.9 shares of GTFM, Inc. stock.⁵

The complaint contains one count, labeled as for breach of contract, in which Smith alleges that as of November 1, 2001, defendants “are obligated to pay him 1% of the Gross Revenues from the sale of FUBU Merchandise” (Klein Aff., Exh. F [Complaint], ¶ 25). Plaintiff also alleges that defendants have failed to meet their payment obligations in that they have failed to pay him monies that they acknowledge are owed under the Agreement, and have “underpaid him by applying the 1% formula to less than the full Gross Revenues, as defined in the Agreement” (*id.*, ¶ 26).⁶ The complaint further states that the full amount of the under-reporting cannot be known with precision until after a full accounting by defendants, and an examination of their books and records. In addition, Smith alleges that the defendants have breached their agreement with him because, at the time he commenced this action, they had not paid him the 1% Distribution Payment for the most recent quarterly accounting period.

The 1996 Agreement

According to paragraph 4 of the 1996 Agreement, in consideration for Smith’s endorsement and promotional services, FUBU Inc. was to provide to him Royalty Payments of 1.5% of the:

“Gross Revenues of F.U.B.U. Merchandise received by [FUBU] during the Term, or by any company in which the shareholders of [FUBU] directly or

⁵Smith is also a member of non-party GTFM, LLC.

⁶

In his memorandum of law, plaintiff claims, related to its discovery motion, that he is seeking discovery back to 1996. The complaint, however, consists solely of allegations concerning the 1% payments of Gross Revenues (Complaint, ¶¶ 21, 25, 26), which, as discussed below, were only to be made after November 1, 2001.

indirectly own shares, or by a parent or subsidiary of [FUBU])”⁷

FUBU was to make the Royalty Payments, by specifically enumerated dates of each year,⁸ for the

“Term” (the Term) of the 1996 Agreement, which ended on October 31, 2001 (1996 Agreement, ¶¶ 2, 3, 4).⁹

Also pursuant to paragraph 4, with each Royalty Payment, FUBU was to provide to Smith a report setting forth the payment’s computation. Moreover, each “Contract Year” of the Term, Smith was permitted to audit “such books and records of [FUBU] and the Related Companies as are necessary to determine the Gross Revenues of such entities” (1996 Agreement, ¶ 4).¹⁰

Paragraph 5 of the 1996 Agreement provided Smith an option to purchase shares in FUBU for \$10.00 at any time before the end of the Term. If Smith chose to exercise the option, FUBU would no longer be required to make the Royalty Payments that would otherwise have been payable through the end of the Term (October 31, 2001); that is, the stock in FUBU was to be provided “in lieu” of the Royalty Payments (1996 Agreement, ¶ 5).

The 1998 Amendment

In the 1998 Amendment, GTFM, Inc. was added as a party to the 1996 Agreement.

Paragraph 3 of the 1998 Amendment states:

⁷There appears no dispute that each defendant is a “Related Company.”

⁸Those dates are February 28, May 1, September 30, and October 31.

⁹

“Term”, as used here, includes both the three-year period from November 1, 1996 to October 31, 1999 and the two-year renewal term of the 1996 Agreement spanning from November 1, 1999 to October 31, 2001 (1996 Agreement, ¶¶ 2, 2 [f]).

¹⁰

“Contract Year” is defined as each twelve month period beginning November 1, and ending on the following October 31, during the Term of the Agreement (*see* 1996 Agreement, ¶ 3).

“The first sentence of paragraph 4 of the [1996] Agreement is amended to read as follows: ‘In consideration for the services to be rendered by Smith . . . [GTFM, Inc.] shall . . . pay a sum (the “Royalty”) equal to one and one-half (1.5%) percent of the Gross Revenues received by GTFM during the Term or by any company in which the shareholders of [FUBU] or GTFM directly or indirectly own shares or by a parent or subsidiary of [FUBU] (collectively, a “Related Company”)’”

(1998 Amendment, ¶ 3).

Paragraph 5 of the 1996 Agreement was also amended to provide that if Smith complied with certain of his obligations thereunder, and entered into the then-existing shareholders’ agreement for GTFM, Inc., he would have the option:

“exercisable on thirty (30) days written notice to [FUBU], on or before October 31, 2001, to receive from [FUBU] for ten (\$10.00) dollars and other good and valuable consideration, in lieu of receiving the Royalties that would otherwise have been payable after the date of exercise of this option pursuant to paragraph 4 above (which Royalties Payment obligations shall be deemed immediately, automatically and irrevocably terminated), such amount of shares of non-voting common stock of [GTFM, Inc.] as would equal ten (10%) percent of the issued and outstanding common stock of [GTFM, Inc.] . . . held by [FUBU] at the time (i) Smith exercises his option pursuant to this paragraph 5(a) if Smith exercises his option hereunder, or (ii) upon November 1, 2001, if Smith has not exercised such option, but is entitled to receive stock pursuant to paragraph 5(d) below (the “Stock”)”

(1998 Amendment, ¶ 4 [a]).

Upon his exercise of the option and execution of the then-existing shareholders’ agreement, as just discussed, Smith was to receive from GTFM, Inc., as a distribution on its stock:

“the greater of (a) such amounts(s) as would be payable to Smith based on his pro rata share of distribution paid to all shareholders of [GTFM, Inc.] (the “Pro Rata Rate”) or (b) an amount equal to (i) one and one-half (1-1/2%) percent of the Gross Revenues of [GTFM, Inc.] on or before October 31, 2001 and (ii) one (1%) percent of the Gross Revenues of GTFM . . . on and after November 1, 2001, payable on a quarterly basis”

(1998 Amendment, ¶ 4 [a]).

The June 14, 2002 Letter

It appears undisputed that the parties executed the Shareholders Agreement in June 2002. It is also undisputed that Smith signed and addressed to defendants a letter, dated June 14, 2002, in which he wrote:

“I write relating to the [1996 Agreement] as amended by the [1998 Amendment] . . . Pursuant to paragraph 4 of the Agreement, I, and my authorized representative, were entitled to audit certain books and records of F.U.B.U., Inc. and “Related Companies”. I hereby confirm that all audit rights under the Agreement have expired, without any breach of the Agreement on any of your parts, and that I have no right to audit any of your books and records. Nothing contained in the previous sentence shall in any respect limit or affect any rights I have in the future as a shareholder of GTFM Inc. and member of GTFM, LLC. Furthermore, I confirm that there is no pending default of any kind under the Agreement.”

(Klein Aff., Exh. E [the June 14, 2002 Letter, or the Letter]).

Defendants move to dismiss the complaint and for summary judgment. In support, they provide the affidavits of GTFM, Inc.’s, vice president, Norman Weisfeld, who states that Smith has been paid the quarterly payment that was due when he served his complaint, and all amounts due since then under “the [1996] Agreement” (Weisfeld Aff., ¶ 12). He further states that, having paid Smith all that is due, what remains here is Smith’s “meritless accounting claim” (*id.*, ¶ 14), which should be dismissed because Smith can demonstrate no fiduciary or contractual entitlement to an accounting.

Defendants contend that with this action, plaintiff essentially seeks an audit, disguised as an accounting or discovery, and that pursuant to the 1996 Agreement’s terms, plaintiff’s right to an accounting, or audit, has expired. Defendants also argue that, based on the June 14, 2002 Letter, Smith is barred from seeking an accounting based on the doctrines of waiver and estoppel.

Indeed, it is indisputable that the complaint contains statements concerning an accounting (*supra*, at 3; Complaint, at 6).

On a CPLR 3211 (a) (7) motion to dismiss a complaint, the court must accept the factual allegations in the complaint as true, draw all inferences in favor of the plaintiff, and determine whether “plaintiff can succeed upon any reasonable view of the facts stated” (*Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 [1995], quoting *People v New York City Tr. Auth.*, 59 NY2d 343, 348 [1983]).

Because defendants have moved pursuant to 3211 (a) (7), before considering their defenses, I must determine if plaintiff has stated a cause of action. Although the defendants essentially characterize the complaint as a demand for an equitable accounting, disguised as a breach of contract, plaintiff argues that his complaint states a cause of action for breach of contract. It is, of course, the province of the court to determine the gravamen of the complaint.

To sustain a breach of contract claim, plaintiff must demonstrate: (1) formation of the contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant’s failure to perform; and (4) resulting damage (*see Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 403 [SD NY 2004]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). Smith claims that he has a written agreement with defendants, that entitles him to certain payments, under which he has fully performed, but that defendants have not paid him all that he is owed thereunder and, consequently, that he has suffered damages.

To support his claim that defendants have not paid him in full, plaintiff provides newspaper articles in which, he claims, the reported annual revenues for FUBU merchandise are considerably greater than the Gross Revenues upon which his Royalty Payments and

Distribution Payments were calculated. Plaintiff contends that these reports are based on statements attributable to GTFM officers. For example, plaintiff points to a September 7, 1999 New York Times article in which Daymond Aurum, FUBU's president and an officer of GTFM, Inc.,¹¹ reported annual sales in 1998 of \$350 million. Plaintiff also refers to a 2002 court decision, where U.S. District Judge Denise Cote, in her findings of fact, stated that "GTFM's sales for the year 2001 . . . exceeded \$350 million worldwide at wholesale" (*GTFM, Inc. v Solid Clothing, Inc.*, 215 F Supp 2d 273, 279 [SD NY 2002]).¹²

Plaintiff states a claim for a breach of contract. Moreover, as plaintiff, through counsel, specifically represents that he is not alleging a cause of action for an accounting, I take notice of this representation as establishing plaintiff's concession of that issue. Accordingly, this case will proceed solely as a breach of contract claim. Therefore, whether or not the June 14, 2002 Letter bars an equitable accounting claim is irrelevant.

Defendants argue for dismissal and summary judgment, on waiver and estoppel theories, based on Smith's assertions in the June 14, 2002 Letter. In support, Aurum swears that Smith wanted to compete with defendants, and that in consideration for the June 14, 2002 Letter and Smith's waiver of his right to an audit, defendants agreed to convey to Smith the GTFM, Inc. stock free of certain non-competition provisions contained in the then-existing GTFM, Inc. shareholders' agreement. Because the Letter was provided in consideration for defendants' changing that agreement to omit non-competition provisions,

¹¹ Aurum is also a manager of FUBU the Collection, LLC, and a founder of FUBU.

¹²

At oral argument, defendants' counsel argued that the numbers quoted in the news articles submitted by plaintiff include revenue excluded from Gross Revenues. In his opposition papers, however, plaintiff argues that the full amount of the under-reporting cannot be known, as that information is within the exclusive knowledge and possession of defendants, and that, accordingly, summary judgment should be denied pursuant to CPLR 3212 (f).

defendants contend that they would suffer prejudice if Smith is permitted to avoid the consequences of his representations.

It is well established that summary judgment should not be granted where there is any doubt as to the existence of triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Fradera v 124 Realty Co.*, 220 AD2d 258 [1st Dept 1995]). It is similarly well established that on summary judgment, the evidence is to be viewed in the light most favorable to the non-moving party, and that credibility determinations are improper (*Gurfein Bros., Inc. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1988]).

“Waiver is the voluntary abandonment or relinquishment of a known right” (*Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 AD3d 65, 69 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]), and should not be lightly presumed (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). An intentional relinquishment of a known right, waiver “must be clear, unequivocal, and deliberate” (*Silverman v Silverman*, 304 AD2d 41, 46 [1st Dept 2003] [citation omitted]).

The elements of equitable estoppel are:

“with respect to the party estopped: ‘(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position’”

(*First Union Natl. Bank v Tecklenburg*, 2 AD3d 575, 577 [2d Dept 2003], quoting *Airco Alloys*

Div., Airco Inc. v Niagara Mohawk Power Corp., 76 AD2d 68, 81-82 [4th Dept 1980]).

Smith swears that his statements in the June 14, 2002 Letter were merely an acknowledgment that, based on the representations of defendants and their agents, GTFM

was not in default under the agreement (Smith Aff., ¶ 28). Such a bald assertion, unsupported by factual detail, is insufficient to prevent summary judgment. Smith also swears that because defendants had not provided documents in response to his prior requests for audits, he did not know what was in their books and records. Thus, it appears, plaintiff asserts that although fully aware that he did not know what was in the books and records, he expressly stated, in the Letter, that he had no right to audit them.

However, Smith also swears that what he agreed to waive in the Letter was an audit that his attorney had recently demanded in April 2002. Plaintiff further swears that it was not his intention, or agreement, to waive any rights to sue defendants for breach of contract for failure to pay and account to him honestly, and that considering his history with defendants and their agents, he never would have waived such important rights.¹³

Defendants argue that the language of the June 14, 2002 Letter evidences a broad waiver of Smith's right to bring an action for breach of contract, akin to a release of any such claim, while plaintiff swears that he gave up a much more narrow right to an audit he had recently demanded. Any determination that the Letter serves as Smith's waiver of a right to assert a breach of contract claim would necessitate both the interpretation of evidence, that is, the Letter, which is not unequivocal, and credibility determinations improper on summary judgment (*S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [stating that the court's role on summary judgment is issue-finding, not issue-determination]). Accordingly, summary judgment is not properly granted here, based on waiver or equitable estoppel, because, among other things, there exists an issue of fact as to the meaning of the Letter.

¹³This "history" is explained in depth in Smith's Affidavit.

On another note, defendants argue that FUBU and FUBU the Collection, LLC, are entitled to summary judgment for the period after June 14, 2002, pursuant to paragraph 4 (a) of the 1998 Amendment. Specifically, they argue that upon Smith's exercise of the stock option, no further Royalty Payments were due, and all monies thereafter were payable to Smith by GTFM, Inc. as distributions on his GTFM, Inc. stock. In addition, defendants also point out that FUBU the Collection, LLC was not a party to the 1996 Agreement.

It is, of course, the province of the court to interpret written instruments in order to determine the intention of the parties from the language employed (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 291 [1973]). A contract "is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978] [citation omitted]). When a contract's meaning is plain and clear, it is to be enforced according to its terms, and is not to be subverted by straining to find an ambiguity which might otherwise not be thought to exist (*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Plaintiff opposes summary judgment, and argues that defendants' argument is based on a misreading of what he deems to be the three components of the Agreement: the 1996 Agreement, the Amendment and the 2001 Shareholder Agreement.¹⁴ According to plaintiff, the 1998 Amendment merely served to add GTFM, Inc., as a party to the original agreement, but did not extinguish FUBU's liability. Plaintiff also points out that FUBU the Collection, LLC is described as the successor to FUBU in the Shareholders Agreement, and is the direct

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For convenience, I have used, as did plaintiff, "the Agreement" to signify, collectively, the 1996 Agreement, the 1998 Amendment and the Shareholders Agreement, despite that plaintiff has not shown how the Shareholders Agreement, dated November 1, 2001 and executed in 2002, is part of the 1996 Agreement.

continuation of FUBU, operating as a limited liability company.

While it is apparent that the parties intended to add GTFM, Inc. as a party, in light of the plain language of the 1996 Agreement and the 1998 Amendment, the rest of plaintiff's argument is unpersuasive. Plaintiff alleges that he was underpaid the 1% Distribution Payments he is owed.¹⁵ The 1996 Agreement contains no obligation on the part of FUBU to make any payments to Smith after his exercise of the stock option or October 31, 2001; it certainly does not provide that FUBU is to pay any distributions to Smith. The obligation to make Distribution Payments is contained only in paragraph 4 (a) of the 1998 Amendment, in which the parties amended the 1996 Agreement to state that Smith was entitled to receive "from GTFM as a distribution on the Stock . . . one (1%) percent of the Gross Revenues of GTFM on and after November 1, 2001" (*emphasis added*). No such obligation was imposed on FUBU.

Thus, read together, the 1996 Agreement and the 1998 Amendment demonstrate the parties' intent that GTFM, Inc. incur the 1% Distribution Payments obligation.¹⁶ Plaintiff points to nothing in the Shareholders Agreement that indicates otherwise. Accordingly, the complaint is dismissed as against FUBU, and FUBU the Collection, LLC.

Finally, defendants move to dismiss the complaint to the extent that it asserts breach of contract claims that accrued more than six years before commencement of this action on

¹⁵

The complaint does not describe breaches of any Royalty Payment. For example, Smith alleges that he has no basis to believe that the 1% formula is being applied to the full revenue stream (Complaint, ¶ 21; *see also* Complaint, ¶ 25 ["[u]nder the Agreement, on or after November 1, 2001 the [defendants] are obligated to pay Smith 1% of the Gross Revenue from the sales of FUBU Merchandise"]).

¹⁶

Although no party has pointed to the provision, I note that in the 1998 Amendment, GTFM guaranteed to Smith payment of all monies due Smith from FUBU under the 1996 Agreement. As previously stated, however, FUBU was not obligated to make the 1% Distribution Payments under the 1996 Agreement.

February 17, 2005. The six-year statute of limitations for a breach of contract claim (CPLR 213 [2]), begins to run upon breach of the contract (*Beller v William Penn Life Ins. Co. of New York*, 8 AD3d 310, 314 [2d Dept 2004]). In addition,

“where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to the filing of the suit”

(*ibid.*, quoting *Airco Alloys Div., Airco Inc.*, 76 AD2d at 80).

In opposition, plaintiff asserts, without supporting evidence, detail or explanation of his theory, that defendants’ statute of limitations defense is defeated by partial payments.

However,

“[i]n order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder”

(*Lew Morris Demolition Co., Inc. v Board of Educ. of City of New York*, 40 NY2d 516, 521 [1976]; *Flynn v Flynn*, 175 AD2d 51 [1st Dept], *appeal denied* 78 NY2d 863 [1991]). Plaintiff’s bald assertion of “partial payments,” without admissible evidence that defendants acknowledged that more was due for earlier payments, is insufficient to defeat summary judgment. Accordingly, to the extent that plaintiff is claiming damages from any breaches occurring prior to February 17, 1999, such claims are time-barred.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is denied; and it is further

ORDERED that the motion for summary judgment dismissing the complaint as

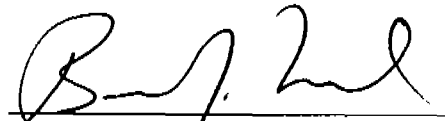
against F.U.B.U. Corp. s/h/a F.U.B.U., Inc., and FUBU The Collection, LLC, is granted and the complaint is hereby severed and dismissed as against those defendants and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that summary judgment is granted to the extent that any claim made by plaintiff for any breach of contract that occurred prior to February 17, 1999 is time-barred and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 25, 2006

ENTER:


J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
JUL 26 2006
COUNTY CLERK'S OFFICE
NEW YORK