

McGill v Wainstein

2007 NY Slip Op 31482(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0604146/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 604146/2006

MCGILL, CHARA

vs

WAINSTEIN, DEBORAH

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for 23712

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

and plc scheduled for 6/28/07
at 9:30 am in Part 10

Dated: MAY 29 2007

J.S.C.

JUDITH J. GISCHE, 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 10

-----X

Chara McGill,
Plaintiff

-against-

Deborah Wainstein and
Priority Staffing Solutions, Inc.,
Defendants.

-----X

DECISION/ORDER
Index No.: 604146/06
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltff's amended n/m (§3212) w/CM affid, exhs	1
Def's' x/m (partial s/j §3212) w/DW-G affid, exhs	2

FILED

JUN 06 2007

NEW YORK
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Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action to enforce a promissory note in the principal sum of \$90,000.

Defendants have answered and asserted a counterclaim against the plaintiff for unpaid rent, etc

The court has before it plaintiff's motion for summary judgment against the defendants on her complaint against them and for the dismissal of their counterclaim against her.

The defendants have cross moved for partial summary judgment dismissing plaintiff's third cause of action which seeks attorneys' fees. Plaintiff has voluntarily withdrawn her 3rd cause of action in her reply, therefore the court does not have to decide whether defendants would have been entitled to summary judgment on that

claim. Plaintiff's 3rd cause of action for legal fees is hereby severed and the clerk shall mark it as withdrawn. Since issue has been joined and the note of issue has yet to be filed, the motion is timely and the remaining issues framed by these papers will be decided. CPLR § 3212; Brijl v. City of New York, 2 NY3d 648 (2004).

Background

It is unrefuted that there is a promissory note between the parties dated January 25, 2005 and it is in the principal sum of \$90,000. The note is signed by defendant Deborah Wainstein, "on behalf of herself and on behalf of Priority Staffing Solutions, Inc.," the named corporate defendant ("PSS"). Wainstein personally guaranteed repayment of the loan according to its terms.

Plaintiff contends that the loan was to have been repaid according to a schedule accompanying the note. The schedule calls for 6 equal payments, in as many months, each in the sum of \$15,000. The first payment (\$15,000) was due on February 28, 2005. At the term of the note, the total repayment would have been \$91,575, including interest of 6% per annum.

Plaintiff contends that the defendants have defaulted in repaying the loan. While Wainstein does not deny that the note has not been repaid in full, she argues that the defendants have not defaulted in making payments because: 1) the parties orally modified the terms of the note, as they had contemplated when they first signed it, 2) Wainstein offered to make certain payments which plaintiff either refused to accept, or deferred to a later time, and 3) the initial payment schedule was later modified in August 2005 after extensive negotiations between the parties. Thus, it is defendants'

contention that the parties worked out a new schedule (which they attach as an exhibit) for a total of 60 payments, each in the monthly sum of \$1,783.89. Under the new schedule, the sum of \$107,033.40 would be repaid and installments would extend into the year 2010. Defendants contend that the renegotiation of the note had been contemplated by the parties from the time the loan had been made which is why the note contains the following provision:

"Chara McGill and Deborah Wainstein, with Priority Staffing Solutions, Inc. foresee entering into a contractual relationship whereby the terms of this loan may be re-negotiated. In the event that no such re-negotiation occurs, the terms stated above remain unchanged."

Defendants contend that the "contractual relationship" referred to in the note involved plaintiff moving into PSS's office space and running her business, RMG Group, Inc. ("RMG") from that space. Defendants contend they had an informal agreement with plaintiff about rent and staffing because plaintiff and Wainstein were friends, as well as business associates. These claims form the underpinnings of defendants' counterclaim against plaintiff as well.

Plaintiff admits she extended the note and even that she had office space within the space PSS occupies. Plaintiff contends, however, that the revised payment terms were never "finalized" and that any agreement for office space was between her company (RMG) and defendants. Thus, she claims she accepted no personal liability or responsibility for paying rent on behalf of RMG and since RMG is not a party to this action, defendants' counterclaim for rent, etc., must be dismissed.

In support of their counterclaim (and in opposition to plaintiff's motion)

defendants contend the rental, etc. agreement among these parties directly affected the note and its repayment. Thus, defendants contend they re-negotiated the terms of the note with plaintiff. The defendants also claim their agreement was with Wainstein, personally, and not her corporation. For this claim they rely upon an email from plaintiff to the defendants dated February 27, 2006 which states, in relevant part, the following:

“The open issues with rent are a) for what period should I be paying rent (from when) and b) what amount of rent should I be paying? . . .”

Discussion

Since plaintiff is moving for summary judgment, she has the initial burden of setting forth evidentiary facts to prove her *prima facie* case that would entitle her to judgment in her favor. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if she meets this burden does it then shift to defendants who must establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If plaintiff does not meet her burden then her motion must be denied, regardless of the sufficiency of the defendants' opposition. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). The court's function on a motion for summary judgment is limited to issue finding, not issue determination. Brunetti v. Musallam, 11 AD3d 280 (1st dept. 2004).

Although plaintiff has proved there is a promissory note between the parties, she has not proved its terms or how much is owed. Defendants have raised a number of factual disputes about whether the terms of the note were renegotiated because of a

subsequent business agreement between plaintiff and Wainstein who also have a personal relationship. The note clearly provides for its terms to be renegotiated if the parties make further agreements. It does not contain a merger clause nor does it bar oral modifications. Connecticut Nat. Bank v. Hack, 186 A.D.2d 387 (1st dept. 1992). The "new" repayment schedule calls for payments well into 2010 and there is no acceleration clause in the note.

Plaintiff's motion for summary judgment dismissing the counterclaim is also denied. Although she contends the agreement is between RMG and the defendants, she has no proof of this and defendants have, in any event, raised factual disputes whether their agreement was with plaintiff, not her company.

Conclusion

Plaintiff's motion for summary judgment is denied in its entirety. Defendants' cross motion for partial summary judgment has been rendered academic since plaintiff has agreed to withdraw her claim for legal fees. The 3rd cause of action in the complaint is therefore severed and marked withdrawn.

The court hereby schedules a preliminary conference for June 28, 2007 at 9:30 a.m. in Part 10, 80 Centre Street.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 29, 2007

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE
So Ordered
Hon. Judith J. Gische,
J.S.C.