

Schulman v Becker

2007 NY Slip Op 32366(U)

June 27, 2007

Supreme Court, New York County

Docket Number: 0602766/2004

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUDITH J. GISCHE, J.S.C.

PRESENT: _____ PART _____

Index Number : 602766/2004

SCHULMAN, ALLAN

vs

BECKER, STUART

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

7 _____ read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JUL 31 2007

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 7/27/07

JUDITH J. GISCHE, J.S.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 10

-----X
ALLAN SCHULMAN,

Plaintiff,

-against-

STUART BECKER,

Defendant.
-----X

Index No.: 602766/04
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):

FILED

Papers	Numbered
Pltf's motion [sj] w/AGS affid in support, memo, exhs	1
Def's cross mot [sj] w/SB affid in support, memo, exhs	2
Pltf's AGS reply affid in further support/opp, memo	3
Def's reply memo in further support/opp	4
Transcript 4/26/07	5

JUL 31 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action seeking to enforce a promissory note. Plaintiff Allan Schulman ("Schulman") now moves for summary judgment in his favor, and for dismissal of defendant Stuart Becker's ("Becker") affirmative defenses and counterclaims. Becker opposes Schulman's motion and cross moves for partial summary judgment on the verified complaint.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief may be considered by the court. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). No preliminary conference has yet been held. The court's decision follows.

Background

Although many facts are undisputed, a continuing difficulty in these motions stems from the fact that the parties fail to distinguish their individual actions and claims from those of their related business organizations. The parties were friends, and thereafter became business associates. From October 11, 1994 through April 1998, Becker & Company, LLC ("Becker LLC"), of which Becker is a principal, performed accounting, tax and financial services for Manschul Construction Corp. ("Manschul"). Schulman was president of Manschul.

Sometime in or about 1998, Manschul filed a bankruptcy petition which prompted the court to issue a bankruptcy order. The bankruptcy order, as reported by the parties, provides that Manschul could spend no more than \$2,000 per month on accounting, tax and financial services, and also reportedly allowed Manschul to defer payment for services rendered to a later date. In April 1998, Schulman executed a retainer agreement made pursuant to the bankruptcy order, wherein Manschul retained Becker LLC to continue to provide professional services. The bankruptcy order has not been provided to this court.

Schulman is the sole owner of SGA Associates Inc. ("SGA Inc"). SGA Inc. gave Becker, personally, an interest-free loan in the amount of \$60,000 (the "Loan"). In return, Becker executed a promissory note (the "Note") dated August 2, 2001, in favor of SGA Inc., for the same amount. By the terms of the Note, Becker promised to pay SGA Inc. the sum of \$60,000, sixty days from August 2, 2001.

Schulman claims that SGA Inc. assigned the Note to himself personally. Schulman provides a copy of the alleged handwritten assignment of the Note from "SGA Associates" to himself, dated August 28, 2001. The assignment, although not provided in plaintiff's

moving papers, was provided in his reply.

It is undisputed that Becker did not timely pay the Loan. Thereafter, Schulman made a series of demands for Becker's payment, evidenced by various correspondence.

On May 10, 2002, Becker sent Schulman a letter for "[t]he purpose of ... address[ing] the issue of fees which [Becker LLC has] incurred during the period January 1, 1999 - April 30, 2002 which have not yet been billed." This letter indicates that Schulman owed \$155,223 for services rendered since January 1, 1999.

On May 11, 2002, Becker delivered a check to Schulman, in the amount of \$60,000. Becker appended a note to the check, which stated that his bank account was overdrawn, and that the check could not be deposited until funds became available. Without being notified that funds were otherwise available, Schulman deposited the check on May 17, 2002. The check was returned unpaid due to insufficient funds. Schulman made several more attempts to collect on the Note, all of which were unsuccessful.

Schulman has also provided an undated letter, written and signed by Becker and addressed to Schulman, which states that Becker "will be repaying the \$60,000 loan from the proceeds of the refinancing of [his] Southampton house which closed on Wednesday, July 10, [2002]. Funds will be released as soon as two title exceptions are resolved which is expected to occur during this coming week."

Meanwhile, Becker claims that Becker LLC provided Schulman with accounting, tax and financial services, from 1999 through 2002, valued at \$139,223 (the "Schulman Receivable"). Becker claims that on June 4, 2002, he provided Schulman with a statement of account to that effect. Becker claims that this debt is currently due and owing, together with interest thereon.

On August 14, 2002, Becker sent Schulman a letter which stated, in pertinent part:

“... at no time did I guarantee you that the \$60,000 would be paid to you today.

...

It is obvious that you are ignoring the substantial balance that is due to my Firm (in excess of \$130,000).

...

Prior to any services being rendered for your family and you, including returns and collection by the taxing authorities we must come to an agreement regarding the above and fee payment schedule for services to be rendered.”

The subject line of this undated letter states:

“RE: Balance Due to Allen Schulman
 Balance Due to Becker & Company, LLC”

Becker LLC assigned the Schulman Receivable to Becker, personally, on February 1, 2004. At that time, Becker LLC assigned various accounts receivable to its members in contemplation of a merger with another firm. Becker has provided a copy of the Schulman Receivable assignment.

Schulman commenced this action on August 24, 2004 with a verified complaint. The case appears to have languished for several years. Schulman now seeks the principal sum of \$60,000 plus interest thereon at 9% per annum from October 2, 2001 to the date of judgment.

Becker served a verified answer, asserting various affirmative defenses. Becker has also asserted two counterclaims for payment of services performed (first counterclaim) and account stated (second counterclaim). For his damages, Becker seeks \$139,233.00, together with interest thereon from June 4, 2002.

Arguments of the Parties

Schulman contends that he is entitled to summary judgment because Becker failed to assert a valid defense to the Note. Schulman also argues that Becker's counterclaims should be dismissed as he claims to have paid Becker LLC's fees.

Becker, however, claims that there are issues of fact which would preclude summary judgment. Becker also contends that he is entitled to summary judgment because Schulman failed to establish there was a valid assignment from SGA Inc. to himself in his moving papers. Becker also claims that if Schulman has established a valid assignment of the Note, the Schulman Receivable should be brought to a simultaneous conclusion with his outstanding obligations under the Note. He states that this arrangement was intended by the parties "to allow Schulman to continue to defer payment [to Becker LLC] while minimizing the negative impact that his delayed payment was having on his personal finances."

Becker states that the bankruptcy court did not prevent Becker LLC from billing more than \$2,000 per month, or deferring payment, but only capped the amount it could pay at that time. Therefore, Becker counterclaims that Schulman owed a substantial amount of money to Becker LLC, and he seeks discovery on the issue of services provided to SGA Inc., Schulman and the now defunct Manschul, so that he can fully establish the Schulman Receivable and Schulman's agreement to pay these debts. Becker also states that Schulman has failed to provide a response to his discovery demands and has failed to appear for a deposition.

In reply, Schulman claims that Becker's argument with respect to the validity of the assignment is merely "a meager attempt to manufacture an issue of fact." He now provides

* 7]
a copy of the alleged assignment. Schulman also contends that discovery is unnecessary and unrelated to Becker's obligation under the Note. He claims that defendant's assertions with respect to the validity of the assignment of the note are conclusory and fails to raise an issue of fact. Finally, Schulman states there is no mutuality between the Note and the Schulman Receivable, as the Note is clear on its face and all of Becker LLC's accounting services have been paid in full.

At oral argument, the issue of the prior bankruptcy proceeding against Manschul and its effect, if any, on the Loan and the Schulman Receivable was raised. The parties represented to the court that these transactions were consistent with the bankruptcy order.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then 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 the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The

court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

Since each party has moved for summary judgment, each bears the initial burden of establishing their respective motions or raising factual disputes that would defeat the other movant's motion.

While plaintiff has established the existence of the note and defendant's obligations thereunder, there are several issues of fact in connection with his claims. First, as to the alleged assignment between SGA Inc. and Schulman, the court finds that Exhibit "A" attached to Schulman's reply papers, on its face, does not unequivocally represent such an assignment. The handwritten assignment is from "SGA Associates," not "SGA Associates Inc." The entity to which Becker agreed to pay the Loan is a corporation, SGA Associates Inc. Further, the assignment is not signed by someone in their capacity as officer of the corporation, but rather, is merely signed by plaintiff, personally. Therefore, plaintiff has failed to prove, as a matter of law, that he, and not SGA Inc., is entitled to Becker's payment under the Note.

Without providing the bankruptcy court order, the record is unclear as to what effect, if any, the order in that prior proceeding may have had on the Loan and the alleged Schulman Receivable. The parties failure to provide these essential documents upon which they rely is necessarily fatal to these motions.

Accordingly, for at least these reasons, Schulman and Becker's respective motion

and cross motion for summary judgment on the verified complaint are hereby denied.

Having failed to prove his *prima facie* case that plaintiff is entitled to any payment under the Note, the court rejects Schulman's argument that Becker's affirmative defenses are without merit as a matter of law. Accordingly, that branch of Schulman's motion for summary judgment to dismiss Becker's affirmative defenses is hereby denied.

Schulman has also failed to meet his burden on the motion for summary judgment to dismiss Becker's counterclaims. In support of his motion, Schulman has provided a large volume of invoices and billing statements from Becker LLC for the period 10/11/94 through 4/17/098. Schulman has failed to explain why this material is relevant since the period for which Becker claims Becker LLC has not been paid is from January 1, 1999 through April 30, 2002.

For a portion of the relevant period, Schulman has provided a two-page handwritten list of payments allegedly made to Becker, in the amount of \$2,000 per month, from March 1998 through August 2000. Based on this, Schulman claims that all fees for Becker LLC's professional services were paid and that bills were never submitted for such services "because [Schulman and Becker] had agreed in April of 1998 that [Shulman] would pay to [Becker LLC] the fixed monthly sum of \$2,000 only." This two page list, and plaintiff's statement that he does not owe Becker or Becker LLC any money, do not support plaintiff's motion for the grant of summary relief, dismissing defendant's counterclaims.

Defendant has conceded the that Schulman paid \$2,000 per month to Becker LLC. Becker's counterclaims are for services beyond that which was provided for in the purported bankruptcy order budget, but Becker contends that payments were deferred by mutual agreement of the parties. This is a factual dispute that must be resolved at trial, defendant

this branch of Schulman's motion.

Even were the court to decide that Schulman had set forth evidence that would entitle him to judgment as a matter of law on the counterclaims, there exists a material issue of fact as to whether Schulman agreed to defer payment for Becker LLC's services beyond the stipend set forth in the bankruptcy proceeding.

Further, the Schulman Receivable assignment in February 2004 supports Becker's contention that Schulman owed Becker LLC, and consequently Becker as a member, and later as assignee of the company's receivables, for services rendered. In any event, discovery is justified except where the counterclaim clearly warrants dismissal as a matter of law, and here, the parties have not yet engaged in discovery, where the plaintiff has refused to answer defendant's request for discovery and inspection and appear for his deposition.

Accordingly, Schulman's motion for summary judgment dismissing Becker's counterclaims is hereby denied.

Both parties in this action are hereby directed to appear before this court on September 10, 2007 for a preliminary conference at 9:30 a.m. at 80 Centre Street, Room 122.

Any requested 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
June 27, 2007

FILED

So Ordered:

JUL 31 2007

HON. JUDITH J. GISCHE, J.S.C.

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