

**Jones v Stallworth**

2007 NY Slip Op 33079(U)

September 20, 2007

Supreme Court, New York County

Docket Number: 0112187/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

DR. Samuel Jones

INDEX NO. 112187/07

Felicia Stallworth,  
Et Al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

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

*is denied*

*attached*

**FILED**  
OCT 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/20/07

**EMILY JANE GOODMAN** 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 : IAS PART 17

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DR. SAMUEL JONES,

Plaintiff,

INDEX NO.  
112187/07

-against-

FELICIA STALLWORTH, individually and  
as director of MOBILE WOODS AMBULETTE  
& TRANSPORTATION CORPORATION, and  
MOBILE WOODS AMBULETTE  
& TRANSPORTATION CORPORATION,

Defendants.

----- X

**FILED**  
OCT 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Plaintiff moves to attach Defendants' assets on the basis that they, with the intent to defraud Plaintiff, and to frustrate the enforcement of a judgment which might be rendered in Plaintiff's favor, assigned, disposed of, encumbered or secreted property (CPLR 6201 [3]). The motion is denied and the action is transferred to Civil Court.

Plaintiff maintains that he made a short-term, two week loan with unspecified interest to Defendants in the amount of \$25,000<sup>1</sup> and simultaneously received a check from Defendants in the amount of \$25,000, as repayment of this loan, which was to be deposited two weeks later as repayment. According the complaint, Plaintiff "received clearance" from Stallworth to deposit Defendants' check, which was then unpaid due to insufficient funds. Plaintiff submits a copy of the \$25,000 check he wrote, dated 12/1/06, to "Mobile Woods" reflecting the notation

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<sup>1</sup>The affirmation of Plaintiff's attorney and Plaintiff's affidavit also inconsistently refer to amounts of \$25,000 and \$25,150.

"Investment" on the bottom of the check (Plaintiff's Check). Plaintiff also submits a copy of a \$25,000 check he deposited on 12/11/06 written on the account of "Mobile Woods Ambulette & Transportation Corp." purportedly signed by Stallworth (Defendants' Check), and a letter from Citibank, dated 12/12/06, both indicating that the Defendants' Check was unpaid due to insufficient funds.

Defendants submit the affidavit of Felicia Stallworth, who maintains that Plaintiff wrote Plaintiff's Check to Mobile Woods as an investment, and that Plaintiff was to be repaid in December, 2008. Stallworth does not indicate the purported terms of the investment, nor the amount plaintiff was to receive in 2008, other than presumably, \$25,000. Stallworth then explains that she wrote plaintiff a check for \$25,000 for the purpose of "just in case, God forbid, something happens to me within the two year period."

CPLR 6201 provides in relevant part that "[a]n order of attachment may be granted . . . where the plaintiff has demanded and would be entitled . . . to a money judgment against one or more defendants, when . . . the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts"(CPLR 6201).

"On a motion for an order of attachment or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (CPLR

6212[a]). "The moving party has the burden of demonstrating, through affidavit or other written evidence, that a valid cause of action for a money judgment exists, that it will probably succeed on the merits, that it has satisfied one of the statutorily- enumerated grounds of CPLR 6201, and the need for such an order..." Pires v Frota Oçeanica Brasileira, SA, 6 Misc3d 1036(A) [NY Sup 2005]; see also Amlon Metals, Inc v Liu, 292 AD2d 163 [1st Dept 2002]; Arzu v Arzu, 190 AD2d 87 [1st Dept 1993]; Silvestre v De Loaiza, 12 Misc3d 492, 499 [NY Sup Ct 2006] [probability of success is a higher standard than a likelihood of success]).

Plaintiff has not demonstrated that he will probably succeed on his causes of action for breach of contract, fraud and intentional infliction of emotional harm, as against both Defendants. The alleged transaction appears to have been oral, and the terms of it are in dispute. Although Plaintiff maintains that he made a \$25,000 short term loan to Defendants, the notation on the check Plaintiff issued indicates "Investment," which is consistent with Stallworth's explanation that the transaction was an investment, and not a loan. Credibility determinations are not for the Court and both parties descriptions of the transaction raise more questions than they answer. To the extent that Plaintiff may have stated a claim under the Uniform Commercial Code (which is not alleged as a cause of action in his complaint, but which is fairly implied), Plaintiff still has not demonstrated that he will probably succeed. Although under the UCC the drawer of a check agrees to make good on the check upon dishonor (see UCC-3-413), Plaintiff seeks an attachment against both Defendants. Plaintiff has not addressed the issue of whether Stallworth is personally liable on the check as a signatory under UCC-3-403 (or, as noted, even alleged a cause of action under the UCC in his complaint). "While it is true that one who signs a negotiable instrument without indicating that his or her signature is made in an agency capacity

will ordinarily be personally obligated upon the instrument (UCC 3-403 [2] [a]), it is also true that this rule of personal liability admits of exception where it is established that the immediate parties to the instrument have otherwise agreed that the signatory will not be held individually responsible.” (Arde Apparel, Inc. v Matisse Ltd., 240 AD2d 328, 329 [1st Dept 1997]).

As Plaintiff has failed to raise the issue, and as Defendants have not had the opportunity to respond, the Court cannot find that Plaintiff has met his burden on an unpleaded UCC cause of action.

In any event, Plaintiff has not satisfied his burden to demonstrate that Defendants have assigned, disposed of, encumbered or secreted property, or removed it from the state, or are about to do so, with the intent to defraud plaintiff. That argument is based solely on the fact that Defendants’ Check was not paid due to insufficient funds. By making and delivering a negotiable instrument, the maker represents that upon presentment, the instrument will be paid (UCC 3-413), and, that funds are available for payment (see Heurtematte v Morris, 101 NY 63 [1885]). However, funds may not be available for payment for reasons other than the maker’s intent to defraud (i.e., mere inadvertence). Stallworth’s explanation that the check was not supposed to be cashed until something “happens” to her, if believed, negates a finding of intent to defraud. As credibility determinations are not for the Court, Plaintiff has failed to establish Defendants’ intent to defraud.

Accordingly, it is

ORDERED that Plaintiff’s motion for an attachment is denied; and it is further


ORDERED that this action is removed from this Court and transferred to the Civil

Court of the City of New York, County of New York pursuant to CPLR 325 (d); and it is further

ORDERED, that upon service of a copy of this order, the Clerk of this Court shall transfer to the clerk of the Civil Court of the City of New York, County of New York, the above action, upon payment of proper fees, if any.

**This Constitutes the Decision and Order of the Court.**

DATED: September 20, 2007

ENTER:   
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
OCT 01 2007  
NEW YORK  
COUNTY CLERKS OFFICE