

**Gorelik v Machkovskiy**

2007 NY Slip Op 33449(U)

October 24, 2007

Supreme Court, Kings County

Docket Number: 0025013/2004

Judge: James G. Starkey

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CIVIL TERM, PART 6  
HON. JAMES G. STARKEY

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MAYA GORELIK,

Plaintiff,

-against-

OLEG MACHKOVSKIY,

Defendant.

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**DECISION**

INDEX NO.: 25013/2004

Dated: October 24, 2007

**APPEARANCES OF COUNSEL**

**For the Plaintiff(s):**

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**For the Defendant(s):**

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**Caption: Gorelik v. Machkovskiy**

**Index No.: 25013/2004**

Plaintiff Maya Gorelik brought this action based upon breach of an alleged loan agreement executed by defendant Oleg Machkovskiy. Specifically, plaintiff claims to have loaned the defendant the sum of \$25,000.00 on August 31, 1998, as well two subsequent loans totaling \$8,000.00, all of which defendant had failed to repay until suit was commenced.

An Inquest was conducted by the Court on September 19, 2007, and defendant appeared to contest the damages.<sup>1</sup> Both plaintiff and defendant testified with respect to their positions.

### **FINDINGS OF FACT**

In early August, 1998, plaintiff Maya Gorelik met defendant Oleg Machkovskiy. The parties discussed various business opportunities that defendant could arrange, including a “partnership” as he was “Chief Financial Officer” of his own oil company. Plaintiff declined the offer to become defendant’s partner. However, she did agree to loan defendant money for his business ventures on the understanding that he was in the process of getting a divorce, and could not obtain access to his personal funds. According to plaintiff, defendant offered to pay the then current interest rate for credit card advances which was approximately 20% per annum.

The parties met on August 31, 1998 and plaintiff gave defendant the sum of \$25,000.00, having withdrawn the money, in the presence of defendant, from two banks near her residence.<sup>2</sup>

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<sup>1</sup> By order dated November 15, 2004, plaintiff was awarded a default judgment against defendant. Defendant never moved to vacate the judgment.

<sup>2</sup> Plaintiff’s Exhibit “2” is a tax statement from Astoria Federal Savings indicating a \$63.54 penalty for early withdrawal of a certificate of deposit in 1998. Plaintiff’s Exhibit “4” is a tax statement from Independence Community Bank indicating an \$86.47 penalty for a similar early withdrawal in the same year.

A written acknowledgment for the money – signed by the defendant and notarized – was introduced as Plaintiff’s Exhibit 1.<sup>3</sup> The statement does not contain a date certain for repayment, nor a repayment plan nor any reference to interest on the monies. Plaintiff further testified that on September 2, 1998 she loaned defendant an additional \$7,000.00 and the next day, loaned the defendant an additional \$1,000.00 to close an oil purchase transaction in San Diego, CA. No written acknowledgment of this additional money was produced by plaintiff. It was the last time plaintiff had contact with defendant as defendant thereafter stopped answering plaintiff’s cellular pages.

As a result, plaintiff contacted the New York City Police Department and filed a complaint against defendant. On September 22, 1998, plaintiff retained the services of Intercontinental Investigations, Inc., for the sum of \$500.00 to ascertain defendant’s residence address (Plaintiff’s Exhibit “3”). On September 25, 1998, Intercontinental provided their report identifying two possible addresses for defendant (Plaintiff’s Exhibit “5”). On November 11, 1998, he was located and arrested on the basis of plaintiff’s complaint. On August 5, 2004, plaintiff commenced the instant action – shortly before the expiration of the applicable statute of limitations – alleging causes of action based upon a promissory note; breach of two verbal contracts; breach of contract; conversion; and fraud by intentional misrepresentation.

Defendant stated that he had indeed received \$25,000.00 in cash from plaintiff on the day he signed the acknowledgment; that when plaintiff prepared Exhibit 1, he suggested that she put a payback period of five years; that plaintiff stated that it did not matter and that the money could be paid back in ten years at defendant’s option, and that the money was for his personal use in

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<sup>3</sup> The acknowledgment reads as follows: “I, Machkovsky Oleg leuded (sic) from Maya Gorelik the sum of \$25,000.”

establishing a new residence, paying off credit cards and purchasing furniture for an apartment.

Defendant denied receiving the additional \$8,000.00 claimed by plaintiff to have been delivered or agreeing to any interest on the money loaned to him.

The parties agree that defendant has reimbursed plaintiff \$23,000.00 in bank teller checks since the commencement of this action. Defendant brought \$2,000.00 with him to Court in an unsuccessful effort to bring the matter to conclusion.

### ***LAW AND APPLICATION***

Initially, the court must review plaintiff's claims for their viability. See *Litvinskiy v. May Entertainment Group, Inc.*, \_\_\_ A.D.3d \_\_\_, 2007 Slip Op 07409 (2<sup>nd</sup> Dept. 10-2-2007). Plaintiff's claims of conversion and misappropriation of funds must be dismissed as they are predicated on a simple breach of contract,<sup>4</sup> and plaintiff failed to submit evidence at Inquest demonstrating a wrong independent of the contract claim. See *Fiorenti v. Central Emergency Physicians*, 305 A.D.2d 453, 762 N.Y.S.2d 402 (2<sup>nd</sup> Dept. 2003); *MBL Life Assurance Corporation v. 555 Realty Co.*, 240 A.D.2d 375 (2<sup>nd</sup> Dept. 1997).

The court also dismisses plaintiff's claims of fraud and intentional misrepresentation. The essential elements of a cause of action for fraud are representation of a material existing fact; falsity, scienter, deception and injury. See *N.Y. University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995). "At the very threshold, then, plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that induced plaintiff to [act] . . . . General allegations that defendant entered into a contract while lacking the intent to

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<sup>4</sup> However, the court notes that the action is not time barred as its genesis is in contract law. See *Baratta v. Kozlowski*, 94 A.D.2d, 464 N.Y.S.2d 803 (2<sup>nd</sup> Dept. 1983).

perform it are insufficient to support the claim.” *Id.* at 318. Plaintiff has failed to demonstrate adequately that defendant lacked intent to repay the loan provided him by plaintiff.

Oral agreements are enforceable and courts look to the objective intent manifested by the parties at the time they contracted. Specifically, “the court looks not to the parties’ after-the fact professed subjective intent, but rather at their objective intent as manifested by their expressed words and conduct at the time of the agreement.” *Winkler v. Kingston Housing Authority*, 259 A.D.2d 819, 823, 686 N.Y.S.2d 513 (3<sup>rd</sup> Dept. 1999). In this case, plaintiff testified that she loaned defendant an additional \$8,000.00 shortly after loaning him \$25,000.00. Although she had obtained a written acknowledgment from the defendant for the prior loan, she did not obtain a written statement for the smaller loan. Nevertheless, the court finds plaintiff’s testimony regarding the additional \$8,000.00 loan credible, and accordingly finds an oral agreement for repayment of the \$8,000.00 to have been breached by defendant. See *Jump v. Jump*, 268 A.D.2d 709, 701 N.Y.S.2d 503 (3<sup>rd</sup> Dept. 2000).

The last remaining cause of action is that on the promissory note. Defendant admits receiving the money and that the note was signed by him. It is further established that defendant has paid \$23,000.00 to plaintiff since the default judgment was taken against him. Therefore, plaintiff is entitled to the balance of \$2,000.00 on the promissory note.

But a different result is mandated concerning plaintiff’s claim of interest on this note from August 31, 1998 at the rate of 20% per annum. This claim runs afoul of the parol evidence rule as set forth in *Greenfield v. Philles Records*, 98 N.Y.2d 562, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002). “Extrinsic evidence of the parties’ intent may be considered when interpreting a contract, but only if the agreement is ambiguous, which is an issue of law for the courts to decide . . . . Stated

another way, does the contract's silence on [a set interest rate or charge] create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties? We conclude that it does not . . ." *Id.* at 569-570. Since the contract is silent as to the interest rate, plaintiff's offer of extrinsic evidence as to the agreed upon rate is inadmissible by operation of law. Therefore, plaintiff is not entitled to pre-judgment interest on the loan at the alleged rate of 20%.

Plaintiff is entitled, however, to the statutory interest of 9% per annum from the earliest ascertainable date the cause of action existed as established by the testimony at trial. See *Atlas Refrigeration-Air v. Pinto*, 33 A.D.3d 639, 821 N.Y.S.2d 900 (2<sup>nd</sup> Dept. 2006); *Romito v. Panzarino*, 11 A.D.3d 444, 782 N.Y.S.2d 759 (2<sup>nd</sup> Dept. 2004); *Brady v. Zambrana*, 221 A.D.2d 171, 633 N.Y.S.2d 139 (1<sup>st</sup> Dept. 1999); CPLR § 5001(b). The evidence establishes that date as November 11, 1998, the date defendant was arrested based upon plaintiff's complaint.<sup>5</sup> Since defendant made payments to plaintiff, he is entitled to appropriate credit. Therefore, the interest due plaintiff is calculated as follows:

November 11, 1998 to March 2, 2006 (2,668 days) @ \$33,000.00 times 9%;

March 3, 2006 to September 6, 2006 (187 days) @ \$30,000.00 times 9%;

September 7, 2006 to February 20, 2007 (166 days) @ \$15,000.00 times 9%;

February 21, 2007 to September 19, 2007 (210 days) @ \$10,000.00 times 9%.

Based on these calculations, plaintiff is owed the total sum of \$24,224.55 in interest to the date of Inquest.

Plaintiff is not entitled to reimbursement of the \$500.00 expended to locate the defendant,

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<sup>5</sup> Plaintiff made no written demand of defendant for repayment prior to her complaint to the police, nor did she have an opportunity to make an oral demand until he was arrested pursuant to her complaint. That complaint and his arrest is deemed a demand for repayment.

nor the fees charged by the bank when the money was received by defendant as these consequential and incidental damages were either not proximately caused by the breach or fairly within the contemplation of the parties when they entered into the contracts. See *Sirles v. Harvey*, 256 A.D.2d 1227, 682 N.Y.S.2d 747 (4<sup>th</sup> Dept. 1998).

### ***CONCLUSION***

In light of the above, Plaintiff is awarded Judgment in the amount of \$34,224.55 on her breach of contract claims and breach of promissory note. Plaintiff's remaining claims are dismissed with prejudice, including a request for punitive damages. Plaintiff is entitled to enter Judgment with one bill of costs against the defendant in accordance with this decision. This constitutes the decision and order of the Court. Plaintiff is directed to settle Judgment on Notice in accordance with this decision.

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J. S. C.