

Siebert v Dermigny

2007 NY Slip Op 34564(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 117696/05

Judge: Walter B. Tolub

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
MURIEL SIEBERT.,

Plaintiff,

**Index No.117696/05
Findings of Fact and
Conclusions of Law**

-against-

NICHOLAS DERMIGNY,

Defendant.
-----x

FILED

MAY 25 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

WALTER B. TOLUB, J.:

This constitutes this court's findings of fact and conclusions of law after the trial on January 29th and 30th, 2007.

Plaintiff, Muriel Siebert, sued Defendant, Nicholas Dermigny, to recover an unpaid loan in the amount of \$105,000. Plaintiff claims she loaned the Defendant the money as a down-payment for an apartment in 2004. Defendant claims that the money was reimbursement of the rent promised to him for his Jersey City apartment.

FINDINGS OF FACT

Plaintiff is the principal shareholder and chief financial officer of Siebert Financial Corp. and Muriel Siebert & Co., Inc., a registered broker-dealer that specializes in discount brokerage services. Defendant was employed by Siebert & Co. from 1989 until September 2005. During the period of 2002 through

2005, Defendant was the company's chief operating officer and most senior executive in the company after Plaintiff.

Plaintiff brought this action to recover an unpaid loan in the amount of \$105,000. The trial testimony presents two starkly different and conflicting versions of the facts. Plaintiff testified that she loaned Defendant \$105,000 in March 2004 in response to his request for a 25% cash portion of the purchase price of a co-op in Manhattan. Plaintiff testified that she loaned the Defendant the money without a written agreement and that even though Defendant agreed to repay her, the loan has not been repaid despite the demand for payment. Defendant testified that the loan was not a loan, but rather a repayment by Plaintiff of business expenses, namely rent, accrued over a period of four years and three months.

Compounding and complicating the issues presented is Defendant's belief that Plaintiff has engaged in securities law violations and that this lawsuit is an attempt to get "even" with the Defendant. The Defendant communicated his belief to Muriel Siebert & Co.'s outside counsel as well as the Attorney General. Plaintiff's position is that the only time Defendant denied that the money was a loan, was in 2005 after being fired from his position and after bringing a Sarbanes-Oxley retaliatory proceeding against the Plaintiff.

The court finds that neither Plaintiff's nor Defendant's

testimony was credible because the Plaintiff bears the burden of proof. (Dan-Nor Realty v. Kleinport Realty Corp., 114 NYS2d 338 [Sup. Ct. 1952]). The claims must fail and the Complaint must be dismissed.

CONCLUSIONS OF LAW

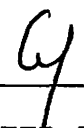
Plaintiff has failed to overcome the presumption that the check represented an obligation she had to the Defendant and was not loan as she contends. There is a longstanding principle that the presumption arising from the delivery of a check is that it was tendered in payment of a debt and not as a loan. (Leask v. Hoagland, 205 NY 171 [1912]; In Re Effross, 43 AD539 [1st Dept 1973]). In the absence of other evidence, a loan is not presumed from the making of a check, there must be evidence that the payment was intended as a loan. (Marks v. Kellogg, 170 AD 468 [1st Dept 1915]). Care must be given in considering evidence to overcome the presumption that the check tendered by the Plaintiff represented some debt or obligation owed. (Koehler v. Adler, 78 NY 287 [1879]).

Plaintiff has failed to overcome the presumption that the check was not a loan. Plaintiff did not (1) note the purpose of the check in the check's memo line; (2) have a written agreement with the Defendant; and (3) Plaintiff failed to demand payment when \$100,000 bonuses were given to Defendant.

Accordingly it is

ORDERED the action is dismissed in its entirety.

Dated: 5/22/07



HON. WALTER B. TOLUB, J.S.C.

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