

Coen v Whelan

2008 NY Slip Op 31580(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0112630/2007

Judge: Judith J. Gische

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PRESENT: ~~HON. JUDITH J. GISCHE~~

PART 10

J.S.C. Justice

Index Number : 112630/2007

COEN, THERESA A.

vs

WHELAN, JOAN MARIE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for §3212, §3211

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

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

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/2/08

J. Gische
HON. JUDITH J. GISCHE ^{S.C.}
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

THIS DOCUMENT IS ILLEGITIMATELY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
THERESA A. COEN,

Plaintiff,

-against-

JOAN MARIE WHELAN and EMPOWERED
PRODUCTIONS LLC,

Defendants.
-----X

Index No.: 112630/07
Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK
Numbered

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

Papers

Pltf's motion [sj] w/APS affirm, TAC affid in support, exhs.....	1
Def's opp w/EK affirm, JMW affid in support, exhs.....	2
Pltf's APS reply affirm in further support, exhs.....	3

-----X

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

This action arises from a failed business relationship. Plaintiff seeks to recover \$40,000 she allegedly gave to defendant Joan Marie Whelan ("Whelan") as part of a business venture. Plaintiff now moves for summary judgment in her favor on the complaint, and, pre-answer, to dismiss defendants' counterclaims. CPLR §§ 3212, 3211. Defendants oppose the motion.

Since issue has been joined on the claims in chief, 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).

Whelan states that she is an "internationally known and recognized Business Intuition Expert, Intuition Coach, Intuition Expert, Medium and Past Life Regression Expert." Defendant alleges that she provided plaintiff with her services "with respect to business and personal related matters" and that starting on June 16, 2007, plaintiff agreed

to pay Whelan \$10,000/month for "ongoing and extensive consultations." Whelan contends that there remains a balance due and outstanding owed by plaintiff of \$20,000.

On June 29, 2007, plaintiff gave Whelan a check for \$20,000 (the "first check") in connection with a proposed investment in a business venture called "Empowered Productions." The purpose of this business venture was to develop and produce a one-woman theater production starring Whelan. On August 7, 2007, plaintiff gave Whelan another \$20,000 check (the "second check") for the investment. Whelan indorsed these checks and deposited them into a Commerce Bank in New Jersey. At the time plaintiff delivered the second check to Whelan, the parties executed a document entitled "Promissory Note", dated both August 1 and August 7, 2007, and in the face amount of \$60,000 (the "Note"), which also contained an option to convert the Note to a 25% partnership interest in defendant Empowered Productions LLC ("Empowered"). The Note provided for interest on the unpaid principal balance "at the rate of six percent (18%) Per annum." Whelan signed the note as borrower and as president of Empowered Productions LLC, though such entity did not yet exist.

Whelan also alleges that there is another oral agreement reached in or about June 2007 wherein "plaintiff agreed to pay [her] \$20,000/month for three months" so that Whelan could develop the "one-woman show." Whelan has provided a letter purportedly from plaintiff provided along with the first check which states: "Joanie, Here's to our magical partnership! Let's get to work!"

For reasons that are not clear to the court on this record, the relationship between plaintiff and Whelan soured. By email dated September 7, 2007, Whelan wrote to plaintiff the following:

"You put me in a very difficult position for two reasons, first because I felt that I had to beg you for the money. Second, because we had an agreement and I trusted you to stand up to your part of the agreement. I am very disappointed to have to say this, but I do not feel that I can honor you as a business partner as this time.

...

You have already violated the terms of the agreement and therefore, it causes this agreement to be non-existent.

...

I will pay you back the \$40,000 as everything start [sic] to flows."

Plaintiff then sent Whelan a letter dated September 10, 2007 wherein she wrote:

I accept your proposal to cancel the "agreement," to deem it non-existent and accept return of the money paid in full. I expect and demand return of this money immediately.

... I don't accept your various characterizations of the circumstances of this purported investment, or that I have violated the terms of any agreement. I reserve all of my rights.

There is no dispute that neither Whelan nor Empowered has returned the \$40,000 to plaintiff. Plaintiff commenced this action to recover the \$40,000. Plaintiff has asserted four causes of action, to wit: [1] conversion; [2] money had and received; [3] unjust enrichment; [4] a claim that the \$40,000 given to defendants constitutes trust funds and seeking the imposition of a constructive trust upon the \$40,000 in defendants' possession. Plaintiff argues that on September 10, 2007, an accord and satisfaction resulted from her acceptance of Whelan's offer of rescission and that the defendant's are obligated to return the funds. Plaintiff alternatively contends that the parties "agreed to termination/rescission."

Plaintiff claims that the counterclaims based on the alleged oral agreement are barred by the parol evidence rule because the Note is a fully integrated document. Plaintiff argues that Whelan's counterclaim for services is unavailing because it is based upon a contract, the performance of which is criminal act. Plaintiff cites Penal Law § 165.35, which provides that:

A person is guilty of fortune telling when, for a fee or compensation which he directly or indirectly solicits or receives, he claims or pretends to tell fortunes, or holds himself out as being able, by claimed or pretended use of

occult powers, to answer questions or give advice on personal matters or to exorcise, influence or affect evil spirits or curses; except that this section does not apply to a person who engages in the aforescribed conduct as part of a show or exhibition solely for the purpose of entertainment or amusement.

In their answer, defendants have asserted three counterclaims, the first two on behalf of Whelan and the third on behalf of Empowered, to wit: [1] breach of an agreement to pay Whelan for daily expenses and compensate Whelan for lost income; [2] for counseling services rendered and unpaid; and [3] for breach of an agreement which provided for the creation of Empowered to develop and create a theatrical production. Plaintiff also seeks dismissal of the counterclaims, which she argues are barred by the parol evidence rule and are illegal as a matter of law.

Defendants argue that there are issues of fact which preclude summary judgment. Defendants claim that there was an oral agreement between the parties, related to and made contemporaneously with the Note, which obligated plaintiff to cover Whelan's personal and business expenses for three months to allow Whelan to promote herself and develop the parties' business concept. Defendants contend that the oral agreement they allegedly reached in June 2007 is wholly separate and apart from the subject matter of the Note. Defendants claim that the \$40,000 paid by plaintiff was for Whelan's personal and business expense as per the alleged June 16, 2007 oral agreement, and not, as plaintiff argues, monies loaned to the defendants.

Defendants further claim that "the reason Whelan sought to sever [the parties'] business relationship was plaintiff's failure to make the September payment." Defendants argue that they have sustained significant damages as a result of plaintiff's failure to make payments due. Therefore, it is defendant's position that plaintiff is not entitled to a return of the \$40,000.

Discussion

The court first addresses plaintiff's motion seeking summary judgment relief.

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 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 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 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 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 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 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 AD2d 459 [2d Dept 2003]).

Although plaintiff has established the existence of the Note, there are issues of fact which preclude summary judgment. It is unclear to the court why plaintiff only seeks \$40,000 when the face value of the Note is for \$60,000. In addition, the September 7, 2007 email does not constitute an accord and satisfaction, as plaintiff contends. Black's Law Dictionary defines an accord and satisfaction as follows: "[a]n agreement to substitute for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance" (Black's Law Dictionary 707 [8th ed 2004]). Defendants are debtors under the Note, and therefore were not capable of offering

an accord and satisfaction.

Plaintiff's September 10, 2007 letter may constitute an offer of an accord and satisfaction, where plaintiff agreed to discharge defendants' performance under the Note in exchange for payment of \$40,000. However, such was never accepted by defendant, which would require defendant delivering to plaintiff an amount less than the face value of the note to constitute an accord and satisfaction (see Pincus-Litman Co., Inc. v. Canon U.S.A., Inc., 98 AD2d 681 [1st Dept 1983]).

In addition, there is an issue of fact as to whether there was an oral agreement between the parties which may impact defendants' obligations under the Note. Although plaintiff argues that defendants' claims of a separate oral agreement are barred by the parol evidence rule, there is an issue of fact whether the alleged oral agreement was a separate agreement which does not vary or add to the terms of the Note. Parol evidence of a contemporaneous or prior oral agreement is inadmissible to alter, vary or contradict the terms of an otherwise complete written instrument (Lebowitz v. Minguş, 100 A.D.2d 816 [1st Dept 1984]; Thomas v. Scutt, 127 N.Y. 133 [1891]). If the oral agreement was in fact a separate agreement from the Note, as defendant contends, the parol evidence rule may not apply (id.).

For at least these reasons, plaintiff has failed to establish entitlement to summary judgment on any of the causes of action asserted.

Nor has plaintiff demonstrated that defendants' counterclaims should be dismissed. In determining whether a cause of action is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]). The facts as alleged must be accepted by the court as true for purposes of such a motion, and are to be accorded every favorable inference (Morone v.

Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept 1997]).

The court rejects plaintiff's contention that the counterclaims sounding in breach of contract are "fatally indefinite." The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termiani Corp. v. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999). Defendants have alleged sufficient facts to support each of the counterclaims.

Moreover, the court cannot conclude that the alleged contract for services Whelan provided to plaintiff was illegal. In her affidavit, Whelan describes the services she provided to plaintiff as follows:

[Whelan] helped uncover and begin to resolve numerous traumatic events that plagued the plaintiff concerning the causes of [plaintiff's] sister's tragic death and other family matters concerning [plaintiff's] brother, mother and other family members. In addition [Whelan] provided intuitive guidance to plaintiff with respect to her ongoing businesses and employee issues.

It is unclear from this description what type of services were actually provided to plaintiff by Whelan. Although plaintiff urges the court to conclude that Whelan's services fall within the ambit of Penal Law § 165.35, even plaintiff concedes that "it is hard to discern precisely what it is that Ms. Whelan actually does in terms of 'services'". Based on this record, the court cannot conclude that, as a matter of law, Whelan used "occult powers" while providing plaintiff with the alleged services at issue, thereby violating Penal Law § 165.35 (see also People v. Ballard, 143 A.D.2d 919 (2d Dept 1988)). This case remains to be developed at trial.

Accordingly, the motion is denied in its entirety.

Plaintiff shall serve her response to the counterclaims within twenty (20) from the

date of this decision and order.


Both parties in this action are hereby directed to appear before this court on June 26, 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 2, 2008

So Ordered:


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

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK