

Caires v Hack

2008 NY Slip Op 32010(U)

June 24, 2008

Supreme Court, Suffolk County

Docket Number: 0003520/2008

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 DR. ROBERT CAIRES,

Plaintiff,

-against-

NARUL HACK a/k/a TONY HACK,

Defendant.

ORIG. RETURN DATE: MARCH 24, 2008
 FINAL SUBMISSION DATE: APRIL 24, 2008
 MTN. SEQ. #: 001
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
 LAW OFFICES OF DONALD H. DARBEE, ESQ.
 1213A MAIN STREET
 OAKDALE, NEW YORK 11769-0504
 631-567-7757

DEFT'S/RESP ATTORNEY:
 KENNETH J. GLASSMAN, ESQ.
 475 PARK AVENUE SOUTH - SUITE 700
 NEW YORK, NEW YORK 10016
 212-213-2510

Upon the following papers numbered 1 to 6 read on this motion _____
TO DISMISS

Notice of Motion and supporting papers 1-3; Answering Affidavits and supporting papers 4, 5; Replying Affidavits and supporting papers 6; it is,

ORDERED that this motion by defendant for an Order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the complaint in this action in its entirety based upon documentary evidence and/or that the complaint fails to state a cause of action upon which relief can be granted, is hereby **GRANTED** solely to the extent provided hereinafter.

Defendant alleges that he and plaintiff entered into a Collaboration Agreement dated February 13, 2007 ("Agreement"), drafted by plaintiff, wherein defendant was to finance an unpublished book written by plaintiff, and in exchange, the parties were to evenly share in any profits realized therefrom. Pursuant to ¶ 3 of the Agreement, defendant was to pay plaintiff the sum of \$60,000.00 in two payments, to wit: the first payment in the amount of \$6,000.00

upon signing of the Agreement, and the second payment in the amount of \$54,000.00 within thirty (30) days of the date of the Agreement. However, defendant alleges that approximately a month prior to signing the Agreement, he paid plaintiff \$6,000.00, and then another \$6,000.00 upon signing. Defendant further alleges that the balance of the monies was to be paid by two post-dated checks delivered to plaintiff on February 13, 2007. The first check, numbered 1266 and dated March 12, 2007, was in the amount of \$25,000.00. The second check, numbered 1016 and dated March 30, 2007, was in the amount of \$29,000.00. Defendant claims that after paying plaintiff \$12,000.00, signing the Agreement, and delivering the post-dated checks to plaintiff, defendant realized he was "duped" by plaintiff concerning the book, and allegedly told plaintiff not to deposit the checks as there would not be sufficient funds to cover them. Defendant alleges that he received about a dozen books from plaintiff, but claims that they were a gift and were "worthless." The Court notes that defendant has not further elaborated as to how he was "duped" by plaintiff.

Defendant has now filed the instant motion to dismiss, arguing that plaintiff is entitled to no further monies under the Agreement. Defendant alerts the Court that ¶ 3(c) of the Agreement provides that in the event defendant fails to pay plaintiff the additional \$54,000.00, then plaintiff may cancel the Agreement and retain the \$6,000.00 as liquidated damages. Defendant further alerts the Court that ¶ 10 of the Agreement provides in part that all monies paid to plaintiff forever belongs to plaintiff as liquidated damages if defendant does not timely perform. Moreover, defendant alleges that pursuant to ¶ 15 of the Agreement, defendant should be reimbursed for his legal fees incurred in defending this matter, which currently exceed \$10,000.00, and seeks a hearing on this issue.

In opposition, plaintiff acknowledges the Agreement, the payment of \$6,000.00 upon signing, the two checks totaling \$54,000.00, and the liquidated damages clauses. However, plaintiff alleges that defendant gave him the two checks on March 12, 2007, the date of the first check, and therefore only the second check was post-dated. Plaintiff further alleges that on March 12, 2007, defendant took a box of forty-eight (48) books and gave plaintiff a written receipt therefor. Plaintiff contends that defendant took approximately 150 to 200 books from plaintiff in total for distribution. Plaintiff alleges that the first check received by defendant was dishonored by the bank for insufficient funds, and that plaintiff learned defendant stopped payment on the second check and therefore did not present the check for payment. Plaintiff further alleges that although defendant sought additional time from plaintiff to make the payments, he was in reality

“shopping” the book to interested parties to establish whether he could make a profit.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211(a)(1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence “must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Frehofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

In the underlying complaint, plaintiff has asserted three causes of action. The first cause of action is based upon the bank’s dishonor of the check numbered 1266, dated March 12, 2007, in the amount of \$25,000.00. The second cause of action is based upon the check numbered 1016, dated March 30, 2007, in the amount of \$29,000.00. Although the complaint recites that this check was dishonored by the bank on April 23, 2007, plaintiff, in opposition to the instant application, informs the Court that he never presented this check for payment because he learned that defendant had stopped payment on the check. The third cause of action sounds in breach of contract, fraud, and conversion, and arises out of the subject Agreement. Plaintiff seeks damages in the amounts of \$25,000.00, \$29,000.00, and \$13,500.00 respectively on each cause of action.

With respect to plaintiff’s first and second causes of action, subdivision (1)(b) of section 3-802 of the Uniform Commercial Code provides in pertinent part that “[u]nless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation” (UCC 3-802[1][b]).

Plaintiff has established that check number 1266 was presented for payment and dishonored by the bank for insufficient funds. However, plaintiff

never presented check number 1016 for payment, as defendant stopped payment on the check. Delivery of an uncertified check constitutes only conditional payment, dependent upon the check being honored when presented. Before presentment, the check vests no title or interest in the payee in the funds on deposit with the bank and is revocable by the drawer, who has the legal control of the moneys to his credit until payment (see *e.g. Carmichael v General Electric Co.*, 102 AD2d 838 [1984]). Therefore, check number 1016 vested no title or interest in plaintiff in the funds on deposit with the bank and was revocable by defendant before presentment.

Accordingly, upon favorably viewing the facts alleged, and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that first cause of action sufficiently pleads a cause of action based upon Uniform Commercial Code 3-802(1)(b). While the Court is mindful that defendant may assert defenses alleging lack of consideration for the check, the complaint nevertheless sufficiently pleads the aforementioned cause of action. However, with respect to plaintiff's second cause of action, plaintiff admittedly never presented the check for payment. As such, the check was never dishonored, and therefore plaintiff's second cause of action lacks an element of a claim based upon Uniform Commercial Code § 3-802(1)(b) (see UCC 3-802[1][b]; *cf. Sedlacek v Dryden Mut. Ins. Co.*, 266 AD2d 768 [1999]).

Regarding plaintiff's third cause of action, it is undisputed that the Agreement contains liquidated damages clauses which provide that in the event of a breach by defendant, all monies paid to plaintiff forever belong to plaintiff as liquidated damages. Notably, plaintiff, who is also an attorney, drafted the Agreement. Liquidated damages are in effect an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of a breach of the agreement (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373 [2005]). A contractual provision fixing damages in the event of a breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, *supra*). In the case at bar, defendant alleges that he gave plaintiff payments totaling

\$12,000.00, albeit \$6,000.00 was allegedly given prior to execution of the Agreement, and plaintiff claims damages incurred for the alleged conversion of the books delivered to defendant in the amount of \$13,500.00. The Court finds that the liquidated damages clauses in the Agreement are reasonable and enforceable, and that the amount retained by plaintiff bears a reasonable proportion to the alleged loss (*see Fed. Realty Ltd. P'ship v Choices Women's Med. Ctr., Inc.*, 289 AD2d 439 [2001]). Moreover, a cause of action to recover damages for fraud will not arise when the only fraud alleged relates to a breach of contract (*see Valentin v Chong*, 36 AD3d 896 [2007]). In addition, a claim to recover damages for conversion cannot be predicated on a mere breach of contract (*see Hochman v LaRea*, 14 AD3d 653 [2005]).

In view of the foregoing, defendant's motion is **GRANTED** solely to the extent that plaintiff's second and third causes of action asserted in the complaint are dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: June 24, 2008


HON. JOSEPH FARNETI
Acting Justice Supreme Court