

**ABKCO Music & Records, Inc. v Montague**

2008 NY Slip Op 32851(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 110349/05

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

Index Number : 110349/2005  
**ABKCO MUSIC & RECORDS**  
 vs.  
**MONTAGUE, NATHANIEL**  
 SEQUENCE NUMBER : 005  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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 *is denied*

*granted*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
 OCT 20 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 10/14/08

EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
ABKCO MUSIC & RECORDS, INC.,

Plaintiff,

-against-

Index No. 110349/08

NATHANIEL MONTAGUE, ROSE T. CASALAN,  
and THE MONTAGUE-CASALAN FAMILY  
TRUST,

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

**FILED**  
OCT 20 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action for breach of contract and unjust enrichment, plaintiff ABKCO Music & Records, Inc. (ABKCO), a recording company, seeks to recover \$353,590.29 allegedly loaned to defendants Nathaniel Montague, Rose T. Casalan, and The Montague-Casalan Family Trust (hereinafter referred to as The Family Trust). ABKCO alleges that these sums were lent to defendants in order to enable them to sell an extensive collection of African artwork. Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint.

**BACKGROUND**

The following facts are gleaned from the submissions of the parties. ABKCO, a New York corporation, is engaged in the recording, music publishing, and film industries (Klein Aff. in Opp., ¶ 11). ABKCO was founded by Allen Klein (*id.*). ABKCO owns, controls, and commercially exploits the musical compositions of artists, such as The Rolling Stones, Mick Jagger, Keith Richards, and Sam Cooke (*id.*). The company has also served as the business manager of Sam Cooke (*id.*). Montague and Casalan are residents of Las Vegas, Nevada (Montague Aff., ¶ 2). Montague was a radio disc jockey known professionally as "Magnificent

[\* 3 ]

Montague” or “Magnificent One” (Klein Aff. in Opp., Exh. L). ABKCO claims that Montague, Casalan, and the Family Trust are the owners of the art collection.

ABKCO alleges in the amended complaint that, in or about 1997, it entered into an oral loan agreement with defendants through ABKCO’s New York’s office (Amended Complaint, ¶ 6). The funds were to be used for the purpose of cataloguing, photographing, evaluating, insuring, and advertising the art collection (*id.*). Defendants allegedly agreed to repay the funds upon demand (*id.*).

ABKCO further alleges that it agreed to make additional cash advances to defendants, also through its New York office, to assist defendants in pursuing business opportunities and to support their general living expenses (*id.*, ¶ 8). According to ABKCO, defendants agreed to repay these funds upon its demand for repayment (*id.*).

The amended complaint contains two causes of action against defendants for breach of contract and unjust enrichment. In the first cause of action, ABKCO asserts that defendants failed to repay the loans upon its demand for repayment. In the second cause of action, ABKCO alleges that defendants have been unjustly enriched by retaining the funds and failing to repay the funds, as agreed to by the parties. In their amended answer, defendants assert unrelated counterclaims for unjust enrichment, replevin, and conversion, which are not the subject of this motion. After this motion was fully submitted, the parties entered into a stipulation, dated July 17, 2008, pursuant to which ABKCO discontinued the action as against the Family Trust. Therefore, the court shall consider the motion only as it pertains to Montague and Casalan.

Kenneth Salinsky, the vice president of ABKCO, testified at his deposition that, at some point in 1997, he attended a meeting with Allen Klein, then president of ABKCO, Montague and

Casalan (Salinsky Dep., at 18). Montague and Casalan asked that Allen Klein, as the president of ABKCO, loan them money to help catalog and inventory the art collection (*id.* at 19, 20). Klein agreed to loan them the money (*id.* at 19). Salinsky stated that “[t]he only terms that were discussed during that meeting was that it was going to [be] a short-term loan, . . . [and] they needed a short period of time to put it together, get it catalogued, photographed and then try and sell it. And it would take somewhere around nine months or so” (*id.* at 20). No interest rate was discussed at that time (*id.* at 21).

Jody Klein, the current president of ABKCO, asserts that the company made a series of loans to defendants, for a total of \$353,590.29, as follows:

- August 1, 1999 through December 31, 1999 – \$36,383.44
- January 1, 2000 through December 31, 2000 – \$68,217.07
- January 1, 2001 through December 31, 2001 – \$60,581.42
- January 1, 2002 through December 31, 2002 – \$77,157.49
- January 1, 2003 through December 31, 2003 – \$56,576.93
- January 1, 2004 through December 31, 2004 – \$45,303.27
- January 1, 2005 through March 4, 2005 – \$9,370.67.

(Klein Aff. in Opp., ¶¶ 23-29). According to Klein, defendants failed to repay these funds (*id.*, ¶ 40).

However, defendants deny that any loan agreement was ever entered in connection with the art collection. Montague submits an affidavit in which he avers that he and his wife only borrowed \$143,000 from ABKCO in connection with the purchase of their home in Las Vegas (Montague Aff., ¶ 5). According to Montague, they have since repaid this loan (*id.*). ABKCO procured life insurance in the amount of the loan on each of their lives (*id.*).

Defendants claim that the then president of ABKCO, Allen Klein, provided the monies at issue as a gift, not a loan (*id.*, ¶ 7). Montague and Klein were friends, as evidenced by the

acknowledgment in Montague's autobiography (Montague Aff., ¶ 6; Goldweber Affirm., Exh. H). Montague also has extensive knowledge and expertise in black history and Rock 'n Roll music, including the music and life of Sam Cooke (Montague Aff., ¶ 7). He does not know what meeting to which Salinsky was referring at his deposition (*id.*, ¶ 4).

### DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After a prima facie showing has been made, the burden shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

Initially, ABKCO argues that the motion should be denied because defendants have failed to submit copies of the answer with counterclaims or reply. ABKCO further contends that the motion is premature because discovery has not yet been completed. Neither of these arguments has any merit. ABKCO has submitted these pleadings in opposition to the motion, and thus, the court has a full record. ABKCO has also failed to demonstrate what additional discovery is needed to oppose the motion (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

#### Breach of Contract (First Cause of Action)

Defendants argue that ABKCO's breach of contract claim is time-barred, since any

\* 6 ]  
breach of the 1997 oral agreement would have occurred in 1997 or 1998, and therefore, the statute of limitations would have expired at the latest in 2004.<sup>1</sup>

A cause of action to recover money loaned must be brought within six years of the accrual date unless the statute is tolled (CPLR 213 [2]). A demand loan is one in which no time for repayment is specified, and is payable immediately (*Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & Western R.R. Co.*, 123 NY 316, 326-327 [1890]; *Pine v Okoniewski*, 256 App Div 519, 521 [4th Dept 1939]). As a result, this cause of action accrues immediately upon receipt of the loan proceeds (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143 [1993] ["the Statute of Limitations affecting a note payable upon demand, without doubt, begins to run from the date of its execution"]; *Avon Dev. Enters. Corp. v Samnick*, 286 AD2d 581, 582 [1st Dept 2001] [statute of limitations on a note payable on demand runs from the date the loan is made]; *Skiadas v Terovolos*, 271 AD2d 521 [2d Dept 2000] [in action to recover money loaned, accrual dates were the dates upon which the individual loans were made]).

Here, ABKCO alleges that the parties entered into oral demand loan agreements, i.e., there was no set time for repayment. Contrary to defendants' contention, ABKCO's breach of contract claim accrued when defendants actually received the loan proceeds (*see Skiadas*, 271 AD2d at 521), not the date of the 1997 meeting. ABKCO alleges that it made a series of loans to defendants from August 1999 through March 2005. ABKCO commenced this action on July 27, 2005 by filing a summons and complaint, or just less than six years from August 1999. Therefore, ABKCO's breach of contract claim was timely filed.

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<sup>1</sup>Defendants also contend, pointing to Salinsky's deposition testimony, that the parties only made an agreement as to inventorying and cataloguing of the art collection. Defendants have failed to establish the absence of any material issues of fact on this point.

Defendants next contend that the oral loan agreements are barred by the statute of frauds. They maintain that eight years of payments (from 1997 through 2005) could not have been performed within one year.

The statute of frauds, as incorporated in General Obligations Law § 5-701 (a) (1), provides that an agreement is void if it is not in writing and “subscribed by the party to be charged therewith” when the agreement “[b]y its terms is not to be performed within one year from the making thereof.” The purpose of this section is “to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury” (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 453 [1984]). In *D & N Boening, supra*, the Court of Appeals interpreted this section as barring those agreements that “have absolutely no possibility in fact and law of full performance within one year” (*id.* at 454). “As long as the agreement may be ‘fairly and reasonably interpreted’ such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame” (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998], quoting *Warren Chem. & Mfg. Co. v Holbrook*, 118 NY 586, 593 [1890]).

In the instant case, the oral loan agreements are not barred by the statute of frauds. There is no evidence that the oral agreements had any restriction against repayment within one year. The loans could have been repaid, for instance, six months after the money was lent to defendants. Thus, the loan agreements could have been performed within one year (*see Moon v Moon*, 6 AD3d 796, 798 [3d Dept 2004] [oral loan agreement was not unenforceable under § 5-701 [a] [1] because it had no restriction against prepayment within one year]; *Costantini v Bimco Indus.*, 125 AD2d 531 [2d Dept 1986] [loan agreements did not violate statute of frauds because

they were open-ended, with no set time for repayment]).

Consequently, summary judgment is unwarranted on the breach of contract claim.

#### Unjust Enrichment (Second Cause of Action)

Defendants also assert that the unjust enrichment claim must be dismissed, because ABKCO undisputedly gave the money to defendants as a gift, not a loan.

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). Generally, the existence of a valid and enforceable written contract precludes recovery in quasi-contract concerning the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). However, "if 'there is a bona fide dispute as to the existence of a contract . . . a plaintiff may proceed upon a theory of quasi contract as well as contract'" (*Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007], quoting *Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [2d Dept 2003]).

In order to have a valid inter vivos gift, there must be three elements: (1) an intent on the part of the donor to make a present transfer; (2) delivery of the gift, either actual or constructive, to the donee; and (3) acceptance by the donee (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]; *Widom v Mittman*, 39 AD3d 374 [1st Dept 2007]). The intent element requires an irrevocable present transfer of ownership (*Gruen*, 68 NY2d at 54-56).

Specifically, defendants contend that ABKCO gave money to Montague and Casalan out of friendship, which was memorialized in Montague's autobiography *Burn, Baby! Burn!*, which

contains the following acknowledgment: “[a] special acknowledgment to Montague’s matchless, dearest friend, Allen Klein of ABKCO Records, without whose support this book would have remained an unheard melody” (Goldweber Affirm., Exh. H, at 2). Additionally, defendants point to the deposition testimony of Jody Klein, Allen Klein’s son, who stated that his father and Montague had a “friendship and a passion for Sam Cooke” (Klein Dep., at 63).<sup>2</sup>

Defendants have failed to establish that the amounts allegedly loaned to them were gifts as a matter of law. Defendants’ evidence does not even relate to the transactions at issue. In any case, defendants have shown that there are factual issues as to ABKCO’s intentions. For instance, Salinsky testified at his deposition that each of the transactions was carried as a “loan receivable” from defendants (Salinsky Dep., at 64). In a letter dated July 13, 1999, defendants’ own accountant, David Cooper, wrote to Salinsky that “it became apparent that [defendants] may have some deductible business expenses being paid for via the *loan* that has been set up through your office” (Klein Aff. in Opp., Exh. C [emphasis supplied]). Additionally, on numerous occasions in 1998 and 1999, ABKCO provided schedules of advances made to third parties, which were approved by Casalan (*id.*, Exhs. A, B, F, G). Klein also recalled that Casalan repeatedly informed him that she wanted to sell the art collection so that they could pay ABKCO back (Klein Aff. in Opp., ¶ 34). Although defendants submit an affidavit from Cooper in reply, which states that the loan referred to the mortgage on their home, the court concludes that issues

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<sup>2</sup>Defendants also argue that ABKCO’s claim that it lent over \$350,000 without a writing is incredible. They assert that, on other occasions, ABKCO lent \$143,000 to defendants for the purchase of a home in Las Vegas, Nevada, which was secured with a mortgage, and also procured life insurance in the amount of the loan on the lives of both Montague and Casalan (Klein Dep., at 35-36, 38-41). Nonetheless, the court’s function on a motion for summary judgment is not to evaluate credibility (*see Quinn v Krumland*, 179 AD2d 448, 449-450 [1st Dept 1992]).

[\* 10 ]  
of fact exist as to whether the transactions constituted loans or a gift (*see Ptasznik v Schultz*, 223 AD2d 695, 696 [2d Dept 1996] [issues of fact as to whether disputed transactions constituted loans or gifts]).

In sum, defendants are not entitled to summary judgment on the unjust enrichment claim.

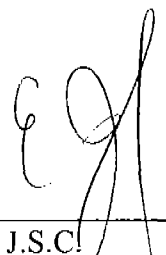
**CONCLUSION**

Accordingly, it is

**ORDERED** that the motion (sequence number 005) by defendants Nathaniel Montague and Rose T. Casalan for summary judgment dismissing the amended complaint is denied.

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

Dated: October 14, 2008

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

**FILED**  
OCT 20 2008  
COUNTY CLERK'S OFFICE  
NEW YORK