

Paliogiannis v Capone

2010 NY Slip Op 30271(U)

January 29, 2010

Supreme Court, Nassau County

Docket Number: 011713/09

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
KONSTANTINOS PALIOGIANNIS,

TRIAL TERM PART: 45

Plaintiff,

-against-

INDEX NO.:011713/09

MOTION DATE:12-24-09

SUBMIT DATE:1-26-10

SEQ. NUMBER - 001

PETER CAPONE,

Defendant.
-----x

The following papers have been read on this motion:

- Notice of Motion, dated 12-7-09.....1**
- Memorandum of Law in Support, dated 12-7-09.....2**
- Affirmation in Opposition, dated 1-14-10.....3**
- Reply Affirmation, dated 1-20-10.....4**

This motion by the defendant to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied.

This action is one that pits two victims of an alleged wrongdoer against one another. Although unfortunate, courts cannot make both whole, but can determine only which of the two must bear the loss under New York law.

Because this is a motion brought pursuant to CPLR 3211(a)(7), even though an answer has been interposed, the Court must assume all the factual allegations to be true, and if submitted may consider evidence demonstrating that the plaintiff has a cause of action,

even if not properly pleaded. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268 (1977).

The factual scenario is not complex. Essentially, both the plaintiff and the defendant allege that they are victims of one Mark Goldman, a disbarred attorney now the subject of a criminal investigation by the office of the United States Attorney for the Eastern District of New York. An application for an arrest warrant has been submitted to the federal District Court.

Plaintiff alleges that in November, 2008, Goldman solicited a short-term loan from him in the amount of \$250,000. Plaintiff agreed, and gave two checks to Goldman: one was for \$100,000, payable to Goldman, and the other for \$150,000, payable to Peter Capone, the defendant in this suit. Capone received the check from Goldman, and deposited the check. Shortly thereafter, Goldman informed the plaintiff that he could not pay back the loan. The complaint alleges that Capone received the \$150,000 and benefitted therefrom, that the money belongs to the plaintiff, and that “under principles of fairness and good conscience, Defendant Peter Capone should not be permitted to keep the said funds.”

On this motion to dismiss, the defendant submits his affidavit, in which he states that he has never met, spoken to or had any communication with the plaintiff, and never agreed to guarantee or become liable for any loan by the plaintiff to Goldman. As is plaintiff, defendant asserts that he too is a creditor of Goldman, to the extent of \$12 million, which was lost in a Ponzi scheme. Defendant is currently suing Goldman in the United States District Court, Eastern District. Annexed to the amended complaint in that action is the application of the arrest warrant noted above. Defendant outlines his allegations against Goldman, and states that “Plaintiff is not the only party in this case who has been victimized

by Goldman.” Defendant asserts that he accepted the \$150,000 check from Goldman as a small payment on the millions owed, and there was no suggestion that he would have to pay the money back to anyone.

In the memorandum of law submitted with the motion, the defendant has interpreted the claim as one sounding in unjust enrichment, and has provided authority demonstrating that such a claim cannot be made out in that there are no allegations that the defendant did anything to induce the plaintiff to act. Citing, *Fountoukis v Geringer*, 33 AD3d 756 (2d Dept. 2006); *Clark v Daby*, 300 AD2d 732 (3d Dept. 2002); *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375 (1st Dept. 1991). However, in response to the moving papers the plaintiff, by his attorney, has stated that the complaint alleges a “straightforward cause of action for money had and received.” Plaintiff does not address unjust enrichment, other than to note that this is the focus of the defendant’s motion, and has thereby abandoned such a claim. See, *Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070 (3d Dept. 2009); *Farley v Town of Hamburg*, 34 AD3d 1294 (4th Dept. 2006).

A claim for money had and received “is one of quasi-contract or of contract implied in law.” *Board of Education of the Cold Spring Harbor Central School Dist. v Rettliata*, 78 NY2d 128, 138 (1991). It is a species of restitution, based on the notion that “ ‘if A pays money to B upon the erroneous assumption of the former that he is indebted to the latter, an action may be maintained for its recovery.’ ” *Banque Worms v BankAmerica Intl.*, 77 NY2d 362, 366 (1991), quoting *Ball v Shepard*, 202 NY 247, 253 (1911). It would appear that historically the courts have recognized that in order for the claim to be viable, the receiving party must have had a hand in inducing the transfer. “The remedy is available ‘if one man

has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass.’ ” *Parsa v State of New York*, 64 NY2d 143, 148 (1984), quoting *Miller v Schloss*, 218 NY 400, 408 (1916). However, it would also appear that a court is not to read the remedy too narrowly, nor to place undue restrictions in its application, because “[t]he action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it”, even though it is an action at law. *Parsa*, at 148.

In discussing the nature of the claim, the Court of Appeals noted that two divergent rules have emerged where a third party enters the picture, as it has in the present case. One is the “mistake of fact” doctrine, in which money paid under a mistake of fact may be recovered, even where the transferor was negligent, unless the receiving party has changed his position in detrimental reliance on the payment. The other is the “discharge for value” rule, under which a creditor of a given debtor, who has received a benefit from a third party in discharge of the debt, is under no duty to make restitution to that third-party transferor, even where the transferor made a mistake in parting with the benefit, if the creditor made no misrepresentations and did not have notice of the transferor’s mistake. *Banque Worms v BankAmerica Intl.*, 77 NY2d 362, *supra*, at 366-367; see, *Bank of New York v Spiro*, 267 AD2d 339, 340 (2d Dept. 1999).

In *Banque Worms*, the Court of Appeals applied the “discharge for value” rule in the area of wire money transfers, citing the policy goal of finality in business transactions. It noted that when “a beneficiary receives money to which it is entitled and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether

it may retain the funds.” *Id.*, at 373. In later cases, the Appellate Division, Second Department applied the “mistake of fact” doctrine (*Bank of New York v Spiro*, 267 AD2d 339, *supra*), and stated that the “discharge for value” rule “appears limited to mistakes of banks in making electronic wire transfers” under the Uniform Commercial Code, citing *Banque Worms. Fountoukis v Geringer*, 33 AD3d 756, *supra*, at 757.

In view of this most recent statement of the law from the Appellate Division, this motion should be denied.

The plaintiff has not alleged that the defendant had any role in inducing him to make the loan in the form Goldman requested – a check made out to the defendant – nor has he alleged that the defendant had notice that this was a loan from plaintiff to Goldman and/or that defendant knew that Goldman would be unable to repay, or had no intention to repay, the plaintiff. Because defendant too alleges that he was a creditor for much more than the \$150,000 received, the complaint should be dismissed if the “discharge for value” rule applies.

However, and while it is at least arguable that the *Fountoukis* court read the *Banque Worms* case too expansively (in that the Court of Appeals nowhere states or clearly implies that the “discharge for value” rule is not the law in New York beyond the world of electronic funds transfers), this Court is bound by that interpretation as a matter *stare decisis*. It therefore must apply the “mistake of fact” rule, under which the plaintiff may recover unless the defendant can demonstrate detrimental reliance, which is not even alleged in the answer, or in the Capone affidavit.

The Court notes the defendant’s citation to *Mendelsohn v Ferber*, 26 Misc 3d 190

(Sup Ct Suffolk County 2009), but the facts of that case are readily distinguishable. Moreover, this Court must respectfully disagree with the analysis given regarding the claim of money had and received, as it appears to rely on the "discharge for value" doctrine (in which the defendant's culpability is key), and does not evaluate the issue of detrimental reliance by the defendant, which is necessary under the "mistake of fact" rule the Appellate Division has held is the law in all but wire transfer cases.

Accordingly, under the generous standard of review to be applied to a complaint when a defendant moves for dismissal pursuant to CPLR 3211(a)(7), the motion should be and is denied.

The Court notes that a preliminary conference has been held and that a compliance conference in this Part is scheduled for May 27, 2010. In view of this determination, discovery should now proceed as called for in the preliminary conference order.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 29, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice
ENTERED

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FEB 02 2010
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