

**Bidnick v Bidnick**

2010 NY Slip Op 33494(U)

December 14, 2010

Supreme Court, Suffolk County

Docket Number: 23190-09

Judge: Peter Fox Cohalan

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INDEX # 23190-09  
 RETURN DATE: 1-6-10  
 MOT. SEQ. # 002

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

PRESENT:  
Hon. PETER FOX COHALAN

**COPY**

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 MARTIN BIDNICK and RENEE BIDNICK,

CALENDAR DATE: May 5, 2010  
 MNEMONIC: MD

Plaintiffs,

PLTF'S/PET'S ATTORNEY:

Ivars Berzins, P.C.  
 484 West Main Street  
 Babylon, NY 11702

-against-

ROBERT BIDNICK and SUSAN BIDNICK

DEFT'S/RESP ATTORNEY:

Finkelstein & Feil, LLP.  
 666 Old Country Road, Suite 210  
 Garden City, NY 11530

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion to dismiss \_\_\_\_\_;  
 Notice of Motion/Order to Show Cause and supporting papers 1-5; Notice of Cross-Motion and  
 supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 6-12; Replying  
 Affidavits and supporting papers 13-14; Other \_\_\_\_\_; and after hearing counsel in support of and  
 opposed to the motion it is,

**ORDERED** that this motion by the defendants to dismiss the plaintiffs' action pursuant  
 to CPLR §3211 (a)(5) and (7) on statute of limitations and statute of frauds grounds as well  
 as failure to state a cause of action because the purported "loan" was a gift is hereby denied  
 in its entirety.

The plaintiffs instituted this action seeking to recover an alleged loan of \$20,000.00  
 made to the defendants in or around March 11, 1988 for the defendants to purchase a home  
 at 64 Clinton Street in Babylon, Suffolk County on Long Island, New York. The plaintiffs are  
 the parents of the defendant Robert Bidnick and Susan Bidnick, the co-defendant, is Robert  
 Bidnick's wife. The plaintiffs claim that the loan was to be interest free until the plaintiff Martin  
 Bidnick reached the age of 65 on October 9, 1994 when interest would begin to accrue on the  
 loan at 7.25% until repaid. The plaintiffs claim the defendants made certain payments to them  
 of \$3,000.00 on February 27, 2002, \$1700.00 on April 15, 2002 and \$1,000.00 on December  
 24, 2006. The plaintiffs claim that the defendants now owe them over \$40,000.00 when  
 interest is included.

The alleged loan was not reduced to a written agreement though beginning on October  
 30, 2004 the plaintiffs, in a writing, stated "regarding our loan to you for the purchase of your  
 home..." and provided alleged payment requirements. These were continuing letters to the  
 defendants seeking repayment. The defendants deny both the existence of the debt and the  
 amount but do acknowledge that the plaintiffs made a gift of \$16,000.00 to the defendant  
 Robert Bidnick in 1988 to help purchase their home. They attach as evidence of the gift an  
 affidavit, dated February 5, 1988, from Renee Bidnick, one of the plaintiffs and mother of the  
 defendant, Robert Bidnick, acknowledging a gift of \$16,000.00 to Robert Bidnick which  
 provided that the "said funds are a bona fide gift and no repayment is expected or implied" and

allowing that the funds would be drawn from the account of Renee Bidnick at Coral Gables Federal at 2511 Ponce DeLeon Blvd., Coral Gables, Florida. The plaintiff Renee Bidnick, in an affidavit, dated December 16, 2009, denies the gift affidavit, dated February 5, 1988, was made by her and avers that she had never seen the gift affidavit, never signed it and never had an account with Coral Gables Federal. The monies are still due and owing and this lawsuit was thereafter commenced.

The defendants now move for dismissal of the plaintiffs' action pursuant to CPLR §3211 (a)(5) because the action may not be maintained as it is barred not only by the statute of limitations but also by the statute of frauds. They also argue that the plaintiffs have failed to state a cause of action because the alleged loan was actually a gift from the plaintiffs. The plaintiffs oppose the motion arguing that this is an open ended loan so the statute of limitations does not bar the present action seeking repayment, the statute of frauds does not apply and the alleged gift affidavit was not executed by the plaintiff, Renee Bidnick.

For the following reasons, the defendants' motion to dismiss the plaintiffs' action pursuant to CPLR §3211 (a) (5) and (7) is denied in its entirety.

### **Failure to state a cause of action**

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. **Frank v. DaimlerChrysler Corp.**, 292 AD2d 118, 741 NYS2d 9 (1<sup>st</sup> Dept. 2002); **Gruen v. County of Suffolk**, 187 AD2d 560, 590 NYS2d 217 (2<sup>nd</sup> Dept. 1992); **Moore v. Johnson**, 147 AD2d 621, 538 NYS2d 28 (2<sup>nd</sup> Dept. 1989); **Conroy v. Cadillac Fairview Shopping Center Properties**, 143 AD2d 726, 533 NYS2d 446 (2<sup>nd</sup> Dept. 1988). Further, the complaint should be liberally construed in the plaintiffs' favor and the facts alleged in the complaint should be assumed to be true. **P.T. Bank Central Asai v. ABN Amro Bank N.V.**, 301 AD2d 373, 754 NYS2d 245 (1<sup>st</sup> Dept. 2003); **Palazzolo v. Herrick, Feinstein, LLP**, 298 AD2d 372, 751 NYS2d 401 (2<sup>nd</sup> Dept. 2002); **Holly v. Pennysaver Corp.**, 98 AD2d 570, 471 NYS2d 611 (2<sup>nd</sup> Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. **McGill v. Parker**, 179 AD2d 98, 582 NYS2d 91 (1<sup>st</sup> Dept. 1992); **Marini v. D'Atolito**, 162 AD2d 391, 557 NYS2d 45 (1<sup>st</sup> Dept. 1990).

As noted by the Court in **Pace v. Perk**, 81 AD2d 444, 440 NYS2d 710 (2<sup>nd</sup> Dept. 1981) with regard to a motion to dismiss pursuant to CPLR §3211

" Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (**Denihan Enterprises v. O'Dwyer**, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (**Condon v. Associated Hosp. Service of New York**, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR

3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (CPLR 3013; Foley v. D'Agostino, 21 AD2d 60, 62-65, 248 NYS2d 121; Guggenheimer v. Ginzberg, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (Rovello v. Orofino Realty Co., 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

The Court's rules in reviewing a motion to dismiss pursuant to CPLR §3211 (a)(7) are straight forward. The Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. Guggenheimer v. Ginzburg, *supra*; One Acre Inc. V. Town of Hempstead, 215 AD2d 359, 626 NYS2d 226 (2<sup>nd</sup> Dept. 1995). Although the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by the plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (Rovello v. Orofino Realty Co., *supra*, 635, 389 NYS2d 314, 316). Here, the question of whether the alleged loan was a gift as the defendants contend or a loan as claimed by the plaintiffs, the fact issue raised is sufficient to withstand a motion to dismiss for failure to state a cause of action. The Court must accept the plaintiffs' averments as true including the plaintiffs' claim that the gift affidavit of Renee Bidnick is a forgery. While the defendants may ultimately prevail on a summary judgment motion, on a CPLR §3211 motion to dismiss the Court should not attempt to resolve a fact issue as to the question of a forgery without discovery. Thus, the motion to dismiss on the grounds of a failure to state a cause of action because the action is predicated on a gift as opposed to a loan is denied.

### Statute of Frauds

As to the defendants argument that the statute of frauds precludes enforcement of this alleged debt, that portion of their application is also denied for the reasons hereinafter stated. The statute specifically requires that

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged..."

if by its terms it is incapable of being performed within one year of its making. General Obligations Law (hereinafter GOL) §7-701(a)(1). Here, the plaintiffs tender nothing other than an alleged oral agreement to pay this debt owed by the defendants involving a "loan" for \$16,000.00 or \$20,000.00 made in 1988 which would be interest free until the plaintiff Martin Bidnick reached the age of 65 when interest at 7.25% would begin to accrue beginning on October 9, 1994.

Although it is true that the requisite memorandum to satisfy the statute of frauds may be pieced together out of several writings, it is imperative that the writings together refer to the same subject matter or transaction and **unequivocally** establish all the essential elements of a contractual relationship between the parties such as price, terms, parties and a description of the subject matter. **Travelco, Inc. v. Chain Locations**, 170 AD2d 939, 940 lv dismissed 78 NY2d 906, 566 NYS2d 763 (3<sup>rd</sup> Dept. 1991); **Rothvoss & Sons v. Estate of Neer**, 139 AD2d 37, 38-39, 530 NYS2d 331 (3<sup>rd</sup> Dept. 1988); **Bordeau v. Oakley**, 185 AD2d 417, 585 NYS2d 623 (3<sup>rd</sup> Dept. 1992). Additionally, in such a case, the signed writing by the party to be charged must establish a contractual relationship between the parties. **Bordeau v. Oakley**, *supra*. The mere receipt of letters by the defendants from the plaintiffs referring to an obligation to repay a debt of \$20,000.00 does not qualify as a writing or memorandum evidencing a contractual obligation. The presentation of letters in 2002, 14 years after the obligation or loan was made and unsubscribed by the defendants, does not qualify as a writing to satisfy the statute of frauds. The letters by Martin Bidnick are mere self serving statements sought to be used to preserve the claim of a debt owed, specifically denied by the defendants. See, GOL §5-701(b)(3)(c) and (d)

However, the loan was made in 1988 and by its terms required performance and repayment in full without any interest prior to 1994 when Martin Bidnick turned 65, otherwise interest would begin to accrue thereafter. This contractual obligation could have been intended to be performed within one year and thus would not require a written instrument. **Constantini v. Bimco Industries, Inc.**, 125 AD2d 531, 510 NYS2d 136 (2<sup>nd</sup> Dept. 1986). As noted in **Thurber Lumber Co. Inc v. Marcario**, 29 Misc3d 1220(A), 2010 WL 4540441, "As long as the agreement may be 'fairly and reasonably interpreted' as capable of performance within a year, the statute of frauds would not apply." Here, in the case at bar, the performance of repayment on the part of the defendants of the alleged "loan" was capable of being performed in the first year, however unlikely, and therefore the statute of frauds does not preclude the present action. See, **Moon v. Moon**, 6 AD3d 796, 776 NYS2d 324 (3<sup>rd</sup> Dept. 2004). Accordingly, the defendants' motion to dismiss on statute of frauds grounds is denied.

### Statute of Limitations

CPLR §213(2) specifically provides that an action based upon a "contractual obligation or liability" must be commenced within 6 years. Thus the statute of limitations imposes upon the plaintiffs a 6 year period within which to commence an action at the time the "cause of action accrues." In **Mundaca Inv Corp. v. Rivizzigno**, 247 AD2d 904, 668 NYS2d 854 (4<sup>th</sup> Dept. 1998), the Court citing to **Knapp v. Greene**, 79 Hun 264, 267, 29 NYS 350 (1894), stated that "The statute of limitations on a note is six years after the cause of action accrues (See, CPLR §213 [2]). A cause of action accrues for the purpose of setting the [statute of limitations] in motion as soon as the creditor, by his own act and in spite of the debtor, can make the [note] payable." Thus, here, the accrual of the action occurred upon the demand for repayment by the plaintiffs which date remains in doubt since the plaintiffs merely sent statements to the defendants of the amounts owed based upon the interest accruing. The question of when a demand for payment was made by the plaintiffs to the defendants, as opposed to an acknowledgment of the defendants' loan remains in doubt.

The defendants' argument that the "gift" [defendants] or "loan" [plaintiffs] required repayment on October 9, 1994 when the plaintiff Martin Bidnick turned 65 is unavailing since the note by plaintiffs averments did not become due on that date but merely alleged by its

terms that interest at 7.25% would start to accrue on the obligation. Even if the Court were to view the obligation as a demand note or having accrued after the 6 year limitation period expired, there were alleged partial payments made by the defendants to the plaintiffs. **Pomaro v. Quality Sheet Metal, Inc.**, 295 AD2d 416, 743 NYS2d 556 (2<sup>nd</sup> Dept. 2002). As concurring opinion noted in **Education Resources Institute, Inc v Piazza**, 17 AD3d 513, 794 NYS2d 65 (2<sup>nd</sup> Dept. 2005):

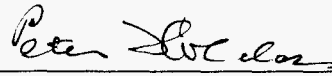
“The general rule is that a debtor’s partial payment of either principal or interest renews the statute of limitations and starts the six year period running anew (see **Skaneateles Sav. Bank v. Modi Assocs.**, 239 AD2d 40, 668 NYS2d 819).”

The payments by the defendants which have been acknowledged to have occurred on February 27, 2002 in the amount of \$3,000.00, April 15, 2002 in the amount of \$1700.00 and December 24, 2006 in the amount of \$1000.00 factually provide a basis on the issue of renewal of the 6 year limitations period. See, **Cognetta v. Valencia Developers, Inc.**, 8 AD3d 318, 778 NYS2d 80 (2<sup>nd</sup> Dept. 2004). Since the plaintiffs commenced this action on June 12, 2009 it falls within the 6 year period from the alleged December 24, 2006 partial payment on the debt owed. **Grant v. Marshall**, 307 AD2d 274, 762 NYS2d 280 (2<sup>nd</sup> Dept. 2003). While the defendants argue that these payments were only monies given to Richard Bidnick’s parents because they were in need of funds and were not repayments of any alleged debt, a fact issue again arises on the nature of these alleged “partial payments” and this warrants a denial of the motion to dismiss on statute of limitations grounds. The motion is denied in its entirety.

Accordingly, the defendants’ motion to dismiss pursuant to CPLR §3211 (a) (5) on statute of limitations grounds is also denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: December 14, 2010

  
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J.S.C.