

Melamed v Rosenthal
2011 NY Slip Op 32125(U)
July 21, 2011
Sup Ct, Nassau County
Docket Number: 8130/10
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

DR. SAMUEL MELAMED,

Plaintiff(s),

-against-

IRWIN M. ROSENTHAL and
SUZANNE ROSENTHAL,

Defendant(s).

ORIGINAL RETURN DATE: 04/15/11
SUBMISSION DATE: 05/20/11
INDEX No.: 8130/10

MOTION SEQUENCE #1, 2

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Plaintiff's motion for an order awarding him partial summary judgment against defendant Irwin M. Rosenthal ("Mr. Rosenthal") pursuant to CPLR 3212 on the first (breach of contract), third (moneys had and received) and fourth (unjust enrichment) causes of action on the grounds that defendant Mr. Rosenthal admitted liability in his deposition or, in the alternative, awarding him partial summary judgment against Mr. Rosenthal on the issue of liability in the aforementioned causes of action and setting the matter down for inquest on the issue of damages is determined below.

Defendants' cross-motion for partial summary judgment dismissing all claims alleged against defendant Suzanne Rosenthal ("Mrs. Rosenthal") and dismissing the claims against Mr. and Mrs. Rosenthal with regard to the \$50,000 loan made in July 2001 and the \$10,000 loan made in January 2004 on the grounds that these loans are barred by the Statute of Limitations is granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced

with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, *supra*).

In support of his motion for partial summary judgment, plaintiff submits his affidavit as well as the deposition of defendant Mr. Rosenthal, from which it appears that money was transferred from plaintiff to defendant between July 2001 and June 2007. Mr. Rosenthal's testimony acknowledges "there's some money due" to be paid back to plaintiff (Pl.'s Ex. D, p. 47). It is alleged that repayments of borrowed funds have not been made since July 2007. There are no triable issues of fact with respect to liability for a breach of the contract to borrow money, as both parties maintain defendant owes some amount of money to plaintiff. Accordingly, the matter will be set down for inquest to determine damages owed to plaintiff, if any.

A party alleging breach of contract must "demonstrate the existence of...a contract reflecting the terms and conditions of their... purported agreement" (*Mandarin Trading, Ltd. v. Wildenstein*, 16 NY3d 173 [2011]). The parties agree that their oral agreement provided that plaintiff would loan defendant money interest-free, and it was defendant's intention to pay the money back.

However, the oral agreement did not reflect specific terms and conditions of lending or repayment. Since the advances were made without a specific time of repayment, they were each payable on demand (*Seattle Pacific Industries, Inc. v. Golden Valley Realty Associates*, 54 AD3d 930 [2d Dept. 2008]). Pursuant to CPLR 213, plaintiff had six years from the execution of each loan to commence this action (*Id.* at 932; *Lynford v. Williams*, 34 AD3d 761,762 [2d Dept. 2006]). Since three of the loans were granted to defendant more than six years from the time this action was filed, the loans made by plaintiff in July 2001, March 2003 and January 2004 are time-barred. Loans subsequent to April 2004 are accordingly not time-barred. As to those loans, the parties differ on the amount due and owing to plaintiff, an issue of damages.

Plaintiff's contention that defendant's partial payments renewed each of the separate loans for purposes of the limitations period is without merit because defendant submits that certain repayments were for a particular loan (Pl.'s Ex. G; Pl.'s Affidavit, p. 7; Pl.'s Ex. D, pp.29, 30). Mere "proof of payment, without anything to show what account or for what reason the money was paid is of no avail to defeat the operation of the statute" (*Crow v. Gleason*, 141 NY 489 [1894]). Any repayment must be "accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor that more was due, so that a promise to pay the remainder may be inferred" if a lender is attempting to revive the statute of limitations period for purposes of initiating an action (*Id.*).

New York's General Obligations Law states that "the *only* competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions" is an "acknowledgment or promise *contained in a writing signed* by the party to be charged thereby" (General Obligations Law §17-101)(emphasis added). The "statutory insistence on a writing would...be controlling, and concededly, none of the promises allegedly made by defendant in this case were in writing," so the first three loans plaintiff extended to defendant are effectively time-barred. (*Scheuer v. Scheuer*, 308 NY 447, 451 [1955]).

As to the third cause of action for moneys had and received, plaintiff has not met his burden of proving a prima facie case. Plaintiff claims that "an action for money had and received is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another" (*see, Miller v. Schloss*, 218 NY 400, 406-407 [1916]; *see also, State v. Park*, 204 AD2d 531 [2d Dept. 1994]). This cause of action generally requires the procurement of said money through "the medium of oppression, imposition, extortion or deceit, or by the commission of a trespass" (*Miller v. Schloss, supra*).

Here, plaintiff acted voluntarily by lending defendant copious amounts of money with full knowledge that some of the previous loans had not yet been repaid. Plaintiff chose to continue lending money to defendant, even though plaintiff alleges defendant had outstanding debts at the time. "There was not in the transaction mistake, imposition, extortion or oppression. The entire transaction was covered and is controlled by the express agreement or understanding of the parties" (*Id.* at 408). A cause of action for money had and received is an obligation which the law creates in the *absence* of an agreement or intention of the person sought to be charged (*Id.*, emphasis added) and here, there is no such absence. Accordingly, plaintiff's motion for summary judgment on the third cause of action is denied.

To succeed on a claim of unjust enrichment, plaintiff must show: (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [defendant] to retain what is sought to be recovered" (*Paramount Film Distributing Corp. v. State*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). Here, defendants acknowledge plaintiff made requests for repayment that were not complied with. The withholding of the outstanding balance contributes to both defendant's benefit and plaintiff's detriment.

"Where the moneys of an outside third party add to the property of another, but also where the payment saves the other from expense or loss," a benefit resulting in unjust enrichment arises (*3105 Grand Corp. v. City of New York*, 288 NY 178, 181 [1942]). Defendant Mr. Rosenthal has not offered evidence that suggests anything other than agreement with plaintiff's assertion that money owed to plaintiff remained unpaid despite requests for repayment. Therefore, plaintiff's motion for summary judgment on the issue of liability on plaintiff's fourth cause of action is granted with damages to be determined at an inquest.

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The breach of contract cause of action cannot lie against Mrs. Rosenthal as she was not a party to the original lending agreement, and any assumption of liability for debt alleged by plaintiff is barred by the Statute of Frauds (McKinney's General Obligations Law § 5-701[a][2]). Plaintiff's allegation that Mrs. Rosenthal orally promised that the subject debt would be repaid is not sufficient to impose liability upon her as guarantor (*see, Bauer v. Amb's*, 144 AD 274 [2d Dept. 1911]). Section 5-701(a)(2) of the General Obligations Law provides in relevant part that an agreement "to answer for the debt...of another person" must be "in writing and subscribed by the party to be charged therewith." Accordingly, defendants' cross-motion for partial summary judgment dismissing the breach of contract claim alleged against defendant Mrs. Rosenthal is granted. The additional causes of action against defendant Mrs. Rosenthal based on theories of money had and received and unjust enrichment are similarly dismissed.

Plaintiff's "contention that the motion for summary judgment was premature is without merit. [He] failed to offer any *evidentiary basis* to suggest that discovery may lead to relevant evidence. The hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis to deny the motion (citations omitted)" (*Essex Ins. Co. v. Carpentry*, 74 AD3d 733, 734 [2d Dept. 2010] (emphasis added)). Although Mrs. Rosenthal is married to the man to whom plaintiff loaned money, plaintiff's evidence is insufficient to demonstrate that she had original involvement with the loans or that she personally had access to and benefitted from the monies lent by plaintiff to Mr. Rosenberg.

Based upon the foregoing, plaintiff's motion for partial summary judgment against defendant Mr. Rosenthal on the issue of liability with regard to plaintiff's first and fourth causes of actions is granted, with the issue of damages to be determined at an inquest. Plaintiff's motion for partial summary judgment against defendant Mr. Rosenthal on the third cause of action is denied. Defendants' cross-motion for partial summary judgment dismissing all claims alleged against defendant Mrs. Rosenthal is granted. Additional cross-motion by defendants dismissing claims against Mr. and Mrs. Rosenthal with regard to the \$50,000 loan made in July 2001 and the \$10,000 loan made in January 2004 on the grounds that these loans are barred by the Statute of Limitations is granted.

This matter is referred to the Calendar Control Part (CCP) for an inquest on the issue of damages to be held on August 29, 2011, at 9:30 a.m.

Plaintiff shall file a Note of Issue, together with a copy of this order, with the Nassau County Clerk and shall serve copies of same, together with proof of payment of any fees, upon the Calendar Clerk of this Court within twenty (20) days of the date of this order.

The directive with respect to the inquest is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer (JHO), or a Court Attorney/Referee, as he or she deems appropriate. A JHO or Court Attorney/Referee shall not be used, however, unless said JHO or Court Attorney/Referee has the power to hear and determine, and not merely hear and report (see CPLR Article 43).

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The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the inquest.

The caption of this action is amended to read as follows:

"DR. SAMUEL MELAMED,

Plaintiff,

-against-

IRWIN M. ROSENTHAL,

Defendant."

This decision constitutes the order of the court.

Dated: 7-21-11

HON THOMAS P. PHELAN
[Signature]
J.S.C.

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ENTERED
JUL 26 2011
NASSAU COUNTY
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