

Chodorow v Mendelson

2011 NY Slip Op 32829(U)

October 12, 2011

Supreme Court, New York County

Docket Number: 104871/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

JEFFREY CHODOROW,

Plaintiff,

-v-

BRAD MENDELSON,

Defendant.

INDEX No. 104871/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2

Answering Affidavits- Exhibits _____ 3, 4, 5

Replying Affidavits _____ 6

CROSS-MOTION: YES NO

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/12/11

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

✓

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----x
JEFFREY CHODOROW,

Plaintiff,

Index No.: 104871/11

-against-

DECISION

BRAD MENDELSON,

Defendant .

-----x
DONNA MILLS, J.:

Defendant moves, pursuant to CPLR 3211 (a) (1), (2), (3), (7), (10) and (c), to dismiss the complaint. Plaintiff cross-moves, pursuant to CPLR 3211 (c), for summary judgment, and, pursuant to CPLR 3025 (b), for leave to amend the complaint to: (1) add Valerie Mendelson as an additional defendant; (2) amend the caption to reflect defendant as Brad Mendelson a/k/a Charles Bradley Mendelson; and (3) add causes of action for breach of guarantee of contract, breach of contract naming plaintiff as third-party beneficiary, breach of implied covenant of good faith and fair dealing, fraud and unjust enrichment.

BACKGROUND

The complaint states that, pursuant to a promissory note, dated April 1, 2003, plaintiff lent defendant \$250,000.00 to enable defendant and his then-wife to purchase and renovate a house in Cannes, France. Plaintiff states that defendant agreed

[* 3]

to repay the loan, with interest, within two years but, despite defendant making sporadic payments, the full amount of the loan has yet to be repaid. The complaint further says that plaintiff has demanded payment from defendant, but that defendant has failed to repay the loan in full.

In his motion, defendant avers that there was no promissory note, but admits that, in a letter to plaintiff dated July 18, 2003, he agreed to repay the loan within two years; the letter does not mention any interest. This letter is attached to the motion as one of several exhibits, but the exhibits are unmarked by either letter or number. According to defendant's characterization of some other documents presented, which are in French, the loan was made by plaintiff's corporation to the French corporation that handled the loan and mortgage. The court notes that the document provided by defendant indicates that the lender is China Grill Management, Inc.

Defendant maintains that the complaint should be dismissed because plaintiff lacks the legal capacity to sue because he is not the lender, that the court lacks jurisdiction over the subject matter because the loan was executed in France and that, at the most, he could only be considered a guarantor based on his July 18, 2003 letter to plaintiff.

In his opposition to defendant's motion, plaintiff claims that the loan was made as a personal favor to defendant and, in

accordance with defendant's instructions, he completed two separate wire transfers, one for \$175,000.00 to the French corporation, and one for \$75,000.00 to defendant personally. It is noted that plaintiff does not include any documentary evidence of such wire transfers, but that defendant's motion's exhibits include a copy of a document with a letter from plaintiff instructing a "Madame Renee Langer-Netter" to release \$175,000.00 that she is holding in her escrow account to the French corporation and that defendant would be forwarding papers to her for her review. The court notes that the complaint fails to mention the French corporation at all, but the proposed amended complaint identifies it as equally owned by defendant and his then-wife. Cross Motion, Ex. C.

In his motion, plaintiff has included a document which he says was translated from French. The translation contains the notarized statement of the translator that it is a true translation, which plaintiff claims is a promissory note indicating plaintiff as the lender. Cross Motion, Ex. F. However, the court notes that this translation indicates the borrower as the French corporation.

In support of his contention that defendant owes him the sum claimed, plaintiff has provided a copy of the stipulation of settlement of defendant's divorce, which states, in pertinent part, that defendant is "the sole obligor on a note payable to

Jeffrey Chodorow in the amount of \$250,000." Cross Motion, Ex. G. The stipulation further states that the note "was signed on April 1, 2003 and procured for the purpose of borrowing additional funds to purchase and improve the French house," and that the "Note has been accruing interest at the rate of ten (10%) percent" Further, the stipulation states that, upon the sale of that house, "the Note plus any accrued interest" was to be "paid to Mr. Chodorow" from the proceeds of the sale. *Id.*

Plaintiff argues that summary judgment should be granted in his favor because the document that he asserts is the French promissory note identifies him as the lender, and defendant, in his letter and by divorce stipulation, admits that he owes the money to plaintiff. Further, plaintiff maintains that he should be granted leave to amend the complaint as noted above because, at this early stage in the proceedings, there could be no prejudice or surprise to defendant.

In opposition to defendant's motion, plaintiff asserts that, by failing to argue the statute of limitations in his motion, defendant has waived that objection to the present action; moreover, plaintiff avers that a statute of limitations defense would be unavailable since the note did not become due until July 29, 2005, and the present action was commenced within six years of that date. The court notes that defendant has not moved to dismiss the complaint based on the statute of limitations.

Further, plaintiff states that the documentary evidence provided by defendant fails to dispose of plaintiff's claim.

Plaintiff also argues that this court has jurisdiction over this matter and has jurisdiction over defendant who is domiciled in this state. In addition, plaintiff contends that defendant is at least a guarantor of the note and that he, plaintiff, is at least a third-party beneficiary of the divorce stipulation of settlement. Finally, plaintiff states that neither the French corporation nor China Grill Management, Inc. is a necessary party, since any determination in this court would not adversely affect the French corporation and because the "note" identifies plaintiff as the lender.

In opposition to the cross motion, defendant states that the complaint must be dismissed because it identifies defendant as the signatory of the promissory note and the documentary evidence positively establishes that defendant neither signed nor guaranteed that note.

It is defendant's position that, should the court decline to grant its motion, plaintiff's motion for summary judgment should also be denied because too many questions of fact exist precluding such relief, such as questions of credibility and the interpretation of the French documents.

With respect to that portion of plaintiff's cross motion seeking leave to amend the complaint, defendant states that such

leave should be denied for the following reasons:

1. Defendant's former wife never signed any papers regarding the loan and should not be joined as a party;

2. None of the proposed amendments seeks to add the French corporation as a defendant, and that corporation is a necessary party;

3. The proposed amendments claim that defendant is an unconditional guarantor whereas, at most, he is a guarantor for collection only;

4. Under both New York and French law, no action may be maintained against a guarantor of collection unless and until efforts have been made to collect from the borrower, who, defendant maintains, is the French corporation; and

5. There is no contract between plaintiff and defendant.

In addition to the foregoing, defendant claims that it was never the intention of the parties for the transfer to be a loan. In support of this claim, defendant poses allegations regarding criminal and fraudulent activities on the part of plaintiff aimed at defrauding plaintiff's creditors (notably, defendant does not assert that plaintiff intended to defraud him), which the court will not dignify by reiterating; however, the court notes that defendant's allegations appear only as part of his attorney's affirmation and his affidavit in support, but are otherwise unsupported.

Lastly, defendant maintains that there are viable defenses to this action which defendant, as the guarantor of collection, can assert on behalf of the French corporate borrower. Further, the promissory note states that it is to be interpreted according to French law.

In reply, plaintiff has provided a copy of a check from defendant to plaintiff, dated February 5, 2008, for \$6,249.99, with no indication as the reason for the check, and a second check, dated May 11, 2008, from defendant to plaintiff, in the sum of \$6,249.99, with a memo notation stating "Apr/May/June '08." This, argues plaintiff, is evidence of defendant's partial payment of the amount due under the promissory note. Therefore, plaintiff claims, he is entitled to summary judgment.

DISCUSSION

Defendant's motion to dismiss the complaint is denied, as is that portion of plaintiff's cross motion seeking summary judgment.

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or
 (2) the court has not jurisdiction of the subject matter of the cause of action; or
 (3) the party asserting the cause of action has not legal capacity to sue; or

* * *

(7) the pleading fails to state a cause of action; or
 (10) the court should not proceed in the absence of a

person who should be a party."

CPLR 3211 (c) states that:

"Evidence permitted; immediate trial motion; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

"the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

The documents and affidavits presented with these motions

raise too many material questions of fact to grant dismissal or judgment at this preliminary stage of the proceedings.

The parties have presented two documents in French, only one of which is translated into English, which each party claims proves his position. However, since the court cannot read one of them, the court is unable to determine the parties' rights. Moreover, in the French documents, one indicates that the lender is plaintiff, whereas the other designates China Grill Management, Inc. as the lender.

The parties have provided a letter from defendant in which he agrees to repay the loan, and the stipulation of settlement, signed by defendant and notarized, avers that defendant is solely responsible for a note owed to plaintiff in the amount of \$250,000.00, plus interest; however, the French note supplied with the motions does not mention any interest.

Plaintiff's affidavit says that the money was loaned to defendant and transferred to the French corporation at defendant's request, whereas defendant states that, at most, he only guaranteed collection of the debt. Summary judgment is precluded where material questions of fact are raised by conflicting affidavits and evidence. *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 226 AD2d 261 (1st Dept 1996). Moreover, summary judgment at this point is premature, as discovery has yet to take place. See *Wilson v Yemen Realty*

Corp., 74 AD3d 544 (1st Dept 2010).

Nor can defendant be granted dismissal based on the court's lack of jurisdiction over the subject matter, plaintiff's capacity to maintain the action, or the need to join a necessary party.

The court's jurisdiction for the enforcement of a debt is where the debtor is located. *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303 (2010). Since defendant is in New York, this court may entertain this action. Defendant's argument that the repayment of the loan must be adjudicated in France because that is where the documents were executed is unpersuasive, and, in contrast to defendant's assertions, the documents do not require that any dispute be determined in the French courts; they only require that French law be applied, which this court is capable of doing. Further, the stipulation of settlement, signed by defendant, was executed in New York and filed in this court, and that document is one of the documents in question as to the legitimacy of the cause of action. Therefore, this court has jurisdiction over the subject matter.

At this point, since plaintiff's name appears as the lender on one of the French documents, a letter has been produced written by defendant to plaintiff indicating defendant's intent to repay the money to plaintiff, and by the stipulation of settlement defendant has averred that he owes this debt to

plaintiff, plaintiff has standing to maintain this action. Although defendant seeks dismissal on plaintiff's alleged lack of capacity to sue, defendant's argument actually involves the issue of plaintiff's standing. The doctrine of standing is an element of the concept of justiciability, designed to ensure that a party seeking relief has a cognizable stake in the outcome. *Community Board 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148 (1994). Conversely, capacity to sue usually depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, a business corporation and so forth. *Security Pacific National Bank v Evans*, 31 AD3d 278 (1st Dept 2006) *affd in part, modified in part* 62 AD3d 512 (1st Dept 2009). In the case at bar, no argument has been posited that plaintiff is under some legal disability precluding his entertaining this action.

In addition, since the documents and affidavits are in conflict, the court cannot determine whether the French corporation needs to be added as a party. Moreover, whereas defendant asserts that the corporation needs to be added, he has provided no legal support for that assertion. Should discovery provide evidence that the French corporation is necessary to be joined, plaintiff may seek leave to amend the complaint to join it at such time.

Based on the foregoing, defendant's motion and that portion

of plaintiff's motion seeking summary judgment are denied.

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.*

(83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

Plaintiff's cross motion seeking leave to amend the complaint is granted in part and denied in part, without prejudice.

That portion of plaintiff's motion seeking to amend the caption to reflect defendant as "Brad Mendelson a/k/a Charles Bradley Mendelson" is granted, since there is no prejudice or surprise to defendant by allowing such amendment. *Post v County of Suffolk*, 80 AD3d 682 (2d Dept 2011).

That portion of plaintiff's motion seeking to add Valerie Mendelson as an additional defendant is denied since, at this time, no evidence has been presented that she is in any way responsible for this debt and the only document bearing her name, the divorce stipulation of settlement, states that she is not so

obligated.

That portion of plaintiff's motion seeking leave to add a cause of action for breach of guarantee of contract is granted, since defendant admits that he might be a guarantor of collection.

That portion of plaintiff's motion seeking leave to add a cause of action for breach of contract as a third-party beneficiary is denied.

To maintain a cause of action as a third-party beneficiary, a party must demonstrate that he or she was an intended beneficiary of the contract, not merely an incidental beneficiary. The agreement that forms the basis of plaintiff's argument is the stipulation of settlement entered into by defendant and his ex-wife for the purpose of concluding divorce proceedings, and the alleged benefit to plaintiff is not immediate so as to render him an intended beneficiary. *Alicea v City of New York*, 145 AD2d 315 (1st Dept 1988). Therefore, this cause of action is without merit.

That portion of plaintiff's motion seeking to add a cause of action for breach of the implied covenant of good faith and fair dealing is denied.

As stated by the court in *The Hawthorne Group, LLC v RRE Ventures* (7 AD3d 320, 323 [1st Dept 2004]),

"A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained

where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' [citations omitted]."

Since all of plaintiff's allegations for this cause of action in the proposed amended complaint consist of alleged breaches of the agreements, the damages are only those resulting from a breach of contract.

The portion of plaintiff's motion seeking leave to add a cause of action for fraud is denied.

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud' (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994])."

Not only has plaintiff failed to articulate a cause of action for fraud with sufficient specificity, but the mere assertion that defendant did not intend to honor his contractual obligations does not convert a cause of action for breach of contract into one for fraud. *767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 (1st Dept 2004); *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248, 249 (1st Dept 1997)

Lastly, that portion of plaintiff's motion seeking leave to

add a cause of action for unjust enrichment is granted.

Generally, the existence of a valid contract bars a cause of action in quantum meruit. *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d at 324; see also *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1st Dept 2002). However, in the case at bar, since a question exists as to whether a valid contract was ever formed between the parties, this cause of action may be added so as to avoid defendant being unjustly enriched by receiving the benefit of plaintiff's money which plaintiff did not intend to be a gift.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion is denied; and it is further

ORDERED that the branch of plaintiff's cross motion seeking summary judgment is denied; and it is further

ORDERED that the branch of plaintiff's cross motion seeking leave to amend the complaint is granted, in part, as follows:

leave is granted to add a cause of action for unjust enrichment and the caption is amended as indicated below; and it is further

ORDERED that the action shall bear the following caption:

JEFFREY CHODOROW,

Plaintiff,

-against-

BRAD MENDELSON a/k/a/ CHARLES

BRADLEY MENDELSON,

Defendant.

It is further

ORDERED that to this extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 11/18/11, 2011, at 10:00 A.M.

Dated: 10/12/11

ENTER:

Donna Mills

Donna Mills, J.S.C.

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK