SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x **TRIAL/IAS PART: 20**

CHARLES B. WANG,

Plaintiff,

NASSAU COUNTY

Index No: 001429-11
Motion Seq. No: 1
Submission Date: 9/23/11

-against-

BRIAN MULLANEY,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavits in Opposition and Exhibits.....x
Reply Memorandum of Law in Further Support.....x
Correspondence dated September 26, 2011.....x

This matter is before the Court for decision on the motion filed by Plaintiff Charles B. Wang ("Wang" or "Plaintiff") on July 18, 2011 and submitted on September 23, 2011. The motion was the subject of oral argument before the Court on October 6, 2011. For the reasons set forth below, the Court grants the motion.

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212(a), awarding summary judgment to Plaintiff on the Complaint.

Defendant Brian Mullaney ("Mullaney" or "Defendant") opposes the motion.

B. The Parties' History

The Complaint (Ex. A to McEntee Aff. in Supp.) alleges as follow:

On or about February 4, 2005, Defendant executed and delivered to Plaintiff a demand promissory note ("Note") in the principal amount of $500,000 ("Principal Amount") (Ex. C to McEntee Aff. in Supp.). Plaintiff is, and at all times was, the holder and payee of the Note.

Pursuant to the Note, Defendant promised and agreed to pay Plaintiff interest at the annual rate of five (5%) percent on the Principal Amount during the period that the Note remains unpaid. The Note further provides that Defendant waived presentment, demand, protest, notice of protest and notice of dishonor of the Note.

Plaintiff alleges that Defendant has made no payments in reduction of the Principal Amount, and Defendant owes to Plaintiff the Principal Amount of the Note, with accrued interest. Plaintiff seeks a money judgment in the Principal Amount of $500,000, together with interest as provided in the Note.

In his Verified Answer ("Answer") (Ex. B to McEntee Aff. in Supp.), Defendant asserted ten (10) Affirmative Defenses. In the Tenth Affirmative Defense, which is the focus of Defendant's opposition to Plaintiff's motion, Defendant asserts that Plaintiff "agreed to not collect or enforce the subject Note and released Defendant from his payment obligations."

In his Affidavit in Support of the instant motion, Wang affirms that he has known Defendant professionally for more than 20 years. In or about early 2005, Wang agreed to make a loan ("Loan") to Defendant in the amount of $500,000, to be repaid on demand. In connection with the Loan, Plaintiff gave to Defendant the sum of $500,000 and, in exchange, Defendant executed and delivered the Note to Plaintiff. Plaintiff, at all times, has been the holder and payee of the Note, and the Note has not been assigned, forgiven or released.

The Note provides that Defendant is obligated to pay interest at the annual rate of 5 (5%) percent on the Principal Amount during the period the Note remains unpaid. There have been no payments of interest, and the entire Principal Amount remains unpaid. In the Note, Defendant waived presentment, demand, protest, notice of protest and notice of dishonor. The entire Principal Amount of the Note is now due, together with interest from February 4, 2005.

In opposition, Defendant affirms that, for 20 years, he provided marketing and related services for Wang and his entities ("Other Businesses") which include but are not limited to Computer Associates, the Charles B. Wang Foundation and real estate companies. Plaintiff

submits that he was "one of Wang's right-hand men, one of the most trusted and valued members of Wang's team" (Mullaney Aff. in Opp. at ¶ 2).

In February of 2005, Wang made the Loan to Defendant. At that time, Defendant's only salary was from his work with a non-profit entity founded by the parties, and Defendant affirms that his salary was "far less than what I had been accustomed to earning" (Mullaney Aff. in Opp. at ¶ 4). In addition to this employment, Mullaney continued to provide services to the Other Businesses, and he asked Wang for an equity interest in the Other Businesses. Mullaney affirms that Wang agreed to provide Mullaney, and other close advisors ("Advisors"), with equity interests that Wang described as "virtual stock" in the Other Businesses (*id.* at ¶ 6). Under this alleged agreement ("Offer"), Mullaney could select which entity(ies) he wished to have an interest in, and he was required to maintain that interest for a period of years before cashing out. Wang allegedly made the representation that each person's interest would be worth approximately $5 million within approximately five (5) years. Defendant affirms that Wang and his Advisors, including Mullaney, attended several meetings regarding this alleged Offer, at which time representatives of Wang made "sales pitches" designed to convince the Advisors to invest their "virtual stock" in the Other Businesses (*id.* at ¶ 7).

Defendant alleges, however, that in July of 2006, Wang "pulled an about-face" (Mullaney Aff. in Opp. at ¶ 8), and surmises that this occurred because Wang's relationship with one of the Advisors had soured and resulted in contentious litigation between the two. Wang told the Advisors that the Offer was no longer being extended, resulting in what Defendant describes as a "heated exchange" between Plaintiff and Defendant. Defendant provides an email exchange between Wang and Defendant in July of 2006 (Ex. D to Mullaney Aff. in Opp.). Wang's email makes no specific reference to the Offer; Defendant's email includes Defendant's statements that 1) he was "startled" by what Wang had said; 2) "deal or no deal, I want you to know that working with you for 19 years has been an honor and an experience I wouldn't trade for anything;" and 3) he feels lucky to run the non-profit entity for which he was working, and appreciated Wang's financial help "which makes it possible for me to do so."

Defendant submits that Wang "felt bad about reneging" on the Offer (Mullaney Aff. in Opp. at ¶ 9) and, as a result, agreed to forgive the Loan. Mullaney outlines comments allegedly made to him by Bob Bell ("Bell"), Wang's accountant, discussing the forgiveness of the Loan, and the planned documentation of that forgiveness. Mullaney does not provide an affidavit of

Bell, or provide facts that would permit the Court to conclude that these assertions are other than hearsay.

Mullaney suggests that the instant action is motivated by Wang's desire to take over the entity that employs Mullaney. Mullaney affirms that Wang announced his plans to close down Mullaney's employer, and direct its assets into a fund to be controlled by Wang. Due to negative reaction to that proposed move, Wang subsequently cancelled the proposed merger.

In her Affidavit in Opposition, Kristen Mullaney, Defendant's wife, affirms that Defendant recounted to her details of 1) the Offer, 2) Wang's reneging on the Offer, and 3) Defendant's conversations with Bell.

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to summary judgment by producing the Note and submitting evidence that Defendant failed to make payments in compliance with its terms. Plaintiff contends, further, that Defendant has failed to come forward with evidentiary proof of a factual issue requiring a trial of this matter. Thus, Plaintiff is entitled to judgment against Defendant in the Principal Amount, with interest, costs and disbursements.

Defendant opposes Plaintiff's motion, submitting that there are factual disputes making summary judgment inappropriate. Defendant argues, in the alternative, that he should be permitted to conduct discovery on issues including Plaintiff's alleged Offer, and his reneging on that Offer. Defendant cites *Park Associates v. Crescent Park Associates, Inc.*, 159 A.D.2d 460 (2d Dept. 1990) in support of his contention that there are conflicting statements that give rise to a question of fact, precluding summary judgment.

In reply, Plaintiff submits that Defendant has failed to raise a triable issue of fact in light of the fact that 1) pursuant to Uniform Commercial Code ("UCC") § 3-605, a promissory note may not be forgiven or cancelled orally; 2) assuming *arguendo* that Defendant contends that Plaintiff intended to make a gift to Defendant by forgiving the Note, Defendant has failed to come forward with evidence of a completed gift; 3) Defendant has failed to offer evidence that the Note was discharged for executed consideration, particularly in light of Defendant's contention that he never received any "virtual stock," which was allegedly the consideration for the discharge of the Note; and 4) Defendant has failed to offer competent evidence that the Note was forgiven in light of the fact that a) the statements by Bell are hearsay on which the Court may not rely in concluding that an issue of fact exists; b) the statements of Kristen Mullaney are

hearsay for which no recognized exception exists; and c) Defendant has provided no corroborating written evidence to support his "self-serving hearsay assertion" (Reply Mem. at p. 9) that Plaintiff orally forgave the Note.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Promissory Note

To establish *prima facie* entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms. *Larry Lawrence IRA v. Exeter Holding Ltd.*, 84 A.D.3d 1175, 1176 (2d Dept. 2011), quoting *Lugli v. Johnston*, 78 A.d.3d 1133, 1135 (2d Dept. 2010).

C. Forgiveness of Promissory Note

UCC § 3-605, titled "Cancellation and Renunciation," provides as follows:

> (1) The holder of an instrument may even without consideration discharge any party
>
> (a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

The Uniform Commercial Code does not permit oral cancellation of a promissory note. *Matter of Goggins*, 227 A.D.2d 481, 482 (2d Dept. 1996), citing UCC §§ 3-104 and 3-605. *Accord, Grant v. Marshall*, 307 A.D.2d 274 (2d Dept. 2003), citing *Matter of Goggins*, *supra* and UCC §§ 3-104 and 3-605. *See also Community National Bank and Trust Company v. Gold*, 45 A.D.2d 947 (1st Dept. 1967) (promissory note may not be effectively canceled by a "simple oral statement," citing UCC § 3-605). Moreover, while UCC § 3-601(2) does permit a party to be "discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money," an oral agreement to discharge a debt must be based on an executed consideration. *Matter of Goggins*, *supra*, quoting *Conte Cadillac v. C.A.R.S. Purch. Serv.*, 126 A.D.2d 621, 623 (2d Dept. 1987).

C. Gift

The elements necessary for a valid *inter vivos* gift are 1) intent of the donor to make an irrevocable present transfer of ownership, 2) physical or constructive delivery, sufficient to divest the donor of dominion and control over the property, and 3) acceptance of the gift by the donee. *Chiaro v. Chiaro*, 213 A.D.2d 369, 370 (2d Dept. 1995), *app. den.*, 86 N.Y.2d 708 (1995), citing *Gruen* v. Gruen, 68 N.Y.2d 48 (1986). In *Matter of Goggins*, *supra*, the Second Department directed respondent to repay the amount of the promissory note pursuant to its terms in light of the fact that 1) it was uncontroverted that the decedent never executed any agreement to cancel respondent's obligation under the note; and 2) assuming *arguendo* that the decedent had the requisite donative intent to make a gift of cancellation to respondent, the record established that no delivery of the cancellation was ever effected by decedent. 227 A.D.2d at 482, citing *Gruen*.

D. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for summary judgment based on the Court's determination that Plaintiff has established its right to judgment on the Note by producing the Note, which contains Defendant's unequivocal and unconditional obligation to repay, and the failure by the Defendant to pay in accordance with the Note's terms. The Court concludes,

further, that Defendant has failed to raise an issue of fact that would defeat Plaintiff's right to judgment in light of the fact that 1) the law does not permit the oral cancellation of the Note, and Defendant has produced no writing supporting the purported cancellation; 2) assuming *arguendo* that Defendant has alleged an oral agreement to discharge the debt represented by the Note, he has not produced evidence of consideration supporting that agreement; and 3) Defendant has not established the elements of a gift, particularly in light of the absence of any evidence that Wang surrendered or delivered the Note to Defendant. In reaching these conclusions, the Court has disregarded the affirmations regarding statements allegedly made by Bell on the grounds that they are hearsay, and there does not appear to be a basis for their admissibility under any exception to the hearsay rule. In addition, the emails provided by Defendant provide no evidence of Plaintiff's intention to cancel the Note.

The Court concludes that the case of *Park Associates v. Crescent Park Associates, Inc.*, cited by Defendant, does not compel a different result. In *Park Associates,* plaintiff sought to establish that defendant's obligation to repay the debt was revived by a written acknowledgment of the debt, to defeat defendant's assertion of the statute of limitations as a bar to plaintiff's action on a promissory note. 159 A.D.2d at 461. In an effort to establish the applicability of that exception to the statute of limitations, plaintiff produced writings signed by the defendant as an officer of the corporation which "alternatively referred to the defendants' 'outstanding obligation,' proposed a method of satisfying the debt by allowing the plaintiff to participate in a mortgage held by the corporate defendant, *or requested that the plaintiff forgive the debt* [emphasis added]." *Id.* at 460-461. In opposition, defendants asserted that representatives of the plaintiff and defendant corporation had a meeting at which time the plaintiff agreed to forgive the debt in order to earn a greater profit on another transaction between the parties. *Id.* at 462. The Second Department concluded that the conflicting statements made by the parties in their affidavits gave rise to a question of fact that precluded summary judgment, specifically whether the plaintiff had forgiven the debt. *Id. Park Associates* is thus distinguishable because it involved a writing, proferred by the plaintiff seeking repayment on the promissory note, that included a request that the plaintiff forgive the debt. In the matter *sub judice*, on the other hand, Defendant has produced no writing, and has not suggested that discovery will uncover a writing, evidencing Plaintiff's intent to cancel the Note.

In light of the foregoing, the Court grants Plaintiff's motion and awards Plaintiff

judgment against the Defendant in the sum of $500,000, together with pre-judgment interest at the rate of 5% per annum from February 4, 2005, and costs and disbursements.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY
November 15, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.

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ENTERED
NOV 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE