Ostwald v Ostwald
2011 NY Slip Op 33808(U)
July 1, 2011
Sup Ct, New York County
Docket Number: 115899/2010
Judge: Deborah A. Kaplan

[* 1]

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

PRESENT: HON. DEBORAH A. KAPLAN PART 20

Index Number : 115899/2010
OSTWALD, DAVID
VS
OSTWALD, DAVID H.
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION(S) AND CROSS-MOTION(S) DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION/ORDER OF EVEN DATE.

FILED

JUL 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/30/11

Deborah A. Kaplan
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 29th day of June, 2011

PRESENT: HON. DEBORAH A. KAPLAN

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DAVID OSTWALD, as Executor of the Estates of MARTIN OSTWALD and LORE OSTWALD,

Plaintiffs,

-against-

DAVID H. OSTWALD and KERSTEN OSTWALD,

Defendants.

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Decision and Order
Motion Seq.: 002
Index No. 115899/2010

Recitation as required by C.P.L.R. 2219(a), of the papers considered in the review of Defendant's Notice of Motion to, *inter alia*, reargue and renew this Court's order dated March 1, 2011, and, upon reargument, to vacate the notice of discontinuance and dismiss the action.

Papers	Numbered
Defendant's Notice of Motion and Exhibits:	1-6, 1-15
Plaintiff's Affirmation in Opposition and Exhibits:	1-10
Defendant's Reply Affirmation:	1-12

In this estate action to recover for repayment of a loan, defendant Kersten Ostwald seeks leave to reargue and renew this Court's order dated February 28, 2011, which denied as moot her application to both dismiss the plaintiff's complaint against her with prejudice and to grant her an award of attorney's fees and sanctions, since plaintiff filed a notice of discontinuance. If defendant's application to reargue and renew is granted, she also requests the Court 1) vacate the

notice of discontinuance; 2) treat the dismissal motion as one for summary judgment pursuant to CPLR 3211(c); 3) dismiss the action with prejudice pursuant to CPLR 3211(a)(1) and (a)(5) due to documentary evidence and the expiration of the statute of limitations; and, 4) for an award of counsel fees and sanctions. Alternatively, she requests that the Court consolidate this action with the pending matrimonial action under Index Number 310357/2008, David H. Ostwald v. Kersten Ostwald. Plaintiff David H. Ostwald opposes the motion.

This action was commenced by the service of a summons and complaint on December 10, 2010, and seeks repayment of a loan. Plaintiff David H. Ostwald is the executor of the estates of the decedent-plaintiffs, his parents, Martin Ostwald and Lore Ostwald, and he also is named as a defendant in this action with his wife, Kersten Ostwald. Martin and Lore Ostwald both passed away, respectively, on April 10, 2010 and May 14, 2010. The complaint alleges that the decedents loaned the sum of $150,000 to their son and his wife on or about March 1, 1994. The complaint also alleges that the structure of the loan agreement was confirmed in a letter from the decedents to the defendants, dated March 9, 1994, which acknowledged the oral loan agreement and simultaneously agreed to forgive $30,000 of the total debt, reducing the outstanding balance owed by defendants to $120,000. The letter is not signed by defendants, but only by the decedents, and it states that the loan is repayable upon demand. The complaint further alleges that David, as executor of the wills of the decedents, made a demand upon himself and Ms. Ostwald for repayment of the loan, and defendants have refused to pay.

On or about January 5, 2011, defendant Kersten Ostwald served and filed a motion to dismiss the underlying action and, following a stipulation to extend the time to respond, plaintiff filed a notice of discontinuance on February 18, 2011. Accordingly, on February 28, 2011, the Court denied the motion to dismiss as moot, stating "[t]he parties by stipulation have

discontinued this action." Thereafter, the instant application ensued.

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the court, and may be granted only upon a showing that the court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law in its earlier decision (CPLR 2221 [d] [2]; *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 58 AD3d 657 [2d Dept 2009]; *see also Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). "'A motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior determination"'" (*Prinz v New York State Electric and Gas*, 82 AD3d 1199, 1199 [2d Dept 2011], quoting *Jackson Heights Care Center, LLC v Bloch*, 39 AD3d 477, 480 [2d Dept 2007], quoting CPLR 2221 [e] [2]). It also must state a "'reasonable justification for the failure to present such facts on the prior motion'" (*Renna v Gullo*, 19 AD3d 472 [2d Dept 2005] [citations omitted]).

Here, the defendant argues that renewal is appropriate based on the Court's mistaken belief and misapprehension of a relevant fact, i.e., that the parties had stipulated to discontinue the action when they had not in fact done so. Rather, the plaintiff had unilaterally filed the Notice of Discontinuance in an untimely manner, according to the defendant.

Pursuant to CPLR 3217(a)(1):

> any party asserting a claim may discontinue it without an order by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court.

This is in contrast to CPLR 3217(a)(2) which allows for attorneys of record for all parties to discontinue at any time, before the case is submitted to the Court or jury, by stipulation. Here,

the order of February 28, 2011 provides that the parties discontinued by stipulation, but in actuality, it was by notice of discontinuance. As this fact was incorrect in the original order, the Court grants reargument of the order of February 28, 2011.

Upon reargument, the Court notes that the complaint was served and filed in this action on December 10, 2010, and the notice of discontinuance was filed on February 18, 2011. Hence, under CPLR 3217(a)(1), a notice of discontinuance may only be filed within 20 days after the complaint was served, or by December 30, 2010, since this is the earlier of the two possible dates provided for by the statute. Mr. Ostwald argues that the motion to dismiss and subsequent stipulations extending the briefing schedule on the motion extended the time to discontinue by notice. However, plaintiff's right to discontinue an action is based upon both serving a pleading and honoring the time frames of CPLR 3217(a). *Giambrone v. Giambrone*, 140 AD2d 206 (1st Dept. 1988). Accordingly, plaintiff's notice of discontinuance was untimely, and is vacated.

Turning to defendant's motion to dismiss, plaintiff argues that the Court's sole inquiry on a motion pursuant to CPLR 3211(a)(7) should be whether the facts alleged in the complaint fit within any cognizable legal theory, and not whether there is evidentiary support for the complaint. However, defendant's motion is not one to dismiss for failure to state a cause of action as plaintiff alleges, but rather to dismiss due to the expiration of the statute of limitations, pursuant to CPLR 3211(a)(5). Specifically, Ms. Ostwald argues that the action should be dismissed as violative of the statute of limitations, as the loan—if, in fact, the $120,000 given to her and the plaintiff was a loan[1]—was given over seventeen years ago, and the decedents never made a demand for payment. Further, she alleges that she never received a copy of the March 9,

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[1] It should be noted that Ms. Ostwald avers that the decedents referred to the loan as a gift and that no promissory note was ever signed.

1994 letter until approximately two years ago, upon the commencement of the pending matrimonial action between the defendants. Plaintiff, in opposition, argues that the statute of limitations may be tolled by written acknowledgment of an existing debt, or by partial payment of the debt. However, he adduces no evidence that either method of tolling the statute of limitations exists here.

Regarding motions to dismiss for the expiration of the statute of limitations, the First Department recently rejected an argument that "unless the court gives CPLR 3211(e) notice of its intention to do so, it may not consider non-documentary evidentiary materials for fact-finding purposes on a motion to dismiss pursuant to CPLR 3211(a)(5)." *Suss v. New York Media*, 69 AD3d 411, (1st Dept. 2010). Therefore, the Court will consider the evidence proffered by the defendant in support of her motion to dismiss based on a statute of limitations violation.

Pursuant to Uniform Commercial Code § 3-122, a lawsuit on a loan repayable on demand must be commenced within six (6) years from the date of the note or the date it was issued. The statute of limitations to recover on a promissory note is also six (6) years. CPLR § 213(2). Here, even assuming, *arguendo*, that there was a valid and enforceable loan agreement as evidenced by the March 9, 1994 letter, the loan was issued over seventeen years ago, and the statute of limitations has expired. Plaintiff has raised no triable issue as to whether there has been partial payment or written acknowledgment of the debt to toll the statutory period. *See Schleifer v. Schlass*, 303 AD2d 204 (1st Dept. 2003). Therefore, the present action is dismissed with prejudice, pursuant to CPLR 3211(a)(5).

Defendant also asks this Court to treat her dismissal motion as one for summary judgment. Upon review of the parties' submissions, the parties have laid bare their proof and have charted a summary judgment course. *See Rich v. Lefkovits*, 56 NY2d 276 (1982); *Schultz v.*

Estate of Sloan, 20 AD3d 520 (2d Dept. 2005); *Singer v. Boychuk*, 194 AD2d 1049 (3d Dept. 1993). As such, the Court will treat the motion as one for summary judgment.

In the first instance, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, adducing sufficient evidence to eliminate any material issue of fact. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). The burden then shifts to the party opposing the motion, who must submit proof in admissible form sufficient to require a trial of the material issues of fact. *See Roth v. Barreto*, 289 AD2d 557 (2d Dept. 2001). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact. *See Zuckerman v. City of New York*, 49 NY2d 557 (1980). Here, the defendant has made a prima facie showing that she is entitled to a judgment as a matter of law, based on the evidence that the statute of limitations on any loan repayment application has elapsed, and the plaintiff has failed to raise any triable issue of fact. Accordingly, the defendant's motion for summary judgment is granted.

Lastly, defendant seeks an award of attorney's fees and an imposition of sanctions in connection with the instant application. Defendant alleges that the present action was motivated by a desire to harass her, and that the instant action is frivolous. Conduct is frivolous if the contentions are "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, or is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 NYCRR 130-1.1(c). Here, the conduct of plaintiff and his counsel do not reach the high standard necessary to impose sanctions.

Therefore, upon the facts presented and the applicable law, it is hereby:

ORDERED, that defendant's motion for reargument of the Feb. 28, 2011 order of this

Court is granted, and it is further

ORDERED, that upon reargument, defendant's motion to vacate the notice of discontinuance is granted, and it is further

ORDERED, that defendant's motion to dismiss the action for the expiration of the statute of limitations is granted, and the action is dismissed with prejudice, and it is further

ORDERED, that defendant's motion to consolidate this action with the pending matrimonial action is denied as moot, and it is further

ORDERED, that defendant's application for an award of attorney's fees and an imposition of sanctions is denied, and it is further

ORDERED, that counsel for the defendant is directed to serve the within order, with Notice of Entry, within ten (10) days of entry, upon counsel for the plaintiff.

This constitutes the Decision and Order of the Court.

ENTER:

HON. DEBORAH A. KAPLAN
J.S.C.