SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT: [redacted] Barbara Jaffe PART 12
Justice

Index Number : 101973/2009
LOT 1555 CORP.
vs
NAHZI, FRON
Sequence Number : 010
SUMMARY JUDGMENT

INDEX NO. 101973/09
MOTION DATE 2/6/13
MOTION SEQ. NO. 010

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 86 to 86-17

Answering Affidavits — Exhibits ____ | No(s). 87 to 87-4, 88

Replying Affidavits ____ | No(s). 92, 23 88-1

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 6/18/13

BJ
____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

LOT 1555 CORP., GERALD LIEBLICH, and HASAN BIBERAJ,

Plaintiffs,

-against-

FRON NAHZI, f/k/a FRON NAZI,

Defendant.

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Index No. 101973/09

Subm.: 2/20/13
Motion Seq. No. 10

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiffs:
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By notice of motion dated December 23, 2011, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on defendant's counterclaim. Defendant opposes.

I. BACKGROUND

On February 13, 2009, plaintiffs commenced the instant action with the filing of a summons and verified complaint, alleging that on November 20, 2000, they loaned defendant $165,000 so that he could purchase an apartment, that defendant has not repaid them despite their demands for same, and that they are entitled to $165,000 plus interest from him. (Affirmation of Edward S. Rudofsky, Esq., dated Dec. 23, 2011 [Rudofksy Aff.], Exh. A-1).

Before serving his answer, defendant moved for an order dismissing the complaint, asserting, *inter alia*, that the action was untimely as it was commenced more than six years after the loan was made. (*Id.*, Exh. B-1). In an affidavit submitted in support of the motion, defendant admitted to having borrowed $165,000 from plaintiff Hasan Biberaj in 2000 but claimed that he

was not required to repay him until property located at 1555 Bruckner Boulevard, in which he had an ownership interest, sold. (*Id.*). By decision and order dated November 20, 2009, the justice previously presiding in this part denied the motion, determining, *inter alia*, that as 1555 Bruckner Boulevard was sold on April 14, 2005, and as defendant's obligation to repay Biberaj arose on that date, the action was timely commenced. (*Id.*).

On or about December 11, 2009, defendant joined issue with service of his answer and verified counterclaim. (*Id.*, Exh. A-2). In his third affirmative defense, he alleges that "[o]ne or more of the plaintiffs is indebted to me for sums in excess of the amount claimed. Such sums should be set off against the amount, if any, to which the plaintiffs may be found to be entitled." (*Id.*). In his counterclaim, he alleges that "[o]ne or more of the plaintiffs is indebted to me in excess of $165,000 for unpaid commissions from the sale of real property, unpaid returns on investments, and unpaid loans." (*Id.*).

At an examination before trial (EBT) held on May 5, 2010, defendant testified that in 1993, he loaned $50,000 to Adam & Peck (A&P), a corporation owned by plaintiffs Biberaj and Gerald Lieblich that managed parking lots, in exchange for a 37.5 percent ownership interest in two such lots and repayment of the loan within a year. (*Id.*, Exh. D). The following year, he loaned $40,000 to New West Management (New West), a second corporation owned by Biberaj and Lieblich engaged in parking lot management, in exchange for a 10 percent interest in a parking lot. (*Id.*). According to him, Biberaj and Lieblich orally promised that he would receive $3,000 to $4,000 monthly in returns on these investments, but as they never paid them, in December 1994, they agreed that the $90,000 he had invested in A&P and New West would be "moved" to Lot 1555, thereby providing him with a 25 percent ownership interest in it. (*Id.*). He

denied, however, that he forfeited his interests in A&P and New West or his right to collect on the $50,000 loan as a result of this agreement. (*Id.*).

He additionally testified that in late 1995 or early 1996, after he had obtained his real estate brokerage license, he started working for plaintiffs at an entity known as Broadway West "as a real estate agent and . . . an office manager assistant." (*Id.*). He described the terms of his employment as follows: "They asked me to work as a real estate agent, . . . to help them canvas and find properties for purchase and for resale, and to assist them with daily activities in the office." (*Id.*). He also stated that he "identified and brokered three deals," that he earned commissions from these deals pursuant to oral agreements with Biberaj and Lieblich, that the commissions were never paid to him, and that he never executed a written commissions agreement with plaintiffs or Broadway West. (*Id.*).

When asked to identify the debts on which his third affirmative defense is based, defendant listed his $50,000 loan to A&P, the commissions he earned on the three sales he brokered for Broadway West, and the $3,000 to $4,000 in monthly returns that he claims was promised to him in exchange for his 37.5 percent ownership interest in two A&P parking lots, his10 percent interest in a parking lot managed by New West, and his 25 percent interest in plaintiff Lot 1555 Corporation (Lot 1555), which owned 1555 Bruckner Boulevard. (*Id.*). He confirmed that his counterclaim is based on the same debts. (*Id.*).

Sometime thereafter, plaintiffs moved, as pertinent here, for partial summary judgment on their claim for repayment of the $165,000, arguing that "defendant has no defense to the admitted loan,"and for severance of his counterclaim, as it is based on transactions separate from and independent of the loan. Defendant opposed, claiming that plaintiffs fail to account for his

entitlement to offset, and cross-moved for, *inter alia*, partial summary judgment on his counter-claim, asserting that he is entitled to a $50,000 judgment against Biberaj for his failure to repay the 1993 $50,000 loan to A&P. Plaintiffs opposed the cross-motion on the ground that defendant exchanged his right to repayment of the $50,000 loan and his interest in New West for his 25 percent ownership interest in Lot 1555. (*Id.*, Exh. E).

By decision and order dated June 27, 2011, the previously presiding justice granted plaintiffs summary judgment, declined to sever the counterclaim, and denied defendant's cross-motion. (*Id.*, Exh. C). Although he noted that defendant asserted an affirmative defense for offset, he did not address its merits. (*Id.*).

By affidavit dated December 23, 2011, Biberaj and Lieblich state that defendant worked as a "canvasser" for Broadway West, that he never earned any commissions, and that his interests in A&P and New West were "rolled" into his interest in Lot 1555.

By undated affidavit submitted in opposition to the instant motion, defendant states that in discussing his repayment of the $165,000 loan with Biberaj, they orally agreed to "settle all [their] accounts," including the $50,000 loan, the returns on his investments in A&P, New West, and Lot 1555, and the commissions he earned on the three sales he brokered for Broadway West, when 1555 Bruckner Boulevard was sold. He denies that he exchanged his right to returns on his investments for his interest in Lot 1555. Rather, as during his EBT, he states that in 1994 Biberaj, having failed to pay him the monthly returns on his parking lot investments, made him part owner of Lot 1555 "in light of the profits he failed to pay up to that point."

Annexed to defendant's affidavit is an agreement between him and Biberaj reflecting that he lent $50,000 to A&P, that, after a year, "said monies are to be paid back to [him] in equal

monthly payments of $4,000," that he shall own 37.5 percent of two parking lots operated by A&P, that he is entitled to 37.5 percent of the profits after being repaid for the loan, and that "Biberaj is personally responsible for the repayment of [the loan]."

Also annexed to defendant's affidavit is a letter, dated December 29, 1994, from plaintiffs' accountant reflecting defendant's ownership interests in parking lots managed by New West and Lot 1555 as a result of his $90,000 investment.

II. CONTENTIONS

Plaintiffs claim that defendant's counterclaim is barred by the law of the case, as the previously presiding justice implicitly determined that his affirmative defenses are meritless in granting them summary judgment, and his counterclaim is identical to his third affirmative defense. (Rudofsky Aff.). In any event, they assert that he is not entitled to payment of commissions absent a written agreement, as he worked as a finder rather than a broker, that he is not entitled to payment of investment returns absent proof of his investments, and that he is not entitled to payment on his $50,000 loan, as this loan was subsumed in his investment in Lot 1555. (*Id.*). They also argue that his claims are time-barred, having accrued more than six years before this action was commenced, and that he fails to state a cause of action as his counterclaim is conclusory and devoid of facts. (*Id.*).

In opposition, defendant denies that his claims are barred by the law of the case, as the previously presiding justice never ruled on the merits of his affirmative defenses. (Def. Mem. of Law in Opp.). He maintains that there exist issues of material fact as to the debts on which his counterclaim is based and that it is timely pursuant to CPLR 203[d], as it arose from the same transactions as did plaintiffs' claim for $165,000, and the previously presiding justice determined

that plaintiffs' claim is timely. (*Id.*). And he denies that he failed to state a cause of action, noting that plaintiffs may be held liable under a breach of contract theory based on the facts set forth in his counterclaim. (*Id.*).

In reply, plaintiffs claim that defendant's EBT testimony demonstrates that he worked as a finder, and even assuming that he is entitled to commissions, he must seek them from Broadway West, not them individually. (Pl. Reply Mem. of Law). They deny that he has demonstrated that he has any interest in A&P or New West or that he may rely on CPLR 203(d), as he seeks affirmative relief in his counterclaim. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. Failure to state a cause of action

A party may move for summary judgment on the grounds set forth in CPLR 3211. (Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR 3212 C3212:20 [2011]) As pertinent here, pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In

deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Further, [the court] must consider the factual assertions of an affidavit submitted in opposition to the dismissal motion in order to preserve inartfully pleaded, but potentially meritorious, claims." (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]; *accord Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

"The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]).

Here, notwithstanding the conclusory nature of defendant's counterclaim, as his affidavit in opposition reflects that the counterclaim is based on agreements for the repayment of his $50,000 loan, the payment to him of commissions for brokering three deals for Broadway West, and his investments in A&P, New West, and Lot 1555, his performance on these contracts, and plaintiffs' alleged breaches in failing to pay him for the loan, commissions, and returns on his investments, defendant states a claim for breach of contract.

B. Law of the case

A legal determination resolved on the merits in a prior order constitutes the law of the case, precluding parties from relitigating it. (*South Point, Inc. v Redman,* 94 AD3d 1086 [2d Dept 2012]; *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). As the law of the case applies only when the same question is at issue in the same case (*Erickson v Cross Ready Mix, Inc*, 98 AD3d

717 [2d Dept 2012]; *Martinez v Paddock Chevrolet, Inc.*, 85 AD3d 1691 [4th Dept 2011]), "the procedural posture and evidentiary burdens of the litigants must be considered" (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012]) before a determination is accorded preclusive effect.

An affirmative defense substantively differs from a counterclaim. (*P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195 [1st Dept 2009]). Whereas an affirmative defense serves only to defeat a plaintiff's claim as a cause of action, a counterclaim constitutes an independent cause of action through which a defendant may obtain affirmative relief. (*Id.*). Thus, a counterclaim "embraces, but is broader and more comprehensive than, [the affirmative defense of offset] . . . ." (84 NY Jur Pleading § 159).

Here, the previously presiding justice made no express determination as to the merits of defendant's third affirmative defense. Even assuming that he implicitly found the third affirmative defense to be meritless, such a determination pertains solely to whether the debts on which the defense is based defeat plaintiffs' claim for repayment of the $165,000 loan, a different question from whether defendant has established, independent of his obligation to repay the loan, his right to affirmative relief based on plaintiffs' alleged indebtedness to him. Moreover, defendant's evidentiary burden on the prior motion is different from the burden he now carries, as he was then required to demonstrate the existence of triable factual issues as to his obligation to repay the $165,000, whereas he now must demonstrate the existence of triable factual issues as to plaintiffs' obligation to pay him on different debts. Accordingly, defendant is not precluded from litigating the merits of his counterclaim.

C. Statute of limitations

A claim for breach of contract must be brought within six years of the date on which it

accrued. (CPLR 213[2]). "Where a claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the party making the claim possesses a legal right to demand payment." (*Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 770 [2012]).

Here, the parties' dispute whether defendant forfeited his right to demand repayment of the $50,000 loan and his interests in A&P and New West when he acquired his interest in Lot 1555, and whether he is entitled to commissions for the deals he brokered. There thus exists material issues of fact as to whether the 2000 agreement to settle all of their accounts encompassed these debts, and thus whether defendant first acquired the right to demand their repayment on April 14, 2005, when 1555 Bruckner Boulevard was sold.

In light of this determination, the parties' contentions as to the applicability of CPLR 203(d) need not be addressed.

D. Claim for unpaid commissions

Whereas a contract for the payment of commissions to a finder must be reduced to a writing or is void, a contract for the payment of commissions to a licensed real estate broker need not be. (General Obligations Law § 5-701[a][10]). "Distinguishing between a broker and a finder involves an evaluation of the quality and quantity of services rendered. The finder is required to introduce and bring parties together, without any obligation or power to negotiate the transaction .... While a broker performs the same introduction task, [he or she] must ordinarily also bring the parties to an agreement." (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d 158, 162-63 [1993]).

Here, although defendant testified to having searched for properties, as it is undisputed

that he was a licensed real estate broker when he worked for Broadway West, and as he testified to having "brokered" three deals for the corporation, there exist triable factual issues as to whether he earned commissions as a broker, and thus, whether he may assert a claim for them absent a written agreement for same. Moreover, although defendant admitted to having earned commissions while working for Broadway West, as he testified that Biberaj agreed to settle all of their accounts, including the unpaid commissions, upon the sale of 1555 Bruckner Boulevard, there exists a material factual issue as to whether, because of this agreement, plaintiffs may be held liable for them.

E. Claims for investment returns and repayment of $50,000 loan

As defendant's testimony, affidavit, and the 1993 written agreement with Biberaj, and the 1994 letter from plaintiffs' accountant reflect that he invested funds in A&P, New West, and Lot 1555, and as the parties dispute whether he forfeited his interest in A&P and New West when he acquired his interest in Lot 1555, there exist triable factual issues as to whether he is entitled to unpaid returns on these investments and repayment of the $50,000 loan.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment on the counterclaim is denied.

ENTER:

Barbara Jaffe, JSC

DATED: June 18, 2013
New York, New York