

Swift Funding, LLC v Isacc

2013 NY Slip Op 31795(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 155770/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 155770/2012
SWIFT FUNDING, LLC
vs
ISACC, YOUSEF
Sequence Number : 002
DISMISS ACTION

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

Dated: 8/2/13

CK, J.S.C.

CYNTHIA S. KERN
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: Part 55

-----X
SWIFT FUNDING, LLC,

Plaintiff,

Index No. 155770/2012

-against-

DECISION/ORDER

YOUSEF ISACC a/k/a YOUSEF ISAAC;
SIM & PAK, LLP, PETER SIM, ESQ., INDIVIDUALLY
aka SANG J. SIM, ESQUIRE, ANDREW PARK, ESQ.,
INDIVIDUALLY

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : Summary Judgment in Lieu of Complaint

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff commenced the instant action pursuant to Civil Practice Law and Rules (“CPLR”) § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendants to recover funds allegedly owed pursuant to two Funding Agreements. The court previously denied the motion for summary judgment in lieu of complaint and directed plaintiff to serve a complaint against defendants, which it has done. The individual defendant Peter Sim has now brought a motion to dismiss the complaint against him and the defendant Andrew Park has brought a cross motion seeking the same relief. For the reasons

stated below, the motion and cross motion to dismiss are denied.

The relevant facts are as follows. Plaintiff, Swift Funding, LLC, is a company whose principal purpose is to advance money to plaintiffs involved in personal injury and related litigation. On February 11, 2009 and March 3, 2009, respectively, defendant Yousef Isacc a/k/a Yousef Isaac ("Isacc"), who was a plaintiff in a pending personal injury lawsuit at the time (the "lawsuit"), entered into two separate "Funding Agreements" with plaintiff. Pursuant to the terms of the agreements, plaintiff advanced to Isaac funds in the total amount of \$10,000, which were to be repaid by funds recovered from the lawsuit. The aforementioned agreements were also signed by attorneys from the law offices of Zohar & Larock, LLP, who were the trial attorneys for Isaac at the time the agreements were executed. The complaint alleges that trial counsel Zohar & Larock, LLP, under the direction of Andrew Park and the law firm Sim & Park, LLP ("S&P"), initially contacted plaintiff to request the financing. The complaint also alleges that the law firm of S&P represented Isacc in the underlying litigation, that Zohar and Larock LLP were retained as trial counsel and that they were subsequently relieved as trial counsel. Defendants Sim and Park were partners at S&P. It is undisputed that defendants Sim, Park and S&P are not signatories to the Funding Agreements. The lawsuit settled on or about October 8, 2009 and the settlement funds have been dispersed. According to the complaint, S&P distributed the proceeds of the settlement of the lawsuit to Isacc after they deducted their legal fees without paying plaintiff what it was owed pursuant to the Funding Agreements. In its complaint, the plaintiff has asserted a number of different causes of action, including conversion and tortious interference with contract.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the complaint is to be afforded a

liberal construction and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, “bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency.” *O’Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154 (1st Dept 1993).

Defendants Sim and Park both argue that the complaint must be dismissed against them individually pursuant to Partnership Law section 26 on the ground that the law firm S&P is a limited liability partnership. Partnership Law section 26 generally provides that partners are liable for the debts and obligations of the partnership. It further provides however, that except as provided by subdivision (C) and (D), no partner of a partnership which is a registered limited liability partnership is liable for the obligations of the limited liability partnership. Subdivision (C) provides that a partner in a limited liability partnership shall be held liable for any negligent or wrongful act or misconduct committed by him while rendering professional services on behalf of the partnership. Moreover, the courts have held that when the partnership assets are insufficient to satisfy a judgment that may be obtained against the partnership, a creditor can look to the general partners to satisfy the debts of the limited partnership. *See Belgian Overseas Security Corp. v. Howell, Kessler Co.*, 88 A.D.2d 559 (1st Dept 1982).

In the present case, Park and Sims are not entitled to dismissal of the complaint on the ground they are limited partners in a limited liability partnership for two reasons. First, plaintiff has sufficiently alleged in the complaint and affidavits in opposition to the motion to dismiss that

defendants Park and Sim are negligent or have committed a wrongful act or misconduct by failing to satisfy plaintiff's lien from the proceeds of the settlement despite being on notice that plaintiff had a lien based on the Funding Agreements with Isacc. The plaintiff specifically alleges that both individual defendants had knowledge of the Funding Agreements between Isacc and plaintiff and intentionally paid the entire settlement proceeds to Isacc after deducting their attorneys fees even though they knew that this was prohibited by the express terms of the Funding Agreements. These allegations are sufficient to state a claim that liability may be imposed on the individual defendants pursuant to subdivision (C) of Partnership Law section 26.

The individual defendants are also not entitled to a dismissal of the complaint against them at this juncture as the complaint sufficiently alleges that the law firm partnership is not sufficiently funded to pay a judgment in the event plaintiff obtains a judgment. In response, the movants have failed to demonstrate the ability of the law firm S&P to meet its obligations in the event that there is a finding of liability against it. As Justice Tingling held in *Larock v. Sim*, another litigation between the law firm S&P and the third party defendant, the individual partners of S&P cannot shield themselves from liability pursuant to Partnership Law section 26 without demonstrating the ability of S&P to meet its obligations should it be found liable.

The argument that the complaint should be dismissed because there is no privity between plaintiff and the individual defendants is without merit. Whether or not the law firm of Larock & Perez was acting as an agent of S&P when it signed the Funding Agreements, the claims against the partnership S&P and the individual defendants are not for breach of contract. The claims are for tortious interference with contract and conversion, neither of which require privity.

The court also denies the motion to dismiss on the ground of usury. Based on the

