EGA Assoc., Inc. v Giaimo
2014 NY Slip Op 30170(U)
January 6, 2014
Supreme Court, New York County
Docket Number: 602112/07
Judge: Andrea Masley
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY JUDGE _____ **PART** 43

Justice

Index Number : 602112/2007
EGA ASSOCIATES, INC.
vs.
GIAIMO, ROBERT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

Decided pursuant to attached decision and order

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

RECEIVED
JAN 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
JAN 23 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/06/14

HON. ANDREA MASLEY
JUDGE
_____, 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

Index No. 602112/07 and 106078/10

SUPREME COURT, NEW YORK COUNTY

----------X

EGA ASSOCIATES, INC.,

Plaintiff,

Index No. 602112/07

-against-

ROBERT GIAIMO,

Defendant.

----------X

JANET GIAIMO VITALE, DERIVATIVELY ON BEHALF OF EGA ASSOCIATES, INC.,

Plaintiff,

-against-

Index No. 106078/10

ROBERT GIAIMO,

Defendant,

and EGA ASSOCIATES, INC.,

Nominal Defendant.

----------X

HON. ANDREA MASLEY, J.S.C.:

This is a consolidated action for breach of contract and unjust enrichment by plaintiffs EGA Associates, Inc. ("EGA") and Janet Giaimo Vitale against her brother, defendant Robert Giaimo. Plaintiffs move pursuant to CPLR 3212 for summary judgment on their claim for breach of defendant's obligation to return a deposit of $100,000 to EGA pursuant to a written 1988 agreement (the "Agreement"). Defendant cross-moves pursuant to CPLR 3515, 3211 and 3212 for summary judgment dismissing the 2007 complaint and the 2010 derivative complaint.

EGA is a closely-held company formed in 1961 under the laws of the State of New York by father Edward Giaimo ("Father"), deceased since December 2004. Later, brother Edward P. Giaimo, Jr. ("Brother"), deceased since March 2007, was EGA's president. Janet Giaimo Vitale is currently in control of EGA.

On November 21, 1988, EGA, by Father, as president, and defendant executed the Agreement. Defendant granted EGA an option to purchase his shares in Silver

Diner Development, Inc. ("SDDI") for which EGA agreed to pay $100,100, of which $100,000 would be an advance deposit on the acquisition price and $100 as consideration for the option. At the time, defendant held 65,000 shares of SDDI. According to the Agreement, "In the event that this option is not exercised on or before December 31, 1993, EGA shall have the right to have its deposit returned to it. The deposit shall be noninterest bearing and need not be held in a segregated account." The Agreement also provided that "In the event [Robert Giaimo] sells or otherwise disposes of his stock to a third party, deposit moneys shall be promptly repaid to EGA." EGA delivered to defendant three checks dated November 18, 1988 payable to SDDI in the sum of $100,100.

EGA neither exercised its option to purchase the shares of SDDI stock on or before December 31, 1993, nor demanded return of the $100,000 deposit from defendant until it filed this action.

EGA commenced this action in September 2007, demanding return of the $100,000 deposit with interest. At the time the action was commenced, Janet Vitale, Robert Giaimo and the Estate of Edward Giaimo Jr. held equal shares of EGA, and EGA had two directors, Janet Vitale and Robert Giaimo.[1] Attached to the complaint are: (1) the executed Agreement; (2) a fax cover note dated November 21, 1988 which states from Father to "Bob" "Enclosed are 3 checks totaling $100,100. Also a note in duplicate for $100,000. Sign original & keep copy. Much success. & old note for old arrears. Dad. Return notes to me." and three EGA checks signed by Edward Giaimo with a handwritten memo "Real Estate Investment;" (3) Demand note payable to

[1]Appellate Division, First Department nullified a shareholders meeting held on July 23, 2007 at which a third person was elected to the Board of Directors. *Robert Giaimo v EGA* v. EGA Assoc. Inc., 68 AD3d 523 (December 15, 2009).

Edward and Antoinette Giaimo dated November 21, 1988 with an interest rate of 10% with a signature line and Robert Giaimo's typed name but no signature; and (D) fax dated November 13, 2002 to "Ed Giaimo Jr." from "Bob Giaimo" which states "We have completed our 'Going Private Transaction' effective October 7, 2002. However, in order for me to complete the reverse split/exchange of my stock, I need to turn in all of my old Silver Diner stock certificates, including those you are holding for me as indicated below:...[chart] I believe that we previously agreed with Dad that the stock should be returned and was no longer needed as collateral." According to EGA, the 2007 complaint constitutes its demand for return of the deposit.

On October 28, 2008, Judge Marcy Friedman denied Robert Giaimo's motion to dismiss the 2007 complaint because she found that the court had personal jurisdiction over him. At the pre-answer motion stage, the statute of limitations issue was not resolved as issues of fact precluded its determination. Specifically, Judge Friedman found an issue of fact as to whether the $100,000 was a deposit, as indicated in the Agreement, or a loan payable on demand pursuant to the promissory note, dated November 21, 1988, attached to the complaint. The court rejects any reliance on Judge Friedman's decision as law of the case for anything other than that the court has personal jurisdiction over Robert Giaimo. Otherwise, issues of fact precluded determination of the statute of limitations issue.

In his Verified Answer dated March 24, 2010, defendant asserted nine affirmative defenses, including: (1) statute of limitations; (2) failure to state a claim; (3) unjust enrichment claim is precluded by contract claim; (4) payment; (5) satisfaction of indebtedness; (6) forgiveness cancellation of debt; (7) gifts; (8) Janet Vitale's lack of standing; and (9) Janet Vitale improperly caused EGA to bring this action.

In his March 7, 2013 affidavit, defendant admits that EGA returned to him 250,000 shares of Silver Diner Inc. stock consistent with the November 13, 2002 letter which is annexed to the complaint. He also admits that the original note, attached to the complaint, is in his possession. Defendant states he is the president of SDDI. He explains that SDDI was acquired by Silver Diner Inc. in March 1996. SDI went public, but reverted to private ownership in 2002.

On May 4, 2010, Janet Vitale filed the derivative action that arises from the same subject matter.

Defendant's motion to dismiss the derivative action was denied by Judge Singh. He also consolidated the actions. Judge Singh denied defendant's motion to dismiss on statute of limitations grounds relying on Judge Friedman's decision and also finding it to be an issue of fact that could not be determined on a pre-answer motion. Judge Singh rejected defendant's argument that SDDI was a necessary party as it was not a party to the agreement and complete relief could be granted without SDDI. The April 8, 2011 decision was served with notice of entry but defendant has not filed an answer. Note of issue was filed on October 5, 2012.

Two preliminary matters require resolution before the summary judgment motion can be resolved. Based on CPLR 3215(a), defendant argues that the derivative complaint should be dismissed. Defendant admits that it failed to answer the derivative complaint but argues that because EGA failed to move for a default judgment against him, the derivative action was abandoned. The court rejects this argument because Judge Singh consolidated the two actions. EGA is clearly prosecuting both actions.

Second, based on the checks payable to SDDI, defendant seeks dismissal for EGA's failure to name SDDI as a defendant. Judge Singh resolved this issue which is

law of the case: SDDI is not a necessary party.

The movant has the initial burden of proving entitlement to summary judgment. *Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 (1985). Under CPLR 3212(b), the opposing party must "show facts sufficient to require a trial of any issue of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). "It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proof, in order to show that the matters set up in his [complaint] are real and are capable of being established upon a trial." *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of facts exists. *Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 (1975) .

Plaintiffs seek summary judgment on their breach of contract claim. In an action for breach of contract, plaintiff has the burden of proof. The court requires proof of "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County, 1999). It is undisputed that the parties entered the Agreement. Defendant admits signing the Agreement before a witness in Virginia. In his May 17, 2012 deposition, page 59, defendant admits that EGA delivered $100,100. At pages 41 to 44 of the deposition and October 9, 2007 affidavit, defendant admits that he received the funds. It is undisputed that EGA did not exercise the option, EGA demanded return of the $100,000 in 2007, and defendant has refused to do so. Plaintiff has established its prima facie case with nonhearsay testimony.

Defendant objects to EGA's reliance on its complaints verified only by counsel.

The court rejects this objection since plaintiffs submit 20 documents as exhibits to its summary judgment motion and opposition. In addition, plaintiffs submit sworn statements from persons with knowledge, including defendant. Clearly, this is not a summary judgment motion based on the verified complaint alone. These documents also provide evidence not available to Judges Friedman and Singh. The court is thus not bound by their prior decisions on pre-answer motions.

Defendant also objects to EGA's motion to the extent that it is based on hand-written notes and checks which defendant insists are inadmissible hearsay. Plaintiff does not rely on hand-written notes for its prima facie case. Defendant admits he received the checks. The checks would be admissible as business records, in any case. Both parties object to the alleged demand note attached to the complaint. Plaintiff sues on the Agreement, not the note. The note is unsigned by defendant and thus he objects to it. Since plaintiffs do not rely on the unsigned promissory note to prove their prima facie case, the evidentiary issue is moot.

The statute of limitations is six years. CPLR 213(2). The question is when does it begin? If the transaction was a deposit, as the Agreement provides, then the six year statute of limitations begins to run upon demand for repayment and refusal. *Rossi v Oristian*, 50 Ad2d 44 (4th Dept 1975). If the transaction was a deposit, then defendant argues the right to demand the return of the deposit accrued on December 31, 1993, six years after the agreement. Defendant's theory is simply contrary to law. The limitations period begins on demand. Based on the agreement, plaintiff has established a prima facie case of a deposit. It made its demand in 2007.

Defendant insists the transaction was a loan for which the statute of limitations expired in 1993, six years after the date of the unsigned note. Although defendant

objects to the unsigned promissory note and hand-written notes attached to the complaint in opposing plaintiffs' prima facie case, he relies on the very same objectionable documents to make this argument. Defendant cannot have it both ways. Defendant fails to explain how these documents are now admissible. Further, defendant relies on plaintiff's repeated use of the term "loan" in the complaint. However, the complaint is a pleading verified by counsel, who has no actual knowledge. "The rule that facts admitted by the pleadings are binding on the parties throughout the entire litigation is inapplicable" where inconsistent claims are made in the pleading or they are made on "information and belief." *Scolite International Corp. v. Vincent J. Smith, Inc.*, 68 A.D.2d 417 (3d Dept 1979). Here, the complaint was pled in the alternative and contained inconsistent theories. Indeed, one of defendant's objections is to the inconsistent theories. Further, the complaint was inoculated by counsel's use of the term "on information and belief," rendering it useless. The attorney's sworn statement does not constitute an admission by its client. The transaction is not a loan. Therefore, defendant has failed to support his defense of statute of limitations with admissible evidence.

There is no issue of fact as to whether the transaction was a gift from father to son. It was not. Defendant fails to support this defense with any facts, documents or description of the circumstances other than to say his father was a very generous man who often gave him cash gifts. Here, we have an agreement which states nothing about a gift and deceased Father is not available to testify otherwise.

Defendant argues the loan was forgiven as evidenced by the return of the 250,000 shares and note. As defendant fails to establish a loan with admissible evidence, the forgiveness of the loan defense must also be rejected.

Accordingly, it is

ORDERED, that the motion for summary judgment on the first cause of action is granted and plaintiffs shall have judgment for $100,000 with interest from September 12, 2007; and it is further

ORDERED, that the cross-motion to dismiss is denied.

Dated: Jan. 6, 2014

Andrea Masley SCJ