Blanksteen v Bralower

2014 NY Slip Op 31262(U)

May 14, 2014

Supreme Court, New York County

Docket Number: 157074/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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DAVID BLANKSTEEN, GOLDIE BLANKSTEEN and THE GOLDIE & DAVID BLANKSTEEN FOUNDATION

- against -

JOHN I. BRALOWER,

Defendant.

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Decision/Order

Mot. Seq.: 001

Index No: 157074/2013

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, David Blanksteen, Goldie Blanksteen (collectively, the "Blanksteens"), and The Goldie & David Blanksteen Foundation (the "Foundation") (and together with the Blanksteens, "Plaintiffs"), bring this action for money had and received against defendant, John I. Bralower ("Defendant"). Plaintiffs' complaint alleges that Plaintiffs issued two loans to Defendant, one on September 30, 2009, and the other on October 1, 2009, in the principal sums of $60,000 and $90,000, respectively, that Defendant made a written promise to repay these loans by December 31, 2010, and that Defendant failed to repay the loan amounts despite Plaintiffs' having made due demand for payment.

Defendant interposed an answer and affirmative defenses on or about October 25, 2013, a copy of which is provided to the Court in Plaintiffs' moving papers but does not appear on e-filing.

Plaintiffs now move for an Order, pursuant to CPLR § 3212, granting summary judgment to Plaintiffs on each of the two allegedly unpaid loans, as follows: On the First Cause of Action, in favor of plaintiffs against the defendant in the sum of Ninety Thousand Dollars ($90,000), together with interest at the legal rate of 9% per annum

thereon from October 1, 2009; and, on the Second Cause of Action, in favor of the plaintiffs against the defendant in the sum of Sixty Thousand Dollars ($60,000), together with interest at the legal rate of 9% per annum thereon from September 30, 2009.

In support, Plaintiffs submit a copy of the complaint, verified by plaintiff Goldie Blanksteen, and the exhibits annexed thereto, a copy of Defendant's answer and affirmative defenses, copies of email exchanges between the parties regarding the loan agreements at issue and the checks sued upon hereunder, and the affidavit of Goldie Blanksteen.

In her affidavit, Goldie Blanksteen avers that she and her husband, David Blanksteen, are trustees of the Blanksteen Family Foundation. Goldie Blanksteen avers that she and her husband have known the Bralower family for many years, and that Defendant discussed his financial problems with Plaintiffs in September, 2009. Goldie Blanksteen avers that Defendant requested a $90,000 loan from Plaintiffs, by letter dated September 30, 2009, in which Defendant also promised, in consideration of the loan, to repay said amount by December 31, 2010. Goldie Blanksteen avers that Plaintiffs relied on Defendant's promise to repay the loan amount.

Goldie Blanksteen also avers, "On September 30, 2009, Defendant Bralower requested another loan in the amount of Sixty Thousand ($60,000) Dollars to pay for the private school tuition of his two children. The Plaintiffs issued two checks, one for $16,500 to Trevor Day school, and the other for $43,500 to Tabor Academy. In consideration for the $60,000 paid to the two schools, Defendant made a written promise to repay the Foundation the full amount of $60,000 plus interest of 6% by December 31, 2010." Goldie Blanksteen avers that Defendant has failed to pay any of the principal as required in the written agreements, and that, despite due demand, Defendant is in default on all of the loans.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are

not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A claim for money had and received is recognized as an action in implied contract, "[a]lthough the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another." (*Parsa v. State*, 64 N.Y.2d 143, 148 [1984]). "A cause of action for money had and received is established when '(1) the defendant receive[s] money belonging to [the] plaintiff, (2) the defendant benefit[s] from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money.'" (*Matter of Moak*, 92 A.D.3d 1040, 1044[3d Dep't 2012]).

Here, Plaintiffs have demonstrated a prima facie showing of entitlement to judgment as a matter of law on their causes of action for money had and received based on the loans at issue. Plaintiffs have demonstrated that Defendant discussed his financial problems with Plaintiffs, that the Blanksteens issued a personal check, in the amount of $90,000 to Defendant, and that the Foundation issued two checks, one for $16,500 to Trevor Day school, and the other for $43,500 to Tabor Academy. Plaintiffs have further demonstrated that Defendant expressed an intention to repay the Blanksteens and the Foundation for these loans, by December 31, 2010, and that Goldie Blanksteen made a demand for payment. By failing to oppose, Defendant has failed to raise any issues of fact.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment on the first and second causes of action for money had and received is granted without opposition; and it is further,

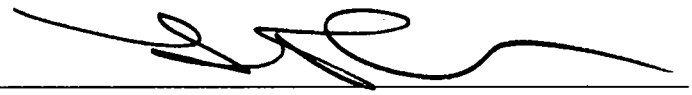
ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs, David Blanksteen and Goldie Blanksteen, and against defendant John Bralower, in the sum of $90,000.00, with interest at the statutory rate (from 8/1/2013), as

calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of plaintiff, the Goldie & David Blanksteen Foundation, and against Defendant John Bralower, in the amount of $60,000.00, with interest at the statutory rate (from 8/1/2013), as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: May 14, 2014



EILEEN A. RAKOWER, J.S.C.