JPMorgan Chase Funding, Inc. v Cohan
2014 NY Slip Op 32115(U)
August 7, 2014
Sup Ct, New York County
Docket Number: 151693/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART 13**
Justice

JPMORGAN CHASE FUNDING, INC.,

Plaintiff,

-against-

WILLIAM D. COHAN,

Defendant.

INDEX NO. 151693/2013
MOTION DATE 07-30-2014
MOTION SEQ. NO. 002
MOTION CAL. NO. ______

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 7
Answering Affidavits — Exhibits	8 - 9
Replying Affidavits	10

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's, JPMorgan Chase Funding Inc. (herein "JPMorgan"), motion for summary judgment is denied.

JPMorgan alleges it extended a loan to defendant, William D. Cohan (herein "Cohan") pursuant to an investment program offered by JPMorgan to its high-level employees. JPMorgan claims Cohan participated in the program and now owes JPMorgan the balances due and interest accumulated on loans extended pursuant to the leverage and recourse component of the loans under the investment program. Specifically, JPMorgan alleges that the investment program contained a recourse-loan component thereby making Cohan personally liable for the repayment of the recourse-loan and now seeks repayment of that recourse-loan against Cohan.

The Complaint asserts causes of action for (1) breach of contract, (2) breach of contract implied in fact, (3) money lent, (4) unjust enrichment, and (5) account stated. JPMorgan now moves for summary judgment as to the second through fifth causes of action, prior to any discovery being exchanged among the parties, and prior to holding a preliminary conference in this matter.

JPMorgan claims the parties intended to, and in fact did form, by their course of dealing, a valid and enforceable contract regarding a full recourse loan, which is embodied in the full recourse note. Cohan argues he never assented to the recourse-loan component of the investment program or any terms associated with the recourse-loan. JPMorgan asserts that upon agreeing to participate in the investment program, Cohan executed a limited partnership agreement with Sixty Wall Street Fund, L.P (herein "SWSF") thereby giving the general partner of SWSF the ability to take out full recourse loans on Cohan's behalf. JPMorgan is unable to locate and provide the original or certified copy of the agreement executed by Cohan granting the general partner of SWSF the ability to take out recourse loans on Cohan's behalf.

[* 2]

In support of this motion, JPMorgan submits affidavits from Ana Capella, on officer of SWSF; Sam Block III, an officer of JPMorgan Chase Bank, N.A., an affiliate of JPMorgan; and Marie Nourie, an officer of JPMorgan. The affidavits explain how the investment program was funded, what percentage was funded through recourse mortgages, and how the profits were distributed. JPMorgan annexes copies of financial statements, letters, and tax documents sent to Cohan from 2001 through 2013.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

"CPLR 3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion exist but cannot then be stated (Sepulveda v. Cammeby's Management Co., LLC, --- N.Y.S.2d ----, 2014 N.Y. Slip Op. 05530 [2nd Dept., 2014] citing to, Wesolowski v. St. Francis Hosp., 108 A.D.3d 525, 526, 968 N.Y.S.2d 181 [2nd Dept., 2013]), especially when the "opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (Id., citing to Schlichting v. Elliquence Realty, LLC, 116 A.D.3d 689, 983 N.Y.S.2d 291 [2nd Dept., 2014]).

"An implied-in-fact contract would arise from a mutual agreement and an intent to promise, when the agreement and promise have simply not been expressed in words" (Maas v. Cornell University 94 N.Y.2d 87, 93-94, 699 N.Y.S.2d 716, 719-720, 721 N.E.2d 966, 969-970 [1999] citing to, 1 Williston, Contracts § 1:5, at 20 [4th ed. 1990]). An implied-in-fact contract "still requires such elements as consideration, mutual assent, legal capacity and legal subject matter (Id.). Formation of a contract will not be found if it is "not reasonably certain in its material terms" (Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 482, 548 N.Y.S.2d 920, 548 N.E.2d 203 [1989]; Edelman v. Poster, 72 A.D.3d 182, 184, 894 N.Y.S.2d 398 [1st Dept., 2010]).

JPMorgan fails to make a prima facie showing of entitlement to judgment as a matter of law as it is unable to show mutual assent as to the terms of the SWSF agreement by Cohan. "The conduct of a party may manifest assent if the party intends to engage in such conduct and knows that such conduct gives rise to an inference of assent" (Maas v. Cornell University 94 N.Y.2d 87, 94, 699 N.Y.S.2d 716, 720, 721 N.E.2d 966, 970 [1999]).

When determining a motion to dismiss for failure to state a cause of action, "a cause of action for money lent need plead only that defendant owes a sum of money lent" (Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 124, 559 N.Y.S.2d 704, 712 [1st Dept., 1990] citing to, Minevitch v. Puleo, 9 AD2d 285, 288, 193 N.Y.S.2d 833, 836 [1st Dept., 1959).

JPMorgan moves for summary judgment on the cause of action for money lent, alleging that it extended a recourse loan and Cohan failed to pay that loan. JPMorgan fails to meet the higher threshold required for summary judgment as issues of fact remain as to the amount owed, if any, the terms of the loan, or whether Cohan accepted the loan.

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (Suntrust Mortg., Inc. v. Mooney, 113 A.D.3d 836, 978 N.Y.S.2d 901, 902 [2nd Dept., 2014] citing to, Citibank, N.A. v. Walker, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48 [2nd Dept., 2004]).

JPMorgan fails to show, as a matter of law, that Cohan has been unjustly enriched through money loaned under the recourse component of the investment program at the expense of JPMorgan. Issues of fact remain as to whether Cohan accepted and received recourse loans and if and how he benefitted from said loans.

"An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them (Citibank (South Dakota) N.A. v. Cutler, 112 A.D.3d 573, 976 N.Y.S.2d 196 [2nd Dept., 2013] citing to, White Plains Cleaning Servs., Inc. v. 901 Props., LLC, 94 A.D.3d 1108, 1109, 942 N.Y.S.2d 636 [2nd Dept., 2012]). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (American Exp. Centurion Bank v. Cutler, 81 A.D.3d 761, 762, 916 N.Y.S.2d 622 [2nd Dept., 2011]).

The affidavit of Block submitted in support of plaintiff's motion for summary judgment annexes statements of Cohan's capital account from 2001 through 2009, respectively. Block states that his records contain FedEx tracking reports for years 2005 through 2009, but have no record of FedEx tracking reports for years 2002, 2003, and 2004.

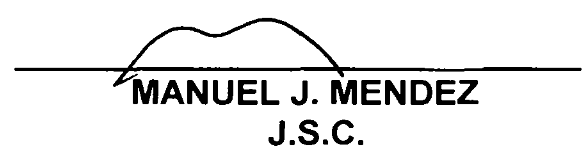
Cohan's affidavit, and that of James A. Batson, an attorney who represented Cohan in 2006, both state that Cohan first received a capital account statement from SWSF in 2006. Upon receipt of the statement indicating a recourse loan in 2006 and 2007, Cohan, through Batson, contacted counsel for JPMorgan to dispute the loan, request proof that a power of attorney had been executed by Cohan, and requesting all other underlying loan documents. Issues of fact exist as to when Cohan first received a capital account statement from either JPMorgan or SWSF, and whether he timely object to said statements.

As such, summary judgment is improper for the reasons stated herein. Further, a motion for summary judgment is premature when it is made prior to the preliminary conference (Bradley v. Ibex Const. LLC, 22 A.D.3d 380, 801 N.Y.S.2d 901 [1st Dept., 2005]), and prior to any discovery being exchanged among the parties (Bradley v. Ibex Construction, LLC, 22 AD3d 380, 801 N.Y.S.2d 901 [1st Dept., 2005]).

[* 4]

Accordingly, it is ORDERED that plaintiff's motion for summary judgment is denied, and it is further,

ORDERED, that the parties shall appear for a Preliminary Conference in IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York, on October 8, 2014 at 9:30AM.



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Dated: August 7, 2014

MANUEL J. MENDEZ
J.S.C.

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Check if appropriate: ☐ DO NOT POST ☐ REFERENCE