

Zorse v Gitter
2014 NY Slip Op 32273(U)
August 25, 2014
Sup Ct, New York County
Docket Number: 159181/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
BRETT ZORSE

Plaintiff,

Index No.
159181/2013

Decision and
Order

- against -

Mot. Seq. 001

ERIC GITTER and LISA GITTER, individually and as
Managing members of Chickie the Cop, Inc.,

Defendants.

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

This is an action for *quantum meruit* and unjust enrichment, violations of New York debtor and creditor law, fraudulent conveyance, and accounting based on an alleged loan transaction between plaintiff, Brett Zorse ("Plaintiff" or "Zorse"), and defendants, Eric Gitter and Lisa Gitter (collectively, the "Gitters") individually and as managing members of Chickie the Cop, Inc. ("Chickie") (and together with the Gitters, "Defendants"). Plaintiff claims that, on November 14, 2007, Plaintiff, via his mother's account, wired \$300,000.00 to Defendants, as a loan to be used for production costs for a film that the Gitters were producing (the "Loan"). Plaintiff further claims that the purported Loan was to be repaid "immediately." Plaintiff claims to have requested repayment from November 17, 2007, through the date of the instant complaint, and that Defendants have yet to return any of the \$300,000.00 to Plaintiff.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(7), (a)(8), dismissing Plaintiff's complaint on the basis of documentary evidence, failure to state a claim, and lack of personal jurisdiction over Defendants. In support, Defendants submit the affidavit of Eric Gitter; the affidavit of Lisa Gitter; a copy of a loan agreement (the "Loan Agreement") between non-parties Markowitz Films, Inc. ("Markowitz") and Seasons of Dust, LLC ("Seasons of Dust"); a copy of the certificate of dissolution of Chickie; a copy of the certificate

of incorporation of Seasons of Dust; a copy of Chickie's statement of accounts; email correspondence between Plaintiff and Eric Gitter, dated November, 2013; a copy of a letter, dated May 21, 2013, addressed to Markowitz Films; and, a spreadsheet of numerous transactions concerning the film titled 'Seasons of Dust' along with supporting documents.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action; or

(8) the court has not jurisdiction over the person of the defendant;

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

CPLR § 302 permits a court to exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business. (CPLR § 302 [a][1]; *Lebel v. Tello*, 272 A.D.2d 103, 103-04 [1st Dep't 2000]). CPLR § 302 is a “single act statute” and “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York as long as the requisite purposeful activities and the connection between the activities and the transaction are shown.” (*Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 21 A.D.3d 90, 93-94 [1st Dep't 2005]). For purposes of CPLR § 302(a)(1), “[p]urposeful activities are those with which a defendant, through volitional acts, ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” (*Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]).

Initially, Defendants argue that Plaintiff’s complaint should be dismissed for lack of personal jurisdiction. Specifically, Defendants argue that this Court lacks personal jurisdiction over Defendants because Defendants are non-domiciliaries who did not transact business within the State. The Gitters aver that they are officers of Chickie, a Delaware corporation, which is the managing member of non-party entity Seasons of Dust. The Gitters aver that Defendants did not solicit loan money from Plaintiff or Plaintiff’s mother, and that Defendants had no business dealings with Plaintiff or Plaintiff’s mother respecting the Loan.

The Gitters further aver that Seasons of Dust was formed to produce and develop a motion picture titled ‘Seasons of Dust’, and that Markowitz Films, another non-party, was obligated to raise financing in connection with this film. Defendants argue that Plaintiff’s mother loaned the \$300,000.00 at issue to Markowitz Films, through a production account which Chickie maintained, pursuant to a contract between Plaintiff and/or his mother and Markowitz Films. Defendants point to a Loan Agreement—which is not signed—between Markowitz Films and “Seasons of Dust by Eric Gitter in his capacity as president of Chickie, the managing member of Seasons of Dust”. Defendants argue that this Loan Agreement demonstrates that Defendants do not have a contractual relationship with Plaintiff or Plaintiff’s mother, and that Defendants did not purposefully transact business with Plaintiff or Plaintiff’s mother in this State.

Plaintiff’s complaint alleges that Plaintiff is a resident of the State of New York. Plaintiff’s complaint also asserts:

Defendant Chickie the Cop Entertainment, Inc. (“Chickie”) was a corporation, incorporated in the State of New York, with Lisa Gitter as the agent for service or [sic] process, the Defendants forfeited that corporation and re-incorporated under the same name in Delaware with Eric Gitter as agent for services of process at 1226 11th St. #1, Santa Monica, CA, 90401.

Plaintiff’s complaint further alleges that Defendants requested money from Zorse, that Zorse loaned the money in question to Defendants, and that Defendants failed to repay the subject Loan. Plaintiff’s complaint arises from the purported Loan transaction.

In addition, Plaintiff avers that, “the only Chickie that was in existence on November 15, 2007, was a ‘Chickie the Cop Entertainment, Inc.’ a New York Corporation and Lisa Gitter (‘LG’) was the ‘Agent for service of Process’”. Plaintiff further avers that, “a new Chickie the Cop Entertainment, Inc.” was formed in Delaware, on April 18, 2013, with Eric Gitter named as the agent for service of process. Plaintiff submits a copy of the business search for “Chickie the Cop Entertainment, Inc.” in the online database for the California Secretary of State, which lists a New York entity named Chickie the Cop Entertainment Inc. with the status, “forfeited” and a Delaware corporation named Chickie the Cop Entertainment, Inc. with the status “active.”

The burden of proving jurisdiction rests on the party asserting it. (*O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 (1st Dep’t 2003). Where the defendant submits facts to suggest that personal jurisdiction is lacking, it is “incumbent upon the plaintiff, in the face of [Defendants’] claims, to come forward with evidence to support the existence of a basis upon which to predicate the exercise of personal jurisdiction over [Defendants], or to show that such evidence may exist.” (*Spectra Products, Inc. v. Indian River Citrus Specialties, Inc.*, 144 A.D.2d 832 [3d Dep’t 1988]; CPLR § 3211[d]). Here, accepting the allegations in Plaintiff’s complaint as true, Plaintiff’s complaint and supporting documentation are sufficient to support the existence of a basis upon which to predicate the exercise of personal jurisdiction over Defendants, namely, that Chickie was incorporated in New York when the Loan transaction allegedly took place. Plaintiff’s complaint arises from the Loan transaction. Accordingly, Plaintiff’s complaint and supporting documentation adequately set forth a sufficient basis for

this Court's exercise of specific long arm personal jurisdiction over Defendants with respect with respect to Plaintiff's complaint, for purposes of a motion to dismiss pursuant to CPLR § 3211(a)(8).

Turning to Defendants' motion to dismiss Plaintiff's complaint based on documentary evidence and failure to state a claim, Plaintiff's first cause of action seeks relief for unjust enrichment and *quantum meruit*. To prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). Here, Plaintiff's complaint alleges that, "[i]n and around November 14, 2007, Defendants requested that Zorse, by and thru [sic] its agents, employees, associates, and assigns, immediately wire \$300,000.00 to Chickie to be used to pay for some of the production costs of a film that [the Gitters were] producing. This money was a loan and was to be repaid immediately." Plaintiff's complaint further alleges, "On that same day Zorse via his mother's account, wired \$300,000.00 to Chickie", and that, "Zorse's mother has assigned all of her rights and interests in the \$300,000.00 loan to her son Zorse". Plaintiff's complaint asserts that, "[f]rom November 17, 2007 through today's date, Zorse has requested the return of his money, but the Defendants have refused and neglected to return the same." Plaintiff's complaint alleges that, as a result, "Defendants have obtained from Plaintiff property that in equity and good conscience they should not retain or enjoy the benefit thereof." Accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint adequately state a cause of action for unjust enrichment.

To the extent that Plaintiff's first cause of action also claims *quantum meruit*, however, in order to prevail on a claim for *quantum meruit*, the "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services. (*Soumayah v. Minnelli*, 41 A.D.3d 390, 391 [1st Dep't 2007]). Plaintiff's complaint does not allege that Plaintiff charged any interest for the purported loan, or that Plaintiff expected any additional compensation beyond repayment of the principal amount. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to plead the performance of services in good faith, with the

expectation of compensation therefore, and do not state a claim for *quantum meruit*.

As for Plaintiff's second cause of action, § 276-a of the New York Debtor and Creditor Law ("DCL") permits attorneys' fees in an action to set aside a conveyance made with intent to defraud. Although the DCL gives rise to causes of action for "constructive fraud" and "actual fraud", only the latter form a proper basis for a judgment granting attorneys' fees under § 276-a. (DCL § 276; *Scola v. Morgan*, 66 A.D.2d 228, 234 [1st Dep't 1979]). Plaintiff's third cause of action, for fraudulent conveyance in violation of DCL §§ 271-276, seeks relief based on theories of actual and constructive fraud.

As far as actual fraud is concerned, DCL § 276 provides: "Every conveyance made with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." (DCL § 276). In order to demonstrate intent to defraud for purposes DCL § 276, a plaintiff must show "actual intent" or "badges of fraud" supporting an inference of fraudulent intent. (*Atsco Ltd. v. Swanson*, 29 A.D.3d 465, 465-66 [1st Dep't 2006] [citing *Wall St. Assoc. v Brodsky*, 257 A.D.2d 526, 529 (1999), for the proposition that, "badges of fraud" are "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent."]). In addition, CPLR § 3016(b) requires particularity in the pleading of fraudulent intent. (CPLR § 3016[b]).

With respect to Plaintiff's claim for constructive fraud, DCL § 273 provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." (DCL § 273). Both "insolvency" and "fair consideration" are defined terms under this statute. (DCL §§ 271-272).

Here, Plaintiff's complaint alleges:

Defendant Chickie the Cop Entertainment, Inc. ("Chickie") was a corporation, incorporated in the State of New York, with Lisa Gitter as the agent for service or [sic] process, the Defendants forfeited that corporation

and re-incorporated under the same name in Delaware with Eric Gitter as agent for services of process at 1226 11th St. #1, Santa Monica, CA, 90401.

Plaintiff's complaint further alleges that, "at the time the debt of more \$300,000.00 [sic] became due and payable, Chickie became insolvent and in fact closed Chickie, NY, and transferred all of its assets to [the Gitters] and/or Chickie, DE." Plaintiff's complaint alleges that, "Eric Gitter, took money from Chickie, NY and paid money from the same to himself his wife, Chickie, DE and other third parties, monies rightfully belong to Zorse yet all Defendants paid nothing of reasonably equivalent value for the transfer of said monies" and that, "the conveyance of monies and assets, by Chickie, NY to others as 'insiders' was done without fair consideration and the transferor was insolvent at the time of the conveyance." Plaintiff's complaint also asserts that, "the conveyance of the monies and assets were made with the intent to hinder, delay, or defraud present and future creditors," and further asserts that, "Chickie NY transferred monies and assets with the intent to defraud Zorse of any monies or assets."

Defendants argue that the Loan Agreement constitutes documentary evidence that flatly contradicts Plaintiff's fraudulent conveyance claims. Defendants argue that the Loan Agreement provides for Markowitz Films to make a wire payment of \$300,000.00 to Seasons of Dust, and argue that Plaintiff made the \$300,000.00 payment at issue in Plaintiff's complaint to Markowitz Films, rather than Defendants, pursuant to the Loan Agreement. Defendants also argue that, because the Loan Agreement is between Markowitz Films and Chickie, the Loan Agreement demonstrates that there is no contractual relationship between Defendants and Plaintiff or Plaintiff's mother, and that, as a result, no debtor-creditor relationship was formed between these parties. In addition, Defendants argue that Chickie's spreadsheets and account statements do not reflect the complained-of transaction, and therefore flatly contradict Plaintiff's allegations concerning the alleged transaction¹.

¹ Defendants also submit letters and email correspondence purporting to reference an agreement between Plaintiff and Markowitz Films, and the Gitters aver that they had no knowledge of the loan transaction alleged in Plaintiff's complaint. However, affidavits and letters are not considered "documentary evidence" within the intendment of CPLR § 3211 (a)(1). (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 997 [2d Dep't 2010]; *Flowers v 73rd Townhouse LLC*, 99 A.D.3d 431 [1st Dep't 2012]).

Here, accepting Plaintiff's allegations as true, the four corners of Plaintiff's complaint are sufficient to state a claim for constructive fraud, and Defendant's documentary submissions do not flatly contradict the factual assertions and legal conclusions asserted in Plaintiff's complaint. The Loan Agreement is not executed, and does not mention Plaintiff. Thus, while not inconsistent with Defendants' argument that Plaintiff and/or Plaintiff's mother loaned \$300,000.00 to a third party and not to Defendants, the Loan Agreement does not conclusively establish a defense to Plaintiff's complaint.

However, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint do not plead with particularity facts sufficient to support an inference of fraudulent intent, and fail to state a claim for fraudulent conveyance in violation DCL § 276. Accordingly, insofar as Plaintiff's complaint fails to adequately plead a cause of action for fraudulent conveyance based on actual fraud, pursuant to DCL § 276, Plaintiff's second cause of action, for attorneys' fees under DCL § 276-a, also fails.

Finally, with respect to Plaintiff's fourth cause of action, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." (*Palazzo v. Palazzo*, 121 A.D.2d 261, 265 [1st Dep't 1986]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*HF Mgmt. Servs., LLC v. Pistone*, 34 A.D.3d 82, 84 ([1st Dep't 2006] [citations and quotations omitted])). Here, Plaintiff's complaint alleges that Plaintiff "demanded of Defendants, a true, accurate and correct accounting of all monies spent and/or transferred by Defendants to any and all third parties while owing Zorse money, but he has refused and neglected to produce the same." Even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint do not allege a fiduciary relationship between Plaintiff and Defendants. Absent the requisite fiduciary relationship, Plaintiff's pleadings fail to state a cause of action for accounting.

Wherefore it is hereby,

ORDERED that the motion of Defendants Eric Gitter and Lisa Gitter, individually and as officers of Chickie the Cop Entertainment, Inc., is granted only to the extent that Plaintiff's claim for *quantum meruit*, Plaintiff's cause of action for attorneys' fees pursuant to DCL § 276-a, Plaintiff's claim for fraudulent conveyance under DCL § 276, and Plaintiff's fourth cause of action, for accounting, are dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's remaining causes of action are severed and shall proceed.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 25, 2014



Eileen A. Rakower, J.S.C.