Ali v Pranto Inc.
2015 NY Slip Op 30014(U)
January 8, 2015
Supreme Court, Queens County
Docket Number: 25586/2012
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

SHAHBAZ ALI,
Plaintiff(s),

- against -

PRANTO INCORPORATED, et al.,
Defendant(s).

Index
No. 25586 2012

Motion
Date December 1, 2014

Motion
Cal. No. 5

Motion
Seq. No. 2

The following papers numbered 1 to 4 read on this motion by defendants for an order: (1) granting them summary judgment dismissing the complaint; (2) severing defendants' counterclaim for trial; and (3) awarding them costs on this motion.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover certain monies alleged to be due pursuant to a loan agreement dated April 10, 2008. According to the complaint, the contract provided that plaintiff was to loan defendants $100,000, and defendants would pay the sum back "plus $3,500.00 per month as profit and make [plaintiff] a silent equitable owner in defendant Pranto Incorporated and Grand 99 Cents & Variety Store. Plaintiff has alleged that, despite

having loaned defendants the monies, defendants ceased payments after August 22, 2009, despite demand therefor. Plaintiff has asserted several causes of action, to wit: (1) breach of contract; (2) money had and received; (3) fraud; (4) unfair and deceptive trade practices under General Business Law § 349; (5) set aside fraudulent conveyances under Debtor and Creditor Law §§ 276 and 278; (6) unjust enrichment; (7) constructive trust; (8) equitable lien; (9) promissory estoppel; (10) accounting. Defendants have answered, denying the material allegations of the complaint and have asserted three counterclaims.

Defendants have submitted, inter alia, the affidavit of defendant Sufia Akhter, who is also the president of defendant Pranto Incorporated d/b/a Grand 99 Cents & Variety Store. Akhter explained the following: that in or about 2007, plaintiff's son was Pranto's employee and, over time, he and Akhter developed a cordial relationship. Plaintiff's son eventually informed Akhter that his father was an investor and inquired as to whether defendant would be interested in obtaining a loan, to which she expressed her willingness. During negotiations, plaintiff and defendant Akhter agreed that plaintiff would loan her $100,000, provided that Akhter pay $4,000 per month in interest. It was finally agreed that Akhter would pay $3,500 monthly interest on the loan. Akhter indicates that her business was not involved in the deal inasmuch as the loan was a personal one.

Akhter then explains that the loan agreement prepared by plaintiff, referred to the interest amount on the loan as "profit" since plaintiff was forbidden by his religion to refer to the term "interest." Notwithstanding, the agreement provided for the entire understanding of the parties. Akhter received the monies and commenced her monthly interest payments of $3,500, by cash, until December 25, 2011, representing the final payment. It was not until October 19, 2012, when Akhter received a letter from plaintiff alleging for the first time that a business agreement was made in which Akhter promised to make plaintiff a silent partner in Pranto. Akhter denied the allegations by letter dated November 5, 2012. The instant action ensued by filing a copy of the summons and complaint on December 28, 2012.

Defendants also submit, inter alia, a copy of the subject loan agreement, executed by plaintiff as "loan provider" and defendant Sufia Akhter as "borrower," and acknowledged before a notary on April 10, 2008. Therein, it appears, inter alia, that defendant Akhter was to borrow the sum of $100,000 and that plaintiff would receive the amount of $3,500 per month as "profit on the Loan," and that the agreement would remain in effect for one year after which time the parties would revisit and either continue for further period or would be canceled.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d

851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if it meets this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

As an overriding general principle, defendants have established that the corporate defendant, and its "d/b/a," are entitled to summary judgment inasmuch as the loan agreement was between plaintiff and defendant Akhter only. Notwithstanding, the corporate defendants have demonstrated their entitlement to dismissal of the complaint for the same reasons as the individual defendant, noted *infra*.

Defendants are entitled to dismissal of plaintiff's first cause of action for breach of contract since, inter alia, plaintiff admitted at his deposition that the subject loan agreement was the only agreement between the parties and that loan agreement is silent with respect to any terms regarding plaintiff becoming a partner in the business. In any event, defendants have established that the agreement is void since it provides for a usurious rate of interest, amounting to 42% per annum (*see* GOL § 5-501; 5-511; Banking Law § 14-a [providing for an interest rate no greater than 16 per cent per annum for a loan of this kind]; *see also Venables v Sagona*, 85 AD3d 904 [2011]; *Lugli*, 78 AD3d at 1135).

Defendants are entitled to dismissal of plaintiff's second cause of action for monies had and received. No cause of action for this exists where the money sought to be recovered has already been paid to the plaintiff (*see Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128 [1991]), as detailed by defendant Akhter in her affidavit.

Defendants are entitled to dismissal of plaintiff's third cause of action for fraud inasmuch as plaintiff admitted at his deposition that the subject loan agreement was the only agreement between the parties, and that the loan agreement is silent with respect to any terms regarding plaintiff becoming a partner in the business. In any event, it appears that the fraud claim is duplicative of the contract claim (*see Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790-791 [2012]; *Barker v Time Warner Cable, Inc.*, 83 AD3d 750 [2011]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644 [2005]).

Defendants are entitled to dismissal of plaintiff's fourth cause of action under General Business Law § 349. In order to prove a cause of action under General Business Law § 349, plaintiff must show that his claim is based on a deceptive act or practice that is "consumer

oriented," and plaintiff must also show that defendants have engaged in an act or practice that is deceptive or misleading in a material way which caused injury (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608 [2002]). Private contractual disputes do not fall within the ambit of the statute (*see New York Univ. v. Continental Ins. Co.*, *supra; Gomez-Jimenez v. New York Law School*, 103 AD3d 13 [2012]; *North State Autobahn, Inc. v. Progressive Ins. Group Co.,* 102 AD3d 5 [2012]). This cause of action fails to adequately allege wrongful conduct directed toward the public at large (*see State of New York Workers' Compensation Bd. v. 26–28 Maple Avenue, Inc.,* 80 AD3d 1135 [2011]). The fourth cause of action merely concerns a private dispute (*id.*); as such, it must be dismissed.

Defendants are entitled to dismissal of plaintiff's fifth cause of action under the Debtor and Creditor Law since – notwithstanding the fact that plaintiff has not specified which conveyances were made – defendants have not conveyed any assets with the intent to defraud plaintiff.

Defendants are entitled to dismissal of plaintiff's sixth cause of action. "A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another" (*Mente v Wenzel*, 178 AD2d 705 [1991]). Notably, unjust enrichment arises from facts which are "wholly independent of any contract upon which plaintiff sues" (*see e.g Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446 [2010]). Here, plaintiff alleges facts which form the basis of his contract claim. Assuming plaintiff relies on the promise that he become a silent partner in the business, given the fact that defendant Akhter has detailed that over $100,000 was paid back to plaintiff on the loan, it would not appear that defendants have done anything inequitable which stems from the transaction.

Defendants are entitled to dismissal of plaintiff's seventh and tenth causes of action for the imposition of a constructive trust and an accounting, respectively, since they established that the parties did not have a "confidential or fiduciary relationship" (*see e.g. Palazzo v Palazzo*, 121 AD2d 261 [1986]).

Defendants are entitled to dismissal of plaintiff's eighth cause of action to impose an equitable lien since they demonstrated that there was no agreement with respect to making plaintiff a silent partner in the business; the same can be said about plaintiff's ninth cause of action sounding in promissory estoppel (*see e.g. Rock v Rock*, 100 AD3d 614 [2012]).

Accordingly, defendants' motion is granted without opposition. The complaint against them is dismissed. The action shall proceed to trial on defendants' counterclaims. Defendants are awarded motion costs in the amount of $100.00.

Dated: January 8, 2015

J.S.C.