

Lesches v Omes

2015 NY Slip Op 30699(U)

April 29, 2015

Supreme Court, New York County

Docket Number: 155121/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DOVI LESCHES o/b/o THE LESCHES GROUP, INC.
d/b/a EMPIRE EQUITIES,

Index No.: 155121/2013

DECISION & ORDER

Plaintiff,

-against-

THE ESTATE OF ALEJANDRO OMES, EMILIO
GUERRA, and UR1 FESTIVAL OPERATIONS, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Dovi Lesches moves, pursuant to CPLR 3212, for summary judgment against defendants, the Estate of Alejandro Omes (the Estate),¹ Emilio Guerra (Emilio), and UR1 Festival Operations, LLC (UR1). Plaintiff's motion is granted for the reasons that follow.

I. Procedural History & Factual Background

The material facts are not in dispute.

On October 22, 2012, the parties executed a written contract (the Contract), pursuant to which plaintiff loaned \$350,000 to defendants to fund a music festival in Miami featuring Kanye West. *See* Dkt. 100 at 86. The principal was due to be repaid in full within 112 days, that is, by February 10, 2013. The principal was to be repaid along with 7.5% of the net profits from the

¹ Alejandro Omes passed away in January 2015, after the instant motion was fully briefed, but shortly before oral argument was scheduled to take place on January 22, 2015. In an interim order dated January 22, 2015 (Dkt. 114), the court stayed this action pending substitution of the Estate, which was done by stipulation dated April 15, 2015. *See* Dkt. 124. It should be noted that the instant summary judgment motion was originally brought by cross-motion to defense counsel's motion to reargue the sanction issued against him. As set forth in an order dated March 13, 2015 (Dkt. 119), reargument was denied, and the court confirmed the sanction amount recommended by the Special Referee. Plaintiff's counsel has since represented to the court that the sanction was paid. Hence, the only prong of the instant motion (Seq. 005) that remains to be decided is the instant summary judgment motion. As the automatic stay, pursuant to CPLR 1015(a) and 1021, has been lifted by virtue of the substitution of the Estate, the court now decides the summary judgment motion.

music festival. In the event of default, defendants would owe 15%² interest “per six months” on the principal. All three defendants, Alejandro, Emilio, and UR1, personally guaranteed repayment of the loan. The Contract is governed by New York law and provides for jurisdiction in this court. It contains a merger clause and a clause prohibiting oral modifications.

The music festival did not occur as planned³ and defendants defaulted on the loan. Plaintiff commenced this action on June 3, 2013. Plaintiff’s operative pleading, its second amended complaint (the SAC), was filed on January 8, 2014. *See* Dkt. 47. The SAC asserts two causes of action for breach of contract, one on the loan and one on the guaranty. Defendants filed an answer on February 4, 2014. *See* Dkt. 49. Plaintiff now moves for summary judgment since defendants do not dispute nonpayment. Rather, defendants merely argue that the \$350,000 was an investment, not a loan.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v*

² In what appears to be a scrivener’s error, the Contract states that the rate is “25% (fifteen percent).” While neither party explicitly addresses this issue, in his moving papers, plaintiff quotes the interest percentage as “[1]5% (fifteen percent),” implying that 15% was the intended amount. Defendants are entirely silent on this issue, which, as this is a summary judgment motion, constitutes a concession to plaintiff’s interpretation. The court, therefore, applies the 15% rate.

³ The music festival was scheduled to take place on December 8 and 9, 2012, at Bayfront Park in Miami. It was scheduled to coincide with the Basel Art Festival. The music festival was canceled due to the lingering effects of Hurricane Sandy.

Gervasio, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

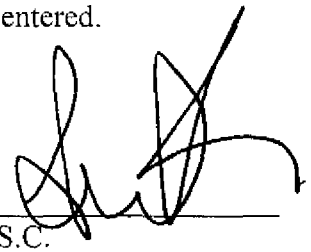
The sole issue raised by defendants – whether the \$350,000 was a “loan” or an “investment” – is irrelevant. The money was *not* given to defendants in exchange for equity in the music festival. Rather, the Contract provides that the principal was to be repaid along with 7.5% of the profits. While the Contract, which is inartfully drafted, does refer to the \$350,000 as both a “loan” and an “investment”, the Contract does not condition repayment on the success of festival. Moreover, plaintiff's entitlement to repayment of the \$350,000 was *guaranteed*, and the only conditional, uncertain amount was the 7.5% net profit share.

Since the festival did not occur, there are no profits for plaintiff to recover. Plaintiff is, nonetheless, entitled to the return of its principal plus default interest. However, plaintiff also seeks an additional \$105,000, a speculative number which he claims corresponds to a “conservative estimate” of expected profits. Plaintiff is not entitled to estimated profits because such estimates are not provided for in or contemplated by the Contract. As the Contract

provides, plaintiff is merely entitled to 15% default interest for a six month period, which amounts to \$26,250.⁴ Accordingly, it is

ORDERED the motion by plaintiff Dovi Lesches for summary judgment against defendants the Estate of Alejandro Omes, Emilio Guerra, and UR1 Festival Operations, LLC is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendants, jointly and severally, in the amount of \$376,250 plus 9% statutory pre-judgment interest from February 10, 2013 to the date judgment is entered.

Dated: April 29, 2015

ENTER: 

J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C

⁴ 15% annual interest on \$350,000 is \$52,500. Half of that amount, representing six months of interest, is \$26,250.