

Cohen Bros. Realty Corp. v Dumani

2015 NY Slip Op 31083(U)

June 24, 2015

Supreme Court, New York County

Docket Number: 150330/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

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COHEN BROTHERS REALTY CORPORATION,

Plaintiff,

- v -

GEORGE DUMANI,

Defendants.
-----X

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

Index No.
150330/2015

**DECISION
and ORDER**

Mot. Seq. #001

This is an action for breach of contract, promissory estoppel and “victim of crime” based on, *inter alia*, a Judgment of Order and Court Restitution Order dated September 29, 2003, ordering defendant, George Dumani (“Dumani” or “Defendant”), to pay plaintiff, Cohen Brothers Realty Corporation (“Cohen Brothers” or “Plaintiff”), restitution in the amount of \$68,628.29, over a period of five years, with a rate of 5% interest per annum.

Plaintiff commenced this action on January 12, 2015, by summons and complaint.

Defendant now moves for an Order, pursuant to CPLR § 3211(a)(5), dismissing Plaintiff’s complaint as time-barred.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(5) the cause of action may not be maintained
because of . . . statute of limitations . . . ;

(CPLR § 3211[a][5]).

On a motion to dismiss pursuant to CPLR § 3211(a)(5), the court may grant dismissal of a cause of action which is time-barred by the statute of limitations. The statutory period for claims sounding in breach of contract is six years. (CPLR § 213[2]). A cause of action for breach of contract accrues, and the statute of limitations begins to run, when the contract is breached. (*Ely-Cruikshank Co v. Bank of Montreal*, 81 N.Y.2d 399 [1993]). Pursuant to General Obligations Law § 17-101, “[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions.” (Gen. Oblig. § 17-101). A writing that “recognize[s] an existing debt and . . . contain[s] nothing inconsistent with an intention on the part of the debtor to pay it” is sufficient to satisfy General Obligations Law § 17-101. (*Hon Fui Hui v. East Broadway Mall, Inc.*, 4 N.Y.3d 790, 791 [2005] quoting *Lew Morris Demolition Co., Inc. v Bd. of Educ.*, 40 N.Y.2d 516, 521 [1976]).

Plaintiff’s complaint alleges that Defendant was previously employed as Plaintiff’s payroll manager from July 2002 through July 2003. (Compl. ¶ 4). Plaintiff’s complaint further alleges that, “during [Defendant’s] employment with Plaintiff, Defendant forged payroll checks for fictitious employees, then cashed those checks using the company’s payroll check-cashing card”, and that, “Defendant thereby breached his employment contract with Plaintiff.” (*Id.* ¶¶ 5-6). Plaintiff’s complaint alleges that Plaintiff terminated Defendant’s employment as a result. (*Id.* ¶ 8). Plaintiff’s complaint further alleges that, by Judgment Order dated September 29, 2003, together with Court Restitution Order, Defendant was convicted for grand larceny in the second degree and ordered to pay Plaintiff restitution in the amount of \$68,628.29, over a period of five years, with a rate of 5% interest per annum. (*Id.* ¶ 10).

Plaintiff’s complaint further asserts, “Defendant thereafter paid the sum of \$26,799.99, thus leaving a balance of \$41,828.30, a sum acknowledged to be due and owing by Defendant to Plaintiff in an Affidavit of Confession of Judgment, sworn to on July 29, 2010.” (*Id.* ¶ 11). Plaintiff’s complaint alleges that “[d]espite his acknowledgment of the debt still owed, Defendant has defaulted in payment on the debt and has not since paid Plaintiff anything more.” (*Id.* ¶ 12). Plaintiff’s complaint alleges that the instant action “now seeks to enforce the debt owed by

Defendant to Plaintiff, in the amount of \$41,828.30, plus interest, costs, and allowable attorney's fees." (*Id.* ¶ 13).

Here, Defendant argues that Plaintiff's complaint is not timely brought because Plaintiff commenced this action on January 12, 2015, more than six years after Defendant's alleged breach of employment contract in 2003. Defendant argues that the Affidavit of Confession of judgment is insufficient to take this action out of the operation of the provisions of limitations of time for commencing actions pursuant to General Obligations Law § 17-101 because the Affidavit of Confession of Judgment does not demonstrate Defendant's willingness to pay the debt in issue. Additionally, Defendant argues that Plaintiff's complaint falls outside the three-year statute of limitations applicable to suits on a confession of judgment pursuant to CPLR § 3218(b), as Plaintiff did not enter judgment or move to enforce such judgment before July 29, 2013.

However, viewing Plaintiff's complaint in the light most favorable to Plaintiff, the Affidavit of Confession of Judgment annexed to Plaintiff's complaint constitutes an "acknowledgement or promise" within the meaning of General Obligations Law § 17-101. The Affidavit of Confession of Judgment recites the original restitution amount and the amount of Defendant's partial payment and states, "I [Dumani] acknowledge, therefore, that I still owe Cohen Brothers Realty Corp. forty-one thousand, eight hundred twenty eight dollars and thirty cents (\$41,828.30)." (Compl. Exh. 3 ¶¶ 2, 4). The Affidavit of Confession of Judgment further states that Defendant is "justly indebted" to Plaintiff in the amount described therein. (*Id.* at ¶ 6). Thus, the Affidavit of Confession of Judgment acknowledges an obligation to pay and "clearly conveys and is consistent with an intention to pay, which is all that need be shown in order to satisfy section 17-101." (*Banco do Brasil S.A. v. State of Antigua & Barbuda*, 268 A.D.2d 75, 77-78 [1st Dep't 2000]). Accordingly, the Affidavit of Confession of Judgment is sufficient to revive Plaintiff's otherwise time-barred claims.

Insofar as Plaintiff does not bring this action pursuant to CPLR § 3218, to enforce a judgment by confession, the three-year limitations period to file an affidavit of confession of judgment with the county clerk under CPLR § 3218(b) is inapplicable the instant suit.

Wherefore, it is hereby

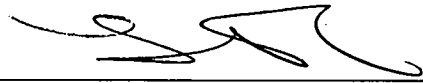
ORDERED that Defendant's motion to dismiss Plaintiff's complaint is denied; and it is further

ORDERED that Defendant is directed to file an answer to Plaintiff's complaint within 20 days of service of a copy of this Order with Notice of Entry.

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

DATED: June 24 2015

JUN 24 2015



EILEEN A. RAKOWER, J.S.C.