Taekman v Shapiro
2015 NY Slip Op 31253(U)
July 16, 2015
Supreme Court, New York County
Docket Number: 651281/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JOSH TAEKMAN,

Plaintiff,

Index No. 651281/15

-against-

DECISION/ORDER

JONATHAN SHAPIRO a/k/a JONNY SHIPES and CINEMATIC MUSIC GROUP, INC. d/b/a CINEMATIC MUSIC GROUP,

Defendants.

---x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Notice of Cross Motion and Answering Affidavits......................	2
Affirmations in Opposition to the Cross-Motion.........................	3
Replying Affidavits..	4
Exhibits...	5

Plaintiff Josh Taekman commenced the instant action pursuant to Civil Practice Law and Rules ("CPLR") § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendants Jonathan Shapiro a/k/a Jonny Shipes ("Shapiro") and Cinematic Music Group, Inc. a/k/a Cinematic Music Group ("CMG") to recover the principal amount of $99,000.00 with interest thereon plus costs and attorneys' fees. Plaintiff alleges that this action is based upon an instrument for the payment of money only and that there is no defense thereto. Defendants cross-move for an Order pursuant to CPLR §§ 3211(a)(1) and (5) dismissing the action. Plaintiff has agreed to withdraw the action as against Cinematic. For the reasons set forth below, plaintiff's motion is granted as against Shapiro only and defendants' cross-motion is denied.

The relevant facts are as follows. Defendant Shapiro executed a promissory note, dated

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June 23, 2006, in favor of plaintiff pursuant to which Shapiro was to pay plaintiff $99,000.00 by December 31, 2008 and any unpaid balance after January 1, 2009 would collect interest at the rate of 10% per annum. On or about May 23, 2008, plaintiff entered into a settlement agreement with Shapiro pursuant to which the parties renegotiated the Note's terms and conditions (the "Settlement Agreement"). Specifically, pursuant to the Settlement Agreement,

> 1. Debtors shall execute an Affidavit on Confession of Judgment ("Affidavit") and confess judgment in favor of Taekman, jointly and severally, in the amount of $99,000.00, plus interest at 10% per annum, from April 1st, 2009, plus costs and attorneys' fees in an amount equal to 33% of the total amount of money due (the "Judgment").
>
> 2. The parties agree that the Affidavit shall not be entered in any court of law, and that the Note shall be deemed satisfied and paid in full, on the following condition: Debtors pay Taekman Thirty Five Thousand Dollars ($35,000.00), in good funds, on or before March 31, 2009.
>
> 3. Upon Default...Debtors authorize Taekman to file said Affidavit and enter Judgment as against Debtors, jointly and severally for the entire Judgment amount.
>
> 4. Debtors authorize entry of Judgment in New York County and in any other county in New York State....

It is undisputed that the defendants failed to pay plaintiff the agreed-upon $35,000.00 by March 31, 2009. Thereafter, the parties agreed that defendants could make payments to satisfy the debt. However, plaintiff asserts that defendants have failed to make the payments. Indeed, plaintiff asserts that as of April 2015, defendants have made only sporadic payments totaling $3,000.00 and that the last payment was made on January 20, 2015 totaling $1,000.00. Thus, plaintiff commenced the instant action for an Order pursuant to CPLR § 3213 for summary judgment in lieu of complaint based on the Settlement Agreement. Defendants cross-move for an

Order pursuant to CPLR §§ 3211(a)(1) and (5) dismissing the action.

As plaintiff has agreed to withdraw the action as against Cinematic, the court will only address the portion of defendants' cross-motion for an Order pursuant to CPLR § 3211(a)(5) dismissing the action as against defendant Shapiro. "A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired." *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dept 2007). A party has six years to commence an action for breach of contract. *See* CPLR § 213(2). "In New York, a breach of contract cause of action accrues at the time of the breach." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). However, a writing made by the party to be charged may be used as evidence of a new or continuing contract which would take the action out of the original statute of limitations period. Specifically, pursuant to General Obligations Law ("GOL") § 17-101,

> An 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 under the civil practice law and rules other than an action for the recovery of real property.

"To constitute an acknowledgement of a debt, a writing must recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it." *Knoll v. Datek Sec. Corp.*, 2 A.D.3d 594, 595 (2d Dept. 2003)(citing *Morris Demolition Co. v. Board of Educ. Of City of N.Y.*, 40 N.Y.2d 516, 521 (1976)). "In determining the effectiveness of an acknowledgement, the critical determination is whether the acknowledgement imports an intention to pay." *Knoll*, 2 A.D.3d at 595.

This court finds that pursuant to GOL § 17-101, the instant action is not time-barred. Although it is undisputed that plaintiff had until March 31, 2015 to timely commence an action

against Shapiro and that this action was not commenced until April 17, 2015, the action is timely based on certain e-mails between plaintiff and Shapiro which constitute evidence of a continuing or new contract between the parties. In September 2009, after Shapiro breached the Settlement Agreement, plaintiff e-mailed Shapiro requesting a timeline for the payment of the debt, specifically stating

> I really need to know a hard date I am going to have money...I have continue (sic) to give you the benefit of the doubt we signed an agreement that promised me $30,000 payment in full by March 31st, 2009, which you only paid $1,000 and since then you have not paid $1...I need within 2 weeks at least $15 grand or I am going to have to turn this over to my lawyer and exercise my legal options which I prefer not to do but you are not leaving any choices. Let me know what I can expect.

On or about September 16, 2009, Shapiro responded: "I will have concrete pay schedule 2 u late 2nite." Days later, Shapiro e-mailed plaintiff and stated "Hey I will have money by the 5th for sure" and when questioned whether it would be the whole amount or half Shapiro responded "no a few [thousand] just gonna have a good month so I can spare somehing (sic)." In November 2009, plaintiff again e-mailed Shapiro the terms of a new agreement. Specifically, plaintiff stated "for the updated agreement it will say you have to pay a minimum of $3 grand a month and have it paid off by March 31st 2010...basically a full year extension from our previous agreement...that work?" In response, Shapiro stated "Yes except I really can't do 3k a month bro I'm not cakin like that its a recession...." Shapiro continued to acknowledge the Settlement Agreement debt and demonstrated his intention to pay throughout 2010. When plaintiff again requested payment of the debt in August 2010, Shapiro replied "I am tryin my best I really don't wana borrow from any1 I'm o[w]ed close[] 2 125k when I get it I'm gonna give u a bulk payment." In May 2011, plaintiff e-mailed Shapiro as follows: "If you can make a $20 grand bulk payment in next 7 days or less, I will tear up

the agreement that was for $99 grand plus compounding interest…look you in eye and wish you the best and we will be all good no ill feelings…" and Shapiro responded "Ok let me work on this now." In January 2013, plaintiff e-mailed Shapiro as follows: "can we please meet this week and make a real plan on when and how you are going to start paying me some money" to which Shapiro responded "I am gonna pay u in 1 lump sum it is the best way for me 2 doit (sic) when I close my deal I am gonna pay u." Six months later, in June 2013, Shapiro again promised that plaintiff would "be paid as soon as [his] deal is done." Shapiro continued to promise to pay the debt in 2014 and even into 2015 after payment of the debt was requested by plaintiff. In an e-mail dated February 6, 2015 to plaintiff, Shapiro stated "I can do 15000.00 and an ad campaign from vashtie that I would need to confirm with her 1st she would do me the solid. Her campaigns run between 75k & 200k I can send you paperwork from other deals to show you value. I think w[ith] her behind e boost it could be huge boost for sales etc let me know." As the e-mails between plaintiff and Shapiro demonstrate that Shapiro acknowledged the debt contained in the Settlement Agreement and intended to pay said debt, the instant action is timely.

Shapiro's assertion that the statute of limitations for the instant action has not been tolled pursuant to GOL § 17-101 on the ground that Shapiro's promises to pay the debt were conditional on some other event or occurrence is without merit. It is well-settled that an acknowledgement of a debt that contains a condition to payment of the debt renders GOL § 17-101 inapplicable. *See City of New York v. North Riv. Hous. Dev. Fund Corp.*, 12 A.D.3d 294 (1st Dept 2004). However, Shapiro's promise to pay the debt once he received funds from other deals that he was involved in is not a condition to payment of the debt that would render GOL§ 17-101 inapplicable. Indeed, the First Department has held that when the condition is not inconsistent with an intention to pay or

where the acknowledgement itself is not conditional, GOL § 17-101 will apply to restart the statute of limitations. . *Id.*

As this court has found that the action is timely, it next turns to plaintiff's motion for summary judgment in lieu of complaint. Pursuant to CPLR § 3213, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "In order to qualify for CPLR § 3213 treatment, plaintiff must be able to establish a prima facie case by proof of the agreement and a failure to make the payments called for thereunder." *SCP (Bermuda) Inc. v. Bermudatel Ltd.*, 224 A.D.2d 214, 216 (1st Dept 1996). "A defendant can defeat a CPLR § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact." *See Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383 (2004).

In the instant action, plaintiff has established his prima facie entitlement to summary judgment against defendant Shapiro as he has demonstrated the existence of the Settlement Agreement between plaintiff and Shapiro for the payment of money only and it is undisputed that Shapiro has failed to make certain payments called for under the Settlement Agreement.

Shapiro's assertion that summary judgment should be denied on the ground that he denies signing the Settlement Agreement is without merit. "[A]verments merely stating conclusions, of fact or of law, are insufficient" to "defeat summary judgment." *Mallad Constr.Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290 (1973). "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." *Banco Popular N. Am.*, 1 N.Y.3d at 384. Here, the Settlement Agreement provided to the court is signed by both plaintiff and Shapiro and Shapiro has provided no evidence to support his conclusory

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assertion that the signature on the Settlement Agreement is not his.

Shapiro's assertion that summary judgment should be denied on the ground that there was an executory accord between the parties that the claim would be settled for $5,000.00 is without merit. Even if said offer could be considered an accord, the court declines to address said argument as it was raised for the first time in reply. Indeed, it is well-settled "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992).

Accordingly, plaintiff's motion for an Order pursuant to CPLR § 3213 for summary judgment in lieu of complaint against Shapiro is granted and Shapiro's cross-motion for an Order pursuant to CPLR § 3211 dismissing the action is denied. The Clerk is directed to enter judgment in favor of plaintiff and against Shapiro in the principal amount of $99,000.00 with interest at the rate of 10% per annum from April 1, 2009, less the $3,000.00 already paid by Shapiro, plus costs and attorneys' fees in an amount equal to 33% of the total amount due to plaintiff. This constitutes the decision and order of the court.

Date: 7/16/15

Enter: ______________________