

**Mamis v Philp**

2016 NY Slip Op 31046(U)

May 13, 2016

Supreme Court, New York County

Docket Number: 650589/2016

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Index Number : 650589/2016
MAMIS, SUSAN
vs
PHILP, STEVEN MICHAEL GRAFTON
Sequence Number : 001
DISMISS

INDEX NO.
MOTION DATE 4/12/16
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In this action for, inter alia, breach of contract, defendant Steven Michael Grafton Philp ("defendant") moves to dismiss the complaint of the plaintiffs Susan Mamis ("Mrs. Mamis") and Justin Mamis ("Mr. Mamis").

Factual Background

In their complaint, plaintiffs allege that they entered into an oral agreement with defendant to loan him \$38,000.00 at 2.67% per annum defendant needed for his tuition, room and board at Oxford University (the "Loan Agreement"). Plaintiffs' son, Noah Mamis, transferred to defendant's bank account \$32,000 in connection with the Loan Agreement on October 10, 2014, and the remaining \$6,000.00 on October 10, 2014. After defendant completed his studies, and despite several emails (April 27, September 20, and November 2015) acknowledging his debt, defendant refused to make any payments under the Loan Agreement. Therefore, plaintiffs seek to recover \$38,000 under theories of breach of contract and unjust enrichment.

In support of dismissal, defendant submits an affidavit, in which he denies entering into any loan agreement with plaintiffs, and states that plaintiffs and plaintiffs' son (with whom defendant was then engaged) encouraged him to attend the University of Oxford without "worry about the cost of attendance." In June 2014, defendant was made to understand that plaintiffs entered into a written agreement with their son to provide their son an undisclosed sum of money, and plaintiffs' son told him that such "money was offered freely" to finance "the purchase of our shared apartment, the expense of relocating to New York, and costs associated with my enrollment at the University of Oxford." In June 2014, plaintiffs also sent defendant a "note" explaining that plaintiffs would transfer \$10,000 to defendant as a "gift, not a loan" and

Dated: , J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

offering to extend an “interest-free loan” to cover the cost of tuition at the University of Oxford; the note also stated that “we’ll talk about how and when you’ll begin to pay down the loan . . . “ Defendant attests that “No loan agreement was ever entered into and this conversation never occurred.”

Defendant states that he sent an email on April 27th to “mitigate negative emotions,” and “to pay some portion of the financial support he had received from plaintiffs' son” during the relationship. Defendant also emailed plaintiffs' son on June 3, 2015 and September 20, 2015 indicating that he had not entered a loan agreement. And, in an email dated November 5, 2015, defendant expressed his belief that any financial support was offered “in good faith,” within the context of me and Plaintiffs' son having been engaged.

As no loan agreement was entered nor material content necessary to constitute an agreement settled on between plaintiffs and defendant, there can be no breach of contract. And, as all financial support was done as a gift, there can be no unjust enrichment.

In opposition, plaintiffs argue that they have adequately stated claims for breach of contract and unjust enrichment. Further, defendant's conclusory assertion that he did not enter in any loan agreement and that the money deposited into his bank account was a gift is refuted by defendant's own “documentary” evidence and, in any event, is insufficient to defeat plaintiffs' claim of unjust enrichment. Plaintiffs submit the emails in which defendant acknowledged his obligation to repay the loan.

In reply, defendant argues that the money transferred to his account was from plaintiffs' son to support defendant while in Oxford, as a gift, during the period of their engagement. Any obligation defendant undertook was in desire to make amends after the end of the engagement. There was no agreed upon repayment term for the gift, or evidence of any loan.

#### *Discussion*

It is noted that defendant cites no section under the CPLR under which dismissal is sought. However, as defendant has yet to file his answer, and supports his motion with an affidavit and note card, the Court treats his motion as one to dismiss pursuant to CPLR 3211(a)(1) for failure to state a cause of action and CPLR 3211(a)(7), based on documentary evidence.

#### *CPLR 3211(a)(1): Dismissal Based on Documentary Evidence*

Pursuant to CPLR 3211 (a) (1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted “only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1<sup>st</sup> Dept 2014]). “Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Mill Financial, LLC v. Gillett, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1<sup>st</sup> Dept 2014]).

#### *CPLR 3211(a)(7): Failure to State a Cause of Action*

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding “whether the pleading states a cause of action, and if from its four corners factual

allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1<sup>st</sup> Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1<sup>st</sup> Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*US Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 950 N.Y.S.2d 127 [1<sup>st</sup> Dept 2012]; *Harris v. Seward Park Housing Corp.* 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [1st Dept. 2010]; *Morris v. 702 East Fifth Street HDFC*, 46 A.D.3d 478, 850 N.Y.S.2d 6 [1st Dept. 2007]).

To assert a claim for unjust enrichment, a plaintiff must establish that he/she performed services for the defendant which resulted in the defendant being unjustly enriched (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, 12 Misc 3d 1182 [2006], *citing Clark v Daby*, 300 A.D.2d 732, 751 N.Y.S.2d 622 [3d Dept 2002] and *Kagan v. K-Tel Entertainment, Inc.*, 172 A.D.2d 375, 568 N.Y.S.2d 756 [1st Dept. 1991]). Plaintiff must allege that the services were performed at the request or behest of the defendant (*Clark v. Daby, supra*; *Prestige Caterers v. Kaufman*, 290 A.D.2d 295, 736 N.Y.S.2d 335 [1st Dept. 2002]).

As to relief under CPLR 3211(a)(7), accepting the allegations in the complaint as true, as this Court must, the Court finds that plaintiffs adequately stated causes of action for breach of contract and unjust enrichment. A review of the complaint’s allegations reveal sufficient, detailed facts of plaintiffs’ loan agreement with defendant, tender of funds to defendant, and defendant’s failure to pay, which support both causes of action. Therefore, dismissal of the complaint for failure to state a cause of action is unwarranted.

As to relief under CPLR 3211(a)(1), to be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1<sup>st</sup> Dept 2008] (documentary evidence “apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based”). To constitute documentary evidence, the papers must be “essentially undeniable” and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1<sup>st</sup> Dept 2014] *citing* Siegel, Practice Commentaries, *supra*, at 2)). Emails can qualify as documentary evidence, they “must meet the ‘essentially undeniable’ test” (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1<sup>st</sup> Dept 2014]; *see also Langer v. Dadabhoy*, 44 A.D.3d

425, 843 N.Y.S.2d 262 [1st Dept 2007], lv denied 10 N.Y.3d 712 [2008]). However, affidavits do not qualify as "documentary evidence" for purposes of this rule (see *Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]; *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004] (affidavits and depositions cannot be the basis for this motion); *Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983] [stating that affidavits do not qualify as "documentary evidence" for purposes of this rule]).

Defendant's affidavit is insufficient to support relief under CPLR 3211(a)(1). Further, the note submitted by defendant fails to conclusively establish any defense to plaintiffs' claims. The note indicates that plaintiffs' transfer of "\$10,000" to defendant was "a gift, not a loan," and thus, does not appear to pertain to the transfers of \$32,000 and \$6,000.00 referenced in plaintiffs' complaint. The note also references a "loan" (albeit, "interest free") "to cover your tuition," which supports plaintiffs' complaint.

Further, the Court notes that defendant's April 27<sup>th</sup> email (in response to plaintiffs' email the day before regarding the "Oxford loan" for "\$38,000") details the expenses defendant incurred as approximately "\$33,600.00." Defendant's April 27<sup>th</sup> email also suggests that the "discrepancy" between plaintiffs' "suggested" loan amount "lies in the expenses I have been paying for since the separation; the remainder should still be in the joint account, where it was deposited." Further, defendant concludes that he "will send a check . . ." The remaining emails raise issues as to defendant's acknowledgment to repay the sums owed.

Defendant's reliance on *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce* (70 A.D.3d 423, 894 N.Y.S.2d 47 [1<sup>st</sup> Dept 2010]) (dismissing breach of contract claim based on written "draft summary and summary documents" which indicated an intent not to be bound)).

Therefore, dismissal pursuant to CPLR 3211(a)(1) is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss plaintiffs' complaint is denied; and it is further

ORDERED that defendant shall serve and file his answer within 30 days of entry of this order; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on July 26, 2016, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated 5/13/16

ENTER: , J.S.C.

**HON. CAROL R. EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION **J.S.C.**

Check if appropriate:  DO NOT POST  REFERENCE