

Skutnik v Messina

2016 NY Slip Op 33097(U)

June 23, 2016

Supreme Court, Orange County

Docket Number: 0403/2016

Judge: Sandra B. Sciortino

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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
ANTHONY SKUTNIK,
Plaintiff,

DECISION AND ORDER

INDEX NO.: 0403/2016
Motion Date: 5/9/16
Sequence Nos. 1 & 2

-against-

PETER SCOTT MESSINA A/K/A SCOTT MESSINA,
Defendant.

-----X
SCIORTINO, J.

The following papers numbered 1 to 12¹ were considered in connection with the application (Sequence #1) of defendant for an Order dismissing the Complaint; and the Cross-Motion of plaintiff (Sequence #2) for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Seq. #1)/Affirmation (Pressler)/Affidavit (Messina)/ Exhibits A-B	1 - 5
Notice of Cross-Motion (Seq. #2)/Affidavit (Skutnik)/Affirmation (Gold)/Exhibits 1-3	6 - 11
Affirmation in Reply and in Opposition to Cross-Motion (Pressler)	12

Background and Procedural History

This action arises out an alleged loan of \$45,000 by plaintiff to defendant, in or around June, 2002, for which there was never a written contract or promissory note. The loan has never been

¹Plaintiff submitted papers entitled "Reply Affidavit and Affirmation". As sur-replies are not permitted pursuant to the Civil Practice Law & Rules and the Rules of this Part, they were not considered.

repaid. On or about March 10, 2016, plaintiff filed a Summons and attorney-Verified Complaint (Exhibit A to moving papers). In the Complaint, plaintiff alleged that, at all relevant times, defendant was and continues to be a resident of the State of Florida. His first cause of action alleged that he loaned defendant the funds on or about June 2, 2002, and that defendant agreed to repay the funds on January 1, 2011. (Exhibit A at ¶¶Fourth) The second cause of action alleged that plaintiff rendered periodic statements of account to defendant, none of which were objected to or challenged. (Exhibit A at ¶¶ Ninth-Tenth)

Motion to Dismiss (Seq. #1)

By pre-Answer Notice of Motion filed on or about April 11, 2016, defendant seeks dismissal of the Complaint, on the grounds that: (a) the Court lacks personal jurisdiction over defendant, a Florida resident; (b) the alleged oral contract violates the Statute of Frauds; (c) the Complaint fails to state a cause of action; and (d) the claims are time-barred.

By counsel, and through his own affidavit, defendant argues that he has had no contacts with New York; does not operate or transact business here; has not committed a tort in New York, and derives no substantial revenue from New York. He owns no property or assets in New York. There is thus no basis for the assertion of New York jurisdiction over him.

Defendant denies that he ever borrowed \$45,000 from plaintiff, or agreed to make payments to him. Further, even if true, plaintiff's claim that an oral contract made in 2002, requiring performance in 2011, violates the Statute of Frauds (General Obligations Law §5-701), which provides that an agreement which is not to be performed within one year is void, unless in writing. As such, it must be dismissed.

Defendant asserts that, even if plaintiff's allegations are accepted as true, they do not state an actionable claim against him. Finally, defendant submits that the 2002 contract, if it existed, was subject to a six-year statute of limitations. He suggests that plaintiff's arbitrary and baseless selection of a 2011 performance date is manufactured to avoid the statute of limitations which would otherwise prevent his claim.

Fees and costs are sought for what defendant characterizes as a frivolous, baseless pleading.

Motion for Summary Judgment (Seq. #2)

Plaintiff first asks the Court to treat his Affidavit as a Verified Answer, and to consider issue joined, for purposes of seeking summary judgment.

His opposition begins by asserting that he loaned defendant the money "as a friend." The funds were wired from his bank account to an account maintained by defendant at Citibank in Smithtown, New York, pursuant to wiring instructions given to him by defendant on June 20, 2002. Thereafter, plaintiff provided three wires, the last occurring on or about August 29, 2002. Plaintiff no longer has any paperwork regarding the loan funds, but argues that, from the foregoing, it is evident that the loan agreement in question was made in New York.

Although his Complaint asserted a due date of January 2011, plaintiff's affidavit states that the loan "was to be repaid immediately and not beyond a one year period." (Affidavit at ¶23, Attorney's Affirmation at ¶5)

In support of this argument, plaintiff appends a 61-page printout of emails between himself and defendant, which he asserts contain repeated promises to repay the funds. Of note is that plaintiff avers that these records were kept in the ordinary course of his business affairs. (Affidavit at ¶3) However, there is no explanation of what plaintiff's "business" was or how plaintiff and

defendant came to do business together.

The emails appended to plaintiff's papers begin with wire information sent by defendant to plaintiff, as well as follow-up requests for the loan funds, sent between June 20th and August 29th, 2002. On August 29, 2002, defendant emailed plaintiff, stating that "if you need me to start paying it down, I probably can start once the land financing goes through in September, however I don't want to leave myself short, which means I would rather pay it off once the land is sold...." Plaintiff responded: "Give me a very rough idea when you think things will open up for you finance wise. I am not going to hold you to anything, I just want to get an idea." (Exhibit 2 to Cross-Motion) An email from plaintiff to defendant dated July 29, 2003 asks "how are things looking with the 45k?" In the next appended email, dated September 30, 2003, plaintiff states "...unfortunately we need to get a schedule setup for the 45k." Defendant's October 1, 2003 response indicated "...it's possible I might be able to pay you back in full in a few weeks." All of these emails contain as their subject line, "Hey"

Emails in January and March of 2004, entitled "Loan" asked for repayment. Defendant's responses were "I'll work on it this week." and "I should have it together in about 30 days." The emails over the next several years continue in this fashion, with plaintiff asking for repayment, and defendant putting him off for "a few weeks" or "until [some event] happens". Many emails discussed the closing of a Long Island house, apparently an investment property, which appeared to fall through many times. A 2010 email from defendant indicates that the house was lost. Finally, in August 2011, plaintiff demanded his money back "now." Defendant responded "if I had it, I'd give it to you, I just don't." (Exhibit 2)

Plaintiff argues that the email chain shows that defendant's repeated promises to repay the loan constitute continuing promises, thus tolling the six-year statute of limitations, and rendering the action timely. (Affidavit at ¶¶ 30-32)

With respect to the motion to dismiss for failure to state a cause of action, plaintiff asserts that a cause of action for breach of contract is sufficiently pled so as to give notice to defendant of the claims against him. (Affirmation at ¶21) Liberally construing the pleadings, as the Court is required to do, plaintiff's omission of detail can be excused, since the details are "peculiarly in defendant's knowledge." (Affirmation at ¶27)

Moreover, plaintiff asserts that his documentary evidence (i.e., his emails) showing the loan; defendant's acknowledgment of receipt; and defendant's repeated promises to pay create a *prima facie* case, entitle him to summary judgment against defendant. He asserts that there are no issues of fact which need to be resolved. (Affirmation at ¶¶ 30, 32) Defendant has no defense to the documents submitted. (Affirmation at ¶36)

Finally, plaintiff asserts that while his Complaint may have been "inartfully drafted and pled," it was in no way frivolous or designed to harass. Consequently, sanctions are not warranted.

Defendant's Reply

Defendant asserts that plaintiff's papers fail to refute his legal arguments. Plaintiff has not established that defendant had sufficient contacts with New York so as to warrant jurisdiction. He has not proven that the \$5,000 wire made on June 20, 2002 had anything to do with the alleged \$45,000 loan. Moreover, the maintenance of a New York bank account is insufficient to support personal jurisdiction. (Reply Affirmation at ¶6)

Nor can plaintiff's contradictory statements regarding the due date of the alleged loan² controvert the arguments advanced by defendant with regard to Statute of Frauds and Statute of Limitations. Defendant argues that on a motion to dismiss, the allegations of the Complaint must be deemed to be true. Here, the Complaint asserts an oral contract formed on June 2, 2002, to be performed on January 1, 2011, clearly violating the Statute of Frauds. (Reply Affirmation at ¶9)

Defendant points out that, if the Complaint is true, the claim is barred by the Statute of Frauds; if the Affidavit is true, it is barred by the Statute of Limitations. The Court cannot rely on "ambiguous statements" in emails to extend or toll the six-year limitations period. (Reply Affirmation at ¶¶ 10-11)

The cross-motion for summary judgment is procedurally flawed, as issue has not yet been joined, and no discovery has taken place. Defendant further argues that plaintiff has failed to offer any authority for treating the opposing affidavit as an answer.

Even if that were possible, there are material issues of fact which require discovery, making a motion for summary judgment premature, at best.

Defendant reiterates its request for sanctions, asserting that plaintiff was given an opportunity to withdraw its Complaint, and its failure to do so, in light of the facts asserted in defendant's motion, constitutes frivolous pleading. (Reply Affirmation at ¶18)

The Court has fully considered the submissions of the parties, as limited herein.

²This apparently refers to the Complaint, which alleges a due date in January 2011, and plaintiff's Affidavit, which states that the loan was to be repaid "immediately."

DISCUSSION

The motion to dismiss is denied, without prejudice to renew after discovery. The cross-motion for summary judgment is denied.

Motion for Summary Judgment

Civil Procedure Law & Rules section 3211(c) provides that, upon a motion to dismiss, whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. In the instant matter, it is undisputed that no such notice was provided. Moreover, for the reasons that follow, the submissions, which raise more questions than they answer, fall far short of the standard required to support summary judgment. Plaintiff's submissions have thus been considered only insofar as they oppose the motion to dismiss.

Motion to Dismiss

For a variety of reasons, defendant's motion to dismiss lacks merit.

Personal Jurisdiction

It is undisputed that defendant was a resident of the State of Florida, at the time of the purported loan, and has remained a resident of the State of Florida. Defendant's business interests, whatever they may be, appear to be located in that state, as well. However, whether defendant had, or continues to have sufficient contact with New York so as to invoke jurisdiction is not at all clear.

It is well established that Civil Practice Law & Rules §302 enables a New York court to exercise personal jurisdiction over an out-of-state defendant if he purposefully transacts business within the state. *McGowan v. Smith*, 52 NY 2d 268 (1981) When there is no systematic course of doing business in New York, it is essential to establish a nexus between the business transacted and the cause of action sued upon. *Id.* at 323 Plaintiff has done nothing to establish that defendant had

any kind of ongoing or systematic business in New York. However, the emails appended to plaintiff's opposition showed two facts: first, that defendant maintained a Citibank account in New York, and second (although not raised by plaintiff in his superficial treatment of the issue), that defendant owned a property in Long Island, the sale of which was one of the conditions upon which defendant's intent to repay was pinned. Defendant correctly argues that the mere maintenance of a bank account, without other contacts, is an insufficient predicate upon which jurisdiction can rest. *Arroyo v. Mountain School*, 68 AD3d 603 (1st Dep't 2009) However, if a New York bank account is used to conduct almost all of the business of a party, the same may demonstrate an intent to take advantage of the protections of New York law on a continuous and systematic basis, creating a constructive "presence" in New York. *Georgia Pac. Corp. v. Multimark's Int'l Ltd.*, 265 AD2d 109, 111 (1st Dep't 2000)

As the party seeking to assert personal jurisdiction, plaintiff bears the ultimate burden of proof on the issue. *Marist College v. Brady*, 84 AD3d 1322 (2nd Dep't 2011) To successfully oppose a motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiff need not make a *prima facie* showing, but need only set forth "a sufficient start, and [show its] position not to be frivolous." *Id.* at 1323, quoting, *Peterson v. Spartan Indus.*, 33 NY 2d 463, 467 (1974)

Plaintiff's opposition has, at the very least, raised an issue of fact regarding the nature, extent and length of defendant's ongoing business interests in New York. Plaintiff shall be entitled to discovery reasonably related to the jurisdictional issue. *Peterson*, 33 NY2d at 468

On that basis, the motion to dismiss on jurisdictional grounds is denied, without prejudice to a further motion to dismiss upon the conclusion of discovery, if warranted.

[* 9]

Statute of Limitations/Statute of Frauds

Like the issue of jurisdiction, the submissions of the parties raise more questions than they answer. Defendant begins by denying that he ever borrowed \$45,000 or promised to pay it. His reply, however, does not address the statements in his emails, except to characterize them as “ambiguous.” These statements, however dubious they may make his denial appear to be, must be the subject of further inquiry. There is thus a primary question of fact about whether the loan ever existed, which must be addressed before there can be any inquiry about when the cause of action accrued, and when it became stale.

On a motion to dismiss, however, the allegations of the complaint are deemed to be true. *Dunn v. Gelardi*, 59 AD3d 385 (2nd Dep’t 2009) Thus, for purposes of this application, the Court accepts plaintiff’s allegation that a loan was made to defendant on June 2, 2002. The due date of the loan is a question of fact that must be determined before there can be any determination of whether the Statute of Limitations or the Statute of Frauds can be invoked. A debt which does not provide a date for which repayment was intended is deemed payable on demand. McKinney’s Uniform Commercial Code §3-108; *Lakhaney v. Anzelone*, 788 F. Supp. 160 (S.D.N.Y. 1992) Since there is no writing, there can be no definitive determination of a due date. Whether the loan was a demand loan, or had a definitive due date, as asserted by plaintiff, is one of fact. If the loan was in fact due on demand, and the emails submitted by plaintiff can be considered demands, the Statute of Frauds is irrelevant, requiring a finding that the complaint asserts a valid cause of action, and precluding the motion to dismiss.

With respect to the Statute of Limitations, plaintiff’s cause of action appears to rest on the assertion that the debt was to be repaid “immediately” as he states, however conveniently, in his

opposing papers. The accrual dates for an action to recover on money loaned, based on a series of transactions, were the dates upon which the original loans were made. *Skiadis v. Terovolas*, 271 AD2d 521 (2nd Dep't 2000) The date on which this loan (or loans) was made is unclear from the pleadings, in which plaintiff asserts a date of June 2, 2002, while his supporting paperwork suggests the loan was not made until after the wiring instructions were provided on June 20, 2002.

Whether the loan was made on June 2nd or June 20th, the six-year statute of limitations may well have run. However, that question is dependent upon when demand was made, and when the cause of action accrued. These are questions of fact which require further inquiry.

Plaintiff argues that the "promises" made by defendant in emails spanning over nine years tolled or extended the six-year statute, until his 2011 email refusing to pay, thus rendering this action timely. General Obligations Law §17-101 provides that the statute may be tolled, providing there is a signed written acknowledgment of an existing debt, which contains nothing inconsistent with an intention on the part of the debtor to repay. Each such acknowledgment starts the statute running anew. *Bernstein v. Kaplan*, 67 AD2d 897 (2nd Dep't 1979) The same is true of a claim of account stated, the second cause of action. *Erdheim v. Gelfman*, 303 AD2d 714 (2nd Dept 2003)

Whether an email chain in which defendant allegedly acknowledges the debt serves to toll the statute depends on the circumstances of the individual case. In determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay. *Good Luck Prod. Co. v. Crystal Cove Seafood Corp.*, 60 F. Supp. 3d 365 (E.D.N.Y. 2014), citing *Knoll v. Datek Sec. Corp.*, 2 AD3d 594 (2nd Dep't 2003) It is important to note that, even if a writing is something less than a new promise to pay a past-due debt, if it clearly conveys and is not inconsistent with an intent to repay, the tolling statute may be satisfied. 60 F. Supp. At 372

[* 11]

In the matter at bar, defendant asserts that the emails are “ambiguous.” However, it is plausible to interpret defendant’s emails as an acknowledgment of the debt. As in *Good Luck*, defendant certainly does not deny the debt. *Id.*

Even if the emails acknowledge the existence of defendant’s debt to plaintiff, if they are conditional promises to repay, plaintiff must meet the burden of showing that the conditions were met, in order to succeed on the claim that the statute was tolled. *George Tsunis Real Estate Inc. v. Benedict*, 36 Misc. 3d 1209(A) (Suffolk Co. 2012)

Finally, there are issues of fact regarding whether defendant’s statements, if interpreted as promises to pay, were made to induce plaintiff to postpone bringing suit; and whether plaintiff exercised reasonable diligence in commencing the action. *Id.*

For all of the foregoing reasons, the motion to dismiss on the grounds of Statute of Limitations and Statute of Frauds is denied.

Costs and Fees

Plaintiff himself acknowledges that his Complaint was less than artfully drawn, and his unexplained “correction” in his affidavit as to the due date for the loans certainly raises issues as to his credibility. However, the Court does not believe that either party in this matter has been entirely forthright to date, and cautions the parties that as discovery continues, such careless (if not worse) regard for the truth will not be countenanced by the Court.

Because neither of the parties has squarely addressed the question of good-faith pleading, the application for costs and fees is likewise denied.

Conclusion

On the basis of the foregoing, it is hereby ORDERED that:


1. The motion of defendant to dismiss for lack of personal jurisdiction is denied, without prejudice to a further motion to dismiss at the conclusion of discovery on the jurisdictional issue;
2. The motion of defendant to dismiss on the grounds of Statute of Frauds and Statute of Limitations is denied without prejudice to a further motion to dismiss at the conclusion of discovery on the issues;
3. The motion of defendant for costs and fees is denied;
4. The motion of plaintiff for summary judgment is denied.
5. Defendant shall interpose his Answer not later than July 15, 2016.
6. The parties shall appear for Preliminary Conference on August 2, 2016 at 9:00 a.m.

All relief not addressed specifically herein is denied.

This decision shall constitute the order of the Court.

ENTER:

Dated: June 23, 2016
Goshen, New York



HON. SANDRA B. SCIORTINO, J.S.C.

To: David J. Gold, PC
800 Second Avenue, Suite 810
New York, NY 10017-9223

Jacobowitz & Gubits
158 Orange Avenue, PO Box 367
Walden, NY 12586