

Hahn v Ali
2018 NY Slip Op 30152(U)
January 26, 2018
Supreme Court, Suffolk County
Docket Number: 13-15698
Judge: Peter H. Mayer
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INDEX No. 13-15698

CAL. No. 17-00846CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-25-17 (006)
MOTION DATE 9-22-17 (007)
ADJ. DATE 11-24-17
Mot. Seq. # 006 - MotD
007 - MotD

-----X

ROSEMARIE HAHN,

Plaintiff,

- against -

AMEER ALI, MUNTASIR MUHAMMAD ALI,
AHMED N. CHATTHA,

Defendants.

-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated August 8, 2017, and supporting papers (including Memorandum of Law dated August 8, 2017); (2) Notice of Cross Motion by the defendants Ameer Ali and Ahmed Chattha, dated September 18, 2017, supporting papers; (3) Affirmation in Opposition by the , dated , and supporting papers; (4) Reply Affirmation by the defendants, dated November 28, 2017, and supporting papers; (5) Other Memorandum of law by plaintiff, dated October 27, 2017¹ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. 006) by plaintiff Rosemarie Hahn and the motion (seq. 007) by defendants Ameer Ali and Ahmed Chattha are consolidated for purposes of this determination; and it is

¹ Defendants reply dated November 28, 2017, after the submit date of the motion, and plaintiff memorandum of law, submitted after the return date of the motion, have not been considered.

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ORDERED that the motion by plaintiff Rosemarie Hahn for summary judgment in her favor on the complaint and dismissing and all counterclaims asserted against her is granted to the extent indicated; and it is further

ORDERED that the motion by defendants Ameer Ali and Ahmed Chattha for summary judgment in their favor on the complaint and on the counterclaims is granted to the extent indicated.

Plaintiff Rosemarie Hahn commenced this action to recover money damages for a series of loans totaling \$90,000.00 allegedly made to defendants in 2009. Plaintiff alleges causes of action for breach of contract, fraud, unjust enrichment, and conversion. She also seeks \$90,000.00 in punitive damages. Defendants Ameer Ali and Ahmed Chattha have answered and counterclaimed for outstanding lottery dues, abuse of process, intentional harassment and mental torture, and punitive damages. Issue has been joined, discovery has been completed, and a note of issue has been filed.

Plaintiff now moves for summary judgment in her favor, maintaining that “sufficient evidence exists to prove [her] causes of action,” and that “sufficient evidence exists to prove that defendants’ counterclaims are without merit.” In support of the motion, plaintiff submits, among other things, copies of the pleadings; selected portions of the parties’ deposition transcripts; copies of the checks; a bill of sale; and a New York State Department of State corporate registration. In opposition, and in support of their own motion, defendants submit an affidavit of Ameer Ali; copies of the checks; the bill of sale; a New York State Department of State corporate registration; and the deposition transcripts of plaintiff, Ameer Ali, and Ahmed Chattha.

Plaintiff testified at her deposition that she had been friends with defendant Amer Ali since 2007, and that Ali and defendant Ahmed Chattha, in 2009, were co-owners of GM Cards & Gifts, Inc. She testified that at Ali’s request, she loaned Ali a total of \$90,000.00, delivered from July through September 2009. She further testified that, at Ali’s request, the checks were made out not to Ali, but to businesses owed by Ali and Chattha, specifically SAAM of New York, Inc., and GM Stationery, Inc. She testified that the checks were received by Ali, who promised to pay the funds back within nine months to a year, and some of the loans were in cash.

Ameer Ali testified that the funds received from plaintiff were not a loan, but were for the purchase of GM Cards & Gifts, Inc. He testified that Dalip Malik, an accountant, drew up a bill of sale, dated September 11, 2009. He avers that plaintiff fell in love with defendant Muntasir Muhammad and she was interested in promoting him to shareholder/manager of GM Cards. He avers plaintiff paid \$15,000.00 and \$10,000.00 to SAAM of New York so that she could purchase shares of SAAM of New York, and buy-out Ahmed Chattha’s interest in SAAM of New York and GM Cards. Ali also avers that plaintiff paid \$40,000.00 to GM Stationery, a “subsidiary of SAAM of New York to acquire 50% share in GM Cards.” He further avers, after acquiring “both these businesses,” he sold GM Cards to plaintiff. He avers plaintiff’s name was provided to the New York State, Department of State, Division of Corporations, as CEO of GM Cards & Gifts, Inc. He avers plaintiff applied to New York State Lottery for transfer of the existing lottery retailer license which was in his and Chattha’s names. Finally, he avers that plaintiff had differences with Muntasir Muhammad, and the business was closed with stock in trade inside, in arrears of rent, and outstanding lottery fees due.

Ahmed Chattha testified that he is CEO of A & M Cards and Smoke Shop, and that he was the former CEO of GM Card and Smoke Shop, GM Stationery, and SAAM of New York. He testified plaintiff and Ameer Ali purchased his 50 % of GM Card & Gift, Inc. for \$40,000.00, and that the check was made to payable SAAM of New York.

Pursuant to CPLR 3212, on a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g. J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract" (*Dunkin' Donuts v Liberatore*, 138 AD2d 559, 559, 526 NYS2d 141 [2d Dept 1988]; *see Chrysler Credit Corp. v Kosal*, 132 AD2d 686, 518 NYS2d 162 [2d Dept 1987]).

To establish a claim of fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, knowledge on the part of the wrongdoer, justifiable reliance, and resulting injury (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 823 NYS2d 45 [1st Dept 2006]). Further, to establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership "or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*National Center for Crisis Management, Inc. v Lerner*, 91 AD3d 920, 938 NYS2d 138 [2d Dept 2012]).

Unjust enrichment occurs where a defendant enjoys a benefit bestowed by the plaintiff, but without adequately compensating the plaintiff (*see Sergeants Benevolent Ass'n Annuity Fund v Renck*, 19 AD3d 107, 796 NYS2d 77 [1st Dept 2005]). A plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the

other party] to retain what is sought to be recovered' ” (*Citibank, N.A. v Walker*, 12 AD3d 480, 481, 787 NYS2d 48 [2d Dept 2004]; *Baron v Pfizer, Inc.*, 42 AD3d 627, 629–630, 840 NYS2d 445 [3d Dept 2007]). Receipt of a benefit alone is insufficient to establish a cause of action for unjust enrichment (*see Wiener v Lazard Freres & Co.*, 241 A.D.2d 114, 672 NYS2d 8 [1st Dept 1998]). Rather, liability requires that under the circumstances and as between the parties to the transaction the enrichment be unjust (*see McGrath v Hilding*, 41 NY2d 625, 394 NYS2d 603 [1977]).

As to punitive damages, New York does not recognize punitive damages as a separate cause of action (*APS Food Systems, Inc. v Ward Foods, Inc.*, 70 AD2d 483, 421 NYS2d 223 [1st Dept 1979]). Moreover, to recover plaintiff would have to establish that defendant acted with a conscious or wanton recklessness in disregard to the rights and safety of others, a requisite to the recovery of punitive damages which plaintiff has not alleged (*see Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 551 NYS2d 481 [1990]; *Rinaldo v Mashayeskhi*, 185 AD2d 435, 436, 585 NYS2d 615 [3d Dept 1992]). The Court of Appeals instructed in *Marinaccio v Town of Clarence*, 20 NY3d 506, 511, 964 NYS2d 69 (2013), that “the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.”

Here, plaintiff has failed to establish a prima facie entitlement to summary judgment in her favor as factual issues exist as to whether the payments allegedly made to defendants were for the purchase of GM Cards & Gifts, Inc. or oral loans as described by plaintiff (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Accordingly, that branch of plaintiff’s motion seeking summary judgment in her favor on the complaint is denied.

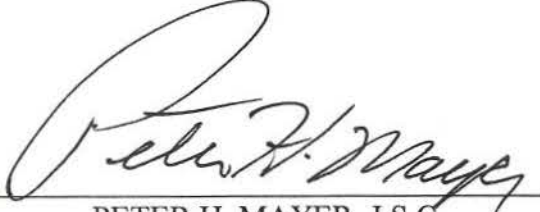
Turning to defendants’ counterclaims, New York does not recognize a common law cause of action to recover damages for harassment (*see Mago, LLC v Singh*, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; *Ralin v City of New York*, 44 AD3d 838, 844 NYS2d 83 [2d Dept 2007], *lv denied* 10 NY3d 784, 857 NYS2d 19 [2008]), and the allegations in the counterclaim are insufficient to state a claim for abuse of process. Three essential elements must be established by a party seeking damages for abuse of process: (1) regularly issued process, either criminal or civil, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Curiano v Suozzi*, 63 NY2d 113, 116, 480 NYS2d 466 [1984]; *see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFL-CIO*, 38 NY2d 397, 380 NYS2d 635 [1975]; *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 907 NYS2d 255 [2d Dept 2010]; *Johnson v Kings County Dist. Attorney’s Off.*, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]). The mere commencement of a civil action by summons and complaint, however, does not constitute abuse of process, since the gist of such a claim is the “improper use of process after it is issued” by way of an “unlawful interference with one’s person or property” (*Williams v Williams*, 23 NY2d 592, 596, 298 NYS2d 473 [1969]; *see Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 907 NYS2d 255). Malicious motive alone is insufficient to give rise to a claim for abuse of process (*Curiano v Suozzi*, 63 NY2d 113, 117, 480 NYS2d 466). “The key to this tort is not impropriety in obtaining the process, but impropriety in using it” (*Matter of Simithis v 4 Keys*

Leasing & Maintenance Co., 151 AD2d 339, 341, 542 NYS2d 595 [1st Dept 1989]). Here, defendants do not allege either in their counterclaim or affidavit in opposition to the motion that process was used by plaintiff to unlawfully interfere with their person or property, only that she acted maliciously in bringing such action (see *Curiano v Suozzi*, 63 NY2d 113, 480 NYS2d 466; *Cozzani v County of Suffolk*, 84 AD3d 1147, 923 NYS2d 348 [2d Dept 2011]; *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 907 NYS2d 255; *Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

Further, as to defendants claim of intentional infliction of emotional distress, the counterclaim does not allege conduct by plaintiff “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, 461 NYS2d 232 [1983], quoting Restatement (Second) of Torts § 46 [d]; see *McGovern v Nassau County Dept. of Social Servs.*, 60 AD3d 1016, 876 NYS2d 141 [2d Dept 2009]; *Kaye v Trump*, 58 AD3d 579, 873 NYS2d 5 [1st Dept], *lv denied* 13 NY3d 704, 887 NYS2d 1 [2009]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]). Accordingly, the branch of plaintiff’s motion seeking dismissal of the counterclaims for abuse of process, intentional harassment and mental torture, and punitive damages is granted.

As to the motion by defendants, plaintiffs’ claims for fraud and punitive damages are dismissed. No independent cause of action exists for punitive damages (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 612 NYS2d 339 [1994]; *Stein v Doukas*, 98 AD3d 1024, 951 NYS2d 173 [2012]). Additionally, plaintiff’s claim for fraud is not pled with sufficient particularity (CPLR 3016 [b]; *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 860 NYS2d 422 [2008]). Plaintiff cannot recover damages under the quasi-contract claims, including unjust enrichment and conversion, if the parties entered into a contract which covered the same subject matter (*Krigsfeld v Feldman*, 115 AD3d 712, 982 NYS2d 487 [2d Dept 2014]). However, as an issue of fact exists as to whether there was a contract, plaintiff’s claims of unjust enrichment and conversion survive the motion for summary judgment (*Sterlacci v Gurfein*, 18 AD3d 229, 794 NYS2d 362 [1st Dept 2005]; *Basu v Alphabet Mgt. LLC*, 127 AD3d 450, 8 NYS3d 273 [1st Dept 2015]). Accordingly, the causes of action alleging fraud and punitive damages are dismissed.

Dated: January 26, 2018


PETER H. MAYER, J.S.C.