

Sharbat v Weiser

2018 NY Slip Op 30604(U)

April 6, 2018

Supreme Court, New York County

Docket Number: 161462/2014

Judge: Melissa A. Crane

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

-----X	:	
SOLOMON SHARBAT,	:	Index No. 161462/2014
	:	
Plaintiff,	:	Motion Seq. Nos.
	:	003 and 004
-against-	:	
	:	
SETH WEISER,	:	<u>DECISION AND ORDER</u>
	:	
Defendant.	:	
-----X	:	

Melissa Crane, J.:

The court consolidates motions 003 and 004 for disposition. Plaintiff Solomon Sharbat sues to recover money he allegedly loaned to defendant Seth Weiser, and to recover money defendant allegedly misappropriated through misuse of plaintiff's credit card account. Defendant answered, denying liability, and counterclaimed, contending the loan transactions were usurious and, therefore, unenforceable.

In motion sequence 003, plaintiff moves for partial summary judgment to recover part of the money he purportedly lent to defendant, plus money defendant allegedly misappropriated from plaintiff's credit card account. Plaintiff also seeks dismissal of defendant's counterclaims. In the alternative, plaintiff seeks a protective order that permits him to appear for his deposition via video conference.

In motion sequence 004, defendant moves for partial summary judgment, seeking dismissal of plaintiff's first and third causes of action, and reduction of the amount in controversy under plaintiff's second cause of action to \$11,725.00. Defendant argues this lower amount represents the total in dispute with respect to the wire transfers defendant allegedly received in October 2011, and the amount defendant allegedly retained, without authorization, from plaintiff's credit card account.

For the following reasons, plaintiff's motion for partial summary judgment is granted in part and denied in part, and defendant's motion for partial summary judgment is denied.

Plaintiff's motion for an order, permitting his deposition by video conference, is granted.

Background

Plaintiff commenced this action by e-filing his summons and complaint on November 18, 2014. Defendant e-filed his answer and counterclaims on January 20, 2015. Plaintiff e-filed his answer to the counterclaims on January 26, 2015.

Plaintiff is currently a resident of Israel. He alleges that he made a series of loans, totaling \$98,500, to defendant, a New York State resident, during a trip defendant made to Israel in 2011. Plaintiff contends that defendant failed to repay those loans. Plaintiff also claims that defendant converted money from plaintiff by misusing plaintiff's credit card account, and that defendant has yet to repay \$4,500 of these converted funds.

Plaintiff claims that two single-page documents evidence loans to defendant, that plaintiff refers to as Note 1 and Note 2. They are exhibits A and B to the complaint.

Note 1, dated "23-06-2011," is signed by defendant and states: "I Seth Weiser received from Shlomo Sharbat \$50,000 USD May 15th. I hereby declare that I will repay \$50,000 by the 15th of September 2011."

Note 2 is headed: "AFFIDAVIT FOR CONFESSION OF JUDGMENT – Signed on August 23, 2011 in Tel Aviv, Israel." In paragraph 1, defendant "state[s] and say[s]" that he resides at certain addresses in New York, New York and Tel Aviv, Israel. Paragraph 2 provides that defendant:

"hereby confess[es] judgment in Favor of Mr. Solomon Sharbat in the sum of Forty Eight thousand five hundred US dollars [*sic*], together with interest of 18% annually from the date of signature of this document, and do hereby authorize Mr. Solomon Sharbat or assigns to enter judgment for said amount."

Paragraph 3 states that

“this confession of judgment is for a debt justly due to Mr. Solomon Sharbat arising out of monies loaned to me during the first half of 2011.”

Defendant signed this document. “Mordechai Gross, PhD” signed below defendant’s signature, in a block headed “Signed before me this day of August 23, 2011.”

In his complaint, plaintiff asserts three causes of action: (1) money lent; (2) money had and received; and (3) unjust enrichment. Plaintiff seeks damages for Note 1 in the amount of \$50,000, “together with pre-judgment interest at the legal rate from September 11, 2011” (complaint at 4). With respect to Note 2, plaintiff seeks \$48,500, “together with interest at the rate of 18% per annum from August 23, 2011” (*id.* at 4-5). As to the funds he claims defendant “misappropriated through misuse of [his] bank account,” plaintiff seeks \$4,500 he alleges remains unpaid, “together with interest from the date of such misuse” (*id.* at 5). Plaintiff also seeks costs and post judgment interest.

In his answer, defendant denies liability. Defendant also alleges that plaintiff has sought to impose 18% interest on Note 1 and Note 2, rendering them both “usurious and as such wholly unenforceable and uncollectible” (answer at 2). Defendant also alleges that Notes 1 and 2, “if they are ever deemed to represent cognizable loan instruments of any kind, [are] wholly duplicative and . . . refer to the same series of transfers, not exceeding \$50,000, occurring solely during the months of May and June, 2011” (*id.* at 3).

Defendant also asserts three counterclaims. First, he alleges that, during 2011, plaintiff made various threats against defendant, including threats of physical violence, to extract sums “in excess of \$25,000” from him. Defendant further alleges that plaintiff collected these sums from defendant knowing “no *bona fide* or enforceable obligation was owing or collectible” from defendant (*id.* at 4).

In his second counterclaim, defendant alleges that he has repaid, either directly to plaintiff or to third parties for plaintiff's benefit, "most, if not all" of what he received from plaintiff. He also alleges that, although these repayments total "not less than \$25,000," plaintiff has informed defendant that he has used all sums he has received from defendant for the sole purpose of reducing the interest that has purportedly accrued on the amounts he lent to defendant (*id.* at 5).

For his third counterclaim, defendant asserts that plaintiff is not entitled to any of the sums defendant has paid to him, and that this unjust enrichment requires that plaintiff pay back all money he has received from defendant (*id.*).

For his three counterclaims, defendant seeks return of all money he has paid to plaintiff, "in an amount not fully determined" (*id.* at 5-6), but exceeding \$25,000. For his first and second counterclaims, defendant also seeks an award of \$75,000 in punitive damages. Plaintiff generally denies the allegations in defendant's counterclaims.

Discussion

The central dispute is whether Note 1 and Note 2 represent the same, or a different, underlying debt. Defendant denies the existence of a second loan. Defendant asserts that the only loan he received from plaintiff was for \$50,000 under Note 1, and that Note 2, purportedly imposing an annual 18% interest rate, "*cover[s] the exact same single indebtedness*" as Note 1 (Weiser aff, ¶ 4 [emphasis in original]). There is evidence to support defendant's position. For example, despite the lack of an interest rate on the face of Note 1, plaintiff sought to collect 18% interest on it. Plaintiff wrote an email to defendant, dated December 12, 2011, complaining about defendant's failure to make weekly remittances for that month, with respect to "the original 50 k money you borrowed at 18% interest" and "the 3500 you withdrew my money [sic] that you were to return next day or so" (Weiser aff, exhibit M). Defendant then argues that Note

1 is usurious, and therefore unenforceable as a matter of law, because Note 2's 18% interest rate applies to it (*id.*), even though Note 1 reflects no rate of interest (*see* complaint, exhibit A).

In his memorandum of law in further support of his summary judgment motion, plaintiff insists that the 18% interest rate applies only to Note 2, and, so, cannot void Note 1. Plaintiff also argues that the law of Israel applies to Note 2, because Israel has the most significant contacts with the transaction. It is undisputed that the 18% interest rate is enforceable under Israeli law.

Moreover, at least with respect to Note 1, the parties dispute not only the amount that remains unpaid, but also the total sum plaintiff lent to defendant. The parties also dispute the appropriate rate of interest, if any. However, defendant admits that, in 2011, he received a loan of \$50,000 from plaintiff, that Note 1 evidences (*see* aff of Seth Weiser in support of defendant's motion, ¶ 4 [a] [Weiser aff]).

Although plaintiff claimed in his complaint that he loaned defendant \$50,000 under Note 1, in his motion, plaintiff now claims that he lent defendant a total of \$56,975 under Note 1. Plaintiff claims he advanced these funds through several wire transfers he made to defendant between May and October 2011, and that Note 1 evidences only part of that particular loan (*see* affirmation of Solomon Sharbat in opposition to defendant's motion, ¶¶ 3-4). As he did in the complaint, plaintiff also contends that he made a second cash loan to defendant, for \$48,500, that Note 2 allegedly evidences (*see id.*, ¶ 5).

Plaintiff does not request any award of interest on Note 1 in his motion (*see* affirmation of Jason Lowe, Esq. in support of plaintiff's summary judgment motion at 9). In his complaint, however, he requests that the court include "pre-judgment interest at the legal rate" for Note 1 in the judgment awarded to him (complaint at 4).

A. Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]).

To prevail at summary judgment, the movant must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in his favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movant has made his showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). The court must carefully examine party affidavits and other proof “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment” (*id.*).

**B. Plaintiff’s Motion for Partial Summary Judgment
(Motion Seq. No. 003)**

Plaintiff seeks summary judgment only with respect to Note 1 and the unauthorized charges defendant allegedly made to plaintiff’s credit card. The amounts plaintiff seeks in this motion differ from the amounts he claimed in his complaint. Plaintiff seeks an order granting him partial summary judgment against defendant for \$61,725, plus costs, fees and disbursements,

under two of his three causes of action: for money lent, and for money had and received. The amount plaintiff seeks is comprised of the \$56,975 plaintiff alleges he loaned to defendant in or around May 2011, in connection with Note 1, and the \$4,750 in charges that defendant allegedly made to plaintiff's credit card without authorization.

Defendant disputes the amounts plaintiff claims to have loaned to him, and denies making any unauthorized credit card charge. Defendant also maintains that the \$6,975 that plaintiff transferred to him in October 2011, months after Notes 1 and 2 were signed, was not a loan, but rather a fund that plaintiff asked defendant to hold and use on his behalf, to pay bills plaintiff owed to vendors and creditors in New York (*see* Weiser aff in opposition to plaintiff's motion, ¶¶ 17-18; exhibit J [email reflecting payment of plaintiff's \$3,462.30 invoice from a retailer]).

Plaintiff also moves for dismissal of defendant's counterclaims, in which defendant seeks return of the payments plaintiff purportedly coerced him to make on the allegedly void Notes, plus punitive damages. In the event he is not granted summary judgment, plaintiff requests a protective order, permitting him to appear for his deposition by videoconference.¹

Defendant contends that the court should deny plaintiff's motion for summary judgment for several reasons. He first argues that the motion is procedurally defective because plaintiff failed to attach the pleadings to his motion papers. Second, defendant argues that plaintiff cannot recover under Note 1, because the 18% annual interest rate plaintiff imposes in Note 2 renders both Notes usurious and unenforceable under New York law.

Failure to attach the pleadings is usually "a fatal procedural defect requiring denial of a motion for summary judgment" (*Weinstein v Gindi*, 92 AD3d 526, 527 [1st Dept 2012] [citations

¹ Plaintiff also sought an order directing Defendant's production of certain documents, but the court resolved that matter in its compliance conference order of July 19, 2017.

omitted]). In an e-filed case like this, though, this oversight does not necessitate denial of plaintiff's motion (*see Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2012] [holding trial court "properly overlooked" failure to include pleadings with summary judgment motion where "pleadings were filed electronically and thus were available to the parties and the court"]; *see also* CPLR 2214 [c] ["[e]xcept when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system"]]).

Defendant's argument that Note 2's interest rate somehow invalidates Note 1 also fails. Even if defendant can maintain a usury defense, Note 2's allegedly usurious interest provision cannot void Note 1 (*see Brest v Kleidman*, 300 AD2d 133, 133 [1st Dept 2002] [original loan "not invalidated or tainted by usury" where lender's post-default loan extension imposed allegedly usurious interest rate]; *see also In re Jeziorski*, 428 BR 18, 21 [Bankr. WDNY 2010]).

Moreover, the interest rate of 18% would trigger only the civil usury statute, not the criminal. The civil usury cap does not apply to defaulted obligations (*see Atul Bhatara v Futterman*, 122 AD3d 509, 511 [1st Dept 2014]; *see also Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 [2d Dep't 1999]).

Finally, defendant's position also fails because it is clear Israeli law applies. Israel has the most significant contacts to the Note 2 transaction wherein defendant allegedly agreed to the 18% interest rate. Defendant does not contest that the alleged 18% interest rate would be legal under Israeli law.

In cases involving the availability of a usury defense, "the law of the jurisdiction having the greatest interest in the litigation, or the most significant contacts with the matter in dispute,

should be applied” (*Marder v Levin*, 244 AD2d 467, 467-68 [2d Dep’t 1997]). Factors to consider in determining which jurisdiction’s laws to apply include: location of contracting, residence of the parties, and place of performance (*see Indus Dev bank of Israel Ltd. v Bier*, 149 Misc2d 797, 804 [Sup Ct. New York Cty. 1991], *aff’d* 182 AD2d 570 [1st Dept 1992]); *see also Marder, supra* at 468).

Here, defendant executed Note 2 in Israel where plaintiff lives and where defendant stayed for an extended period. Defendant does not contest that he used the funds to pay for his stay in Israel. Defendant made payments in Israeli currency (shekels) while in Israel. That plaintiff may have unrelated transactions in New York is not relevant to the question of which law to apply to Note 2 that both parties executed in Israel.

The parties apparently agree that Note 1 is a binding promissory note in the principal amount of at least \$50,000, as reflected on the face of that writing, and that defendant has repaid some, but not all, of that debt (*compare* Weiser *aff in opp* to plaintiff’s motion at 6-7, *with* complaint, ¶¶ 5-6 and exh A; *see also* *Lugli v Johnston*, 78 AD3d 1133, 1134 [2d Dept 2010] [“[a] promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time”]).

Although the parties introduced evidence relating to their dealings with one another after defendant’s execution of Note 1, neither party has attempted to resolve the issue of how much defendant has repaid against the Note 1 debt. That burden, of course, is not for the court to carry (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted] [in deciding summary judgment motion, “issue-finding, rather than issue-determination, is the key to the procedure”]).

Accordingly, as the parties concur that the \$50,000 on the face of Note 1 was not paid in full by September 15, 2011, the court grants partial summary judgment to plaintiff on its cause of action for money lent with respect to Note 1, but solely as to liability for the \$50,000 loan defendant admits (*see Minevitch v Puleo*, 9 AD2d 285, 288 [1st Dept 1959] [in action for money lent, “a duty to repay may be implied if the debt be proved. The use of the term ‘lent’ imports a promise and an obligation to repay”]). However, the court denies, as duplicative, plaintiff’s motion on its cause of action for money had and received.

As defendant has raised material issues of fact with respect to the nature of the October 2011 transfer of \$6,975, and his connection to the \$4,750 in allegedly unauthorized credit card charges, the court also denies plaintiff’s motion with respect to those facets of his claim (*see Ahmad v City of New York*, 129 AD3d 443, 444 [1st Dept 2015], quoting *Phillips v Kantor & Co.*, 31 NY2d 307, 311 [1972] [“summary judgment should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact”] [alteration omitted]).

Plaintiff is also entitled to summary judgment dismissing defendant’s counterclaims. Defendant premises his three counterclaims on his argument that he does not owe plaintiff any money, either in principal or interest, because both Notes are usurious and, therefore, unenforceable. From this, Defendant incorrectly extrapolates that plaintiff must return all sums Defendant has paid to plaintiff.

However, as explained above, the interest rate of 18% is permissible under the facts of this case. Moreover, even if defendant were able to maintain a defense of usury with respect to Note 2, he could only recover from plaintiff the interest payments made in excess of New York’s legal rate (*McNellis v Raymond*, 329 F Supp 1038, 1046 [ND NY], *affd sub nom. Menter v Ames*,

445 F2d 1404 [2d Cir 1971], quoting General Obligations Law [GOL] § 5-513 [“While the borrower can avoid the entire indebtedness before payment by having the appropriate court declare the same to be void, and enjoin any prosecution thereon,” New York’s usury statute “limits [borrower’s] recovery to the amount of money so paid [in interest] ‘above the legal rate’”][alterations omitted]’; *see also Pisano v Rand*, 30 AD2d 173, 178 [2d Dept 1968] [where loan shown to be usurious, “borrower is only entitled to recover from the lender, or deprive him of, the excess received over and above the lawful rate of interest”]).

Defendant has alleged, but offered no proof, that plaintiff has applied all the money defendant has paid to him against usurious interest charges. Defendant does not state the amount of money he has paid to plaintiff, other than to allege that it exceeds \$25,000 (*see* answer, ¶¶ 20-21, 23-24, 27). Defendant has also made no effort to quantify the interest charges plaintiff has allegedly imposed upon him.

Plaintiff also makes no attempt to quantify the interest accrued, the amount defendant has paid, or his outstanding balance. From the parties’ submissions, however, it appears that whatever amount defendant has paid to plaintiff to date, it is less than the principal amount of Note 1. Defendant also fails to present any evidence or argument to support his request for punitive damages. Accordingly, the court grants plaintiff’s motion seeking dismissal of defendant’s counterclaims.

**C. Defendant’s Motion for Partial Summary Judgment
(Motion Sequence No. 004)**

Defendant moves for partial summary judgment. He seeks an order: (a) dismissing plaintiff’s first cause of action, for money lent; (b) dismissing plaintiff’s second cause of action, for money had and received, as duplicative of the \$98,500 demanded for “money lent” under Notes 1 and 2, but allowing the disputed claim, for \$11,725.00, with regard to certain transfers

plaintiff allegedly made to defendant in October 2011 and money defendant allegedly misappropriated from plaintiff's credit card account; and (c) dismissing plaintiff's third cause of action, for unjust enrichment. Plaintiff opposes defendant's motion.

Defendant's motion relies entirely on the argument that defendant cannot be liable under either Note 1 or Note 2, because of Note 2's usurious interest rate. As discussed above, usury is inapplicable. Accordingly, the court denies Defendant's motion for partial summary judgment.

(C) Plaintiff's Motion Relating to his Deposition
(Motion Sequence No. 003)

Plaintiff alleges that he is medically unfit to travel from Israel to New York for his deposition, and requests that he be allowed to appear in Israel and be deposed by video conference instead. Plaintiff supports this request with an affirmation from his treating physician.

"Depositions of parties to an action are generally held in the county where the action is pending; if a party demonstrates that conducting his deposition in that county would cause undue hardship, the Supreme Court in its exercise of discretion can order the deposition to be held elsewhere" (*Weinstein v Gindi*, 92 AD3d 526 [1st Dept 2012]). Plaintiff shows that requiring his attendance in New York would cause him undue hardship. Defendant, however, has raised valid objections to the restraints that a video-conferenced deposition could place on the examination. These objections may be addressed by the engagement of a court reporter service with appropriate technical resources. Accordingly, plaintiff's deposition shall be held via video conference, on or before June 15, 2018, and shall continue day to day until completed. A court reporter service of defendant's choosing shall conduct the deposition and all costs associated with the deposition shall be at plaintiff's expense. The court also directs the parties to conduct that defendant's deposition on or before June 15, 2018.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment, to obtain an award with respect to his first cause of action for money lent against defendant under the promissory note dated June 23, 2011, is **GRANTED** as to defendant's liability but **DENIED** as to plaintiff's request for an award of damages thereon; and it is further

ORDERED that plaintiff's motion for partial summary judgment, to obtain an award with respect to his second cause of action for money had and received against defendant under the promissory note dated June 23, 2011, is **DENIED** as duplicative; and it is further

ORDERED that plaintiff's motion for partial summary judgment, with respect to his first and second causes of action, to obtain an award of damages for other money defendant is alleged to have received from plaintiff and wrongfully retained, is **DENIED**; and it is further

ORDERED that plaintiff's motion for partial summary judgment to dismiss defendant's counterclaims is **GRANTED**; and it is further

ORDERED that plaintiff's motion for leave to have his deposition conducted by videoconference is **GRANTED**, subject to plaintiff's compliance with the conditions set forth herein; and it is further

ORDERED that plaintiff's motion to compel Defendant to produce certain documents is **DENIED**, as moot; and it is further

ORDERED that defendant's motion for partial summary judgment is **DENIED**; and it is further

ORDERED that counsel shall appear for a compliance conference in Part 15 of this court on the 28th day of June, 2018, at 11:00 a.m.

Dated: April 6, 2018
New York, NY



HON. MELISSA CRANE