

<b>Tkatchev v Shtayner</b>
2018 NY Slip Op 31917(U)
August 2, 2018
Supreme Court, Kings County
Docket Number: 519284/2016
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 2<sup>nd</sup> day of August 2018.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

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ALEKANDR TKATCHEV,

Plaintiff,

Index No.: 519284/2016

DECISION & ORDER

-against-

SEMYON SHTAYNER,

Defendant.

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

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1A-1B, 4A-4E</u>
Opposing Affidavits (Affirmations) _____	<u>2A-2B, 5</u>
Reply Affidavits (Affirmations) _____	<u>3, 6</u>
Other Papers: <u>Plaintiff's Memoranda of Law in Opp. and Support</u>	<u>4E, 2A,</u>

***Introduction***

Defendant, Semyon Shtayner, moves by notice of motion, sequence number seven, pursuant to CPLR § 3212 for summary judgment in his favor, dismissing plaintiff's complaint. Plaintiff, Aleksander Tkatchev, opposes this application. Plaintiff also

moves, by notice of motion, sequence number eight, pursuant to CPLR § 3212 for summary judgment. Defendant opposes this application.

### ***Background***

Plaintiff and defendant were social acquaintances. Plaintiff contends that he loaned the defendant \$1,000,000.00 in 1999, so that defendant could open a taxi business. (see Plaintiff's Affidavit, NYSCEF # 173 and 200).<sup>1 2</sup> Plaintiff maintains that defendant executed a statement acknowledging receipt of the funds on November 28, 2000 (see *id.* at ¶ 4; see also *id.* at Exhibit A). This document, executed by a "Sam Shtyner", acknowledges receipt of \$1,000,000.00 on January 1, 1999. This Court notes that defendant's name is Semyon Shtayner. Plaintiff contends that when defendant could not repay the money in 2001 in accordance with the terms of their agreement, defendant executed a promissory note, in plaintiff's favor, on October 17, 2001 (see *id.* at ¶ 5; see also, *id.* at Exhibit B). In addition to his promise to repay the \$1,000,000.00, plaintiff maintains that defendant promised to make interest payments of \$84,000.00 per year, to be paid in monthly installments of \$7,000.00, commencing on November 1, 2001. Plaintiff further avers that the parties entered into a security agreement, dated October 17,

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<sup>1</sup> Plaintiff submitted the same affidavit, affirmed on April 24, 2018, in support of his motion (NYSCEF # 173) and in opposition to defendant's motion (NYSCEF # 200).

<sup>2</sup> After a motion to compel, and pursuant to the order of the Hon. Martin Schneier dated October 30, 2017, plaintiff provided a sworn written statement to defendant, dated December 29, 2017, that he is no longer in possession of a cancelled check, wire transfer or bank transfer proving that the \$1,000,000.00 payment was made to defendant (see Defendant's Affirmation in Support, NYSCEF # 157 at ¶ 25). Notably, defendant did not annex this sworn statement in support of his moving papers, or in opposition herein.

2001, wherein “Plaintiff purported to pledge the assets of Sabina Realty of New York, Inc. as collateral for the loan” (*id.* at ¶ 9; *see also id.* at Exhibit C). Plaintiff avers that defendant did not make full payments as required by the note, but that he made partial payments, wire transferring them from multiple accounts linked to his Chicago-based taxi business. They were purportedly paid into the account of Nataliya Valencia, who is plaintiff’s mother.

Plaintiff avers that he and the defendant maintained a friendly relationship. Plaintiff contends that he visited New York in 2008, where the parties’ families spent time together (*see id.* at Exhibit D, photographs from 2008). Plaintiff avers that on June 23, 2012, defendant signed another agreement acknowledging the debt and changing the maturity date of the promissory note to July 1, 2017 (*see id.* at ¶ 16; *see also id.* at Exhibit E). Plaintiff maintains that defendant’s payments became “more sporadic” and ceased entirely in 2015 (*see id.* at ¶ 19). After a demand letter was sent in 2016 and refused by defendant, plaintiff commenced the instant litigation on November 1, 2016.<sup>3</sup>

Defendant provided an affidavit in support of his motion (*see* Defendant’s Affidavit, NYSCEF # 168). Based on their affidavits, the parties have divergent sets of facts. According to defendant, in October 2001, the parties agreed to embark on a business venture together, as a result of which, defendant signed “a one-page document”

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<sup>3</sup> Plaintiff commenced the instant action by a motion for summary judgment in lieu of complaint. Plaintiff’s motion was denied on January 10, 2017, after which time a complaint was served. This Court notes that plaintiff’s complaint, which is not verified, stated that he loaned defendant the money in 2001, not in 1999.

at plaintiff's suggestion, and plaintiff agreed to transmit the sum of \$1,000,000.00 (*see id.*). Defendant states that he signed this one document. He did not consult with counsel since the parties "shared a common Russian heritage", and defendant assumed that plaintiff "could be trusted implicitly, based on his personal word and without our each communicating with separate attorneys prior to any possible business transaction" (*id.* at ¶ 3). Defendant maintains that after a week's time, he did not receive the funds from plaintiff. He then reached out to plaintiff, who stated that he "had been unable to send [defendant] any funds at the time, and casually told [defendant] to disregard the paper [he] had signed, and that the matter was closed without any further activity" (*id.*). Defendant maintains that he has "heard nothing at all from [plaintiff] or anyone allegedly acting on his behalf about this matter for 15 years" (*id.*).

### *Discussion*

Defendant moves for summary judgment. As an initial matter, defendant contends that he is entitled to judgment as a matter of law because the action was not timely brought within the statute of limitations. "As relevant here, 'an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein' 'must be commenced within six years'" (*U.S. Bank Nat'l Ass'n v. Gordon*, 158 A.D.3d 832, 72 N.Y.S.3d 156 [2 Dept., 2018], quoting CPLR 213[4]). Further, all other actions, "for which no limitation is specifically prescribed by law" shall be commenced within six years (CPLR § 213). However, "General Obligations Law § 17-101

effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt” (*Lynford v. Williams*, 34 A.D.3d 761, 826 N.Y.S.2d 335 [2 Dept., 2006]; see also *Mosab Const. Corp. v. Prospect Park Yeshiva, Inc.*, 124 A.D.3d 732, 2 N.Y.S.3d 197 [2 Dept., 2015]). “A ‘writing, in order to constitute an acknowledgment, must recognize the existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it’” (*Pugni v. Giannini*, -- A.D.3d --, 2018 N.Y. Slip Op. 05509 [2 Dept., 2018], quoting *Lew Morris Demolition Co. v. Board of Educ. Of City of N.Y.*, 40 N.Y.2d 516, 387 N.Y.S.2d 409 [1976]).

Here, defendant met his prima facie burden and established entitlement to summary judgment as a matter of law based on statute of limitations. According to defendant, the transaction purportedly occurred in 2001. Plaintiff commenced the instant action by e-file, fifteen years later, in 2016, after expiration of the 6-year statute of limitations. However, in opposition, plaintiff raised triable issues of fact. Plaintiff avers that defendant executed an acknowledgment in 2012 which effectively revived the statute of limitations period (see *Lynford v. Williams*, 34 A.D.3d 761, *supra*).

However, the defendant denies having signed any such document. Defendant’s affidavit merely recounts that he signed a one-page document in 2001 and was later told to disregard it. Defendant does not identify the document that he signed. Defendant fails to specifically address plaintiff’s contention that he signed any additional documents related to this transaction but states in his affidavit that he has not spoken to the plaintiff for the last fifteen years. Based on the foregoing, without examining the merits of the

writings and determining whether they sufficiently acknowledge the debt or demonstrate the debtor's intention to pay (*see Pagni v. Giannini*, -- A.D.3d --, *supra*), questions of fact exist as to whether the statute of limitations has expired or was revived by a 2012 acknowledgement.

Similarly, the remainder of defendant's motion as well as plaintiff's motion must be denied. Both parties provide affidavits with completely divergent facts as to what transactions purportedly occurred and the circumstances involved therein. Although plaintiff provided several documents purportedly executed by defendant in relation to this transaction, defendant contends that he has not spoken to the plaintiff for the last fifteen years. Meanwhile, plaintiff annexed photographs from 2008 where he and his family purportedly vacationed in New York and visited with defendant and his family. Since the plaintiff contends that the parties entered into agreements in 2000, 2001 and 2012 and defendant states that he signed one agreement in 2001, there are questions of fact which preclude the granting of summary judgment. "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499 [2012]).

### ***Conclusion***

Accordingly, the defendant and plaintiff's motions for summary judgment are denied. Questions of fact exist as to whether the action was timely commenced within

the statute of limitations. These questions of fact further preclude a grant of summary judgment. Anything not addressed herein is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

**Lara J. Genovesi  
J.S.C.**

To:

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