

Sokoloff v Manton

2018 NY Slip Op 33025(U)

November 19, 2018

Supreme Court, New York County

Docket Number: 652531/2016

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

HAL SOKOLOFF

Plaintiff,

- v -

JOSHUA MANTON,

Defendant.

INDEX NO. 652531/2016
MOTION DATE 04/14/2017
MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 86, 88, 90

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is

Plaintiff's motion for summary judgment is denied and defendant's cross-motion to dismiss the breach of contract and unjust enrichment claims are denied. Defendant's cross-motion to dismiss for failure to join Marla Sokoloff (wife of plaintiff and mother to Lauren Manton) and Lauren Manton (daughter of plaintiff and wife of defendant) is denied.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (Integrated Logistics Consultants v. Fidata Corp., 131 AD2d 338 [1st Dept 1987]; Ratner v. Elovitz, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (Rodriguez v. Parkchester South Condominium Inc., 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [Alvarez v. Prospect Hosp., 68 NY2d 320 324 [1986]]. 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, given plaintiff's equivocal deposition testimony -- plaintiff could not recall any conversation about loaning money, he claimed it "had to be a loan" because plaintiff "wouldn't have just given money" without a conversation, and that he didn't remember any part of the alleged conversation -- defendant has properly risen a genuine issue of fact whether there was a loan. Defendant specifically denies there ever being a loan and claims that the money was given as a gift. Plaintiff points to an email between defendant and his wife Lauren Manton, where defendant discusses borrowing from Lauren's father, however, that is not dispositive. The Court does not need to reach the question of whether this email is privileged or whether defendant waived the privilege, as defendant explained why the email used the word borrowed. Defendant's unequivocal testimony about the transaction being a gift and explanation of the email is sufficient to raise a genuine issue of fact, in context of plaintiff's inability to remember making a loan or even a discussion about a loan.

The cross-motion seeking dismissal of the breach of contract claim is denied. Plaintiff submitted the affidavit of Lauren Manton where she states that a loan took place. Accordingly, dismissal of the breach of contract cause of action would be inappropriate. Similarly, the motion to dismiss the cause of action for unjust enrichment, is denied. For unjust enrichment a plaintiff must allege and prove "that (1) the defendant was enriched, (2) at plaintiff'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" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Here, plaintiff

has properly pled the elements of this cause of action. The relationship between the parties, at that time seemingly positive, was not too attenuated and was enough to “indicate a relationship between the parties that could have caused reliance or inducement” (*Georgia Malone*, 19 NY3d at 517 [internal quotation marks omitted]).

A motion to dismiss premised on the notion that the court should not proceed in the absence of a person who should be a party, may be made at any time (CPLR 3211(e); *see also* Practice Commentary 3211:49 and 3211:54). Thus, defendant is not precluded from seeking dismissal pursuant to CPLR 1001. The Court’s first task is to ascertain whether an individual is a necessary party within the meaning of CPLR § 1001(a). Under CPLR § 1001(a), a necessary party is one whose non-joinder will jeopardize the outcome of the action in either of two ways: (1) complete relief cannot be accorded the existing parties to the action; or (2) the absentee may be inequitably affected by the judgment. Pursuant to CPLR § 1003, non-joinder of a party who should be joined under § 1001 is grounds for dismissal of an action without prejudice unless the Court allows the action to proceed without that party under the provisions of that section. The Court finds that complete relief can be accorded between the parties in this action. Although the money in dispute was issued via check drawn from the joint account of Hal and Marla Sokoloff, there is no indication that Marla Sokoloff was involved in the transaction, had any knowledge of the transaction or that Hal Sokoloff did not have all rights to the money in dispute. Similarly, there is no reason Hal Sokoloff was required to bring this action against Lauren Manton (and in any event Joshua Menton could have brought a third party action against Lauren Manton but failed to do so).

Accordingly, it is therefore

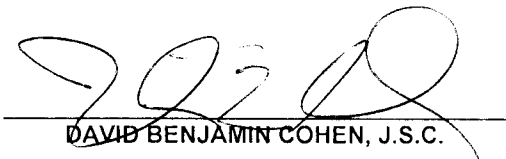
ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that defendant's motion to dismiss the breach of contract and unjust enrichment causes of action are denied; and it is further

ORDERED that defendant's motion to dismiss based upon lack of necessary parties is denied.

This constitutes the decision and order of the Court.

11/19/2018
DATE


DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	DENIED

HON. DAVID B. COHEN
J.S.C.