

Pon v GDA Realty Corp.
2019 NY Slip Op 31114(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 654298/2015
Judge: Tanya R. Kennedy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

----- X
ARTHUR LIM PON,

Plaintiff,

Index No. 654298/2015

- against -

Motion Sequence No.
001

GDA REALTY CORP.,

Defendant.
----- X

TANYA R. KENNEDY, J.S.C:

Plaintiff, Arthur Lim Pon, commenced this action on December 18, 2015 to recover wages that defendant GDA Realty Corp. (GDA) allegedly failed to pay him from 2009 through 2013, totaling \$42,883.64, plus interest, statutory liquidated damages and reasonable attorney's fees. Plaintiff also seeks to recover amounts that he allegedly loaned to GDA for the payment of essential business expenses, totaling \$222,826.65, plus interest.

The complaint asserts causes of action for: (1) violations of Article 6 of the New York Labor Law, based upon GDA's failure to pay wages (first cause of action); (2) breach of contract to pay wages (second and third causes of action) (3) breach of contract to reimburse business expenses (fourth cause of action); (5) quantum meruit/implied contract and unjust enrichment, based upon plaintiff's payment of GDA's business expenses (fifth and sixth causes of action, respectively); and (6) conversion, based upon GDA's alleged failure to reimburse plaintiff for payment of business expenses (seventh cause of action).

On August 16, 2016, GDA, Doris Pon Lam (Doris) and Gloria Lim Jew (Gloria), who are plaintiff's siblings, subsequently commenced a separate action against plaintiff in Supreme Court, New York County, asserting claims for fraud, breach of fiduciary duty, conversion, accounting and indemnification (GDA Action). Plaintiff subsequently removed the GDA Action to the United

States District Court for the Southern District of New York (Docket No. 16-cv-06952) and asserted counterclaims for breach of fiduciary duty and a derivative claim on behalf of GDA, alleging mismanagement of the corporation. The GDA Action is still pending.

BACKGROUND

GDA is a closely-held, family-owned New York corporation which plaintiff's mother, Soo Ying Pon (Soo Ying) formed in 1976 (Pon. Aff., ¶8; parties' joint statement of material facts, ¶2). GDA owns and operates a 39-unit residential rental apartment building located at 65 Park Terrace West, New York, New York 10034 (parties' joint statement of material facts, ¶4). Soo Ying was the president and sole shareholder of GDA until her death on January 25, 2014, (*id.*, ¶3). Upon her death, Soo Ying's children, plaintiff, Doris, and Gloria inherited her interest in GDA in equal shares (*id.*, ¶8).

Plaintiff was employed full-time as an engineer and project manager at Hewlett Packard from 1975 through August or September 2012 (*id.*, ¶25). In or about 1982, plaintiff "began assisting Soo Ying in the operation of GDA on an 'as needed basis'" (Pon aff., ¶10). According to plaintiff, "sometime before 2003, Soo Ying made [him] an employee of GDA" and "also appointed [him] to the position of Vice President" (*id.*, ¶12). Plaintiff "did not have any specific number of hours that [he] was ever required to work," and was only expected to complete tasks "in a timely fashion" which Soo Ying assigned him (*id.*, ¶17). Plaintiff further maintained that "Soo Ying set [his yearly] compensation at \$15,600.00" (*id.*, ¶13).

For each tax year from 2009 through 2013, GDA issued plaintiff an IRS Form W-2 Wage and Tax Statement (W-2) reflecting wage payments of \$15,600 and withholdings for federal income taxes, Social Security, Medicare, state and local income taxes (parties' joint statement of

material facts, ¶13). Based upon the information set forth in the W-2s, plaintiff filed personal tax returns, listing his salary as \$15,600 each year he was a GDA employee (*id.*, ¶8).

GDA also filed New York State Form NYS-45 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns (Quarterly Returns) for each quarter between October 1, 2009 and December 31, 2013, listing plaintiff's quarterly wages of \$3,900, or \$15,600 annually (*id.*, ¶14). Soo Ying signed the Quarterly Returns filed for the periods from October 1, 2009 through September 30, 2013 (*id.*, ¶15). On January 31, 2014, six days after Soo Ying's death, plaintiff signed the Quarterly Return for the period of October 1, 2013 through December 31, 2013, which listed a \$3,900 payment to him that quarter, and he certified it as "true, correct, and complete" (*id.*, ¶16; Pon aff., exhibit 10).

However, plaintiff maintains that GDA failed to pay him his \$15,600 salary (Pon aff., ¶13). Plaintiff also maintains that each week Soo Ying wrote a \$149.00 payroll check payable to him which "[s]he would leave ...in the check register" and promised plaintiff that GDA would pay him once GDA had enough funds (*id.*, ¶18).

Plaintiff also maintains that sometime in March 2010, Soo Ying forwarded him GDA Vendor Invoices (invoices) which she requested that he pay because GDA had insufficient funds (Pon aff., ¶34). From March 2010 through September 2012, plaintiff used personal funds totaling \$232,863.18 from his Sovereign Bank "Premier Checking Account ending in 8512," "Premier Money Market Savings Account ending in 5223," and issued three direct wire transfers to pay the invoices (*id.*, ¶34-35). Plaintiff also maintains that he issued each payment based upon Soo Ying's promise that GDA would reimburse him once GDA obtained enough funds (*id.*, ¶34).

Plaintiff has annexed copies of the subject invoices, along with copies of Sovereign Bank checks and/or wire transfer records, evidencing payment (*id.*, ¶38; exhibits 16-80). On February

1, 2014, plaintiff, as GDA Vice President, wrote two checks to himself totaling \$10,036.53, which he credited against his claim for outstanding loans, leaving a balance of \$222,826.65 (parties' joint statement of material facts, ¶32).

At some unspecified point, plaintiff opened a Citibank account for GDA ending in 5921 to deposit a tax refund of approximately \$21,000.00 and to pay GDA expenses, without informing Soo Ying (*id.*, ¶30). Plaintiff's sister, Doris, maintains that plaintiff wrote checks to himself from GDA's Citibank account which he deposited into his personal Sovereign Bank account, and then issued a certified bank check from his personal Sovereign account to pay GDA vendors, which constituted a "scheme to document the 'Loan from Shareholder' to him as a tax-free loan reimbursement instead of a taxable distribution as a dividend" (Lam aff., ¶21). However, there is no dispute that plaintiff's claim for reimbursement is limited to "those checks he wrote that were not first funded by moving funds from GDA's Citibank account" (*id.*).

There is no written loan agreement between plaintiff and GDA (parties' joint statement of material facts, ¶31). However, plaintiff maintains that his sisters, Gloria and Doris, knew that he paid GDA's expenses with his personal funds and references various emails where they allegedly acknowledged such fact (Pon aff., ¶44).

In a July 9, 2012 email from Gloria to Doris and others, Gloria stated, in pertinent part:

"...[Art] mortgaged the house ... to pay ALL the GDA BILLS
...THIS WINTER, THERE IS NO \$\$ TO PAY FOR THE FUEL
BILLS!!! He will have to apply for a loan AGAIN!"
(Pon reply aff., exhibit 87).

In another email, dated September 4, 2012, Gloria wrote to Doris, plaintiff, and others, stating:

"Also, mom needs to understand that \$\$ coming in needs to pay for the bills and Art's loans, the units can't stay empty the way it has been. It is not sustainable" (*id.*, exhibit 88).

In or about June 2014, plaintiff's prior counsel demanded payment of plaintiff's alleged loan claim, which GDA rejected (parties' joint statement of facts, ¶¶33-34). Thereafter, plaintiff's current attorney forwarded a letter, dated December 4, 2015, demanding payment of plaintiff's wage and loan claims, plus interest, in the total amount of \$330,034.94, by December 16, 2015 (parties' joint statement of facts, ¶35; Pon aff., ¶41; exhibit 82). GDA responded by letter, dated December 15, 2015, rejecting the demand (parties' joint statement of material facts, ¶36; Pon aff., ¶42, exhibit 83).

Plaintiff now moves for summary judgment on his first, fourth, fifth and sixth causes of action. GDA cross-moves for summary judgment dismissing the complaint in its entirety.

ARGUMENTS

Plaintiff argues that he is entitled to summary judgment on his claim for violations of Article 6 of the New York Labor Law (first cause of action) because GDA's federal and state tax returns establish that he was a GDA employee entitled to an annual salary of \$15,600. Plaintiff also contends that he is entitled to summary judgment on his breach of contract claim for reimbursement of business expenses (fourth cause of action), quantum meruit/implied contract (fifth cause of action) and unjust enrichment (sixth cause of action) based upon Soo Ying's promise to repay the loans.

In opposition and in support of the cross-motion, GDA argues, among other things, that plaintiff is estopped from claiming that GDA did not pay him wages since he represented on his tax returns that he received a salary. GDA also argues, *inter alia*, that plaintiff's breach of contract claim regarding reimbursement of business expenses is barred by the Statute of Frauds since it was inconceivable that GDA had the ability to pay the alleged loan within a year when it had not paid its vendors and failed to pay plaintiff for over a decade. Moreover, GDA argues, among other

things, that plaintiff's quantum meruit/implied contract and unjust enrichment claims must be dismissed for unclean hands. Lastly, GDA argues that plaintiff's conversion claim is barred by the Statute of Limitations and that no conversion occurred since plaintiff voluntarily tendered payment.

DISCUSSION

Pursuant to CPLR 3212 (b), "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 demonstrate the absence of any material issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*id.*).

Plaintiff's Claims for Unpaid Wages in Violation of Article 6 of the New York Labor Law

"Article 6 of the Labor Law governs employers' payment of wages and benefits to employees" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). A worker's presence "on the employer's payroll" is among the factors to be considered when determining whether an employer-employee relationship exists (*id.*; see also *Kausal v Educational Prods. Info. Exch. Inst.*, 105 AD3d 909, 912 [2d Dept 2013] [reversing trial court's determination that plaintiff was not an employee under the Labor Law, where, among other things, "the chairman/chief executive officer acknowledged that the plaintiff was paid a salary, was issued an employee's W-2 tax form at some point, and had his work supervised"]).

When tax returns are submitted as evidence, the court will not "permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury

on income tax returns” (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]); *see also* *Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453, 454 [1st Dept 2015]).

Here, plaintiff maintains that GDA’s state and federal tax returns, and W-2s demonstrates that GDA treated him as an employee from December 9, 2009 through December 31, 2013. While these documents support plaintiff’s claim that he was a GDA employee, they also defeat his unpaid wages claim. Since plaintiff previously represented “under the penalty of perjury on income tax returns” that his annual income from GDA was \$15,600, he may not subsequently adopt a contrary position and claim that GDA failed to pay him wages (*Mahoney-Buntzman v Buntzman*, *supra* at 422; *see also* *Walsh v Blaggards III Rest. Corp.*, 131 AD3d 854, 854 [1st Dept 2015] [granting plaintiff summary judgment on his claim for repayment of loan since defendant represented in his tax return “that the \$50,000 plaintiff paid was a loan and that the outstanding balance was \$44,500” and was binding upon defendant]).

Plaintiff’s claim that he was required to declare the income which GDA reported to the IRS and the New York State Department of Taxation and Finance is without merit since plaintiff, in his capacity as GDA Vice President, signed GDA’s Quarterly Return for the period from October 1, 2013 through December 31, 2013, listing a \$3,900 payment to him that quarter, and he certified it as “true, correct, and complete” (Pon aff., exhibit 10). Therefore, plaintiff is estopped from claiming that GDA failed to pay him wages.

Accordingly, the Court denies that branch of plaintiff’s motion for summary judgment on his first cause of action and grants that branch of GDA’s cross-motion for summary judgment dismissing this claim.¹

¹ The Court also grants that branch of GDA’s cross-motion for summary judgment dismissing the second and third causes of action for breach of contract to pay wages because it is barred by the Statute of Frauds (General Obligations Law §5-701[a][1]) and because plaintiff is estopped from claiming that GDA did not pay him a salary.

Plaintiff's Claim for Breach of Oral Agreement—Reimbursement of Business Expenses

A claim for breach of contract requires “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The Statute of Frauds, as incorporated in General Obligations Law § 5-701(a)(1), provides that an agreement is void “unless it . . . be in writing, and subscribed by the party to be charged therewith,” if the agreement “[b]y its terms is not to be performed within one year from the making thereof. . .”

“[T]he determination of whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance; it requires analysis of what was possible, looking forward from the day the contract was entered into” (*Gural v Drasner*, 114 AD3d 25, 28 [1st Dept 2013]). “It matters not that completion of performance within one year may be unlikely or improbable” (*Foster v Kovner*, 44 AD3d 23, 26 [1st Dept 2007]; *see also D & N Boening v Kirsch Beverages*, 63 NY2d 449, 455-456 [1984]).

Here, plaintiff demonstrated his prima facie entitlement to summary judgment through his affidavit, copies of paid invoices, and demand for payment, which GDA rejected (*see Licata v Cuzzi*, 161 AD3d 844, 845 [2d Dept 2018] [court determined that “plaintiff’s submission of his affidavit, along with the canceled checks, was sufficient to meet his burden of establishing his prima facie entitlement to judgment as a matter of law” on claim for breach of oral agreement to repay loan]).

The Court notes that GDA does not contest the invoices’ validity or that plaintiff paid the invoices with his personal funds. Although GDA maintained that plaintiff wrote checks to himself from GDA’s Citibank account which he deposited into his personal Sovereign Bank account, and

then issued a certified bank check from his personal Sovereign account to pay GDA vendors, there is no dispute that plaintiff “is only claiming reimbursement for those checks he wrote that were not first funded by moving funds from GDA’s Citibank account” (Lam aff., ¶21).

Contrary to GDA’s contention, plaintiff’s breach of contract claim loans is not barred by the Statute of Frauds. The fact that plaintiff loaned monies to GDA for more than a year is irrelevant, as “[t]he determination of whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance . . .” (*Gural v Drasner, supra* at 28). Nor is it significant that GDA’s ability to repay the loans within a year would have been “unlikely or improbable” due to GDA’s economic difficulties for over a decade (*Foster v Kovner, supra* at 26).

GDA also argues that the Dead Man’s Statute (CPLR 4519) renders as inadmissible conversations between plaintiff and Soo Ying regarding promises to repay the loans. However, inasmuch as GDA relied upon those portions of plaintiff’s affidavit regarding conversations with Soo Ying to support its Statute of Frauds argument, GDA impermissibly invokes the Dead Man’s Statute “as a sword rather than a shield” (*Herrmann v Sklover Group, 2 AD3d 307, 307* [1st Dept 2003]) [internal quotation marks and citation omitted]. Since GDA relied upon plaintiff’s affidavit in furtherance of its cross-motion for summary judgment, it “has opened the door as to that transaction and otherwise incompetent testimony is admissible to fully explain the personal transaction in issue” (*Matter of Wood, 52 NY2d 139, 145* [1981] [internal quotation marks and citations omitted]).

This Court has not considered GDA’s argument that the submitted invoices are inadmissible due to plaintiff’s failure to establish the business records exception to hearsay (CPLR

4518) since it was impermissibly raised for the first time in its reply papers (*see Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 220 [1st Dept 2001]).

The Court finds that the arguments which GDA presents are “[m]ere conclusory assertions, devoid of evidentiary facts, [and] . . . insufficient to defeat a well-supported summary judgment motion, as is reliance upon surmise, conjecture, or speculation” (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] [internal quotation marks and citations omitted]). As such, GDA has not raised a triable issue of fact to defeat summary judgment regarding unpaid loans.

Therefore, the Court grants plaintiff’s motion for summary judgment on its fourth cause of action for reimbursement of business expenses and denies that branch of GDA’s cross-motion for summary judgment to dismiss this claim.

Pursuant to CPLR 5001(a), “[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract . . .” (*see also J. D’Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012] [“[t]he plain language of CPLR 5001[a] mandates the award of interest to verdict in breach of contract actions”] [internal quotation marks and citations omitted]). Since the oral contract at issue does not specify a time for repayment, “the loan [was] payable immediately upon demand” (*ABKCO Music & Records, Inc. v Montague*, 90 AD3d 402, 403 [1st Dept 2011]; *see also Stein v Anderson*, 123 AD3d 1322, 1322-1323 [3d Dept 2014] [“the loan was payable upon demand” where defendant promised to repay a loan “as soon as [he could]” and the agreement did not provide a time for repayment]). Here, plaintiff demanded payment on December 4, 2015 and sought a response by December 16, 2015. Therefore, the Court will measure statutory interest from the latter date of December 16, 2015 (*see Walsh v Blaggard III Rest. Corp., supra* at 854).

Causes of Action for Quantum Meruit/ Implied Contract, Unjust Enrichment and Conversion

Inasmuch as the Court granted plaintiff summary judgment on his breach of contract claim for reimbursement of business expenses, the court denies those branches of the motion for summary judgment on his quantum meruit/implied contract and unjust enrichment claims and grants that branch of GDA's cross-motion for summary judgment to dismiss those causes of action (cf. *On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 [1st Dept 2013] [stating that it was error to deny a "motion seeking dismissal of [a defendant's] quantum meruit claim" where that defendant moved "for summary judgment on both its contract and quasi contract claims"]).

Further, the Court grants that branch of GDA's cross-motion for summary judgment to dismiss the conversion claim since it is subject to a three-year limitations period and is time-barred (see CPLR 214[3]; *Vigilant Ins. Co. of Am. v. Hous. Auth of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Moreover, the cause of action for conversion is based upon the same facts and seeks the same remedy as the claim for breach of the agreement to reimburse funds (see *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003] ["[a] cause of action for conversion cannot be predicated on a mere breach of contract"]).

Accordingly, it is

ORDERED that the motion of plaintiff Arthur Lim Pon is granted to the extent of granting summary judgment on the fourth cause of action for breach of oral contract for reimbursement of business expenses and the Clerk is directed to enter judgment in favor of plaintiff and against defendant GDA Realty Corp. in the amount of \$222,826.65, together with interest at the rate of 9% per annum from December 16, 2015, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

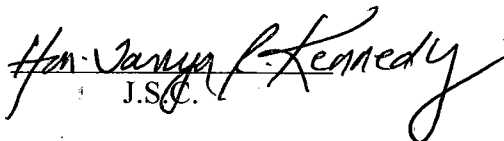
ORDERED that defendant GDA Realty Corp.'s cross-motion for summary judgment is granted to the extent of dismissing the first, second, third, fifth, sixth and seventh causes of action; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 5, 2019

ENTER:


J.S.C.

HON. TANYA R. KENNEDY