

<b>Stark v Keane Stud LLC</b>
2019 NY Slip Op 32663(U)
September 9, 2019
Supreme Court, New York County
Docket Number: 156423/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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JEFFREY STARK

Plaintiff,

- v -

KEANE STUD LLC,

Defendant.

INDEX NO. 156423/2018
MOTION DATE 04/22/2019
MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (9/5/2019), Keane Stud LLC (Keane Stud)'s motion to dismiss Jeffrey Stark's Amended Complaint is denied.

The Relevant Facts and Circumstances

Reference is made to the Keane Stud LLC Operating Agreement (the Agreement), effective January 17, 2006, by and between Tarragon Corporation and Depot Hill Road LLC (NYSCEF Doc. No. 87). William Friedman is the principal of Tarragon Corporation (Tarragon) and Mr. Stark is the single member of Depot Hill Road LLC (Depot Hill) and (NYSCEF Doc. No. 80, ¶ 3). Article XVI of the Agreement contains a procedure for dispute resolution that "will apply" in the event that the parties are unable to mutually agree on the resolution of a matter or a dispute under the Agreement (NYSCEF Doc. No. 87, §§ 16.1-16.4). Pursuant to Article XVI, if a "dispute cannot be resolved among the Members within thirty (30) days of the meeting to discuss the dispute, then any Member may submit the dispute to mediation by notice to all of the other Members" (id., § 16.2). If a dispute cannot be resolved by mediation, the dispute may then be

submitted to arbitration in accordance with the procedures set forth in section 16.3 of the Agreement (*id.*, § 16.3)

In the fall of 2007, Keane Stud sought additional funding for its development project and Mr. Stark alleges that he reached an agreement with Mr. Friedman to make an interim personal loan of \$600,000 to Keane Stud (the **Loan**), rather than a member loan from Depot Hill (NYSCEF Doc. No. 80, ¶¶ 33-38). The \$600,000 loan was made pursuant to a Mortgage Note (the **Note**), dated August 30, 2007, by and between Keane Stud LLC, as borrower, in favor of Jeffrey G. Stark (NYSCEF Doc. No. 89). The Note does not contain any dispute resolution provision.

Mr. Stark alleges that he loaned \$820,000 to Keane Stud, consisting of (1) five loans totaling \$600,000 made between September 5, 2007 to April 7, 2008, and (2) three additional loans totaling \$220,000 made between May 5, 2008 and August 6, 2008 (*id.*, ¶ 47).

The parties did not execute any amendments to the Note by affixing an allonge to the Note, in accordance with UCC § 3-202, addressing the sums allegedly loaned in excess of the \$600,000 set forth on the face of the Note. In his Amended Complaint, Mr. Stark asserts that he was repaid \$530,000 of principal on the Loan but alleges that Keane Stud continues to owe him \$290,000 (*id.*, ¶ 51). Mr. Stark also alleges that he lent an additional \$55,578 to Keane Stud between September 8, 2014 to September 28, 2014 (*id.*, ¶ 54). In sum, Mr. Stark claims that he is owed \$345,578 by Keane Stud (*id.*, ¶ 55; hereinafter the **Additional Loans**).

In his amended complaint, Mr. Stark makes a claim for: (1) monies due under the Note (first cause of action), (2) monies due in excess of the Note (second cause of action), (3) estoppel

(third cause of action), (4) unjust enrichment (fourth cause of action), and (5) costs and attorney's fees (fifth cause of action).

Keane Stud now moves to dismiss the amended complaint or, in the alternative, to compel mediation or arbitration pursuant to the Agreement.

### **Discussion**

Keane Stud moves to dismiss the amended complaint under CPLR § 3211(a)(1) and (7). On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are to be accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

Keane Stud argues that the amended complaint should be dismissed because (i) the documentary evidence establishes that all obligations under the Note were repaid and thereby extinguished, (ii) that Mr. Stark failed to plead the necessary elements of the second through fourth causes of action, and, (iii) in the alternative, that this action falls within the scope of the dispute resolution clause of the Agreement. In opposition, Mr. Stark argues that he adduced documentary evidence indicating that Keane Stud treated his loans as a personal loan, rather than a member loan, and that, therefore, Keane Stud is estopped from now claiming that the amounts at issue should be treated as member loans from Depot Hill. The court agrees.

Significantly, the tax returns of Keane Stud from 2008 to 2018 refer to the sum of \$1,221,559 as “mortgage notes,” which may be broken into the sum of \$290,000 from Mr. Stark’s personal loan and \$931,559 from an outstanding loan from Salisbury Bank (NYSCEF Doc. No. 101, ¶¶ 29-32). Keane Stud’s 2016 tax return also refers to the sum of \$55,578 as “Mortgage notes, bonds payable in less than 1 year” (*id.*, Exhibit 14). Although Keane Stud filed amended tax returns for the years 2013 and 2016, Mr. Stark alleges that the amended returns purported to reclassify his personal loan of \$290,000 as a capital contribution by Depot Hill (*id.*, ¶¶ 48-50). Inasmuch as at oral argument, Keane Stud stated that certain tax returns had been filed in error, the court must take Mr. Stark’s allegations as true on a motion to dismiss. Thus, at this stage in the proceedings, Keane Stud is presently estopped from denying the existence of Mr. Stark’s \$345,578 loan on the basis of its tax returns (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009] [stating that “[a] party to litigation may not take a position contrary to a position taken in an income tax return”). Giving Mr. Stark every favorable inference, as the court must, the amended complaint and the documentary evidence establish that he has asserted valid causes of action for the alleged sums due on the Note (first and fifth causes of action) and those sums due in excess of the Note (second through fourth causes of action). Accordingly, Keane Stud’s motion to dismiss is denied.

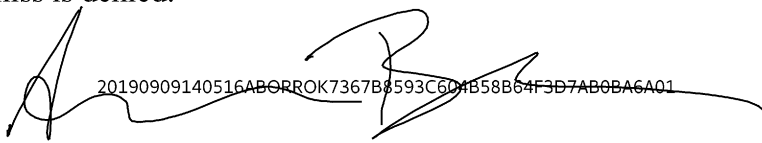
To the extent that Keane Stud argues that the parties’ dispute should be referred to arbitration or mediation, the court disagrees. The Note does not contain any mandatory arbitration provision and the court cannot read in an unequivocal intent to arbitrate in its absence (*Primavera Labs., Inc. v Avon Prods.*, 297 AD2d 505, 505 [1st Dept 2002]) as only the Agreement contains a

dispute resolution provision. Mr. Stark was not a party to the Agreement and, at this point, there is insufficient evidence to pierce the corporate veil to find that Mr. Stark was acting as the alter ego of Depot Hill, the entity that agreed to the dispute resolution procedure set forth in the Agreement. There is also insufficient evidence to establish that the sums Mr. Stark lent in excess of the Loan were member loans that fell within the scope of the Agreement. As a result, the monies claimed to be due in this action are not subject to the dispute resolution provisions in the Agreement.

Finally, Mr. Stark's request to convert this motion to dismiss to one for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is denied.

  
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9/9/2019  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE