

<b>Kosachuk v Quality Choice Healthcare, Inc.</b>
2019 NY Slip Op 32871(U)
September 24, 2019
Supreme Court, New York County
Docket Number: 653771/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

*Justice*

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INDEX NO. 653771/2018

CHRIS KOSACHUK,

MOTION DATE 04/24/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

QUALITY CHOICE HEALTHCARE, INC. D/B/A QUALITY  
CHOICE CORRECTIONAL HEALTHCARE, KATHY  
PETRINO,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48

were read on this motion to DISMISS

*Chris Kosachuk, pro se.*

*Harris Beach, PLLC* (Darius P. Chafizadeh and Michael V. Curti of counsel), for defendants.

Gerald Lebovits, J.:

Plaintiff pro se Chris Kosachuk brings this action to collect on an alleged promissory note under which defendant Quality Choice Healthcare, Inc. (Quality Choice) borrowed \$35,000 from non-party International Trading Company. Kosachuk alleges that the note was subsequently assigned to him and that Quality Choice did not repay the borrowed \$35,000. Kosachuk therefore seeks payment from Quality Choice and its principal, defendant Kathy Petrino. Defendants move to dismiss.

**BACKGROUND**

In 2011, Quality Choice entered into negotiations with International Trading to borrow a sum of money to support its business. Kosachuk alleges that the negotiations ultimately led to an agreement by Quality Choice to borrow money from International Trading through a promissory note; that International Trading assigned the note to an individual named Matias Bullrich; and that Bullrich later assigned the note to Kosachuk.<sup>1</sup> He has submitted the alleged promissory note (and two apparent instruments of assignment) in support of his claim for payment.

<sup>1</sup> Bullrich was Quality Choice's chief financial officer. (See Aff. of Chris Kosachuk in Supp. of Mot. for Summary Judgment, Exh. D (Transcript of Deposition of Kathy Petrino), NYSCEF No. 2, at 33 (Tr. Pg. 15).)

Quality Choice apparently executed the alleged promissory note. The opening paragraph of the note gives a pre-printed amount of \$100,000. That amount, though, was crossed out and replaced by a handwritten \$35,000 and the initials KRP, which Kosachuk alleges was supplied by defendant Petrino. Each page of the alleged note also is initialed KRP.<sup>2</sup> (*See* Promissory Note, NYSCEF No. 39.)

A handwritten note on the first page of the note appears to indicate that the \$35,000 will be paid in two transfers: one for \$25,000 to occur in August 2011, and one for \$10,000 to occur in September 2011. (*Id.* at 1.) It is undisputed that International Trading wired Quality Choice \$24,972 on August 15, 2011, and wired Quality Choice \$9,972 on August 29, 2011. (*See* NYSCEF No. 34, at 5.) And Petrino testified at a deposition that this amount was never repaid to International Trading (or any other party).<sup>3</sup> (*See* NYSCEF No. 2, at 33 (Tr. Pg. 16).)

The pre-printed note gave a maturity date of January 31, 2012, and provided that if the borrower sends a notice to extend the maturity date, the extended date will be July 31, 2012. (NYSCEF No. 39, at 1.) Those dates were crossed out and replaced by handwritten notations giving a maturity date of November 3, 2011, and an extended date of February 5, 2012. The next pre-printed paragraph, which did not contain any handwritten amendments, still provided that the borrower had the option to extend the note by providing written notice to the holder of the note and that in the event the borrower did extend, the maturity date would automatically be extended to the following July 31 (*i.e.*, July 31, 2012).

Regardless, the record does not contain any written notice extending the maturity of the note from November 3, 2011 (or January 31, 2012) to July 31, 2012. Kosachuk has, however, provided what appears to be a 2012 email exchange between Bullrich and Petrino in which they agree that June 30, 2013, is an appropriate repayment deadline for an unspecified loan. (Aff. of Chris Kosachuk Exh. C, NYSCEF No. 2, at 24-26.) Kosachuk alleges that the loan discussed in that email exchange is the \$35,000 loan evidenced by the promissory note that he now seeks to enforce.

In July 2018, Kosachuk brought this action, moving for summary judgment in lieu of complaint under CPLR 3213 (motion sequence 001). Defendants cross-moved to dismiss. Neither party appeared at the scheduled oral argument on the motion and cross-motion. This court therefore denied Kosachuk's motion. (*See* Decision & Order, NYSCEF No. 23.) In light of that denial, Kosachuk's moving papers are deemed to be a complaint, and defendant's cross-motion papers an answer to the complaint. (*See* CPLR 3213.) Defendants have also chosen, for the avoidance of doubt, to renew their motion to dismiss (motion sequence 002). (*See* Aff. of Michael V. Curti in Supp. of Mot. to Dismiss, NYSCEF No. 26, at ¶ 23-24.) They seek dismissal under CPLR 3211 (a) (1) (5), (7), and (8).

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<sup>2</sup> Petrino's full name is Kathy Rudolph Petrino. (*See* Aff. of Kathy Rudolph Petrino in Supp. of Mot. to Dismiss, NYSCEF No. 34, at 1.)

<sup>3</sup> Petrino also testified that these sums did not need to be repaid, because they were an equity investment by International Trading in Quality Choice rather than a loan. (NYSCEF No. 2, at 33 (Tr. Pgs. 14-16).)

## DISCUSSION

### I. Defendants' Request for Dismissal Due to Improper Service

As a threshold matter, defendants argue that the action should be dismissed because Kosachuk set a return date for his CPLR 3213 motion prior to defendants' deadline to appear and respond. This argument is without merit.

The record reflects that Quality Choice and Petrino responded to Kosachuk's motion notwithstanding the early return date, thereby waiving any arguments about short service. (*See Flushing Natl. Bank v Brightside Mfg., Inc.*, 59 Misc 2d 108 [Sup Ct, Queens County 1969]); *Plaza 400 Owners Corp. v Resnicoff*, 168 Misc 2d 837 [Civ Ct, New York County 1996].) Additionally, this court already denied the initial CPLR 3213 motion. Defendants since have had a full opportunity to argue for dismissal—not merely because their earlier cross-motion to dismiss has been deemed an answer under CPLR 3213 (*see supra* at 2), but also because they refiled their motion to dismiss under motion sequence 002.<sup>4</sup>

Defendants thus plainly have not been prejudiced by any short service of the original CPLR 3213 motion. The request to dismiss Kosachuk's action on this ground is denied.

### II. Legal Standards Governing Defendants' Motion to Dismiss

Defendants also move to dismiss on several grounds under CPLR 3211.

In assessing a motion under CPLR 3211 (a) (1), the motion may be granted “only where the documentary evidence utterly refutes [the non-moving party's] factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].)

On a motion to dismiss a complaint under CPLR 3211 (a) (5) the defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. If the defendant satisfies this burden, the plaintiff then has the burden to raise a question of fact as to whether the plaintiff actually commenced the action within the applicable limitations period. (*See Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016].)

When ruling on a CPLR 3211 (a) (7) motion to dismiss, this court must accept as true the facts as alleged in the pleadings and submissions in opposition to the motion, accord the non-moving party the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*See Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Services, Inc.*, 20 NY3d 59, 63 [2012].) However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by

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<sup>4</sup> Although motion sequence 002 is thus in some sense duplicative, the court, under the slightly unusual procedural circumstances here, declines Kosachuk's invitation to deny defendants' motion merely on that basis.

documentary evidence are not entitled to any such consideration.” (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]) (internal quotation marks and citation omitted.)

### III. Defendants’ Motion to Dismiss under CPLR 3211

#### A. The Branch of Defendants’ CPLR 3211 (a) (8) Motion

Each defendant moves under CPLR 3211 (a) (8) to dismiss for lack of personal jurisdiction due to improper service. Defendant Petrino’s motion is granted; defendant Quality Choice’s motion is granted only to the extent of directing a traverse hearing.

Kosachuk served Petrino by the leave-and-mail method of CPLR 308 (2). Under that method, the follow-up mailing must among other things carry the notation “personal and confidential.” Petrino contends—relying on a photograph of the envelope—that Kosachuk’s mailing did not comply with the “personal and confidential” requirement. Kosachuk neither disputes the authenticity and accuracy of that photograph nor asserts that he did comply with the “personal and confidential” condition of CPLR 308 (2). Since service on Petrino facially failed to satisfy the CPLR, this court lacks personal jurisdiction over Petrino.<sup>5</sup> Petrino’s motion to dismiss for lack of personal jurisdiction is granted.

Quality Choice avers that Kosachuk did not properly serve it with his papers, but instead served only an individual at the offices of J&K Health Services, an assertedly unrelated corporation. (NYSCEF No. 26, at 2.) But the affidavit of Kosachuk’s process server states that he delivered the motion papers to a Quality Choice employee who was authorized to accept service. (See NYSCEF No. 17.) Kosachuk also stated in his affidavit opposing defendants’ original motion to dismiss that Petrino is a principal of both Quality Choice and J&K Healthcare Services and that they share a place of business.<sup>6</sup> (See NYSCEF No. 18, at ¶ 3.) Given these conflicting affidavits, a traverse hearing is required to determine whether service on Quality Choice was proper.

In the interests of economy, this court also addresses the other grounds for dismissal relied upon by Quality Choice, should service ultimately be found to have been proper.

#### B. The Branch of Defendants’ Motion under CPLR 3211 (a) (1)

Quality Choice states in conclusory fashion that it seeks dismissal under CPLR 3211 (a) (1). As noted above, to obtain dismissal under this provision, a defendant must provide documentary evidence that conclusively refutes plaintiff’s allegations. But Quality Choice does

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<sup>5</sup> It is immaterial in this context whether Petrino received prompt notice of the action notwithstanding Kosachuk’s failure to serve her by the means authorized by statute. (See *Macchia v Russo*, 67 NY2d 592, 595 [1986].)

<sup>6</sup> Kosachuk also stated that he was unable to serve Quality Choice through the Secretary of State under Business Corporation Law § 306, because Quality Choice’s address on file with the Secretary of State is out-of-date and Quality Choice did not provide for mail forwarding from that address. (See NYSCEF No. 18, at ¶¶ 2, 4.)

not specifically identify the documents that it believes refute Kosachuk's claims. Additionally, Quality Choice's memorandum of law in motion sequence 002 does not contain an argument for dismissal under CPLR 3211 (a) (1), and in fact *omits* a 3211 (a) (1) argument that Quality Choice previously made in motion sequence 001. (*Compare* NYSCEF No. 15, at 8-11, *with* NYSCEF No. 41, at 9-10.) Thus, to the extent that Quality Choice is still seeking dismissal under 3211 (a) (1), that branch of its motion to dismiss is denied.

### C. The Branch of Defendants' Motion under CPLR 3211 (a) (7)

Quality Choice appears to argue that Kosachuk's action should be dismissed for failure to state a cause of action because Kosachuk's allegation that Quality Choice failed to satisfy its payment obligations under the note would require this court to go outside the four corners of the note. (*See* NYSCEF No. 43, at 3.) This argument is without merit.

As Quality Choice itself acknowledges (*see* NYSCEF No. 26, at ¶¶ 23-24), this court's prior denial of Kosachuk's CPLR 3213 motion (in motion sequence 001) transformed Kosachuk's motion papers into a complaint in a conventional plenary action. There is no basis still to hold those papers to the requirements of CPLR 3213.

Kosachuk's action also would satisfy CPLR 3213 in any event. The action is based on an alleged promissory note—a classic instrument for the payment of money under CPLR 3213. The only question is instead whether Quality Choice did or did not fail to repay the money loaned pursuant to the note. And that question may properly be resolved under CPLR 3213 by information outside the four corners of the note.<sup>7</sup> (*See Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *aff'd* 29 NY2d 617 [1971].)

Petrino also appears to raise an argument under CPLR 3211 (a) (7) that would apply to both defendants. Petrino contests the import (or perhaps the authenticity) of the marked-up note submitted by Kosachuk. She claims that the negotiations between International Trading and Quality Choice instead broke down without any promissory note being executed by International Trading. (*See* NYSCEF No. 34, at 4-5.) Petrino admits, however, that Quality Choice received two wire transfers that correspond closely in timing and amount to payments to Quality Choice that are listed on the marked-up note. (*Id.* at 5.) Petrino acknowledged at her deposition that those sums were never repaid. (*See* NYSCEF No. 2, at 33 (Tr. Pg. 16).) And neither Petrino nor

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<sup>7</sup> Quality Choice relies on *Weissman v. Sinorm Deli*, 88 NY2d 437 [1996]. But *Weissman* is inapposite. There, the Court held CPLR 3213 to be an improper procedural vehicle precisely because plaintiff did *not* rely upon a promissory note of the kind on which Kosachuk bases this action. Instead, unlike here, the plaintiff in *Weissman* based his claim on an indemnification agreement imposing certain unspecified (and in some instances contingent) obligations that could not be ascertained within the four corners of the document. (*See* 88 NY2d at 444-445.) Additionally, the Court in *Weissman* made clear that where CPLR 3213 is not available, "the action typically should not be dismissed but simply converted to ordinary form as the statute provides." (*Id.* at 445.) The Court reached the merits in *Weissman* and granted defendants' cross-motion for summary judgment only because plaintiff's claims under the indemnification agreement plainly failed on their merits.

Quality Choice has submitted documentary evidence tending to show that the marked-up note relied on by Kosachuk did not evidence a fully-executed loan agreement. At a minimum, the parties' apparent disagreement about whether the document submitted by Kosachuk accurately reflects a finalized loan agreement cannot be resolved at the pleading stage.

**D. The Branch of Defendants' Motion under CPLR 3211 (a) (5)**

Finally, Quality Choice's argument that Kosachuk failed to bring his action within the applicable limitations period does not warrant dismissal of the action at this time.

The parties agree that the statute of limitations here is six years, and that it ran from any default under the note. The claim therefore accrued no later than the note's maturity date. Kosachuk brought this action on July 30, 2018. The action therefore is timely only if the note matured on or after July 30, 2012. Under the pre-printed terms of the alleged note (or the terms' handwritten amendment), however, the maturity date would be either November 2011 or February 2012. Although the note did also provide that the borrower could choose to extend the note's maturity date until July 31, 2012, there is no evidence in the record that Quality Choice extended the maturity date under this provision.

Kosachuk has, however, submitted one significant piece of evidence regarding timeliness: the 2012 email chain between Bullrich and Petrino. This email is not unambiguous or unequivocal. But it at least suggests that Bullrich and Petrino agreed between them to extend the maturity date of the note in this case until June 30, 2013. And if, as Kosachuk maintains, that is what occurred, his action is timely.

It is of course possible that Kosachuk's characterization of this email—and its import for the note's maturity date—will prove to be incorrect. But that question should be resolved on a more-developed evidentiary record, not on a motion to dismiss under CPLR 3211 (a) (5).

Accordingly, it is

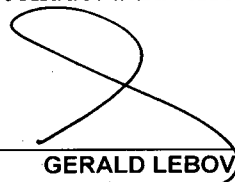
ORDERED that defendant Kathy Petrino's motion to dismiss under CPLR 3211 (a) (8) is granted, and the action is dismissed as to Kathy Petrino and severed and continued as to defendant Quality Choice; and it is further

ORDERED that defendant Kathy Petrino shall serve notice of entry on the County Clerk, who shall enter judgment in her favor accordingly; and it is further

ORDERED that defendant Quality Choice's motion to dismiss under CPLR 3211 (a) (8) is granted only to the extent that the issue of the validity of service upon Quality Choice is hereby referred to a Special Referee to hear and determine, and is otherwise denied; and it is further

ORDERED that defendant Quality Choice shall, within 14 days from the date of this order, serve a copy of this decision and order with notice of entry on the Special Referee Clerk in the General Clerk's Office in Rm. 119 at 60 Centre Street, and the Special Referee Clerk is directed to set a date for the reference to a Special Referee to conduct a traverse hearing to determine whether service on Quality Choice was proper.

9/24/2019  
DATE

  
GERALD LEBOVITS, 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"/>
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE