

Mashinsky v Drescher
2019 NY Slip Op 32882(U)
September 27, 2019
Supreme Court, New York County
Docket Number: 650781/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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ALEX MASHINSKY,
Plaintiff,

INDEX NO. 650781/2017
MOTION DATE 04/10/2019
MOTION SEQ. NO. 003

- v -

REID DRESCHER, SPENCER CLARKE LLC,
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109

were read on this motion for SUMMARY JUDGMENT

Yankwitt LLP (Cassandra M. Vogel of counsel), for plaintiff.
The Roth Law Firm, PLLC (Richard A. Roth of counsel); for defendants.

Gerald Lebovits, J.:

Defendant Spencer Clarke LLC (Spencer) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it. Plaintiff cross-moves for leave to amend his complaint.

BACKGROUND

Plaintiff states that he and Reid Drescher (Drescher) were friends and that, in 2016, Drescher told plaintiff that he was in financial distress (complaint [NYSCEF Doc. No. 6], ¶¶ 2, 24-26; plaintiff EBT [NYSCEF Doc. No. 73] at 23, 39-41, 193-194). Plaintiff contends that after email exchanges in August 2016, they entered into a contract dated August 29, 2016 (the August Contract [NYSCEF Doc. No. 68]), under which plaintiff agreed to give Drescher \$25,000 and Drescher agreed to give plaintiff the rights to \$250,000 in proceeds that Drescher would earn from Spencer's work with certain companies to which plaintiff introduced Drescher, or if no deals were done, \$25,000 plus interest (complaint, ¶¶ 5-7; plaintiff EBT at 46, 49-51, 56, 58, 93-94). Plaintiff asserts that Spencer was bound by the August Contract (id. at 94). Plaintiff states that he sent Drescher the \$25,000 and thereby fulfilled his contractual obligation (complaint, ¶ 41; plaintiff EBT at 61-64, 69, 71).

Plaintiff contends, in early October 2016, that Drescher stated that he needed further funds and, on October 6, 2016, they executed a second contract (the October Contract [NYSCEF Doc. No. 69]), which contained the same provisions as the August Contract, under which plaintiff would give Drescher \$25,000 and Drescher would assign proceeds from deals with the identified companies in the sum of \$250,000 and if no deals were made, that Drescher would pay plaintiff \$25,000 plus interest (complaint, ¶¶ 10, 44-49; plaintiff EBT at 56, 58, 148-149). Plaintiff states that he paid Drescher the \$25,000, but when Drescher consummated various deals with the companies, Drescher breached his obligations under the August and October Contracts (the Contracts) by only giving plaintiff checks for \$30,000, rather than the \$250,000 purportedly owing under the Contracts (complaint, ¶¶ 42, 47, 50-56; plaintiff EBT at 88-89, 105-106, 112, 114, 124, 130, 132-133, 137, 139, 142-144, 160, 163-168, 170).

The Contracts both identified plaintiff as the Buyer and Drescher as the “Sellers.” They also contain provisions that each contract “constitutes the sole and entire agreement between the parties . . . [and it] supercedes all prior understandings [and] agreements [and it] shall not be construed in favor of or against any party” (Contracts, ¶ 4.6). The Contracts are signed by plaintiff and Drescher above a signature line with the word “individually” in all capital letters. The Contracts identify Drescher as “the Managing Member of . . . [Spencer]” and state that he as the authority to enter into the agreement.

Plaintiff’s complaint has a cause of action for breach of contract against Drescher and Spencer. Defendants’ answer [NYSCEF Doc. No. 7] admits that plaintiff and Spencer were friends, that plaintiff gave Drescher a check for \$25,000 pursuant to the August Contract and that Drescher paid plaintiff \$35,000 (answer, ¶¶ 6, 8, 13). Plaintiff’s proposed amended complaint (amended complaint [NYSCEF Doc. No. 101]) has the phrase that Drescher was the agent and alter ego of Spencer.

Drescher acknowledged that he signed the Contracts, but he stated that they did not reflect the genuine nature of the parties’ relationship, which he contended was that plaintiff loaned him \$50,000 and that he repaid \$30,000 (Drescher September 26, 2018 EBT [NYSCEF Doc. No. 79] at 39, 46-52, 78, 81, 103, 118, 149-150, 153, 167-168; Drescher EBT November 6, 2018 [NYSCEF Doc. No. 80] at 333-334, 337-338). He supports his contention that plaintiff’s payments were loans by noting that the checks (NYSCEF Doc. Nos. 70, 71, 72) have the word loan noted on the memo portion of the checks (Drescher EBT at 120-122, 160, 163, 264, 273, 275, 284). Drescher also asserts that the checks and the Contracts involved separate transactions and that the companies listed in the Contracts did not want to have any dealings with plaintiff after plaintiff made the initial introductions (*id.* at 302, 304, 315, 318-319).

DISCUSSION

Legal Standards

A party seeking summary judgment must make a *prima facie* case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the

absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). “Where different conclusions can reasonably be drawn from the evidence, the motion should be denied” (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). “[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment” (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

However, “[a] party’s affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment” (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007] *quoting Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see also Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]).

CLR 3025 (a) permits a party to amend as of right once prior to the time for responding to the pleading expires. Thereafter, leave is freely granted in the absence of prejudice (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *A.N. Frieda Diamonds, Inc v Kaminski*, 122 AD3d 517, 517 [1st Dept 2014]). However, “leave should be denied where the proposed claim is palpably insufficient” (*Pasalic v O’Sullivan*, 294 AD2d 103, 104 [1st Dept 2002]; *see also Tupi Cambios S.A. v Morgenthau*, 48 AD3d 278, 280 [1st Dept 2008]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]).

Contract Claim and Interpretation

“[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms” (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

Generally, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties’ agreement and the best evidence of the parties’ agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, “[c]ourts will give effect to the contract’s language and the parties

must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table” (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; see also *McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

“To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]). Also, “[t]he parties’ course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties” (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 471 [1st Dept 2017]).

Where a party “was not a signatory to [a Contract], no cause of action for breach of contract can be asserted against it” (*Hampton Hall Pty Ltd. v Global Funding Servs., Ltd.*, 82 AD3d 523, 524 [1st Dept], *lv denied* 17 NY3d 707 [2011]; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193, 193 [1st Dept 2005]; see also *Dragon Head LLC v Elkman*, 102 AD3d 552, 552 [1st Dept 2013]).

Alter Ego Liability

“Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer . . . personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in ‘bad faith’ while representing the corporation . . . [Rather, he must allege] acts amounting to an abuse or perversion of the corporate form” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]).

Common ownership and common control does not meet the threshold of complete domination and abuse of the corporate form for the purpose of wrongdoing in the transaction at issue (*East Hampton*, 16 NY3d at 776; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Nuevo El Barrio Rehabilitación de Vivienda y Economía, Inc. v Moreight Realty Corp.*, 87 AD3d 465 [1st Dept 2011]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002]).

Analysis

In the motion, Spencer seeks dismissal of plaintiff’s cause of action for breach of contract against it, since it was not a signatory of the Contracts. In opposition, plaintiff points to Drescher being identified as the “Sellers” and noting the plural, argues that this must mean that Spencer is bound. He also points to personal guarantee language in the Contracts. Plaintiff also seeks to amend his complaint to add alter ego and agency claims against Spencer. Spencer in reply contends that Drescher’s ownership and officer status in Spencer are insufficient to support an

alter ego claim and that plaintiff has not refuted the Contracts' language that plaintiff and Drescher were the parties to the Contract. It therefore seeks dismissal of plaintiff's complaint against it and the denial of plaintiff's cross motion to amend.

As noted above, the parties have sharply contrasting versions of their relationship. Plaintiff asserts that it is based upon the Contracts, while defendants contend that plaintiff loaned Drescher money. For the purpose of resolving Drescher's motion, the court must accept plaintiff's version of contested factual disputes. However, basing plaintiff's claim upon the Contracts, they identify plaintiff and Drescher as the parties and they signed the Contracts "INDIVIDUALLY." Since Spencer "was not a signatory to [a Contract], no cause of action for breach of contract can be asserted against it" (*Hampton Hall*, 82 AD3d at 524). To add Spencer to the Contracts would be to improperly rewrite the Contracts (*see Enjoy Realty*, 24 NY3d at 424; *Greenfield*, 98 NY2d at 569). Plaintiff has not set forth allegations of abuse of the corporate form in the transactions at issue, so the proposed amended complaint does not adequately raise a claim of alter ego liability (*see East Hampton*, 16 NY3d at 776). It is therefore "palpably insufficient" (*Pasalic*, 294 AD2d at 104). Accordingly, Spencer's motion for summary judgment dismissing plaintiff's complaint against it must be granted and plaintiff's cross motion to amend his complaint must be denied.

Accordingly, it is

ORDERED that the motion of Spencer Clarke LLC for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint as against it, is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and all future papers filed with the court reflect the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in caption herein; and it is further

ORDERED that plaintiff's cross motion for leave to amend the complaint is denied.

9/27/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: