

Kahan v Alishaev

2020 NY Slip Op 31011(U)

April 20, 2020

Supreme Court, New York County

Docket Number: 158760/18

Judge: Barry R. Ostrager

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with case details: LESLIE KAHAN, Plaintiff; JOSEPH ALISHAEV a/k/a YOSSIE ALISHAEV a/k/a YOSIF ELISHAYEV and AQUA MASTER ENTERPRISE INC., Defendants; INDEX NO. 158760/18; MOTION DATE; MOTION SEQ. NOS. 006 and 007; DECISION + ORDER ON MOTIONS.

HON. BARRY R. OSTRAGER:

This is an exquisitely simple trial ready case, the trial of which was delayed by the Coronavirus. The plaintiff, who is engaged in the jewelry business, claims he lent a large sum of money to a long-time fellow jeweler and received a promissory note that has not been honored. There are issues for trial about the documentation of the loan. The defendant provided security for the loan in the form of a diamond which was represented to be more than equal to the value of the loan. The Court presumes that if the diamond was worth more than the loan, the plaintiff would have kept the diamond and not prosecuted this lawsuit. The Court also presumes that if the diamond was worth more than the debt, the defendant would have redeemed the diamond by paying off the loan.

Before the Court are two motions in limine to preclude certain evidence at the jury trial of this action. Motion 006 is defendant's motion to preclude plaintiff from offering (1) testimony from the three surprise purported expert witnesses included in plaintiff's recently-filed witness list; (2) the purported "promissory note"; (3) evidence relating to any claim of fraud or unjust enrichment; and (4) any evidence of defendant Alishaev's alleged gambling activity. Motion 007 is plaintiff's motion to preclude defendant from (i) offering testimony at trial from defendants'

proffered expert, Kryzstof Szymanski, as to the alleged custom and practice(s) on “47th Street,” (ii) eliciting hearsay testimony as to Alishaev’s alleged conversations with his son Yuri Shamsiev as to the value of the stone at issue in this action and any related loan transaction; (iii) offering any testimony or proffered evidence questioning the authenticity of the stone in plaintiff’s possession or suggesting the stone is anything other than the 8.53 blue-green diamond Alishaev allegedly gave to plaintiff as collateral for the loan at issue; and (iv) offering any evidence that Alishaev received the proceeds of the loan in a corporate capacity on behalf of Aqua Master or that loan is not his personal obligation.

Custom & Practice Experts

Plaintiff moves to preclude defendants’ proffered expert Kryzstof Szymanski who would purportedly testify in substance that it is the custom and practice on 47th Street to limit recourse for an unpaid debt to whatever security is provided for a loan, regardless of its actual value. Each party in this case may testify about the circumstances surrounding the loan and the documentation of the loan, and each party may testify about the nature and purpose of the security that was offered for the loan. This case will be decided by a jury. The Court rejects the proposition that the jury would be assisted by expert custom and practice evidence as the proffered expert has no testimony that would satisfy the *Frye* test. Accordingly, plaintiff’s motion *in limine* to bar such testimony is granted. And, because plaintiff’s motion to bar defendants’ custom and practice witness is granted, plaintiff is also precluded from calling a custom and practice witness; thus, the portion of defendants’ motion that seeks to preclude plaintiff’s witness Cecilia Gardner is also granted.

Other Experts

Defendant has also moved to preclude plaintiff from offering two other experts: Kohody Detweiler, purportedly to provide his expert opinion as to the authenticity of defendant Joseph Alishaev's signature, and Don Palmieri with respect to the authenticity of the diamond and its purported value. Defendants' objection is only to the belated identification of these experts. However, delay is excusable, absent prejudice. And, under the circumstances presented here, given the indefinite postponement of the jury trial, there can be no prejudice. Defendants are certainly entitled to depose or otherwise examine these witnesses before trial.

Indeed, at the oral argument on February 10, 2020, the Court declined to grant summary judgment and indicated that the authenticity of the signature and the Note would be an issue for trial. *See* NYSCEF No. 116 at 24. Accordingly, defendants' motion to preclude plaintiff's handwriting expert is denied. Likewise, defendant's motion to preclude plaintiff's diamond valuation expert is denied.

The Promissory Note

Defendants move to preclude plaintiff from offering the purported promissory note into evidence, arguing the note has not been properly authenticated. Defendant's motion is denied. The purpose of the jury trial is to discover the truth, including the truth of the circumstances surrounding the execution of the purported promissory note. The parties can both testify with respect to the promissory note and its disputed authenticity or validity, and also testify about who the maker of the promissory note was. Plaintiff has indicated he will call four separate witnesses who intend to authenticate the note. All of those witnesses will be subject to cross-examination, at which time defendants can raise any issues about their firsthand knowledge.

Evidence of Fraud or Unjust Enrichment

Defendants seek to preclude plaintiff from offering evidence of fraud or unjust enrichment on the grounds that there is “no evidence in the record” to support these claims. Plaintiff has alleged both fraud and unjust enrichment in the Complaint. Neither claim has been dismissed. As such, there is no reason to preclude plaintiff from offering evidence in support of these causes of action, and defendants’ motion is denied.

Evidence of Gambling Activity

Defendants seek to preclude any evidence related to Alishaev’s purported gambling activity on the grounds that it would be more prejudicial than probative. Plaintiff argues that this evidence would rebut defendant’s claim that the loan was a corporate debt, rather than defendant Alishaev’s personal debt.

Defendants’ Answer asserts an affirmative defense that “the alleged loan is a corporate debt of defendant Aqua Master Enterprise Inc., defendant Joseph Alishaev cannot as a matter of law be personally liable therefor.” *See* NYSCEF No. 4 at ¶ 54. Plaintiff argues that evidence of Alishaev’s use of the loan proceeds to pay personal debts - such as massive gambling debts – is authenticated by records from Bank of America and Aria Resort and Casino and that this evidence is admissible and relevant to defendants’ defense to plaintiff’s claims in this action. Plaintiff further argues that this evidence has no prejudicial effect on the jury and would be used to only rebut any allegation that the loan is the obligation of Aqua Master, as opposed to Alishaev’s personal obligation.

The Court agrees with plaintiff that demonstrating ownership of the alleged loan is a permissible use of this testimony, and to the extent that defendants introduce any evidence to characterize the loan as a corporate debt, as opposed to Alishaev’s personal debt, plaintiff is

entitled to introduce evidence to discredit that fact. The Court, of course, will not permit any improper character evidence and will rule on any objections to questions at trial. Accordingly, defendants' motion is denied, without prejudice to renewal at trial.

Likewise, plaintiff's motion to preclude defendants from offering any evidence that Alishaev received the proceeds of the loan in a corporate capacity on behalf of Aqua Master or that the loan is not his personal obligation is denied, assuming Alishaev proceeds to assert that defense at trial, with the understanding that plaintiff may rebut that evidence.

Hearsay


Plaintiff moves to preclude defendants from eliciting any alleged hearsay testimony regarding Alishaev's alleged conversations with his son Yuri Shamsiev as to the value of the stone at issue in this action and any related loan transaction. Plaintiff argues that statements by Shamsiev would be impermissible hearsay, and defendants respond that statements by Shamsiev would not be offered for the truth of the matter, but rather for their impact on defendant Alishaev. Defendant Alishaev can testify about anything he supposedly said because Alishaev will be live witness subject to cross examination. Alishaev cannot testify as to what Shamsiev said in response, absent some exception to the hearsay rule, but he can testify to his understanding of relevant facts.

Diamond Authenticity

Plaintiff also moves to preclude defendants from offering any testimony or proffered evidence questioning the authenticity of the stone in plaintiff's possession as anything other than the 8.53 blue-green diamond Alishaev allegedly gave to plaintiff as collateral for the loan at issue. Plaintiff argues that throughout discovery, defendants made no attempt to inspect the stone, nor have they proffered any real evidence that the stone was not what plaintiff says it is.

Defendants counter that plaintiff has failed to meet his burden to establish the authenticity of the stone. As explained above, both parties have sufficient time to establish and rebut whatever facts they seek to establish or rebut about the value and authenticity of the stone. Thus, plaintiff's motion to preclude this evidence is denied.

Dated: April 20, 2020


BARRY R. OSTRAGER, J.S.C.

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