SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE **PART 15**
Justice

Lisa Cullity **INDEX NO. 112494/2011**

DECISION AFTER BENCH TRIAL

-v-

Fred Posner

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	
Answering Affidavits — Exhibits	
Replying Affidavits	

CROSS-MOTION: YES NO

In this case, plaintiff, the daughter of defendant, has sued claiming he promised, not to her, but to Chase Bank, to gift her $8,000 per month. The reason for the promise to Chase was to induce Chase to allow plaintiff to assume ownership of a condominium in plaintiff's divorce proceeding. At the time, the condominium was worth $1,000,000 and had a mortgage of only $200,000. Apparently, Chase allowed plaintiff to assume the mortgage without considering her parents' letter.

The relationship between the parties deteriorated significantly and, in 2011, defendant commenced a replevin action *Posner v Cullity,* Index No., 0325/2011, to recover a vehicle that he had leased for plaintiff's benefit after the expiration of the lease term. Although plaintiff eventually surrendered the vehicle, she commenced this action seeking to enforce her parents' promise to Chase.

A trial was held in 2019. Complicating adjudication was the pandemic and the lack of efiling on this case that made accessing all necessary documents cumbersome. If there are to be further proceedings in this case, it MUST be converted to efiling.

The court finds all witnesses credible with one exception. Pl. Ex 43, a document that substantially devalues her apartment from its previous appraised value, served just before trial, is contrived, inaccurate and appears to be a last minute attempt to deal with an unfavorable fact. Nevertheless, as discussed on the record, plaintiff's view of the case was quite unrealistic anyway on a legal basis. For example, even if plaintiff could sue on some sort third party beneficiary promissory estoppel theory, which is highly doubtful, she simply does not have any damages. Plaintiff's argument that she would have moved to a less expensive residence and invested the money in a moderately performing mutual fund is highly speculative. Moreover, the credible evidence at trial demonstrates that the New York real estate market increased in value substantially from the inception of this case until the time of trial in 2019. Thus, plaintiff is in a much better position than she was at the beginning of this case, nearly ten years ago. The failure of her parents to give her $8,000 a month has had no effect on the value of her real estate. Any other claimed damages related to the apartment are too speculative to warrant consideration. Thus, plaintiff's claims fail because there was no detrimental reliance (*see Weisenfeld v Iskander*, 2020 NY Slip Op 05710 [1st Dep't October 13, 2020]).

Plaintiff also points to several exhibits that appear to be some sort of IOU from defendant to plaintiff. (pls ex 27, 28, 29, 31, and 32). Plaintiff claims defendant failed to repay her. However, unlike defendant's proof on his counterclaims, plaintiff never demonstrates the origin of the loan through documents like cancelled checks. Moreover, each IOU contains an arrangement for repayment and there is nothing in the record to indicate that arrangement did not occur. Therefore, plaintiff has not carried her burden to demonstrate defendant owes her money.

To the extent that plaintiff seeks damages for a ring she claims her father kept that was hers or some $25,000 in damages because father did not pay for son's bar mitzvah, plaintiff has failed to carry her burden to prove either claim by a preponderance of the evidence. In fact, defendant has demonstrated that he did pay for the bar mitzvah (see Def Ex c10). Accordingly, the court dismisses all of plaintiff's claims with prejudice.

The court now turns to defendant's counterclaims. Defendant contends that plaintiff owes him $46,922 as of March 3, 2006, representing accumulating loans to plaintiff. Plaintiff does not contest that defendant did indeed loan her that amount. However, she claims that she does not owe the money yet. There is no dispute that, pursuant to the arrangement between the parties, as Pl Ex 44 demonstrates, plaintiff did not need to repay this money until "the divorce ends and her assets are released."

Although the divorce is essentially over, not all of plaintiff's assets have been released. The parties disagree about the meaning of the phrase "and her assets are released." This phrase does not say "all", but it also does not say "some." There is no doubt in the court's mind that defendant drafted this agreement and its predecessors. First, they are mostly in defendant's handwriting, in particular the last one with the final amount [see Pl. Ex. 44 last page]). However, the agreement is not ambiguous. Had the parties meant "some" assets or particular assets, they would have said so. Therefore, "her assets" refers to all her assets. Both sides acknowledge not all of plaintiff assets have been released. Thus, this loan is not yet due.

Defendant also claims that he lent plaintiff an additional $139,002. Defendant has set forth a prima facie case for this amount consisting of the checks attached in Def. Ex. C12. However, plaintiff has demonstrated that she paid back a portion of this amount. For example, there are at least 14 checks that plaintiff made out to "Fred Posner." There are also memos on checks to Chase Home Finance stating "For Fred Posner." Other checks bear the memo "repayment of loan" or "repayment of loan to dad." Below is a list of the amount and the payee or check memo notation.

500	Fred Posner			
500	" "			
320.72	" "			
505.57	" "			
353.84	" "			

1500	" "			
500	" "			
500	" "			
500	" "			
1000	" "			
1000	" "			
1000	" "			
785	" "			
3000	chase repayment of loan			
4000	Fred Posner			
3400	" …"			
5000		chase home finance for Fred Posner		
3000		" "		
1700		"….."		
1800		". "		
1000		". "		
1000		" "		
1500		" "		
5500		repayment of loan		
1700		repayment of loan to dad		
41565.13		" …"		

The amounts plaintiff paid back total $41,565.13. Defendant has not rebutted plaintiff's proof that she paid back some of what she owed. Therefore, the amount due and owing from plaintiff is $97,436.87.

Accordingly, the court awards judgment to defendant in the amount of $97,436.87 with statutory interest from June 22, 2011, the last date defendant proves he loaned money to plaintiff; and it is further

ORDERED that the parties are to collect their exhibits within 20 days of the date of this order or the court will discard them; and it is further

ORDERED that the court requires prior conference on any future motions.

The clerk is directed to enter judgment against plaintiff, Lisa Cullity, in the amount of $97,436.87 with statutory interest from June 22, 2011 accordingly.

DATED: November 25, 2020
New York, New York

ENTER:

MELISSA A. CRANE, J.S.C

Check one: ☐X FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: ☐ GRANTED ☐DENIED ☐ GRANTED IN PART ☐ OTHER
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT