

Cirillo v Lang

2020 NY Slip Op 34628(U)

November 6, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 1732/2014

Judge: Martha L. Luft

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.

SHORT FORM ORDER

INDEX No. 1732/2014
CAL. No. 201900871OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 8/18/20
ADJ. DATE 8/18/20
Mot. Seq. # 004 MD

-----X
FRAN CIRILLO,

Plaintiff,

- against -

JENNIFER LANG,

Defendant.
-----X

ZABELL & COLLOTTA, P.C.
Attorney for Plaintiff
1 Corporate Drive, Suite 103
Bohemia, New York 11716

RICHARD J. KAUFMAN, P.C.
Attorney for Defendant
646 Main Street
Port Jefferson, New York 11777

Upon the following papers read on the e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, filed July 22, 2020; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by defendant, filed July 29, 2020; Replying Affidavits and supporting papers by plaintiff, filed August 14, 2020; Other ___; it is

ORDERED that plaintiff's motion for, in effect, summary judgment on her claim for breach of contract is denied.

In this contract action, plaintiff, Fran Cirillo, alleges in her complaint that defendant, Jennifer Lang,¹ owes her \$50,000.00 that became due on a personal loan. Plaintiff testified that defendant and plaintiff's daughter, nonparty Lee Cirillo (Lee), co-owned a business, nonparty In The Game Fitness Corp. (ITGF Corp.), which operated a franchise of nonparty Fitness Together. Plaintiff claims that she loaned ITGF Corp. and/or defendant extensive sums of money totaling more than \$100,000.00. There was no written agreement pertaining to the alleged loans. The business relationship between defendant and Lee eventually deteriorated, and defendant sold all of her shares in ITGF Corp. to Lee for \$100.00 toward the end of 2009. In January 2010, plaintiff and defendant both signed a document that stated, in full:

¹ Since the inception of this action, defendant's last name has changed to Nyx.

Cirillo v Lang
Index No. 1732/2014
Page 2

“January 10, 2010

“I, Jennifer Lang owe Fran Cirillo \$50,000.00
For repayment of loans she provided to me as owner
of Fitness Together Port Jefferson, New York.
This loan will be repaid without interest by January 1, 2014

“If after that time, if loan is not repaid, 5% interest will be added
to principle.”

Defendant did not pay plaintiff. Plaintiff then commenced this action for breach of contract and, alternatively, unjust enrichment. Defendant has not interposed any affirmative defenses.²

Plaintiff now seeks, in effect, summary judgment on her claim for breach of contract. In support of her motion, plaintiff submits, among other things, the pleadings, the January 2010 agreement, various checks, and transcripts of the parties' depositions. Plaintiff argues, as pertinent here, that the January 2010 agreement was a valid agreement with past consideration under General Obligations Law § 5-1105 and current consideration by her forbearance to collect certain monies from defendant. Plaintiff does not direct any argument toward her alternative claim for unjust enrichment. In opposition to the motion, defendant submits her affidavit, two court orders, and a notice of appeal.

The Court will first address a timeliness issue. The note of issue in this case was filed, according to the Court's electronic records, on May 10, 2019. Plaintiff previously moved for summary judgment in her favor. In an order dated May 22, 2020, this Court denied the motion, with leave to renew within 30 days of the date of the order. Plaintiff filed the instant motion 61 days later on July 22, 2020. Thus, plaintiff's instant motion is untimely and must be denied on that ground alone.

But even if the Court were to consider the merits of plaintiff's motion, it would still be denied. On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

² Defendant moved to amend her answer to assert the affirmative defenses of fraudulent inducement and duress. This Court, in an order dated November 8, 2019, denied the motion. Defendant has appealed that order. The Appellate Division, Second Department, denied defendant's motion for a stay pending the outcome of that appeal (*Cirillo v Lang*, 2020 NY Slip Op 63898[U] [2d Dept 2020]).

Cirillo v Lang
Index No. 1732/2014
Page 3

“The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Legum v Russo*, 173 AD3d 998, 999, 102 NYS3d 705, 706 [2d Dept 2019]; see *Larsen v Ciolli*, 165 AD3d 1247, 86 NYS3d 149 [2d Dept 2018]; *All Seasons Fuels, Inc. v Morgan Fuel & Heating Co., Inc.*, 156 AD3d 591, 66 NYS3d 512 [2d Dept 2017]). “To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound” (*Galarneau v D’Andrea*, 184 AD3d 1064, 1065-1066, 126 NYS3d 766, 768 [3d Dept 2020] [quotation marks and citations omitted]; see *Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 950 NYS2d 8 [1st Dept 2012], *affd* 20 NY3d 1082, 965 NYS2d 71 [2013]). “Consideration consists of either a benefit to the promisor or a detriment to the promisee. It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made as consideration for the promise made to him or her” (*Nassau County v New York State Urban Dev. Corp.*, 157 AD3d 805, 807, 70 NYS3d 246, 248 [2d Dept 2017] [quotation marks, citations, and alterations omitted]; see *Dee v Rakower*, 112 AD3d 204, 976 NYS2d 470 [2d Dept 2013]; *Hollander v Lipman*, 65 AD3d 1086, 885 NYS2d 354 [2d Dept 2009]). “If the promisor loses nothing, or is not obligated to do anything, and the promisee acquires nothing by the arrangement, there will be no consideration” (*NCSPlus Inc. v WBR Mgt. Corp.*, 37 Misc 3d 227, 236, 949 NYS2d 317, 325 [Sup Ct, NY County 2012] [quotation marks and citations omitted]).

“Generally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise”; in other words, the past consideration was not “bargained for in exchange for the [current] promise” (*Samet v Binson*, 122 AD3d 710, 711, 996 NYS2d 149, 150, 151 [2d Dept 2014] [quotation marks and citations omitted]; see *Korff v Corbett*, 155 AD3d 405, 65 NYS3d 498 [1st Dept 2017], *lv denied* 31 NY3d 92, 81 NYS3d 372 [2018], *rearg denied* 32 NY3d 1041, 88 NYS3d 398 [2018]). General Obligations Law § 5-1105, however, creates an exception to the rule against past consideration “if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed” (see e.g. *Korff v Corbett*, *supra*).

Plaintiff has not eliminated all questions of fact as to whether she is entitled to summary judgment on her claim for breach of contract. There is a question of whether the January 2010 agreement was supported by past consideration as to defendant when, by plaintiff’s own admission, the money at issue was provided to ITGF Corp., not defendant. The distinction between corporations and their shareholders is crucial, as a corporation is a separate legal entity from its shareholders (e.g. *Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd.*, 34 NY3d 600, 122 NYS3d 567 [2019]). In addition, plaintiff has failed to eliminate all questions of fact as to whether there was valid consideration in the form of a forbearance, and whether the monies at issue were loans or gifts.

Plaintiff contends that the prior loans that she purportedly made constituted consideration for the January 2010 agreement. As noted above, General Obligations Law § 5-1105 requires that the past consideration “would be a valid consideration but for the time when it was given or performed.” Plaintiff has failed to eliminate the existence of triable issues of fact as to whether any alleged loans

Cirillo v Lang
Index No. 1732/2014
Page 4

were provided to defendant or ITGF Corp. As defendant was not a party to any alleged transactions with ITGF Corp., a separate legal entity, any alleged loans provided to ITGF Corp. would not constitute consideration for defendant. Plaintiff admitted at her deposition that “I didn’t make a loan to Jennifer [defendant]. I made a loan to Fitness Together [ITGF Corp.]” And when asked if “the contributions were made on behalf of the corporation [ITGF Corp.]; is that correct?”, plaintiff replied “[y]es.” Defendant would not be personally liable for the debts of ITGF Corp., a separate legal entity (*see Crozier v Sauers*, 109 AD3d 507, 970 NYS2d 323 [2d Dept 2013]; *see also Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 95 NYS3d 97 [2d Dept 2019]). Any prior loans provided to ITGF Corp. would not be consideration for defendant, who was not a party to any alleged loan transaction involving ITGF Corp.

That is particularly true because plaintiff does not contend that the January 2010 agreement was a guaranty. General Obligations Law § 5-1105 applies to guaranties (*see Gruberg v McCarthy*, 289 AD2d 915, 735 NYS2d 638 [3d Dept 2001]; *Burke v North Fork Bank & Trust Co.*, 228 AD2d 461, 644 NYS2d 293 [2d Dept 1996]; *American Bank & Trust Co. v Lichtenstein*, 48 AD2d 790, 369 NYS2d 155 [1st Dept 1975], *affd* 39 NY2d 857, 386 NYS2d 215 [1976]), and a past loan to a corporation can be consideration for a guaranty by an individual of the past corporate loan (*see Carrera Casting Corp. v Cord*, 106 AD3d 422, 963 NYS2d 867 [1st Dept 2013]). But plaintiff does not allege that the January 2010 agreement was a guaranty. Indeed, plaintiff’s motion repeatedly refers to the January 2010 agreement as a “[p]romissory [n]ote.” And plaintiff’s complaint characterizes the January 2010 agreement as a “personal loan.” A promissory note, or loan, and a guaranty are two different things. “A promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time” (*Intermax Eco, LLC v Eco Family Food Mart Corp.*, 172 AD3d 1040, 1041, 101 NYS3d 93, 94 [2d Dept 2019] [quotation marks and citations omitted]). On the other hand, a guaranty “is an agreement to pay a debt owed by another [that] creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guarantee[,] and the guarantor is not a party to the principal obligation. The guarantor’s liability accrues only after default on the part of the principal obligor” (*Midland Steel Warehouse Corp. v Godinger Silver Art*, 276 AD2d 341, 343, 714 NYS2d 466, 468 [1st Dept 2000] [quotation marks and citations omitted]). Accordingly, plaintiff has not eliminated all questions of fact as to whether there was valid past consideration for the January 2010 agreement.

Plaintiff also failed to eliminate all questions of fact as to whether her alleged forbearance constituted current consideration for the January 2010 agreement. Specifically, plaintiff alleges that she “forfeit[ed] her right to recover, or seek to recover, more than \$50,000.00 against [d]efendant.” Plaintiff alleges that defendant actually owed her more than \$50,000.00, but that she agreed to take \$50,000.00 to settle all of defendant’s debts. But the January 2010 agreement, by its plain terms, did not explicitly require plaintiff to forbear anything. In addition, at least some of the alleged loans were not provided by plaintiff. The checks submitted by plaintiff to show that she loaned money show that, in fact, she did not loan that money. The checks are from Prinnie Real Estate Corp. (Prinnie Corp.), not plaintiff. The checks demonstrate that the funds at issue came from Prinnie Corp., not plaintiff. That plaintiff was, apparently, the sole shareholder of Prinnie Corp. does not obviate the fact that Prinnie Corp. was a separate legal entity from plaintiff (*Baccash v Sayegh*, 53 AD3d 636, 862 NYS2d 564 [2d Dept 2008]).

Cirillo v Lang
Index No. 1732/2014
Page 5

If the purported loans, or at least some of them, were made by Prinnie Corp., then any alleged forbearance by plaintiff could be illusory, as Prinnie Corp. is a separate legal entity. Moreover, plaintiff failed to eliminate all questions of fact as to whether any such forbearance would be valid consideration for defendant. There is evidence—including plaintiff’s own testimony—that the alleged loans were provided to ITGF Corp., not to defendant. Any forbearance to collect money from defendant would not constitute valid consideration if plaintiff never had a valid claim—not even a doubtful or colorable one—to collect ITGF Corp.’s debts from defendant (*see generally Springstead v Nees*, 125 App Div 230, 109 NYS 148 [2d Dept 1908]; *Pash v Wagner*, 2 Misc 2d 822, 151 NYS2d 411 [App Term 2d Dept 1956]; *Caruana v Prudential Spice Co.*, 178 NYS 401 [App Term 1st Dept 1919]). As explained above, ITGF Corp. is a separate legal entity, and defendant would not be personally liable for any of ITGF Corp.’s debts. Certainly, “[o]ne cannot be held liable under a contract to which he or she is not a party,” and, by plaintiff’s own admission, the alleged loans were provided to ITGF Corp., not defendant (*Victory State Bank v EMBA Hylan, LLC, supra*, 163 AD3d at 965, 95 NYS3d at 101; *see Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]). Thus, plaintiff has failed to eliminate all questions of fact as to whether any alleged forbearance constituted valid consideration for the January 2010 agreement.

Finally, whether the January 2010 agreement is a promissory note, a guaranty, something else, or nothing at all, it applies only to the “repayment of loans.” Plaintiff’s submission failed to eliminate all questions of fact as to whether the monies at issue were gifts instead of loans (*cf. Chase Lincoln First Bank v Watson*, 139 AD2d 903, 527 NYS2d 989 [4th Dept 1988], *lv denied* 72 NY2d 810, 534 NYS2d 938 [1988]). Among other evidence, defendant testified that plaintiff said that they would talk about repayment only “[i]f we were to make money.” By the plain language of the January 2010 agreement, it does not encompass gifts.

Accordingly, plaintiff’s motion is denied.

Dated: November 6, 2020

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT

 FINAL DISPOSITION X NON-FINAL DISPOSITION