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| Gao v Liang |
| 2021 NY Slip Op 30992(U) |
| March 12, 2021 |
| Supreme Court, New York County |
| Docket Number: 154921/2018 |
| Judge: Laurence L. Love |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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GEORGE GAO, TSUEI GAO, FENG GAO

Plaintiffs,

- v -

ETHAN LIANG, HELEN CHEN-LIANG, 4F MANAGEMENT LLC,

Defendants.

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INDEX NO. 154921/2018

MOTION DATE 12/11/2020

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

Plaintiffs commenced the instant action by filing a summons and complaint on or about May 24, 2018, stating causes of action for i) vacatur of judgment; ii) fraudulent misrepresentation; iii) unjust enrichment; iv) breach of fiduciary duty; v) conversion; and vi) malicious prosecution Defendants interposed an answer on or about April 8, 2019.

Defendants now move for summary judgment, i) dismissing plaintiffs' vacatur of judgment claim; ii) dismissing George Gao's fraudulent misrepresentation claim; iii) dismissing Feng Yu Gao's fraudulent misrepresentation claim and Breach of Fiduciary duty claims; iv) dismissing plaintiffs' unjust enrichment and conversion claims; v) dismissing plaintiffs' malicious prosecution claims; and vi) dismissing plaintiffs' demand for punitive damages.

The Gao family and Liang family have been friends and acquaintances for many years. Around November 2016, George Gao approached Ethan Liang and his mother Helen Chen-Liang for financial advice. Ethan allegedly suggested that George put his family's money in a high yield

trust. George apparently did not know how to set up such a financial vehicle and allegedly entrusted Ethan to set one up for the Gao family.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Defendants primarily seek dismissal of plaintiff's first cause of action, which seeks vacatur of a previously entered judgment on the alleged \$4,620,000.00 loan that is the main subject of this action. Confessions of judgments are afforded a presumption of validity, and to vacate them requires a "preponderance of clear, positive and satisfactory evidence" establishing wrongful conduct (see *City of Poughkeepsie v Albano*, 122 AD2d 14 [1986]).

In support of its motion, defendant argues that, “[o]n August 13, 2017, Ethan lent to the Gaos the sum of \$4,620,000. The Gaos gave him a written promissory note wherein they agreed to repay the same over a 35-year period. In addition to the signing the promissory note the Gaos signed an affidavit of confession of judgment. As is set forth in the accompanying deposition transcript of Ethan and Helen, there was no fraud, no misrepresentation, and the claims are nothing more than a hollow excuse for the Gaos failure to repay a loan which was duly made and acknowledged by the Gao’s numerous times” (see NYSCEF Doc. No. 181 Par. 3 – 4, 11). Defendants submit the promissory note (see NYSCEF Doc. No. 204) and the affidavit of confession of judgment (see NYSCEF Doc. No. 205). Based upon the promissory note and confession of judgment, defendants have established a prima facie entitlement to dismissal.

Plaintiff’s opposition argues that, “the plaintiffs entrusted their entire life savings to who they thought were close family friends, to be placed into a trust for which plaintiffs were supposed to be beneficiaries.” “[a]t deposition, defendants were unable to remember any details about the loan, not even basic information such as when plaintiffs asked for the loan, or when the money was lent. Furthermore, the promissory note and affidavit of confession of judgments are on their face suspect. The documents were not contemporaneous with the actual alleged loan. Plaintiffs allege that they were the victims of a fraudulent scheme. Defendants allege that they lent plaintiffs money.”

Defendants contend George Gao is a “sophisticated business person.” George Gao was born in 1990, making him 26 years old at the relevant time of this occurrence. George graduated from Baruch College in 2012 and had only 4 years of total work experience. Defendants contend plaintiff signed a multi-million dollar loan without the assistance of counsel, while they themselves were assisted with counsel, highlights an arms-length transaction. The deposition of Helen Chen-

Liang states “when your family needs help, what do you do? I need some time to think wouldn’t be something that crossed my mind.” There does not appear to be an arms-length business transaction. In *Arfa v. Zamir*, there were “rigorous, arm’s length negotiations between highly sophisticated parties” that were “adversarial, even hostile” at the time of the negotiations. The plaintiffs were deemed “sophisticated” because one was an attorney who practiced law with the Securities and Exchange Commission and was a partner at a large corporate law firm for more than 12 years while the other was a “20-year veteran of the real estate business” and was the principal in his own real estate brokerage firm (see *Arfa v. Zamir*, 76 A.D.3d, 56, 58 [1st Dept. 2010]).

The deposition of Ethan Liang states in relevant part, “[w]hen did they ask for the money? I am not sure. I am not going to guess. I am not entirely sure of the exact date, so I am not going to guess” (see NYSCEF Doc. No. 187 P. 10); [b]ut at some point you went to your attorneys to request them to prepare documents; is that correct? Yeah, my attorney – I don’t know if I went there, or if I called them or something, but yeah, my attorney ended up drafting everything. Which attorney did you consult to draft the documents that you needed? I don’t remember exactly” (see NYSCEF Doc. No. 187 P. 16 – 17); “[s]o, lending over a million dollars to people isn’t something you do frequently; is that right? Define frequently. It’s not something you do every year, how is that? Lending – can you rephrase? Lending somebody more than a million dollars is not something which you do more than once a year? I can’t say for certain” (see NYSCEF Doc. No. 187 P. 24); “[s]o you lent them the money before they notarized the promissory note and the confession of judgment? Before, after, during, yeah” (see NYSCEF Doc. No. 187 P. 33); “[d]id the giving to my clients the money, did it take place over one day, or did it take place over multiple days? It took

quite a while. Over how long a period of time? To tell you exactly, I don't know exactly how long it took" (see NYSCEF Doc. No. 187 P. 34).

The affirmation in opposition continues, "[t]he promissory note is dated August 13, 2017. Most of the money given by plaintiffs was in the March 2017. However, the promissory note on its face states that the total sum due was \$4.62 million, which is listed as the 'unpaid principal balance,' with the first repayment supposed to commence on August 1, 2017." Hence, plaintiff's opposition contends that, "[t]he content of the note is simply irreconcilable with defendants' own admissions of having received nearly \$300,000 before the promissory note and affidavits were even signed."

Plaintiffs allege that the affidavit of confession of judgment is itself a product of fraud. Defendants contend that the confession of judgment contains a waiver. However, New York Courts have repeatedly held that a waiver as contained in the confession of judgment cannot shield a party from their alleged fraud. While ordinarily a debtor may not assert a claim of the invalidity of a confession of judgment given for a bona fide debt, the rule has no application to a case such as this, in which the plaintiffs allege that the confessions here in issue were not in fact given for any bona fide debts but were procured through defendants' fraud and deceit (see *Steward v Katcher*, 283 AD 50, 54 [1st Dept 1953]).

The deposition testimony of Ethan Liang states, "[t]o your recollection, what were the terms of the loan? What do you mean by terms? So, when was the loan supposed to be repaid, for example? Dude, I don't know. I don't remember. Or what was the interest payment, how is that? I believe it was eight. When were the repayments supposed to start? I don't remember exactly. Did you ask for any collateral for the loan? Collateral is a big word. Can you like explain or define collateral" (see NYSCEF Doc. No 187 P. 27).

The deposition testimony of Eucarys Martinez, notary public, establishes that both the promissory note and affidavits of confession of judgment were signed on August 13, 2017. Eucarys Martinez testified that on August 13, 2017, there was a “large stack” of papers, there was no lawyer present, and no oaths were administered before notarizing any of the documents.

As such, plaintiffs have established numerous issues of fact relating to the alleged fraud including whether the alleged loan which is the subject of this action was ever disbursed. The Court notes that there is no evidence of any loan disbursement as same was allegedly disbursed to plaintiffs in cash.

Defendants seek dismissal of Feng Yu Gao's fraudulent misrepresentation claim and Breach of Fiduciary duty claim alleging that he relied exclusively on his son, George Gao's advice and not defendants' and that he did not have a fiduciary relationship with defendants. Defendants cite the deposition of Feng Yu Gao, “[b]efore you signed that document, did you ask anyone what the document was, and what the terms of it were?” Feng Gao testified, “my son says that trust Ethan and Helen” (see NYSCEF Doc. No. 214 P.14). The deposition transcript continues, “[d]o you remember signing that document. I cannot understand or read the document. However, I know that I did signed (sic) it. Do you know when you signed it? I can't answer you. It's not – nothing here is in Chinese” (see NYSCEF Doc. No. 14).

The Court notes the elephant in the room that defendant seems blissfully unaware of at this time. One would think, it is easy enough to produce the bank records and supporting documents to show a loan of \$4.62 million dollars. Little things such as the day the loan was made, how it was made etc would all seem pretty basic.

Plaintiff cites *Akely v Kinnicutt*, “[t]he plaintiffs in every cause allege either that the purchase of the stock was entirely in reliance upon the prospectus, or was in reliance upon advice

of others who had been induced by the defendants to believe all the statements contained in the aforesaid prospectus. The principal means of inducement for accomplishing the fraud of the conspiracy was the prospectus. The respondents are all united in the claim that in reliance upon the prospectus, directly or indirectly, they were induced to make the purchase. The prospectus in every instance, either directly or through influenced intermediaries, was the means of inducing the purchase of the stock through its fraudulent representations” (208 AD 489, 490 [1st Dept 1924]). As such, defendants are not entitled to dismissal of said causes of action.

Defendant also seeks dismissal of the causes of action for iii) unjust enrichment, and iv) conversion on the grounds they are duplicative. Assuming the facts asserted by plaintiff are true, the facts presented in the complaint can demonstrate valid claims of conversion and fraud. Further, the claims for conversion and fraud are not duplicative, as they require different actions and men rea on the part of defendant” (see *Hovhannessian v Yetemain-Torosian*, 11 Misc 3d 1082[A], [Sup Ct, Queens County 2006]).

Defendants seeks dismissal of the v) malicious prosecution cause of action where defendants filed a confession of judgment to obtain and then enforce a judgment against plaintiffs. This has resulted in the garnishing of plaintiffs’ wages. Defendants highlight that there has been no “special injury” on the party of the plaintiffs. However, plaintiff’s opposition establishes that plaintiffs’ wages continue to be garnished, and therefore there is continued interference to this date.

Defendants’ motion is hereby DENIED in its entirety.

3/12/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

| | | | |
|--------------------------|---------------|-------------------------------------|-----------------------|
| <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | GRANTED IN PART |
| <input type="checkbox"/> | DENIED | <input type="checkbox"/> | OTHER |

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE