

Weingrad v Schuster
2021 NY Slip Op 31054(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 655390/2017
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES **PART** **IAS MOTION 59EFM**

Justice

-----X

STEPHEN WEINGRAD

Plaintiff,

- v -

HOWARD SCHUSTER,

Defendant.

-----X

INDEX NO. 655390/2017

MOTION DATE 12/21/2018

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 34, 37

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion to dismiss the first amended complaint is DENIED; and it is further

ORDERED that the plaintiff's cross-motion for leave to amend the first amended complaint is DENIED; and it is further

ORDERED that within thirty (30) days of service of this order with notice of entry, defendant shall serve his answer to the first amended complaint; and it is further

ORDERED that the parties are directed to post on NYSCEF a proposed preliminary conference order or counter proposed preliminary conference orders on May 14, 2021.

DECISION

Defendant moves to dismiss plaintiff's first amended complaint seeking payment on a loan. Plaintiff's first amended complaint contains two causes of action. The first cause of action alleges that plaintiff loaned the defendant \$70,000 on August 25, 2011 and that defendant acknowledged the loan in writing on that same date. The amended complaint alleges that the loan was due upon demand and that upon such demand for repayment the defendant refused to do so. The second cause of action states that plaintiff loaned defendant \$2000 on June 12, 2013 and defendant failed to repay the loan upon demand for repayment.

Defendant, in support of the motion, submits a copy of the handwritten "acknowledgment" referenced in the complaint which states that

I personally owe you, Stephen Weingrad, \$70,000 to be repaid from the first funds due me or my company from the FRAMED project. I authorize you to deduct these funds from any funds due me or my company from money due me or my company in your escrow account.

The document is signed by the defendant and is dated "8-25-2011" below the signature. Plaintiff, in opposition to the motion and in support of his cross-motion, agrees that this is the acknowledgment referred to in the first amended complaint.

Where a motion is made

pursuant to CPLR 3211 (a) (1) and (7), a court is obliged to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory. Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.

Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-71 (1st Dept 2004) (internal quotations and citation omitted).

In this action, the first cause of action specifically refers to and places reliance upon the "acknowledgment" submitted in opposition by the defendant and in fact the plaintiff attempts to incorporate the acknowledgment into the newly proposed second amended complaint on the cross-motion. As the defendant argues, the plain language of the acknowledgment contains no demand procedure. Nor does it set forth that due consideration was received for the agreement to have money paid or repaid to plaintiff. However, as this court must take the allegations in the complaint as true unless contradicted by the documentary evidence, plaintiff's complaint sufficiently alleges that there was consideration in the form of a loan from plaintiff to defendant. Furthermore, while the acknowledgment sets forth that payment is to be made from funds related to the FRAMED project, the document does not set forth that this is the plaintiff's exclusive remedy. That is, the acknowledgment

states that plaintiff "personally owes" defendant and does not state defendant is not personally liable to plaintiff for the funds. Therefore, the acknowledgment fails to conclusively establish a defense to payment under CPLR 3211. In re Rothschild's Estate, (251 AD 639, 641 [3d Dept 1937]) cited by the defendant is inapposite as the relevant issue in that case was the accrual date on a purported promissory note for statute of limitations purposes.

Therefore, on this pre-answer motion to dismiss where the plaintiff's allegations must be accepted as true, defendant has failed to establish that dismissal is mandated as a matter of law.

As to plaintiff's cross-motion to amend the complaint,

It is true that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. However, it is equally true that the court should examine the sufficiency of the merits of the proposed amendment. Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. Contrary to plaintiffs' contention, the court was not required to accept their allegations as true on a motion to amend.

Boaz Bag Bag v Alcobi, 129 AD3d 649 (1st Dept 2015) (internal citations and quotations omitted). Plaintiff's proposed further amended complaint adds an additional defendant, Major Studio Partner, Inc., and an additional cause of action for other alleged demand loans to defendant totaling \$92,000. Plaintiff-attorney

submits an affirmation in support of amending the complaint which plaintiff apparently seeks to have act as an affidavit under CPLR 2106 in support of the argument that the amended pleading is not facially without merit. However,

[a]lthough an attorney is authorized to submit an affirmation in lieu of an affidavit in most situations (CPLR 2106), even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action. Since [the] attorney . . . was [] named [] in this action, his submission of an affirmation instead of an affidavit was improper, and its contents should have been disregarded by the Supreme Court, thereby rendering the [] papers insufficient to defeat the [] motion.

LaRusso v Katz, 30 AD3d 240, 243 (1st Dept 2006) (citations and internal quotations omitted).

As the proposed second amended complaint in this action is not properly verified and the plaintiff-attorney's affirmation in support of the cross-motion must be disregarded as to the facts asserted therein, there is insufficient evidentiary support for the amendment and the court shall deny the cross-motion.

Debra A. James

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3/31/2021

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: