

Farren v Fuks

2021 NY Slip Op 32417(U)

September 8, 2021

Supreme Court, New York County

Docket Number: 651139/2019

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA CRANE PART 60M

Justice

-----X

FARREN, ELLEN K

Plaintiff,

- v -

FUKS, MALI

Defendant.

-----X

INDEX NO. 651139/2019

MOTION DATE N/A

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION AND DECISION AFTER
INQUEST**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 97, 98, 99 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

At first glance, this case seemed straightforward-- a suit on two promissory notes, via CPLR 3213, and no dispute as to the lack of any repayment. Meanwhile, defendant comes in and out of the case in an apparent strategy to delay the inevitable. While defendant had answered, that answer, in response to plaintiff's first motion for a default judgment (withdrawn), was late. Accordingly, on December 24, 2021, this court granted plaintiff's second unopposed motion for a default judgment, issued an order of attachment in the amount of \$232,000, with an undertaking of \$23,200, and set the matter down for an inquest. On February 3, 2021, Ms. Fuks reemerged from her prior failures to appear and interposed a motion to vacate her default.

This court heard the motion to vacate along with the inquest in March 2021. The court denied the motion to vacate for lack of a meritorious defense or a reasonable excuse.

However, at inquest, some troubling connections came to light. This matter is related to two long running (now disposed) litigations also in this court: *Fuks v Rakia*, Index No. 122768/1996 and *Shomron v Fuks*, Index no. 102882/2002 (the "Other Litigations"). The Other

Litigations involve a business dispute between Ms. Fuks and her former business partner Ruth Shomron.

Richard Farren, Esq. was the first attorney to represent Ms. Fuks in the Other Litigations. At some point in 2011, Ms. Fuks ran out of money to pay him. Sensing an opportunity,¹ Mr. Farren concocted a plan where he would step aside as Ms. Fuks' lawyer, arrange for other counsel, and would loan her money to continue with what he viewed as a lawsuit with a potentially large payout. Meanwhile, he would become her expert witness. To put further distance between himself and Ms. Fuks, he arranged for his wife and mother to be the noteholders who would loan Ms. Fuks the money.

Accordingly, in 2011, Ellen Farren issued a \$200,000 Secured Credit Line Note dated May 15, 2011. Meanwhile Adam Perlmutter, Esq. stepped in as Ms. Fuks' lawyer, while Mr. Farren morphed into Ms. Fuks' expert accounting witness. On various dates from May 2011 to July 1, 2014, Ellen Farren "advanced to or for the benefit of Defendant" various sums allegedly amounting to \$200,000. Of course, with the exception of \$35,000, Ms. Fuks never touched this money. It went to pay litigation expenses, such as Adam Perlmutter's bills and Mr. Farren's expert witness bills.

In response to the court's query as to whether this plan of Mr. Farren's violated New York's Rules of Professional Conduct 1.8 prohibiting business transactions acquiring "an ownership, possessory, security or other pecuniary interest adverse to a client" except under very limited circumstances, or the prohibition against loaning money to clients², plaintiff produced an irrelevant "expert" affidavit that completely ignored the fact that Mr. Farren had been Ms. Fuks'

¹ At the inquest Mr. Farren testified that he believed that Ms. Fuks stood to win a good deal of money from the other litigations.

² (See *In re Moran*, 42 AD3d 272 [4th Dep't 2007]; *In re Cellino*, 21 AD3d 229 [4th Dep't 2005]).

lawyer, that he may have withdrawn as counsel only to participate in this “loan,” morphed from lawyer to expert accountant, suspiciously had his mother and wife loan the money, rather than himself (thus indicating that he knew it was possibly wrong), and may have continued to render legal advice in some capacity. Fortunately for Mr. Farren, the court itself found, buried in the commentary to Rule 1.8, some indication that Mr. Farren’s financial arrangement may pass muster, especially as Ms. Fuks allegedly had a different attorney represent her on the loan. Therefore, despite being quite uncomfortable with the apparent self-dealing, the court refrained from referring the matter to the Disciplinary Committee.

Ultimately, Ms. Fuks was somewhat successful in the underlying litigation. On July 29, 2021, this court confirmed the report of the special referee that awarded \$375,000 to Ms. Fuks directly, as well as other derivative relief (see EDOC 36 under Index No. 102882/2002). Of particular relevance to this case, the special referee found Mr. Farren’s expert report to be essentially worthless (See EDOC 9 paragraph 97 in *Shomron v Fuks*, Index No 102882/2002 [“I find that the testimonial and documentary evidence submitted by Richard L. Farren, Ms. Fuks’ expert witness, with respect to the computation of capital accounts of R&L partners during the period 1985 through 2012, are not probative of the remaining claims in the instant matter”]).

Discussion

The court will not vacate the default as to liability. Ms. Fuks has not articulated a meritorious defense to her obligation to pay back at least some of the funds fronted for her benefit in the other litigations. She does not dispute that she signed the note and that she had independent counsel at the time. She also does not dispute the interest rate of 9% on the May 14, 2011 note. However, the court cannot condone the self-dealing that occurred, and, therefore deducts amounts reflecting payments to Mr. Farren or his law firm McLaughlin & Stern. These

amounts total \$57,800.00. This is especially appropriate considering the special referee found Mr. Farren's report to be "not probative." For the same reason, to the extent it was requested, the court declines to award the \$50,000 that Evelyn Keiser sent to McLaughlin & Stern's Escrow account dated June 17, 2011. In addition, the purpose of that advance remains unclear.

The remaining amounts to individuals such as Adam Perlmutter and Zvia Gutman total \$62,140.00. There was also apparently a payment to Mali Fuks directly in the amount of \$35,000 (see EDOC 96). Plaintiff already foreclosed on the \$45,000 retained security amount under the note. Accordingly, the court awards judgment on the \$200,000 promissory note in the amount of \$52,140.00 with interest at 9% from July 1, 2014. In addition, under the note, Ms. Fuks is liable for the costs of collection in the form of legal fees in the amount of \$ 14,863.00.

As for the \$82,000 note, issued in December 2011 (EDOC 22) Ms. Fuks does not deny signing it and that payment was due on December 15, 2014. However, the court deducts \$2,900 that went to Mr Farren for "legal work." This payment is troubling because Mr. Farren supposedly was no longer Ms. Fuks lawyer at the time of the December 2011 note.

As a result of this decision after inquest, the court vacates the order of attachment and undertaking. The amount in that order is no longer valid. This decision is without prejudice to Mr. Farren and McLaughlin & Stern seeking their fees directly against Ms. Fuks in a separate action.

Accordingly, it is

Ordered that the clerk is directed to mark this matter disposed and enter judgment against Mali Fuks in favor of plaintiff as follows:

\$52,140.00 with interest at 9% from July 1, 2014 as calculated by the clerk of the court;

\$14,863.00 with no interest at all;

\$79,100 with interest at 9% from December 15, 2014 as calculated by the clerk of the court; and it is further

Ordered that the order of attachment and accompanying undertaking are vacated; and it is further

Ordered that all other requests for relief are denied.

THERE SHALL BE NO FURTHER MOTION PRACTICE IN THIS CASE, INCLUDING MOTIONS FOR REARGUMENT, WITHOUT PRIOR CONFERENCE WITH THE COURT.

9/8/2021
DATE


MELISSA CRANE, J.S.C.

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