Duan v Chang Tung Yang
2021 NY Slip Op 33427(U)
July 9, 2021
Supreme Court, Albany County
Docket Number: Index No. 905633-19
Judge: Gerald W. Connolly
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHERRI DUAN,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 905633-19

CHANG TUNG YANG,

Defendant.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: E. Stewart Jones Hacker Murphy LLP
John F. Harwick, Esq.
Attorney for Plaintiff
200 Harborside Drive, Suite 300
Schenectady, New York 12305

Connolly, J.:

Plaintiff seeks an order, pursuant to CPLR 3212, granting summary judgment against defendant in the amount of $153,390.00, plus additional interest, costs and disbursements in this action pursuant to plaintiff's causes of action for breach of contract and *quantum meruit* or quasi contract. Defendant has not appeared in opposition.

Initially, the Court granted defendant's former attorney's application seeking leave to withdraw by Order dated December 14, 2020. Defendant has yet to retain an attorney. Plaintiff filed a motion for summary judgment on April 2, 2021. Defendant sent a letter dated May 29, 2021 to the Court, on notice to plaintiff's counsel, asking whether he could submit "a statement with a notarization to [the Court]" based upon his asserted limited knowledge of the law and as he does not presently have an attorney. Plaintiff opposed such request. It is unclear whether such letter is seeking the ability to oppose the motion for summary judgment, however, such motion was filed on April 2, 2021 and returnable on April 30, 2021. Accordingly, such letter received on June 1, 2021

is well beyond the return date of the motion and, to the extent it is related to the motion, defendant's request for an extension to submit papers is denied. The Court continues to encourage defendant to obtain legal counsel with respect to the instant matter.

It is noted that defendant submitted to the Court certain letters after the date of the submission of plaintiff's motion which have not been considered as they are unsworn (and in the case of the April 7, 2021 letter also unsigned), however the Court did not need to consider any opposition of defendant as, discussed below, plaintiff has failed to meet her *prima facie* burden.

Summary Judgment

To obtain summary judgment, a movant must establish his or her position "'sufficiently to warrant the court as a matter of law in directing judgment'" in his or her favor (*Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v City of New York* , 49 NY2d 557, 562 [1980]).

To establish a claim for breach of contract, plaintiff must prove that a contract existed, that plaintiff performed its obligations under the contract, that defendants breached the contract and that

damages resulted *(see Galusha & Sons, LLC v Champlain Stone, Ltd.*, 130 AD3d 1348 [3d Dept 2015]).

"To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure by the defendant to pay in accordance with the note's terms" (*Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789, 921 NYS2d 128 [2011]; *see Lugli v Johnston*, 78 AD3d 1133, 1135, 912 NYS2d 108 [2010]).

Discussion

Plaintiff has alleged via her Verified Complaint, that from 2014 to 2016 plaintiff loaned defendant the aggregate sum of $115,000.00. She alleges that (i) on December 6, 2015 defendant executed and delivered to plaintiff a promissory note in the amount of $30,000; (ii) on January 14, 2015 defendant executed and delivered to plaintiff a promissory note in the amount of $10,000; and (iii) on January 21, 2015 defendant executed and delivered to plaintiff a promissory note in the amount of $40,000.

Plaintiff further alleges that copies of such promissory notes are attached to the complaint and that such promissory notes were written in Chinese and accurately translated to English. Plaintiff also alleges that she loaned defendant an additional $35,000 via three separate wire transfers from her Citizen's Bank account on February 18, 2015, March 16, 2015 and January 12, 2016. She alleges that defendant promised to repay the aforesaid $35,000 upon demand, plus 6.5% interest per annum. Plaintiff alleges that the time for payment of the loans has passed, that plaintiff made a demand for repayment of all amounts due under the promissory notes but defendant failed to pay such amounts. Plaintiff has submitted as part of Verified Complaint a copy of her counsel's July 19,

2019 Demand Letter. Further, she alleges that defendant has recently acknowledged the existence of the aforesaid debt pursuant to a letter dated July 22, 2019 which is attached to the complaint.

Plaintiff alleges (i) as to her first cause of action that she has been damaged as a result of defendant's failure to repay the loans as agreed in the amount of $153,390.00 plus additional interest at 6.5% per annum from and after July 1, 2019; and (ii) as to her second cause of action based on quantum meruit or quasi contract that she is entitled to recover the amount of $35,000.00 plus interest at 9% per annum based on the wire transfers.

Plaintiff has also submitted, *inter alia*, her own affidavit in which she avers that she verified the truth and accuracy of the Complaint which is incorporated therein by reference. She avers that she was born in China, is fully fluent in Mandarin Chinese and English, can accurately read and write both Mandarin Chinese and English and states "I certify that the promissory notes attached to the complaint were completely and accurately translated by me from Chinese to English. I make this certification pursuant to CPLR 2101(b)" (Duan Aff., ¶2). She alleges that defendant convinced plaintiff that he owned land which produced valuable artisan spring water and that a billionaire was willing to buy defendant's land but that he needed between $50,000 and $80,000 to renovate his "Spring Water Exhibition Hall" to impress his investor to close the real estate deal. She further alleges however, that defendant admitted to having received the referenced $115,000 in loans and using the money to pay real estate taxes on several properties that he owned and has not attempted to sell any of his real property to repay the loans he owes, or, if he has sold property, he has not paid plaintiff any of the sale proceeds. Plaintiff asserts she is concerned that any real property he owns may fall into tax foreclosure.

CPLR §2101(b) provides as follows:

Language. Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate.

The plaintiff's affidavit in opposition to summary judgment, which was in English, was not accompanied by an affidavit of a qualified translator attesting to the accuracy of the English-language affidavit, as required by CPLR §2101 (b).

In this case, attached to the Verified Complaint are exhibits in a foreign language, that plaintiff asserts are promissory notes that defendant executed and delivered to plaintiff. Further she alleges that such notes are written in Chinese and accurately translated in English, as set forth in the Exhibits. The only translation of such Exhibits, however, is that provided by plaintiff herself. While she has submitted her own affidavit asserting that she is fully fluent in Mandarin Chinese and can accurately read and write both Mandarin Chinese and English and that she accurately and completely translated the promissory notes attached to the complaint, such submission is insufficient for Court consideration of the English translations of the Chinese documents attached to the Verified Complaint. Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Plaintiff has not met her *prima facie* demonstration for Court consideration of such translated documents where she is submitting such translations that have solely been performed by herself, a party to the action and who has not established that she is a qualified professional translator; rather than a third-party independent professional translator (*see* CPLR §2101(b); *National Puerto Rican Day Parade, Inc. v Casa Publs., Inc.*, 79 AD3d 592 [1st Dept 2010][finding that the plaintiffs

provided sufficient translator affidavits because both affidavits stated that the translators were "qualified professional[s]," competent in both Spanish and English, and that the translations are an "accurate and complete rendering of the content of the original document." Id. at 594]; *see generally, Martinez v 123-15 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2nd Dept 2008][the Court refused to consider a document translated by a party's family member]. Accordingly, to the extent plaintiff's first cause of action relies upon the three promissory notes, plaintiff has failed to meet her *prima facie* burden as to the existence of a promissory note executed by the defendant and is not entitled to summary judgment relief concerning relief pursuant to such three promissory notes.

To the extent the translations provided by plaintiff were considered with respect to such promissory notes, such translations do not provide a date upon which defendant was to repay such amounts, nor an amount of interest, but instead assert that repayment would be (i) "through selling any piece of the real estate in my ownership"; (ii) "when I sell my other real estate," and (iii) when my real estate is sold,". Plaintiff asserts that "[t]o my knowledge, the defendant has not even attempted to sell any of his real property to repay my loans. If he has sold property, he has not paid me any of the sale proceeds. I am fearful that any real property he owns may fall into tax foreclosure." (Pl. Aff., ¶13).

Even according to plaintiff's own submissions, the note defined the due date as being contingent upon defendant's sale of property which plaintiff has not shown has occurred and accordingly, plaintiff has not shown a failure by the defendant to pay in accordance with the note's express terms (*see Frankini v Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593 [2nd Dept 2012]).

Accordingly, even if the translations of the alleged promissory notes were considered, plaintiff still would not have met her *prima facie* burden for recovery pursuant to such notes.[1]

Additionally, as to the first cause of action, plaintiff alleges that she loaned an additional $35,000 via three separate wire transfers occurring in February 2015, March 2015 ad January 2016, that such amounts were received and accepted by defendant and pursuant to which defendant promised to repay upon demand, plus 6.5% interest per annum. Plaintiff alleges that demand was made for repayment as demonstrated via the July 19, 2019 letter from plaintiff's counsel to defendant. Further, plaintiff submitted defendant's July 22, 2019 letter in response to plaintiff's counsel which provided, in pertinent part, that he met with plaintiff and "we both agreed that I would pay off the principal amount of $115,000 plus interest within 5 years. I am selling my property now, Ms. Sherri Duan wanted me to pay her some, I agreed it. Regarding the payment arrangements I will pay the principal plus interest 6.5% within 5 years in a 'pay pay pay' way."

Plaintiff's own submissions evidence the existence of questions of fact concerning the alleged agreed upon arrangements between the parties with respect to repayment of such amount(s). Plaintiff included defendant's letter in response to plaintiff's demand for payment as part of her application for summary judgment. In such letter, defendant asserts that he and plaintiff had come to a new agreement with respect to the payment of the $115,000, and that such repayment would occur "within 5 years". While plaintiff controverts such assertion, given the plaintiff's own submissions of the contradictory contentions between the parties concerning the alleged breach of contract(s) (i.e. the alleged failure to repay such amounts "as agreed" (Complaint, ¶18), plaintiff has

[1] Based upon a review of the complaint, plaintiff has not plead a cause of action for breach of the implied covenant of good faith and fair dealing.

not established her *prima facie* entitlement to summary judgment pursuant to her first cause of action. Credibility determinations are not to be made by the Court upon a motion for summary judgment (*see Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958 [3d Dept 2011]).

Plaintiff also asserts that she is entitled to recover based upon *quantum meruit* or quasi contract in the amount of $35,000.00 plus interest at 9% per annum based on the wire transfers.

To recover in quantum meruit, a plaintiff must allege (1) performance of services in good faith, (2) acceptance of the services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) the reasonable value of the service allegedly rendered (*Clark v. Torian*, 214 AD2d 938, 938 [3rd Dept., 1995]). A cause of action for unjust enrichment "requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain what is claimed by the plaintiff. The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v. LeChase Constr. Servs.*, 31 AD3d 983, 987-988 [3d Dept 2006]).

As discussed above, however, plaintiff's own submissions of the contradictory contentions between the parties concerning the repayment agreement(s) between the parties concerning the $35,000.00 in wire transfers at issue herein present issues of fact concerning plaintiff's entitlement to relief pursuant to her second cause of action. Based upon the record, plaintiff has not established her *prima facie* entitlement to summary judgment with respect to either her first or second cause of action.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly it is hereby

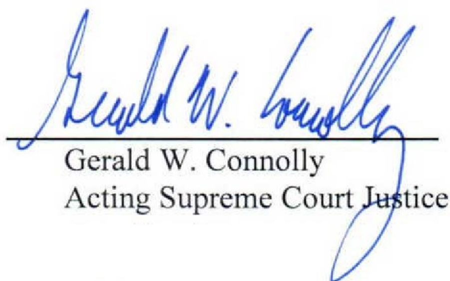
ORDERED, that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a conference via Microsoft Teams on **Tuesday, August 10, 2021 at 2:00 P.M.** to discuss the scheduling of a trial.

This Memorandum constitutes the Decision and Order of the Court which is being electronically filed by the Court via NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties to this action (*see* Uniform Rules for Trial Courts 22 NYCRR § 202.5-b [h][1], [2]).

SO ORDERED.
ENTER.

Dated: July 9, 2021
Albany, New York



Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. NYSCEF Documents 53-57, 62-63.

07/09/2021