

Gates v Perennial Painting & Cleaning, LLC
2022 NY Slip Op 30270(U)
January 27, 2022
Supreme Court, New York County
Docket Number: Index No. 155118/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

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JESSICA GATES

Plaintiff,

- v -

PERENNIAL PAINTING AND CLEANING, LLC,

Defendant.

-----X

INDEX NO. 155118/2021

MOTION DATE 10/12/2021, 11/18/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

Upon the foregoing documents, defendant, Perennial Painting and Cleaning, LLC's motion to dismiss this action and proposed intervening plaintiff, Michael Fortinberry's motion seeking to intervene in this action as a party plaintiff are decided as follows:

Plaintiff commenced the instant action by filing a summons and complaint on May 26, 2021, alleging as follows: Beginning on or about June 28, 2019, plaintiff made a series of loans to defendant, Perennial Painting and Cleaning, LLC at the request of her then domestic partner, Michael Fortinberry, an owner of said defendant, which were received with the knowledge of Aaron Strom, defendant's principal. Plaintiff loaned the following sums to Defendant: a) \$43,000.00 on or about June 28, 2019; b) \$100,000.00 on or about October 11, 2019; c) \$75,000.00 on or about January 6, 2020; and d) \$75,000.00 on or about January 23, 2020. All loans were made by wire transfer from an account solely owned by plaintiff to an account in defendant's name. As of on or about March 6, 2020, the outstanding principal balance of Defendant's loan from Plaintiff

was \$78,000.00, exclusive of interest. Demand for payment of same was made on January 29, 2021. Plaintiff further alleges that between December 11, 2020 through January 15, 2021, Fortinberry used plaintiff's American Express card to incur charges in the amount of \$49,462.28 on defendant's behalf at various home improvement vendors. Plaintiff alleges causes of action for 1. Breach of Loan Agreement, 2. Unjust Enrichment, and 3. Monies had and received.

The defendant now moves for dismissal pursuant to CPLR 3211(a)(1) and (a)(7).

On a motion to dismiss pursuant to CPLR 3211(a)(1) based upon documentary evidence, defendant must present evidence which "utterly refutes" plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]; *533 Park Ave. Realty, LLC v. Park Ave. Bldg. & Roofing Supplies, LLC*, 156 A.D.3d 744, 746 [2d Dept 2017]).

In support of its motion, defendant submits a Promissory Note Term Sheet dated January 1, 2020, evidencing an \$80,000.00 made by and between Defendant (as borrower) and non-party Michael Fortinberry (as lender). The lender, Fortinberry, is Plaintiff's former domestic partner and co-habitant. [Compl. at ¶ 4]. Defendant argues that based upon the term sheet, that it was only Fortinberry who made the loan and signed the Promissory Note, as lender. The submitted term sheet bears no similarities whatsoever to any of the loans alleged in plaintiff's complaint, differing in terms of amount loaned, term, and parties. Even if said document matched plaintiff's allegations, it would still be insufficient to establish that plaintiff did not loan money to defendant.

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see *D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh*, 168

A.D.3d 505; *Weil Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004], *Leon v. Martinez*, 84 N.Y.2d 83, 87-88[1994]).

The elements for a cause of action for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance there under, (3) the defendant's breach of the contract, and (4) damages resulting from the breach. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010); *Lebedev v. Blavatnik*, 193 A.D.3d 175 (1st Dept. 2021). On a motion to dismiss for failure to state a cause of action “[t]he test of the sufficiency of a pleading is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved.” *V. Groppa Pools, Inc.*, 106 A.D.3d at 723 (internal quotation marks omitted).

Plaintiff's complaint sufficiently sets forth the terms of the agreement, including Defendant's obligation to repay the loans upon demand and all of the credit card charges incurred on its behalf, how she performed her obligations by loaning money and allowing the use of her credit card, how Defendant breached the agreement by failing to timely make payment, and how she has suffered damages in the amount of \$127,462.28, together with interest, as a result of the Defendant's breach.

Defendant further seeks dismissal of plaintiff's claim for unjust enrichment as duplicative of plaintiff's contract claim. The elements of an unjust enrichment claim are “that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y. 3d 173, 182 (2011). Said elements are clearly pled. Where, as here, there is a bona fide dispute about the existence of a contract, a plaintiff may proceed alternatively upon quasi-contractual theories, including unjust enrichment, even when the claim for breach of contract

is also permitted to proceed through the pleading stage. *Halliwell v. Gordon*, 61 A.D.3d 932 (1st Dept. 2009). As such, dismissal of said cause of action at this stage of litigation is premature.


"The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money." *Litvinoff v. Wright*, 150 A.D.3d 714 (2d Dept 2017). Here, plaintiff has sufficiently pled that Defendant is in receipt of monies from Ms. Gates and benefitted from the use of her credit card. It is both inequitable and a breach of the parties' agreement for Defendant to retain these monies.

Defendant also seeks dismissal of this action pursuant to CPLR §§ 1001, 1003, 3211(a)(10) for failure to join a necessary party, Michael Fortinberry, Plaintiff's former domestic partner and co-habitant and Fortinberry moves for an Order (1) Pursuant to CPLR § 1012, or in the alternative pursuant to CPLR § 1013, granting non-party MICHAEL FORTINBERRY leave to file an intervening complaint in the instant matter against Jessica Gates. Defendant argues that It is necessary to join Fortinberry to the action in order for complete relief to be accorded between Plaintiff and Defendant. Defendant is obligated to pay Fortinberry \$80,000 pursuant to the Promissory Note Term Sheet and related promissory note(s). As discussed *supra*, defendant's obligations to Fortinberry under said promissory note term sheet are irrelevant to the instant action.

CPLR § 1001(a) states that an individual or entity is a necessary party to litigation "if complete relief is to be accorded between the persons who are parties to the action" or if the individual or entity "might be inequitably affected by a judgment in the action." As the submitted term sheet bears no resemblance to the claims at issue, defendant is not entitled to dismissal and Fortinberry is not entitled to intervene in this action. The proposed intervening defendant has failed

to establish that complete relief is unavailable if he is not joined as a party nor has he established that he could be inequitably affected by a judgment in this action, other than as an owner of defendant.

ORDERED that defendant's motion to dismiss and proposed intervening plaintiff, Michael Fortinberry's motion to intervene are DENIED in their entirety.

<u>1/27/2022</u> DATE	 LAURENCE 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"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE