

Donald Jaffe, Inc. v REEC 137 Franklin St. LLC

2022 NY Slip Op 30301(U)

January 13, 2022

Supreme Court, New York County

Docket Number: Index No. 657651/2019

Judge: Andrew Borrok

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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. ANDREW BORROK PART 53

Justice

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INDEX NO. 657651/2019

DONALD JAFFE, INC., DONALD JAFFE,
Plaintiff,

MOTION DATE 05/05/2021,
05/11/2021,
09/20/2021

- v -

MOTION SEQ. NO. 001 002 003

REEC 137 FRANKLIN STREET LLC, COBB ISLE
COTTAGE LLC, COBB ISLE WATERFRONT LLC,
BRANDON MILLER

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 56, 58,
59, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 57, 60,
61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 89, 90

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97,
98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118,
119, 120, 121, 122, 123, 124, 125

were read on this motion to/for DISCOVERY.

Upon the foregoing documents and for the reasons set forth on the record, the Plaintiffs' motion
(Mtn. Seq. No. 001) to dismiss must be granted because the counterclaims and
(second) affirmative defense are premised on the faulty assumption that the Plaintiff as lender
could not rely on facially valid notarized documents and was required to perform due diligence
to ensure that Brandon Miller's now deceased father, Michael Miller, and his father's former
assistant (and his current assistant), Christine Frangipane, were not conspiring to forge his
signature and a notary on the loan documents (EBC I, Inc. v Goldman Sachs & Co., 91 AD3d
211, 214 [1st Dept 2011]). Additionally, the (first) affirmative defense, that the obligations owed

are due to the alleged fraudulent scheme and the (third) separate defense, that Plaintiffs' claims are barred by fraud, do not state a valid defense because the fraud alleged is of the defendant's assistant not the Plaintiff and they are otherwise not plead with sufficient particularity (CPLR 3016[b]) and therefore must be dismissed.

The Defendants' motion (Mtn. Seq. No. 002) for partial summary judgment must be denied, except as to the fraudulent conveyance by an insolvent entity (seventh) cause of action. This cause of action is time barred because constructive fraud causes of action do not benefit from the 2-year discovery rule (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528-30 [1st Dept 1999]) and this cause of action is not saved by the Tolling Agreement (hereinafter defined). Here, the cause of action accrued on June 25, 2013, July 3, 2013, and November 13, 2013 (NYSCEF Doc. No. 63) and the lawsuit was brought on December 23, 2019. This is clearly outside of the time permitted.

The breach of contract, promise to pay REEC Franklin note (first) cause of action and the breach of contract, promise to pay Miller I loan (fifth) cause of action, on the other hand, are not time barred because the Defendants made partial payments in respect of the defaulted loans until March 2019 and the action was commenced on December 23, 2019. This is well within the 6 year statute of limitations (*Skaneateles Sav. Bank v Modi Assocs.*, 239 AD2d 40, 42 [4d Dept 1998]).

The fraudulent conveyance with intent to defraud (eighth) cause of action is also not time barred because this claim was brought on December 23, 2019 and the conveyances at issue were only

discovered when the Defendants' attorney sent an email on December 17, 2018 (NYSCEF Doc. No. 63) (*Wall Street Assocs.*, 257 AD2d at 530). Nothing in the record suggests that the Plaintiffs were on inquiry notice of the conveyance of the Cooperative Properties (hereinafter defined) prior to that date.

With regard to the Plaintiffs' motion (Mtn. Seq. No. 003) to compel, the Defendants are ordered to provide the documents, as set forth herein, for an in camera review. Brandon Miller has flatly denied his knowledge as to these loans and alleged that his assistant forged his signature. His knowledge is therefore directly at issue and he can not shield relevant documents which go to his defense in this case under the guise of attorney client privilege.

THE RELEVANT FACTS AND CIRCUMSTANCES

Plaintiffs are private lenders, who provided a series of loans via private lending arrangements to father, Michael (**Michael**) and son, Brandon Miller (**Brandon**). Christine Frangipane was Michael's assistant and is now Brandon's assistant indicates that she forged Brandon's signature and was the notary on the documents at issue. For completeness, Michael passed away on December 17, 2016.

Reference is made to a (i) Loan and Security Agreement (**REEC Franklin Loan Agreement**; NYSCEF Doc. No. 2), dated April 20, 2011, by and between Donald Jaffe and Michael and Brandon Miller, (ii) Mortgage Note (**REEC Franklin Note**; NYSCEF Doc. No. 3), dated April 20, 2011, for \$2,500,000 in favor of Mr. Jaffe, by Brandon, to mature on April 21, 2013, (iii) Continuing Absolute Unconditional Guaranty Of Payment (**REEC Franklin Guaranty**;

NYSCEF Doc. No. 4), dated April 20, 2011, signed by Michael and Brandon Miller, in favor of Mr. Jaffe, (iv) Secured Promissory Note (**Cobb Isle Note**; NYSCEF Doc. No. 5), dated September 27, 2011, for \$2,800,000 in favor of Donald Jaffe, Inc. Retirement Trust, by Michael and Brandon Miller, to mature on September 28, 2013, (v) Continuing Absolute Unconditional Guaranty Of Payment (**Cobb Isle Guaranty**; NYSCEF Doc. No. 6), dated September 27, 2011, signed by Michael and Brandon Miller, in favor of Donald Jaffe, Inc. Retirement Trust, (vi) Loan And Security Agreement (**Cobb Isle Loan Agreement**; NYSCEF Doc. No. 7), dated September 28, 2011, between Donald Jaffe, Inc. Retirement Trust and Cobb Isle Waterfront LLC, Cobb Isle Cottage LLC, Michael and Brandon Miller, as amended on December 20, 2013 (NYSCEF Doc. No. 9), (vii) Note Extension Agreement (**Cobb Isle Note Agreement**; NYSCEF Doc. No. 8), dated December 20, 2013, by and between Donald Jaffe, Inc. Retirement Trust and Cobb Isle Waterfront LLC, Cobb Isle Cottage LLC, Michael and Brandon Miller, (viii) Loan And Security Agreement (**Miller I Loan Agreement**; NYSCEF Doc. No. 10), dated May 11, 2012, by and between Donald Jaffe, Inc. and Michael and Brandon Miller, (ix) Secured Promissory Note (**Miller I Note**; NYSCEF Doc. No. 11), dated May 11, 2012, for \$600,000 in favor of Donald Jaffe, Inc., by Michael and Brandon Miller, to mature on May 11, 2013 and (x) Promissory Note (**Miller II Note**; NYSCEF Doc. No. 12), dated February 19, 2014, for \$200,000, in favor of Donald Jaffe, Inc. by Michael and Brandon Miller to mature on September 28, 2015.

In 2006, Brandon joined his father's real estate development company, Real Estate Equities Corporation which created REEC Franklin in 2011 as the development entity. REEC Franklin owned a cooperative apartment building located at 137 Franklin Street, New York, New York 10013 (the **Cooperative Property**) and its units were the primary assets of REEC Franklin.

Brandon is a managing partner of REEC Franklin. By email on December 17, 2018 by Defendants' attorney to Plaintiffs' attorney show that these units were sold on June 25, 2013, July 3, 2013 and November 13, 2013 (NYSCEF Doc. No. 63).

Brandon alleges the loans were made to his father, that his father directed Ms. Frangipane to forge and notarize his signature on various loan documents and that he only found out about them once his father died in January 2017. Every month since maturity, Plaintiffs' sent Defendants an invoice for the interest due on the respective loans.

Significantly, (i) in January 2017, Brandon requested and Plaintiffs agreed to a reduction in the monthly repayment rate on the amounts due on the outstanding debts and (ii) Brandon made two payments in respect of the interest due on these loans from his personal account on or about July 10, 2018 (NYSCEF Doc. No. 71, at 2-3).

The parties entered into a Tolling Agreement (**Tolling Agreement**; NYSCEF Doc. No. 64), by and between Mr. Jaffe and Donald Jaffe, Inc. Retirement Trust would defer filing legal action, effective June 19, 2019 through July 15, 2019, as amended to terminate on December 20, 2019 (*id.*, at 4). The Tolling Agreement provides that it applies to "claims against [Brandon] arising out of certain loans made by Jaffe to, among others, Cobb Isle Waterfront LLC, Cobb Isle Cottage LLC and REEC 137 Franklin Street LLC" (*id.*, at 2).

Plaintiffs filed their complaint on December 23, 2019 (NYSCEF Doc. No. 1). Defendants answered on February 13, 2020 (NYSCEF Doc. No. 15). Defendants answered with

counterclaims on March 26, 2021 (NYSCEF Doc. No. 36). Plaintiffs amended their complaint on March 26, 2021 (NYSCEF Doc. No. 37). Defendants amended their answer and counterclaims with affirmative defenses and separate defenses on April 15, 2021 (NYSCEF Doc. No. 49).

The Counter-Claims Must be Dismissed (Mtn Seq. No. 001)

The Plaintiffs, as lender, had no obligation to perform due diligence so as to protect Brandon from the possibility that his father, Michael, and his assistant, Ms. Frangipane, were forging his name to certain loan documents and notarizing his signature (*EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 214 [1st Dept 2011] [noting no fiduciary duty in arm's length negotiations]) and could rely on the facially valid documents, which were notarized (*In re Estate of Goodman*, 2 AD2d 558, 560 [1st Dept 1956]) and confirmed as validly executed by opinions of Defendants' counsel (NYSCEF Doc. No. 76). Additionally, discovery may reveal that either Michael had permission to act for Brandon to cause his signature to be affixed to the documents at issue or otherwise directed Ms. Frangipane to do it. If this were to be the case, Brandon as principal to his father's actions or Ms. Frangipane cannot now disavow his liability based on his father, as his agent's, actions (*Chubb & Son v Consoli*, 283 AD2d 297, 298 [1st Dept 2001]). It is more than a little bit curious that Ms. Frangipane remains in Brandon's employ.

Additionally, were Brandon to have a complaint against these Plaintiffs, it would in any event be time barred (CPLR 214[3]). The loans were written between April 20, 2011 and December 20, 2013 (NYSCEF Doc. Nos. 2-12) and Brandon brought his counterclaim on March 26, 2021 (NYSCEF Doc. No. 36). As such, the counterclaims are well beyond the statute of limitations and not otherwise saved by any discovery rule or doctrine of equitable tolling because the

Plaintiffs as alleged did not in any way participate in the alleged wrongdoing. For the avoidance of doubt, Brandon admits knowledge of the loans and guarantees in 2017, yet Brandon offers no explanation why these claims are first advanced in counterclaims after four years of making payments on these allegedly forged loans. The third separate defense and the first affirmative defense fail for failure to plead with the requisite particularity (CPLR 3016[b]).

The Defendants motion for Partial Summary Judgment Must be Denied Except as to the Constructive Fraud Cause of Action (Seventh) (Mtn Seq. No. 002)

Brandon's arguments that the statute of limitation has run on the REEC Franklin Loan, Note and Guaranty (NYSCEF Doc. Nos. 2-4) as well as the Miller I Note and Miller I Loan Agreement (NYSCEF Doc. Nos. 10-11) fails. Continuous partial payments on a loan renew the statute of limitations (*Skaneateles Sav. Bank v Modi Assocs.*, 239 AD2d 40, 42 [4d Dept 1998]).

Although General Obligations Law § 17-101 states that an acknowledgement or new promise is the "only competent evidence" for removing an action from its statute of limitation, it also notes "[t]his section does not alter the effect of a payment of principal or interest" to preserve the common law partial payment rule (*Skaneateles Sav. Bank*, 239 AD2d at 42). The statute of limitations is tolled when there is a consistent expression of intention to pay (*Banco do Brasil S.A. v State of Antigua & Barbuda*, 268 AD2d 75, 76 [1st Dept 2000]). Here, the trail of checks and Statements of Interest Due from 2013 through 2019 (NYSCEF Doc. Nos. 70-71) evince an intention to pay. In January 2017, Brandon negotiated with Plaintiffs to reduce the interest rate for the payment of interest on the loans (NYSCEF Doc. No. 74, ¶ 5) and Defendants continued

to send payments to Plaintiffs until March 2019, including two payments from Brandon's personal account for July 10, 2018 (NYSCEF Doc. No. 71, at 2-3).

Defendants' motion for partial summary judgment, as against Plaintiffs' seventh cause of action for fraudulent conveyance by an insolvent entity, pursuant to New York Debtor and Creditor Law § 273 is time barred because constructive fraud causes of action do not benefit from the 2-year discovery rule (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528-30 [1st Dept 1999]). The Ninth Amendment to the Tolling Agreement only extended the ability to file the lawsuit until December 20, 2019 (NYSCEF 64, at 4, ¶ 1[2]) and the lawsuit was not filed until December 23, 2019. Therefore, the seventh cause of action is dismissed as time barred.

Defendants' motion for partial summary judgment, as against Plaintiffs' eighth cause of action for fraudulent conveyance with intent to defraud, pursuant to New York Debtor and Creditor Law § 276 fails for Defendants' failure to demonstrate these claims are time-barred (CPLR 213[1]). On a motion for summary judgment pursuant to CPLR § 3212, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). For cases involving fraud, the statute of limitations is six years from the conveyance or two years from the date when it was or should have been discovered (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 530 [1st Dept 1999]). Defendants' conveyance of the properties occurred on June 25, 2013, July 3, 2013 and November 13, 2013 (NYSCEF Doc. No. 63). Nothing in the record before the court establish that Plaintiffs were on inquiry notice of the

conveyance of the properties prior to the email to Plaintiffs' attorney in 2018 (NYSCEF Doc. No. 68; *see also* NYSCEF Doc. No. 63). Defendants have failed to establish Plaintiffs' knowledge of discovery prior to the email sent by Defendants' attorney on December 17, 2018 (NYSCEF Doc. No. 73, ¶ 14) and thus they have failed to establish as a matter of law that Plaintiffs' claims are barred by the statute of limitation. Therefore, the eighth cause of action is timely and the Defendants' motion must be denied as to this cause of action.

The Defendants must produce the documents for In Camera Review (Mtn. Seq. No. 003)

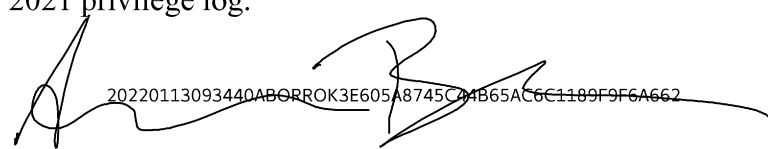
Defendants are hereby ordered to provide the documents as specified in the Amended OSC (NYSCEF Doc. No. 123) for the September 1, 2021 privilege log and item number 48, with its six attachments, from the October 1, 2021 privilege log by January 17, 2022 at 5 PM to the Part 53 email. As discussed above, Brandon has put his knowledge of the loans at issue – *i.e.*, he claims he knew nothing about the loans at the time the loans were made or that his assistant forged his signature and notarized it. These documents may well go directly to what Brandon knew and when he knew it. Thus, they must be produced for in camera review.

Accordingly, it is

ORDERED that Plaintiffs' motion to dismiss is granted as to the counterclaims, second affirmative defense, first affirmative defense and third separate defense; and it is further

ORDERED that Defendants' motion for partial summary judgment is denied, except as to the seventh cause of action; and it is further

ORDERED that Defendants shall provide the following categories of documents, as specified by the Amended OSC (NYSCEF Doc. No. 123) for in camera review by January 17, 2022 at 5 PM to the Part 53 email: (i) the 5 documents from the September 1, 2021 privilege log and (ii) item 48 and its six attachments from the October 1, 2021 privilege log.


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1/13/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" 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