Tauber v Freund
2022 NY Slip Op 33496(U)
October 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 530004/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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MOSHE TAUBER,

Plaintiff, Decision and order

- against - Index No. 530004/2021

MOSES FREUND,

Defendant, October 7, 2022
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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state a cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing the arguments this court now makes the following determination.

According to the Verified Complaint, an agreement was executed between the plaintiff, defendant and non-party Herman Friedman in July 2014. Pursuant to that agreement the other two parties agreed to transfer a five percent interest in an entity called HMF Holdings LLC to the plaintiff in exchange for $225,000. Further, "pursuant to the Agreement, Freund and Friedman, jointly and severally guaranteed to Tauber, that the premises in which HMF was to conduct business would be fixtured and fully prepared to do business on or before August 31, 2015" (see, Verified Complaint, ¶6 [NYSCEF Doc. #1]). In the event the premises were not so fixtured then the money would be returned to the plaintiff within thirty days. In September 2016 another agreement was reached, a settlement agreement, whereby

the two majority shareholders agreed to return the $225,000 to the plaintiff. The plaintiff alleges defendant Freund never paid his share and owes $112,500. Further, the plaintiff seeks an additional $60,000 pursuant to the terms of the settlement agreement and seeks a total of $172,500.

The defendant has now moved seeking to dismissal the complaint on the grounds the plaintiff failed to satisfy a condition precedent contained in the settlement agreement. The defendant also seeks to dismiss the complaint on the grounds there is another action pending and usury. As noted, the plaintiff opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211

motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

It is well settled that a condition precedent is an "act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Oppenheimer & Company Inc., v. Oppenheim, Appel, Dixon and Co., 86 NY2d 685, 636 NYS2d 734 [1995]). Thus, a condition precedent is an act or an event that must occur before the obligations of the parties become operative. If such condition is not fulfilled then the parties are excused from performing under the contract. For example where a broker maintains a contract for the commission of a fee upon closing of title a condition precedent to the contract requires the title actually close (Levy v. Lacey, 22 NY2d 271, 292 NYS2d 455 [1968]). Generally, it is for the court to decide whether a term of a contract is in fact a condition precedent (Rooney v. Slomowitz, 11 AD3d 864, 784 NYS2d 189 [3rd Dept., 2004]). It must be clear from the contract itself the parties intended a provision to operate as a condition precedent (Kass v. Kass, 235 AD2d 150, 663 NYS2d 581 [2d Dept., 1997]). Therefore, if there ambiguity in the language such language will not be treated as a condition precedent (id).

The settlement agreement states that "in the event of the failure of the Purchasers to make any payment due hereunder to

the Seller, then, the Seller shall give a written notice of default to the Purchasers. If the Purchasers fail to cure the Default within fifteen (15) business days of the giving of such Notice of Default, then the Seller may enter a monetary Judgment against the Purchasers" (see, Settlement Agreement, ¶ 5 [NYSCEF Doc. #3]). Thus, the condition regarding notice of default only applies where the purchasers failed to make "any payment due" however, where payments have been made then the plain terms of the agreement do not require notice as a condition precedent. In any event there are surely questions of fact whether the condition precedent applies. As noted, the Verified Complaint asserts that payments were made by non-party Friedman. Thus, since some payments have been made, questions are raised whether such payments obviated the necessity of any condition precedent. Therefore, the complaint cannot be dismissed on that basis.

Next, CPLR §3211(a)(4) provides that a motion to dismiss a lawsuit on the grounds another lawsuit is pending should be granted when "both suits arise out of the same subject matter or series of alleged wrongs" (Aurora Loan Services LLC v. Reid, 132 AD3d 778, 17 NYS3d 894 [2d Dept., 2015]). Thus, where the reliefs sought in the two actions are "substantially the same" then dismissal is proper (Scottsdale Insurance Company v. Indemnity Insurance Corp., RRG, 110 AD3d 783, 974 NYS2d 476 [2d Dept., 2013]). The term "substantially the same" is defined as a

cause of action as sufficiently similar to a simultaneously pending cause of action, when the ruling of one may directly conflict with the ruling of the other (see, Diaz v. Philip Morris Companies, Inc., 28 AD3d 703, 815 NYS2d 109 [2d Dept., 2006]). It is true that a prior lawsuit filed in 2016 sought the same relief, however, that lawsuit is no longer being pursued by the plaintiff. indeed, this is the only lawsuit in which the plaintiff is pursuing its claims.

Lastly, the settlement agreement provided for a $20,000 payment each year if the purchase price is not repaid. The defendant argues this constitutes usury rendering the entire settlement agreement void. However, there are surely questions whether these payments are usurious. It is well settled that usury only applies to loans (Adar Bays, LLC v. Genesys ID Inc., 37 NY3d 320, 157 NYS3d 800 [2021]). The court in Adar Bays, LLC emphasized a number of factors to discern whether a particular transaction is a loan. For example, the court noted that "parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders, not investors" (id). Moreover, the court stressed that "context, such as whether a party applied to the other for a loan or had outstanding, separate transactions, helps to distinguish between intent to borrow and intent to engage in a joint transaction or exchange money for some other reason" (id). Further, the court

acknowledged that evading usury laws is nothing new and loans have been disguised as a "sale of choses in action" exempted from the law (id) and that legislative changes were made "in response to the 'vacuum' in the law that failed to deter the usurious exploitation of corporations by criminal syndicates" and "ended the practice by limiting the corporate exception" (id). Thus, considering the issue in this case, a single payment, essentially a late fee, for failing to pay back the money invested, questions remain whether such payment can be characterized as a usurious loan. It cannot be concluded as a matter of law that such payment was usury rendering the agreement void.

Therefore, based on the foregoing the motion seeking to dismiss the complaint is denied. The parties are directed to proceed with discovery.

So ordered.

ENTER:

DATED: October 7, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC