

**Dangoor v Chowaiki**

2023 NY Slip Op 30775(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652639/2022

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

*Justice*

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DAVID E. R. DANGOOR and INNOVENTOR  
INTERNATIONAL LLC,

Plaintiffs,

- v -

EZRA CHOWAIKI,

Defendant.

-----X

INDEX NO. 652639/2022

MOTION DATE 07/28/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 2, 17, 18, 19, 20, and 21

were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT .

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion by plaintiffs David E.R. Dangoor (“Dangoor”) and Innoventor International LLC (“Innoventor”), pursuant to CPLR 3213, for summary judgment in lieu of complaint on a series of promissory notes executed by defendant Ezra Chowaiki (“Chowaiki”), is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 18-19), in which the court concurs as set forth in the following memorandum decision.

**Background**

Dangoor, Chowaiki, and a third person formed the art gallery Chowaiki & Co. Fine Art, Ltd. (the “Gallery”), in 2004, at which time Dangoor invested approximately \$550,000 into the Gallery and received a 50% ownership stake (Chowaiki aff., NYSCEF Doc. No. 18 ¶¶ 4-7). After the third partner left the Gallery, Dangoor owned 67% and Chowaiki owned 33% (*id.*, ¶ 7).

At various times during their ownership of the Gallery, Dangoor made various other monetary contributions to the Gallery, while Chowaiki served as an art expert (*id.*, ¶¶ 7-22).

By August 2016, the gallery was in financial straits (*id.*, ¶ 23). On August 2, 2016, Dangoor presented Chowaiki with seven promissory notes in various amounts for his signature (*id.*, ¶ 24). Of the seven notes, four were given in exchange for Dangoor funding “the day-to-day operations of [the Gallery]” (promissory notes, NYSCEF Doc. Nos. 5, 6, 9, 11), one for accrued salary (promissory note, NYSCEF Doc. No. 7), one for an investment in a project to obtain certain artworks at below-market costs (promissory note, NYSCEF Doc. No. 8; Chowaiki aff., NYSCEF Doc. No. 18 ¶¶ 15-17), and one for the sale proceeds of certain artworks which were purportedly loaned back to the Gallery (promissory note, NYSCEF Doc. No. 10). Chowaiki signed all seven notes, though he asserts that all of the funds set forth in the promissory notes were investments in the Gallery for which Dangoor was compensated as majority owner (Chowaiki aff., NYSCEF Doc. No. 18 ¶ 26).

On November 13, 2017, the Gallery filed for bankruptcy, and is currently being managed by a bankruptcy trustee (*id.*, ¶ 28). The trustee has commenced multiple adversary proceedings against Dangoor, and settlement negotiations are in progress (*id.*, ¶¶ 29-31). Subsequent to the bankruptcy filing and related adversary proceedings, on July 21, 2022, Dangoor made a demand on Chowaiki pursuant to the promissory notes and demanded payment thereof by July 25, 2022 (demand, NYSCEF Doc. No. 12). Dangoor asserts that no payment was made (Dangoor aff., NYSCEF Doc. No. 4 ¶ 8).

### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof

to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A grant of summary judgment in lieu of complaint under CPLR 3213 is available on “an instrument for the payment of money only or upon any judgment” (CPLR 3213). A plaintiff makes out a prima facie case for summary judgment in lieu of complaint where it can show that the instrument is a valid instrument for the payment of money only and the defendant has failed to pay (*Nordea Bank Finland PLC v Holten*, 84 AD3d 589 [1st Dept 2011]). Once plaintiff establishes a prima facie case, defendant must show a triable issue of fact to defeat summary judgment (*Banco Popular N. Am. v. Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004]).

### **Discussion**

Chowaikei accurately asserts, and plaintiffs do not deny, that all seven of the promissory notes are supported by past consideration. As a general matter, “past consideration is no

consideration and cannot support an agreement because the detriment did not induce the promise” (*Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017], *lv denied* 31 NY3d 912, *rearg denied* 32 NY3d 1041 [2018] [internal quotation marks and citation omitted]). An exception to this rule is codified in General Obligations Law § 5-1105, which provides:

A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

(GOL § 5-1105.) Put differently, the writing must set forth the past consideration; the past consideration would be valid consideration were it given contemporaneous with the writing; and the promisee proves that the consideration was actually “given or performed” (*id.*). The statute does not apply where “the statement with respect to past consideration [is] vague and imprecise” (*Hardy v Rose*, 60 AD3d 904, 905 [2d Dept 2009]; *Clark v Bank of N.Y.*, 185 AD2d 138, 140-41 [1st Dept 1992] [“In the absence of a writing that can be understood without dependence upon extrinsic evidence and that clearly describes the consideration, a promise derived from past consideration is simply not actionable”]).

Here, while each promissory note sets forth in general terms the past consideration for which the note was given, the references to the reasons why the consideration was given or earned are vague and conclusory, as plaintiffs do not provide any admissible evidence of when the loans for day-to-day operations were made or when the referenced artwork was sold, etc. (*see Clark*, 185 AD2d at 140 [“it is not evident from an examination of these documents themselves whether the money, referred to as an ‘award,’ was for past performance or an attempt to retain plaintiff in his job”]). Further, there is no admissible evidence submitted as to whether or not Dangoor paid the referenced consideration, or earned the accrued salary (*cf.*, *Gruberg v*

*McCarthy*, 289 AD2d 915, 916 [3d Dept 2001] [“There being no dispute that the money was actually given to Sanzi in return for his promise to repay the loans plus interest, we find that . . . the agreement was in compliance with General Obligations Law §§ 5-701 and 5-1105”). There are, therefore, issues of fact in the record precluding summary judgment.

Plaintiffs argue that defendant’s claims – including that the moneys recited in the note were investments in the Gallery for which Dangoor was compensated by a majority stake in the business – are unsubstantiated and conclusory, and, therefore, cannot bar summary judgment given the unambiguous terms of the notes. In this regard, *Ehrlich v American Moninger Greenhouse Mfg. Corp.* (26 NY2d 255, 259 [1970]), cited by plaintiffs, is unavailing. There, the Court of Appeals held that “[b]ald conclusory assertions, even if believable, are not enough” to raise an issue of fact as to consideration (*id.*). Here, though: defendant’s affidavit sets forth detailed allegations regarding the nature of the consideration given. Moreover, Chowaiki fairly relies upon CPLR 3212 (f) regarding his failure to submit any documentary proof of his allegations, as all documents that would establish when and under what circumstances the past consideration was given are either in the control of the Galley’s bankruptcy trustee or plaintiffs themselves. Chowaiki, therefore, establishes “that facts essential to justify opposition may exist but cannot then be stated” (CPLR 3212[f]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the plaintiff’s moving papers, consisting of the affidavit of David E.R. Dangoor and the exhibits attached thereto (NYSCEF Doc. Nos. 4-12), are hereby deemed the

complaint in this action, and the defendant’s answering papers, consisting of the affidavit of Ezra Chowaiki (NYSCEF Doc. No. 18), are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, on April 5, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:



<u>3/10/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE