

Gaughan v Russo

2023 NY Slip Op 32191(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 101600/2017

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41

-----x
 AYLIN GAUGHAN,

Index No. 101600/2017

Plaintiff

-against-

DECISION AND ORDER

MICHAEL JOSEPH RUSSO,

Defendant

-----x
 LUCY BILLINGS, J.S.C.:

On April 27, 2017, defendant signed a promissory note for \$25,000.00, payable to plaintiff over 24 months, plus \$5,000.00 for plaintiff's time and expenses. Plaintiff now moves for summary judgment on defendant's breach of the promissory note, conversion, and fraud. C.P.L.R. § 3212(b). Plaintiff also moves to join nonparties Irene Russo and Jacqueline Delaney as defendants and amend the complaint to add claims against the joined defendants. C.P.L.R. §§ 1002(b), 3025(b). Defendant admits liability for breach of the promissory note, but moves for summary judgment dismissing the complaint based on payment and on accord and satisfaction. C.P.L.R. § 3212(b). The court grants plaintiff's motion for summary judgment in part, denies her motion to join defendants and amend the complaint, and denies defendant's motion as follows.

The promissory note provides that defendant's \$25,000.00

debt is "to be paid as follows":

I [defendant] will deposit into the signature account the amount of \$1,000.00 dollars, \$500.00 each pay period, along with this amount, I will pay \$1,200 to cover the loan of Alyin's brother to her in the amount of \$200.00 a month, till this is paid in full. Along with these amounts, I will cover her cel [sic] phone bill as they occur.

If extra monies are needed, I will add extra as I can. I will contact Aylin Gaughan in order that she see's [sic] the extra amount. When this money has been paid in full, I will pay an additional \$5,000 fee for her time and expense. I will also when possible to add an additional \$5,000 as interest on her time, along with a \$500 payment for her fee for a lawyer.

These payments will begin in May of 2017 and will procede [sic] till all monies owed have been paid. I will take a default judgment on this agreement if the monies are not paid within 24 months or sooner if possible. I also offer to take Aylin and Macy her dog to the vet when the need arises, and take care of the bill.

Aff. of Aylin Gaughan Ex. J, NYSCEF Doc. 129, at 1-2. Plaintiff insists that defendant promised to pay for her lifetime medical, cell phone, and veterinary bills, which currently amount to \$108,732.47. Defendant maintains that he is not liable for plaintiff's lifetime expenses and that any expenses paid on plaintiff's behalf constitute an accord and satisfaction. Defendant also clarified at oral argument that he miscalculated his payments to plaintiff. Although he initially claimed to have paid his debt in full, he admitted to erroneously including payments made before the promissory note, so that he actually still owes \$4,723.00 to plaintiff.

Plaintiff's alleged damages are largely based on defendant's

alleged fraud, conversion, and nonpayment of medical expenses. Since plaintiff acknowledges that the promissory note memorialized defendant's total outstanding debt as of April 27, 2017, however, plaintiff's fraud and conversion claims duplicate her claim for breach of the promissory note. 110 E. 138 Realty LLC v. Rydan Realty, Inc., 210 A.D.3d 513, 514 (1st Dep't 2022); Park Armory LLC v. Icon Parking Sys. LLC, 203 A.D.3d 442, 442 (1st Dep't 2022); El Toro Group, LLC v. Bareburger Group, LLC, 190 A.D.3d 536, 541-542 (1st Dep't 2021). The promissory note also does not refer to any payments for plaintiff's medical expenses. Thus the court need not consider defendant's alleged fraud, conversion, or nonpayment of medical expenses as a basis for calculating plaintiff's damages.

Plaintiff further insists that defendant did not pay for all her cell phone and veterinary bills, but conceded during oral argument that she understood payment for these expenses as an alternative method for defendant to satisfy his debt under the promissory note. Moreover, defendant's promises to pay "extra monies . . . as I can," and to "also when possible to add an additional \$5,000.00 as interest on her time, along with a \$500 payment for her fee for a lawyer," Gaughan Aff. Ex. J, at 2, are illusory and thus unenforceable, since defendant's performance remained at his discretion. Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co., 28 N.Y.3d 675, 684 (2017). Consequently,

plaintiff does not demonstrate her entitlement to damages over \$30,000.00.

On the other hand, defendant presents evidence that after April 27, 2017, he paid \$25,777.00 to plaintiff, through both direct payments to her and payments for her expenses. Although plaintiff insists that defendant must reimburse her for numerous bills that she paid herself, she does not rebut the payments that defendant made under the promissory note. Therefore the court grants plaintiff's motion for summary judgment for \$4,723.00 plus interest at 9% per year from April 27, 2019, the date of defendant's default under the promissory note, but otherwise denies her motion. C.P.L.R. § 3212(b) and (e). The court denies defendant's motion for summary judgment, C.P.L.R. § 3212(b), and denies plaintiff's motion to join defendants and amend the complaint, C.P.L.R. §§ 1002(b), 3025(b), since summary judgment concludes this action, and plaintiff still may commence a separate timely action against nonparties Irene Russo and Jacqueline Delaney. This decision constitutes the court's order and judgment. The Clerk shall enter the judgment specified.

DATED: June 16, 2023

Lucy Billings

LUCY BILLINGS, J.S.C.

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