

Square My Capital LLC v Johnson

2023 NY Slip Op 34325(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 526479/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, At Brooklyn, New York, on the 7th day of December 2023

HONORABLE FRANCOIS A. RIVERA

-----X
SQUARE MY CAPITAL LLC,
Plaintiff,

DECISION & ORDER
Index No.: 526479/2021

- against -

ERVIN JOHNSON JR.,
Defendant.

-----X
Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Square My Capital, LLC on January 17, 2022, under motion sequence one, for an order granting plaintiff summary judgment on its claims asserted against defendant Ervin Johnson Jr. The motion is opposed by the defendant.

- Notice of Motion
- Statement of Material Facts
- Affirmation in Support
 - ◆ Exhibit A-D
- Affidavit in Support
- Additional Affidavit in Support¹

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross motion filed by the defendant Ervin Johnson, Jr. on March 8, 2023, under motion sequence number two, for an order pursuant to CPLR 3025(b) granting the defendant leave to amend the defendant's answer.² The cross motion is opposed by the plaintiff.

Notice of Cross Motion
Counter Statement of Material Facts
Affirmation in Support of the Cross Motion and in Opposition to the Motion
Exhibit 1-5
Affidavit in support of the Cross Motion and in Opposition to the Motion in Support
Affirmation in Further Support of the Motion and in Opposition to the Cross Motion

¹ By order issued on May 11, 2022, the Court gave the plaintiff leave to supplement its papers to include an affidavit from an individual with personal knowledge of the transaction at issue and the plaintiff's business practices and procedures pertaining to its record keeping.

² The defendant's cross motion also served as opposition to the plaintiff's motion.

Affirmation in Reply

BACKGROUND

On October 18, 2021, plaintiff Square My Capital, LLC (hereinafter plaintiff) commenced the instant action by filing a summons and complaint (hereinafter the commencement papers) with the Kings County Clerk's Office (KCCO). On December 7, 2021, the defendant Ervin Johnson Jr. (hereinafter defendant) interposed and filed a verified answer with the KCCO.

The complaint alleges twenty-eight allegations of fact in support of three denominated causes of action. The first and third causes of action seek damages for nonpayment of a promissory note inclusive of attorney's fees. The second cause of action claims that the defendant has been unjustly enriched by not paying back the amount due on the loan.

LAW AND APPLICATION

Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Tabak v Shaw Indus., Inc.*, 149 AD3d 1132, 53 N.Y.S.3d 154 [2d Dept 2017], citing *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828 [2d Dept 2008]; see CPLR 3025[b]).

The defendant seeks to amend its answer to assert an affirmative defense of usury. In accordance with CPLR 3025(b) the defendant submitted the proposed amended pleading with an explanation clearly setting forth the changes sought. Although the plaintiff opposed the motion, the plaintiff has neither alleged nor demonstrated that the proposed amendment

was either a surprise or that it palpably insufficient or patently devoid of merit. The defendant's motion to amend the answer is granted. The defendant is directed to file its amended answer with the KCCO on or before January 8, 2024. It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all the evidence must be viewed in the light most favorable to the opponent of the motion (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008], citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [1990]).

An amended pleading, once served, supersedes the initial pleading, and becomes the only pleading in the case as though the initial pleading was never served (*see Elegante Leasing, Ltd. v Cross Trans Svc, Inc.*, 11 AD3d 650 [2d Dept 2004]; *see also Titus v Titus*,

275 AD2d 409 [2d Dept 2000]). Once an original complaint is superseded by an amended complaint, it is no longer viable since the amended complaint takes the place of the original pleading (*Mees v Buiter*, 186 AD3d 1670, 1672—73 [2d Dept 2022], citing *100 Hudson Tenants Corp. v Laber*, 98 AD2d 692, 692 [2d Dept 1983]).

Inasmuch as the defendant's answer has been replaced by the amended proposed answer, the plaintiff's motion must be denied as academic and without prejudice. The effective date of the amended answer will become the date that issue is joined. The plaintiff may move for summary judgment after issue is joined by the amended answer.

CONCLUSION

The motion by plaintiff Square My Capital, LLC for an order pursuant to CPLR 3212 granting plaintiff summary judgment on its claims asserted against defendant Ervin Johnson Jr. is denied without prejudice.

The motion by defendant Ervin Johnson, Jr. for an order pursuant to CPLR 3025(b) granting the defendant leave to amend the defendant's answer is granted. The defendant is directed to file its amended answer with the Kings County Clerk's office or before January 8, 2024.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.