

**Paolini v Milk Truck LLC**

2024 NY Slip Op 32654(U)

July 26, 2024

Supreme Court, New York County

Docket Number: Index No. 100589/2022

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART 37**

*Justice*

-----X

THEODORE PAOLINI,

Plaintiff,

- v -

MILK TRUCK LLC, KEITH KLEIN,

Defendants.

INDEX NO. 100589/2022

MOTION DATE 03/13/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff’s motion, pursuant to CPLR 3212, for summary judgment is granted, and defendants’ cross-motion, pursuant to CPLR 3211(a)(5) and (7), to dismiss and, pursuant to CPLR 3212, for summary judgment dismissing the complaint and, pursuant to CPLR 3025(b), to amend their answer is denied.

Background

On December 22, 2014, pro se plaintiff, Theodore Paolini, as lender, executed a “Simple Loan Agreement” (“the Agreement”) with defendant Milk Truck, LLC (“Milk Truck”), as borrower. Pursuant to the Agreement, Milk Truck agreed to repay plaintiff, over a number of years, \$73,008 due from a prior debt. NYSCEF Doc. No. 8.

On June 29, 2015, Milk Truck wrote a check for \$5,500 and delivered it to plaintiff, but neither defendant has made any further payments. NYSCEF Doc. No. 19.

The Agreement states that “The undersigned is Milk Truck, the Borrower.” However, the Agreement was apparently signed by defendant Keith Klein (“Klein”) and there is no indication that he was signing in a professional capacity. NYSCEF Doc. No. 8.

On June 10, 2022, plaintiff filed the instant lawsuit, asserting two causes of action: (1) breach of contract against Milk Truck; and (2) breach of contract against Klein. Plaintiff seeks \$68,240.00 plus the contractually agreed upon two percent interest. NYSCEF Doc. No. 6.

On March 12, 2024, plaintiff moved, pursuant to CPLR 3212, for summary judgment on both causes of action. NYSCEF Doc. No. 3. Plaintiff argues, inter alia, that Milk Truck stopped payments and that Klein assumed the debt of Milk Truck when he made payments under the Agreement from his personal account. NYSCEF Doc. No. 4. In support of his motion, plaintiff

submits: the Agreement; a copy of the last check from Milk Truck; email exchanges; and 20 copies of personal checks drawn on Klein's personal account to plaintiff from January 2021 to December 2022, some of which include in the memo line "MT," and one of which includes the memo line "Milk Truck." NYSCEF Doc. Nos. 8-10.

In opposition, defendants argue the motion for summary judgment must be denied because, *inter alia*, plaintiff has not shown any facts as to Milk Truck's payments before its alleged default; plaintiff essentially seeks to pierce the corporate veil, a cause of action not asserted in the complaint; and despite plaintiff's contention that Klein assumed Milk Truck's debt, General Obligations Law § 5-701 requires all such agreements to be in writing.

On May 15, 2024, defendants cross-moved: pursuant to CPLR 3211(a)(5) and (7) to dismiss plaintiff's complaint; pursuant to CPLR 3212 for summary judgment dismissing the complaint, because Klein did not agree to repay Milk Truck's debts, or because any such agreement would be void, *ab initio*, as it would have been made under duress; and, pursuant to CPLR 3025(b), for leave to amend Klein's answer to include a counterclaim for unjust enrichment, and upon the granting of leave, pursuant to CPLR 3212, for summary judgment on the counterclaim. NYSCEF Doc. No. 12.

In opposition to defendants' cross-motion, plaintiff contends that: defendants' duress claim is without factual merit; Klein's personal liability is based on the personal checks proffered to plaintiff; and that the action is not time-barred, because the Agreement required Milk Truck to make full repayment of the loan "within 3 years, beginning 2019." NYSCEF Doc. No. 25.

### Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988).

### Milk Truck's Alleged Breach

"To plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations, and; (4) defendant's breach resulted in damages." 34-06 73, LLC v Seneca Ins. Co., 39 NY3d 44 (2022) (internal citations omitted).

Here, the parties agree that plaintiff and Milk Truck executed the Agreement; plaintiff furnished \$75,000 to Milk Truck; Milk Truck's last payment under the Agreement was on June 29, 2015, in the amount of \$5,500; and Milk Truck's breach has damaged plaintiff. NYSCEF Doc. Nos. 8, 19, 21.

Thus, plaintiff's motion for summary judgment against Milk Truck for breach of the Agreement must be granted.

Keith Klein's Alleged Breach

UCC § 3-403(2), in pertinent part, states:

- (2) An authorized representative who signs his own name to an instrument  
 (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity

UCC § 3-403 “aims to foster certainty and definiteness in the law of commercial papers, requirements deriving for takers of negotiable instruments to tell at a glance whose obligation they hold.” Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 228 (1978) (internal quotations omitted). “One who signs a negotiable instrument without indicating that his or her signature is made in an agency capacity will ordinarily be personally obligated upon the instrument.” Arde Apparel, Inc. v Matisse Ltd., 240 AD2d 328, 329 (1st Dept 1997).

Here, the Agreement bears the borrower's signature, which Klein does not deny is his, and does not indicate in what capacity he signed, and thus, pursuant to UCC § 3-403(2)(a), he is personally obligated to it.

Statute of Limitations

Dismissal pursuant to CPLR 3211(a)(5) is warranted when the statute of limitations bars the claim. See EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

That six-year statute of limitations that CPLR 213(2) begins to run when “the party that [is] owed money [has] the right to demand repayment.” CPLR 213(2); see Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co., 18 NY3d 765, 770-71 (2012) (breach of contract claim governed by a six-year statute of limitations begins to run when “party that [is] owed money [has] the right to demand repayment)

General Obligations Law § 17-101 provides:

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules...

In other words, “a written acknowledgment or promise will toll the Statute of Limitations” and that writing, “in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it.” Lew Morris Demolition Co. v Bd. of Educ. of the City of New York, 40 NY2d 516, 520-521 (1976).

Here, Klein sent plaintiff emails in August 2018 acknowledging “I owe you \$65,620” and going so far as to say, “I am absolutely committed to paying it back to you.” NYSCEF Doc. No. 26. Klein issued, from his personal bank account, Klein issued checks to plaintiff to satisfy the Agreement. Therefore, Klein clearly recognized an existing debt,

and the emails contain nothing inconsistent with an intention to repay plaintiff. By doing so Klein, as both a representative of Milk Truck and as an individual, revived the statute of limitations for commencing the instant action. See Toobian v Toobian, 209 AD3d 907 (2d Dept 2022) (Borrower's email to lender was an acknowledgment of debt, reviving statute of limitations for commencing lender's action against borrower for breach of contract).

Thus, defendants' cross-motion to dismiss, pursuant to CPLR 3211(a)(5), must be denied.

#### Failure to State a Claim

Dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. at 19. The question is whether the complaint adequately alleges facts giving rise to "a cause of action, not whether [it] properly labeled or artfully stated one." Chanko v Am. Broadcasting Cos. Inc., 27 NY3d 46, 52 (2016) (internal quotations omitted).

Here, construing the pleadings liberally, the cross-motion must be denied, as plaintiff has provided an executed agreement, checks in small amounts, and email exchanges acknowledging that defendants owed a significant debt to plaintiff. There clearly exists an inference that defendants breached the terms of the Agreement.

#### Duress

"Repudiation of an agreement on the ground that it was procured under duress requires the showing of a wrongful threat and the preclusion of the exercise of free will." Wujin Nanxiashu Secant Factory v Ti-Well Intern. Corp., 14 AD3d 352 (1st Dept 2005). "Furthermore, an agreement purportedly procured under duress must be promptly repudiated." Id. at 353. "The possibility, or even the fear, of litigation is insufficient to establish duress." Beltway 7 & Props., Ltd. v Blackrock Realty. Advisers, Inc., 167 AD3d 100, 107 (1st Dept 2018); Dunham v Griswold, 100 NY 224, 226-227 (1885) ("[a] mere threat to sue ... [is not] duress.")

Here, Klein alleges that either the Agreement or a later oral agreement to repay the Agreement were made under duress and therefore are void. However, Klein not only sent emails to plaintiff, promising to repay the debt under the Agreement, he personally made partial payment at least 20 separate times over two years despite being purportedly under duress. Thus, the Court finds no sufficient ground to void the Agreement, and defendants' cross-motion, pursuant to CPLR 3212, dismissing plaintiff's complaint against Klein must be denied.

#### Leave to Amend

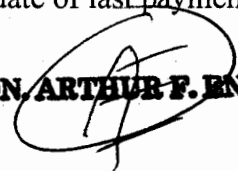
As the Court must grant plaintiff's summary judgment motion, defendants cross-motion for leave to amend is moot and the Court need not address it.

This Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion of plaintiff, Theodore Paolini, for summary judgment against defendants Milk Truck, LLC, and Keith Klein is hereby granted; defendants' cross-motion is hereby denied; and the Clerk is hereby directed to enter judgment as against defendants, jointly and severally, in the amount of \$66,248 (the amount remaining on the instant Agreement) plus two-percent contractual interest starting from January 1, 2022 (30 days after the date of last payment).

**HON. ARTHUR F. ENGORON**



7/26/2024

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: