Batistatos v Fleisher
2024 NY Slip Op 35680(U)
September 5, 2024
Supreme Court, Nassau County
Docket Number: Index No. 605272/2022
Judge: Jerome C. Murphy
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 5

NICK BATISTATOS, individually and on behalf of FLAVORFUL INC.,

Plaintiff,

- against -

CRAIG FLEISHER and FLAVORFUL INC.,

Defendants.

Index No.: 605272/2022
Motion Date: 6-14-24
Motion Sequence: 003

DECISION & ORDER

The following papers were read on this motion:

Motion Sequence 003:

Notice of Motion, Affidavit, and Exhibits	1
Affidavit in Opposition with Exhibits	2
Reply Affirmation in Support	3

PRELIMINARY STATEMENT

In Motion Sequence 003, plaintiff moves: A) pursuant to CPLR 3212, for summary judgment on the first cause of action set forth in the amended complaint, in his favor and against the defendant Craig Fleisher, in the principal sum of $35,000, plus interest from May 15, 2019, and to sever the remaining causes of action; B) to preclude defendant Craig Fleisher from offering any testimony or giving any evidence in defense of this action for failure to respond to discovery; and C) for such further and other relief as may be just, proper, and equitable. Opposition and reply have been submitted.

BACKGROUND

In April 2022, plaintiff, individually and on behalf of Flavorful Inc. (hereinafter Flavorful), a retail ice cream business doing business as "Let's Roll", in Merrick, commenced this action against defendant Craig Fleisher seeking to recover damages, among other things, for breach of contract[1] (*see* NYSCEF Doc. No. 45). Plaintiff alleged that he had loaned Fleisher $35,000 in April 2019, which Fleisher had agreed to repay at a rate of $1,400 per month starting on May 15, 2019, for a period of two years (*see id.*). Plaintiff alleged that, despite their written agreement and demand for payment, Fleisher has not repaid any of the $35,000 (*see id.* at ¶ 7).

On August 1, 2023, plaintiff served his first notice to produce upon defendants' then-counsel seeking 25 categories of documents (*see* NYSCEF Doc. No. 48). Thereafter, defendants' counsel moved to withdraw as counsel which was granted in a decision and order entered January 9, 2024 (*see* NYSCEF Doc. No. 38).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on the first cause of action set forth in the amended complaint, in his favor and against Fleisher, in the principal sum of $35,000, plus interest from May 15, 2019, and to sever the remaining causes of action. He also seeks to preclude Fleisher from offering any testimony or giving any evidence in defense of this action for failure to respond to discovery.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], *quoting Vega v Restani Constr. Corp.*, 18 NY3d 499,503 [2012]). "Only if the movant meets that standard does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact" (*Scurry v New York City Hous. Auth.*, 193 AD3d 1, 9 [2nd Dept. 2021]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). "Ultimately, the role for the court in addressing motions for

[1] Plaintiff originally commenced this action only against Fleisher. Before answering, Fleisher moved, pursuant to CPLR 3211(a), to dismiss the complaint. In its decision and order, entered December 21, 2022, deciding that motion, this Court directed plaintiff to add defendant Flavorful, Inc. as a party to this action since plaintiff seeks certain relief against Flavorful, Inc. (*see* NYSCEF Doc. No. 14).

summary judgment is issue finding rather than issue resolution" (*Scurry v New York City Hous. Auth.*, 193 AD3d at 9; *see Kriz v Schum*, 75 NY2d 25, 33 [1989]).

"To recover damages for breach of contract, a plaintiff must demonstrate 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach'" (*Ben Ciccone, Inc. v Naber Elec. Corp.*, 214 AD3d 936, 937,938 [2nd Dept. 2023], *quoting Legum v Russo*, 133 AD3d 638, 639 [2nd Dept. 2015]; *see Dean Bldrs. Group, P.C. v M.B. Din Constr., Inc.*, 186 AD3d 1612, 1614 [2nd Dept. 2020]).

Here, plaintiff submits evidence to demonstrate his prima facie entitlement to judgment as a matter of law on the cause of action alleging breach of contract (*see Shulamith Sch. for Girls, Inc. v Shulamith School for Girls of Brooklyn*, __AD3d___, 2024 NY Slip Op 04339, *2 [2nd Dept. August 28, 2024]; *Sensible Choice Contr., LLC v Rodgers*, 164 AD3d 705, 707 [2nd Dept. 2018]). In support of his motion, plaintiff submits an affidavit in which he avers that he loaned Fleisher $35,000 towards creating Flavorful Inc., that Fleisher acknowledged the loan and executed a promissory note related to same, and that Fleisher has failed to repay any of the money owed to plaintiff (*see* NYSCEF Doc. No. 44).

In his affidavit, plaintiff also avers that Fleisher did not deny the existence of the loan in his answer (*see id.*). In the answer, Fleisher admitted the truth of the allegation that, in April 2019, plaintiff loaned him individually $35,000 "which was to be applied toward the expenses of Flavorful" (NYSCEF Doc. No. 47, at ¶ 9). Fleisher did deny that he was to repay plaintiff over a period of two years in monthly installment of $1,400 per month commencing May 15, 2019 (*see id.* at ¶ 10). Fleisher also denied acknowledging the terms of the loan in writing except to admit that the initial loan terms were in writing but were later modified (*see id.* at ¶ *11*) Fleisher also denies that he failed to repay plaintiff (*see id.* at ¶¶ 12-14).

Annexed as Exhibit B to plaintiff's affidavit is a typed document entitled "Personal loan between Nick Batistatos and Craig Fleisher", dated March 23, 2019 (NYSCEF Doc. No. 46). The document states that "[Plaintiff] loans [] Fleisher $35,000 to zero interest for 25 months for the opening of their new business. [] Fleisher is to pay [plaintiff] $1400 per month starting May 10, 2019 by check and the last check March 10, 2021 (*id.*). Signatures appear over both the date of March 23, 2019 and the printed names for plaintiff and Fleisher (*see id.*).

In opposition, Fleisher raises a triable issue of fact. While in his affidavit submitted in opposition to this motion, Fleisher avers that the written agreement submitted by plaintiff in support of the motion was "fraudulently signed in [his] name", and that he does not have "knowledge of its existence" and "was not present during [its] creation", this assertion of forgery is insufficient to raise a triable issue of fact on its own (*see Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 384 [2004]; *Sterling Natl. Bank v Alan B. Brill, P.C.*, 186 AD3d 515, 518 [2nd Dept. 2020]). Further, Fleisher does not deny the existence of the loan either in his affidavit or his answer.

However, Fleisher raises a question as to the repayment of the loan. In his affidavit, Fleisher avers that payments have been made to Batistatos in excess of $35,000, so that the loan has been satisfied. He also submits copies of various checks, albeit drawn on an account of Flavorful, Inc., with the name "CRAIG FLEISHER" printed on top of "FLAVORFUL INC", with the memo "Loan Payment", "Flavorful Loan", or "Flavorful Loan Payment", made payable to plaintiff during various times in 2023 for various amounts. In addition, Fleisher submits copies of Flavorful's bank statements showing debits on May 10, 2019, May 29, 2019, June 26, 2019, July 26, 2019, August 26, 2019, and September 26, 2019 for checks drawn on that account, in the amount of $1400, which is the same amount owed for the monthly loan payments (*see* Defendant's Exhibits). Plaintiff's attorney's statement in his reply affirmation that "[a]ny funds received from Flavorful Inc. (of which Plaintiff is 50% stockholder) by Plaintiff were profit distributions and not loan repayment from the individual Defendant" (NYSCEF Doc. No. 50) is without evidentiary value as plaintiff's attorney made this statement without attestation to personal knowledge of the facts (*see Morales v Coram Materials Corp.*, 51 AD3d 86, 96 [2nd Dept. 2008]["Affirmations of attorneys who have no personal knowledge of germane facts have no intrinsic evidentiary value."]). Consequently, that branch of plaintiff's motion which is for summary on his first cause of action is denied and his request to sever that cause of action is denied as moot.

With respect to that branch of plaintiff's motion which is to preclude Fleisher from offering any testimony or giving any evidence in defense of this action for failure to respond to discovery, such branch is denied. "'If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed' the court may, inter alia, make an order 'that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; . . . prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony'" (*Rogers v Howard Realty Estates, Inc.*, 145 AD3d 1051, 1052 [2nd Dept. 2016], *quoting* CPLR 3126[1], [2], [3]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time" (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2nd Dept. 2011] [internal quotation marks and citations omitted]; *see Honghui Kuang v MetLife*, 159 AD3d 878, 881 [2nd Dept. 2018]).

Here, the record does not demonstrate that sanctions pursuant to CPLR 3126 are warranted or appropriate. Plaintiff, as movant, does not make a clear showing that Fleisher willfully and contumaciously refused to comply with discovery demands and orders *(see Plenty v New York City Tr. Auth*, 229 AD3d 571, 573 [2nd Dept. 2024]; *Piper-Rader v Muslim*, 99 AD3d 686, 687-688 [2nd Dept. 2012]).

Accordingly, it is

ORDERED that Motion Sequence No. 003 is DENIED.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 5, 2024

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.

ENTERED
Sep 09 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE