

Coglitore v Mercante
2024 NY Slip Op 35700(U)
April 30, 2024
Supreme Court, Nassau County
Docket Number: Index No. 606471/2022
Judge: Catherine Rizzo
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SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

X

Anthony Coglitore,

TRIAL/IAS PART 44
NASSAU COUNTY

Plaintiff,

INDEX NO.: 606471/2022

-against-

MOTION SUBMISSION
DATE: 2/1/24

Rita Mercante,

MOTION SEQUENCE
NO.: 01

Defendant.

X

The following e-filed documents for Motion Sequence 001 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 001

Notice of Motion and Affidavits/Affirmations..... X Memorandum of Law in Support of Motion..... X Affidavits/Affirmations in Opposition..... X Memorandum of Law in Reply..... X

The defendant moves this Court for an order granting the defendant summary judgment pursuant to CPLR §3212 and dismissing the plaintiff's Verified Complaint. The plaintiff opposes the motion. The defendant submits a reply.

The plaintiff initiated this proceeding by way of Summons and Verified Complaint alleging causes of action sounding in breach of contract and unjust enrichment. The following facts are alleged in the Verified Complaint: the defendant, who is the plaintiff's stepdaughter, asked the plaintiff to "advance her funds" to pay off substantial debts to the Internal Revenue Service ("IRS") for past due taxes. Prior to advancing the money, the defendant agreed she would repay the plaintiff at a rate of \$250.00 per month until the loan was repaid in full. In March 2019, the plaintiff issued two checks on behalf of the defendant to the IRS in the amounts of \$15,510.00 and \$35,000.00, totaling \$50,510.00. The defendant remitted one payment to the plaintiff in the amount of \$250.00, which was dishonored by the defendant's financial institution. The defendant failed to make any further payments in violation of the parties' agreement.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361). The motion court is required to accept the opponents' contentions as true and resolve all reasonable inferences in the manner most favorable to the opponent. (*Giraldo*

v. Twins Ambulette Serv., Inc., 96 AD3d 903). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320; *Zuckerman v. City of New York*, 49 N.Y.2d 557). Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. (*Id.*).

“The statute of frauds bars oral agreements which, by their terms, cannot be performed within one year from their making unless there is some note or memorandum in writing, subscribed by the party to be charged therewith.” (*Bent v. St. John's Univ., NY*, 189 AD3d 973, 974). To satisfy the statute of frauds, the writing need not be in a single document but may be furnished by piecing other, related documents together. Signed and unsigned writings can be read together to satisfy the statute, provided that they clearly refer to the same subject matter or transaction, contain all of the essential terms of a binding contract, and the unsigned writing was prepared by the party to be charged. At least one document signed by the party to be charged must establish a contractual relationship between the parties.” (*Id.*).

The defendant has established *prima facie* entitlement to summary judgment as a matter of law with respect to the plaintiff's claim for breach of contract. At the outset, it is undisputed that the parties' agreement was not reduced to writing. In addition, pursuant to the terms of the oral agreement, the defendant was to repay the total sum of \$50,510.00 by making monthly payments of \$250.00 and, as so, the loan would have taken more than sixteen years to repay. Since there was no written contract that could not be performed within one year, the defendant has established that the parties' agreement is barred by the statute of frauds. (*Bent*, 189 AD3d at 974).

The plaintiff submits only an affirmation by his attorney. An attorney's affirmation alone is insufficient to defeat a motion for summary judgment. (*Zuckerman v. City of New York*, 49 NY2d 557). The failure to submit an affidavit of a person who has personal knowledge of the facts is detrimental. (*SJ. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 NY2d 338). Furthermore, “facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted.” (*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539; see also *McNamee Construction Corp. v. City of New Rochelle*, 29 A.D.3d 544). Since the plaintiff failed to submit an affidavit of a person who has personal knowledge of the facts, the plaintiff has failed to raise a triable issue of fact.

In any event, the plaintiff's argument that there is no evidence demonstrating that the defendant was prohibited from repaying the loan within one year is unavailing as the plaintiff has not offered an affidavit or other documentary evidence establishing that the terms of the parties' oral agreement provided that the defendant could or would repay the loan within one year.

The Court is also not persuaded by the plaintiff's argument that the defendant's canceled checks constitute a written memorialization of the parties' agreement. “A check or note must either have the essential terms of the contract written thereon or must bear references to other documents containing the contract terms and it must be signed by the party to be charged in order to constitute a sufficient memorandum under the statute.” (*McDaniel v. Sangenino*, 67 AD2d 698, 698). The three checks submitted by the plaintiff in opposition are signed by the defendant. While the memos of the checks state they are payments, the checks do not contain the terms of the parties' agreement or reference other document containing the terms of the parties' agreement.

(*Id.*). Moreover, the plaintiff's reliance on *Pollack v. Nemet Motors, Inc.*, 167 AD2d 153 is distinguishable from the matter at bar. In *Pollack*, the Court found that the named defendant's check evinced a binding agreement between the purchaser and seller thereby satisfying the statute of frauds. However, defendant's check in *Pollack* referenced the terms of the parties' agreement and stated that the deposit was for the car, that it was an agreement to purchase and deposit subject to inspection of the car financing, and indicated that it was an agreement to purchase and deposit subject to vehicle inspection, application of all manufacturer's and dealer warranties, and, ability to obtain financing. (*Id.*). The defendant's checks at bar did not contain or reference the parties' contract terms or documents containing the terms of their agreement.

With respect to the plaintiff's claim sounding in unjust enrichment, the defendant argues that the claim is duplicative of the breach of contract claim, which is barred by the Statute of Frauds, and it is barred by the statute of limitation. "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*Bent*, 189 AD3d at 976). The defendant's affidavit in support of the motion acknowledges that the plaintiff issued two checks in the amounts of \$15,510.00 and \$35,000.00 to the IRS on her behalf. The defendant's affidavit further states that she never entered into a written agreement regarding the funds. While a plaintiff may not assert a cause of action sounding in unjust enrichment to circumvent the statute of frauds, such standard is generally applied to motions to dismiss pursuant to CPLR §3211. It is also well settled that the Statute of Frauds is not necessarily a bar to a cause of action for unjust enrichment especially in cases where the plaintiff actually performed services for which it is equitably entitled to compensation. (*Komolov v. Segal*, 40 Misc 3d 1228[A]). As discussed above, the plaintiff has established that the parties' oral agreement is barred by the statute of frauds in that the agreement was not in writing and could not be performed in one year. (*Bent*, at 974, 976). Here, the defendant concedes that the plaintiff made two payments to the IRS totaling \$50,510.00 on the defendant's behalf and her moving papers are silent with respect to any facts establishing that the plaintiff intended the money to be a gift or otherwise not be repaid. The defendant has not eliminated all material issues of fact as to whether should be permitted to retain the benefit of the \$50,510.00 in equity and good conscience. (*Id.*). Therefore, a finding of summary judgment dismissing the plaintiff's claim alleging unjust enrichment is not warranted under these circumstances.

Moreover, the defendant has not established *prima facie* entitlement to summary judgment as a matter of law dismissing the plaintiff's cause of action sounding in unjust enrichment on the grounds that the claim is untimely. Generally, the statute of limitations for a claim sounding in unjust enrichment is six years. (*Gam v. Dvir*, 223 AD3d 706). A tort-based unjust enrichment cause of action can be subject to a three-year statute of limitations when monetary relief rather than equitable relief is sought. (see CPLR §214(3); *Siegler v. Lippe*, 189 AD3d 903). However, it is well settled that where a plaintiff's claims for unjust enrichment and breach of contract are based upon the same fact and pled in the alternative, the six-year statute of limitations applies. (*Maya NY, LLC v. Hagler*, 106 AD3d 583). Here, the defendant asserts that the three-year statute of limitations applies because the plaintiff seeks only monetary relief and, as so, was required to be filed by April 17, 2022, three years after the defendant was allegedly supposed to begin repaying the plaintiff but failed to do so. Although the plaintiff seeks monetary relief only, it is undisputed that the plaintiff's claim is based on the same facts pled in the cause of action for breach of contract. (*Id.*). As such, the six-year statute of limitations expires on April 17, 2025, which renders the plaintiff's claim for unjust enrichment timely. Considering the defendant has not established *prima facie* entitlement to summary judgment and the plaintiff's cause of action sounding in unjust

enrichment is timely, dismissal is not warranted under these circumstances.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

In light of the foregoing, it is hereby

ORDERED, that the branch of the defendant's motion for an order granting the plaintiff summary judgment dismissing the plaintiff's cause of action sounding in breach of contract is granted, and it is further

ORDERED, that the branch of the defendant's motion for an order granting the plaintiff's cause of action sounding in unjust enrichment is denied, and it is further

ORDERED, that counsel for all parties shall appear before the DCM Part for the previously scheduled pre-trial conference on May 2, 2024.

This constitutes the decision and order of the Court.

ENTER:


HON. CATHERINE RIZZO, A.J.S.C.

Dated: April 30, 2024

ENTERED

May 02 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE