Bleier v Lichter
2025 NY Slip Op 35403(U)
January 3, 2025
Supreme Court, Rockland County
Docket Number: Index No. 035776/2023
Judge: Rachel E. Tanguay
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
JONATHAN BLEIER,

Plaintiff,

-against-

MENACHEM LICHTER,

Defendant.
---X

DECISION & ORDER

Index No.: 035776/2023

(Motions # 2 and 4)

Rachel E. Tanguay, J.S.C.

The following papers, NYSCEF documents numbered 25-41, 66-78, 81 and 83 were considered in connection with Plaintiff's Notice of Motion for an Order (Motion #4), pursuant to CPLR § 2221, granting Plaintiff leave to renew his prior motion (Motion #2) for summary judgment against Defendant; and for such other and further relief as this Court may deem just and proper.

Upon the foregoing papers, the Court now rules as follows:

Factual Allegations

The Plaintiff and Defendant are cousins through marriage and share common relatives including Elisabeth Bleier ("Ms. Bleier") who is Plaintiff's grandmother and the paternal grandmother of Defendant's wife. Plaintiff commenced this action on November 14, 2023, alleging breach of a contract with respect to a loan in the amount of $30,000,00 alleged to have been made on November 24, 2109, pursuant to a handwritten note in Yiddish. Additionally, a cause of action was asserted alleging fraud in that Defendant falsely represented himself as an inherently honest individual and knowingly exploited a familial bond to induce Plaintiff to give him a loan. The fraud cause of action was subsequently withdrawn when an Amended Complaint was filed on February 1,2024, which solely alleged a breach of contract cause of action.

Defendant served an Answer with counter-claim on February 20, 2024. The counter-claim alleges defamation per se. A Reply to the counter-claim was filed on March 11, 2024. The counter-claim alleges that on or about February 16, 2021, Ms. Bleier appointed Plaintiff and Defendant as trustees of the trust that was to manage her estate but Plaintiff was removed by Ms. Bleier as trustee on or about October 14, 2021. It is alleged in the counterclaim that on May 6, 2023, Ms. Bleier passed away at 103 years of age and shortly thereafter, Plaintiff telephoned Defendant and told him that he expected him to use his powers as trustee of the estate to assist him in implementing his wishes for the disposition Ms. Bleier's estate, which Defendant asserts he declined to do. On or about June 13, 2023, Defendant was summoned to appear before a Bais Din regarding Plaintiff's father's contest of the will and a request for an accounting of monies which Ms. Bleier spent in converting the garage at Defendant's home into an apartment for herself.

Defendant asserts that on June 19, 2023, Plaintiff defamed him per se by virtue of having caused a law firm to send Defendant a letter that falsely accused him of defrauding Plaintiff into lending him $30,000.00; stealing from Plaintiff by "exploiting his good graces and a shared religious devotion;" masking his deceit and unlawful behavior with claims of being a G_d respecting pious man; avoiding his repayment obligations and stealing from Plaintiff and others. Defendant alleges further acts of defamation by virtue of a November 13, 2023 letter sent by a different law firm to Defendant which asserts that Defendant procured amendments to Ms. Bleier's will and the Trust "through deceptive means" and exerted "undue influence" on Ms. Bleier; manipulated Ms. Bleier's medical care; sowed discord with false claims against Plaintiff, his father and other family members; leveraged Ms. Bleier's compromised health state to alter her estate documents; caused Ms. Bleier pain and suffering that led to her death and stole valuables and money from Ms. Bleier.

Other acts of claimed defamation include that in or about June 2023, Plaintiff contacted at least one of the trustees of the Trust and told the Trustee that Defendant was not a "trustworthy individual," "a thief" and used other derogatory terms with respect to Defendant. Defendant claims that Plaintiff deliberately published these allegations and sought to make them a matter of permanent public record by including these allegations in Plaintiff's verified complaint filed on the NYSCEF system. His counter-claim seeks $300,000.00 in damages.

On April 17, 2024, Plaintiff filed a Motion for an Order (Motion #2), pursuant to CPLR § 3212, for summary judgment against Defendant, on the breach of contract cause of action which asserted that Defendant paid $5,000.00 of the loan but $25,000.00 remained due and owing, on the ground that there were no factual disputes and the loan agreement submitted as documentary evidence was sufficient to meet his burden. In opposition to the summary judgment motion, Defendant argued that summary judgment cannot be granted since his counterclaim far exceeds the amount demanded in the Complaint; Plaintiff does not credibly refute or address any of the sixteen (16) affirmative defenses set forth in the Answer; Plaintiff has not credited Defendant for all payments that he has made and because there has been no discovery in the action. Plaintiff sought a judgment for the outstanding balance of $25,000.00. In a Decision and Order, dated October 3, 2024, this Court found that the handwritten loan agreement, written in Yiddish, was not accompanied by a translator's affidavit, was inadmissible and could not be considered. As such, the Court denied Plaintiff's Motion for summary judgment in its entirety for failure to meet his prima facie burden through admissible evidence.[1]

[1] Pursuant to the same Decision and Order, dated October 3, 2024, this Court decided Plaintiff's Notice of Motion (Motion #3), filed on May 31, 2024, which sought dismissal, pursuant to CPLR § 3211(a)(7), of Defendant's counterclaim for defamation per se. This Motion was granted in part and denied in part with a single claim of defamation via email remaining.

On October 16, 2024, Plaintiff filed a Motion for an Order (Motion #4), pursuant to CPLR § 2221, granting Plaintiff leave to renew his prior motion (Motion #2), which sought summary judgment against Defendant on the ground that no factual disputes existed and on the basis of the loan agreement which was submitted as documentary evidence. In the present motion, Plaintiff submits an affidavit from a third-party translator and a translation of the handwritten loan agreement, as basis for the renewal motion. He argues that this constitutes new facts not offered on the prior motion that would change the prior determination "provided there is reasonable justification for failure to present such facts on the prior motion." *Simpson v. Tommy Hilfiger, U.S.A., Inc.*, 48 A.D.3d 389, 391 (2d Dept. 2008) (internal citations omitted). Plaintiff further avers that CPLR § 2221(e) has not been "construed so narrowly as to disqualify, as 'new facts not offered' on the earlier motion, facts contained in a document originally rejected for consideration because they were not in admissible form." *Id.*

Defendant filed opposition on November 1, 2024, arguing that the present motion should be denied since it does not contain new facts not present on the prior motion and it does not provide reasonable justification for the failure to submit the translator's affidavit with the initial motion (Motion #2). *Id.* In regards to the underlying motion (Motion #2), Defendant avers that substantial issues of fact exist requiring discovery, including but not limited to, his belief that the alleged loan agreement was altered.

Plaintiff's reply, dated November 7, 2024, argues that inadvertent errors, such as submitting evidence in inadmissible form, is reasonable justification for granting motions for leave to renew. Regarding the original motion (Motion #2), he avers that the only factual dispute raised by Defendant is regarding Plaintiff's failure to acknowledge all partial loan payments. However, Plaintiff argues that this was corrected in his original reply affidavit, wherein the amount demanded was amended to reflect both partial payments.

Legal Analysis

Motion to Renew

"A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e). "The requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made." *Citimortgage, Inc. v. Espinal*, 136 A.d.3d 857, 858 (2d Dept. 2016) (internal citations omitted).

The Court now turns to Plaintiff's motion for an Order, pursuant to CPLR § 2221, granting Plaintiff leave to renew his prior motion. The Court previously denied Plaintiff's prior motion on the basis that the loan agreement, written in Yiddish and submitted as documentary evidence, was done so without a translator's affidavit, was inadmissible and could not be considered. *See Raza v. Gunik*, 12 N.Y.S.3d 115 (2d Dept. 2015); *Reyes v. Arco Wentworth Management Corp.*, 919 N.Y.S.2d 44 (2d Dept. 2011); *Ouisoe v. Lemle & Wolff. Inc.*, 698 N.Y.S.2d 652 (1st Dept. 1999). The Court found that Plaintiff did not meet his prima facie burden.

In the present motion, Plaintiff argues that the loan agreement previously submitted without a translator's affidavit was an inadvertent error which is considered reasonable justification as to why it was not included in the underlying motion (Motion #2). "Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there was no showing by opposing party of any prejudice attributable to delay caused by failure." *B.B.Y. Diamonds Corp. v. Five Star Designs*, 6 A.D.3d 263 (1st Dept. 2004). Furthermore, the Second Department, in *Defina v. Daniel*, held that CPLR § 2221(e) is not so narrowly construed as to disqualify new facts not offered on the prior motion solely because they were contained in a document that was submitted in inadmissible form. *Defina v. Daniel*, 140 A.D.3d 825, 826 (2d Dept 2016). In *Defina*, the inadvertent mistake was the submission of an unnotarized statement of a chiropractor, as opposed to a notarized affidavit. *Id*. The Court in *Defina* held that this was "tantamount to law office failure and constituted a reasonable justification for the plaintiff's failure to provide the affidavit to the court" in the original motion. *Id*. Analogous is the instant matter where a loan agreement was submitted without the proper translator's affidavit.

Defendant's argument that this motion to renew should be denied on the basis that the present motion contains no new facts not present on the prior motion and that no reasonable justification was provided for the failure to submit the translator's affidavit with the original motion is not persuasive. Citing the same case as Plaintiff, Defendant argues that reasonable justification for the failure to present a document on the original motion must be provided for a motion to renew to be granted. *Simpson*, 48 A.D. at 391. While Defendant correctly states that Second Department has, at times in the past, taken a narrower approach to what constitutes reasonable justification, recent case law indicates that the court has become more permissive in this area. *See* CPLR § 2221(e); *Defina*, 140 A.D.3d (the attorneys' mistake in failing to include a notarized affidavit constituted law office failure and provided a reasonable justification for the plaintiff's failure to provide the affidavit to the court in the original motion); *Trigoso v. Correa*, 150 A.D.3d 1041, 1043 (2d Dept. 2017) (defendant's failure to submit signed copies of deposition transcripts with the original motion was "tantamount to law office failure, which constituted a reasonable justification" for the court to grant the renewal motion); *Rivera v. Queens Ballpark Co., LLC*, 134 A.D. 3d 796 (2d Dept. 2015) (inadvertently submitting a not so-ordered copy of a stipulation constituted law office failure providing a basis for a motion to renew).

This Court finds that the Plaintiff has sufficiently met the requirements for a motion to renew, pursuant to CPLR § 2221(e), and grants Plaintiff's motion to renew (Motion #4) Plaintiff's prior motion for summary judgment (Motion #2). Upon leave to renew, the Court turns to the prior motion (Motion #2) for a determination on the merits.

Summary Judgment Motion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *Giuffrida v. Citibank Corp. et al.*, 760 N.Y.S.2d 397 (2003), citing *Alvarez v. Prospect Hosp.*, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *Lacagnino v. Gonzalez*, 760 N.Y.S.2d 533 (2d Dept.2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. *Gonzalez v. 98 Mao Leasing Corp.*, 711 N.Y.S.2d 131 (2000), citing *Alvarez*, supra. and *Winegrad v. New York Univ. Med. Center*, 508 N.Y.S.2s 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. *Gilbert Frank Corp. v. Federal Ins.* Co., 525 N.Y.S.2d 793 (1988); *Zuckerman v. City of New York*, 427 N.Y.S.2d 595 (1980).

"In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 A.D.3d 566, 567 (2d Dept. 2015) (internal citations omitted). Summary judgment is also inappropriate where questions of fact or credibility are raised that require a trial." *Nicklas v. Tedlen Realty Corp.*, 305 A.D.2d 385, 386 (2d Dep't 2003); *see also Dauman Displays v. Masturzo*, 168 A.D.2d 204, 205 (1st Dep't 1990).

The Court now turns to Plaintiff's motion for summary judgment (Motion #2) on the breach of contract cause of action. In addition to the papers previously submitted in furtherance of this motion, the Court now also considers the translated loan agreement and the affidavit of the certified translator, Tamar Sheffer from Linguistic Systems, Inc., that was submitted by Plaintiff as a part of the motion to renew. Plaintiff avers that the terms of the contract are clear and unambiguous. He further argues that Defendant's partial repayment is proof of the terms of the contract.

Defendant opposes Plaintiff's motion for summary judgment for reasons, including but not limited to, Plaintiff's failure to acknowledge and address the pending counter-claim and the numerous affirmative defenses posited by Defendant. He further argues that there are numerous factual disputes, including that the provision for repayment within ninety (90) days was fraudulently added by Plaintiff after the contract was finalized. As a part of this argument, Defendant alleges that the date next to the $5,000 partial payment made by Defendant is incorrect and is not the date on which the payment was made. Defendant alleges that the date on the original loan agreement in Yiddish does not correspond correctly to the date on the translation. Further, Defendant claims that Plaintiff forged his signature since the partial payment was not made on the date reflected and he did not sign the acknowledgment. Additionally, there is an alleged dispute as to how much money has been paid back to date.[2] Defendant also avers that while no discovery has yet occurred, it is necessary since Plaintiff is in sole possession of the original contract document. Plaintiff does not address any of the affirmative defenses posed by Defendant and disregarded the existence of Defendant's counterclaim in his motion.

In reply, Plaintiff amends his previous statement that only $5,000 has been paid back to date stating that upon review of his bank records, he confirms that $10,000 has been paid back to date. Plaintiff claims that the contract was not altered as evidenced by the unaltered spacing and the alignment of the handwritten terms. Further, Plaintiff claims that the issue regarding the alleged forgery of Defendant's signature is irrelevant since both parties agree to the terms of the contract, other than the repayment provision, and the amount owed.

In the instant matter, the Court finds that Plaintiff has sustained his burden as to the amount owed by submitting a certified translation of the contract with proof of the partial payment made. The burden then shifted to Defendant to put forth evidence of genuine issues of material fact as to the amount owed, which he failed to do. While Defendant highlights remaining issues regarding the repayment plan on the contract, these are not genuine issues of material fact as to the amount owed since the determination of these alleged issues have no bearing on how much Defendant currently owes Plaintiff. None of the genuine issues of material fact as to this specific issue are in dispute. At no time has Defendant disputed the loan, the contract, or that he owes the amount claimed.[3]

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[2] Plaintiff originally alleged that only $5,000 had been paid back to date, wherein Defendant claimed that $10,000 had been paid back to date. This discrepancy was rectified in Plaintiff's reply wherein he confirmed that $10,000 had been paid back to date.

[3] The only genuine issue of material fact that was in dispute was the amount that had been paid to date and the amount that remained due and owing. This dispute was cured in Plaintiff's reply when he agreed with Defendant's contention that $10,000 had been repaid thus far, with $20,000 remaining due and owing.

In regards to the portion of Plaintiff's cause of action seeking interest, genuine issues of material fact remain, including the determination of whether the contract included a ninety (90) day repayment plan. The recovery of interest in an action of an equitable nature is in the discretion of the Court and will be governed by the particular facts in each case, including any wrongful conduct by either party. *Dayan v. York*, 859 N.Y.S.2d 873 (2d Dept 2008); CPLR § 5001. In light of the existing case law, as well as Defendant's affirmative defenses, which raise genuine issues of material fact as to interest, the issue of interest remains open and will be addressed at the next conference before this Court.

This Court finds that Plaintiff has sufficiently met the requirements for a motion to renew, pursuant to CPLR § 2221(e), and grants Plaintiff's motion to renew (Motion #4) his prior motion for summary judgment (Motion #2). Upon leave to renew and based upon the newly submitted admissible evidence, this Court reverses part of its earlier decision, as to the corpus of the contract. The Plaintiff's motion for summary judgment (Motion #2) is hereby granted in part and denied in part.[4] The final judgment will not be issued until the issue regarding interest and costs are determined by the Court.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for leave to renew (Motion #4) is **GRANTED**; and it is further

ORDERED that, upon renewal, Plaintiff's motion for summary judgment (Motion #2) is **GRANTED in part** and **DENIED in part**; and it is further

[4] As a result of this decision, the only portion of Plaintiff's cause of action remaining is the issue of interest and costs associated with the pursuit of this matter. As to Defendant's counter-claim, the only open allegation remains defamation regarding a disparaging email sent to various individuals.

ORDERED that all parties shall appear for a **status conference** on **February 19, 2025, at 9:30 a.m**.[5]

The foregoing constitutes the Decision and Order of this Court on Motions # 2 and 4.

Dated: New City, New York
January 3, 2025

HON. RACHEL E. TANGUAY
Justice of the Supreme Court

TO: All counsel via NYSCEF

[5] Parties shall submit memorandums of law as to the issue regarding interest and costs by January 31, 2025.