

**Yi Tang v Xu Liu**

2012 NY Slip Op 30430(U)

February 7, 2012

Supreme Court, Nassau County

Docket Number: 1785/10

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU: PART 13

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YI TANG,

Plaintiff,

- against -

**DECISION AND ORDER**

Index No: 1785/10

XU LIU,

Motion Sequence Nos: 001 and 002  
Original Return Dates: 10-18-11  
11-09-11

Defendant.

-----X

**P R E S E N T :**

**HON. JOEL K. ASARCH,  
Justice of the Supreme Court.**

The following named papers numbered 1 to 8 were submitted on this Notice of Motion and Notice of Cross-Motion on November 9, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit	1-3
Memorandum of Law in Support	4
Notice of Cross-Motion	5
Affirmation and Affidavit in Support of Cross-Motion	6-7
Affirmation in Opposition	8

The motion by Plaintiff Yi Tang for an Order pursuant to CPLR 3212, granting Plaintiff summary judgment on his two causes of action [breach of contract and unjust enrichment] and dismissing the Defendant's counterclaims (motion sequence No. 1), and the cross-motion by Defendant Xu Liu for summary judgment dismissing the complaint and granting Defendant judgment on his counterclaims (motion sequence No. 2), are decided as follows:

Plaintiff alleges in his moving papers that the Defendant approached Plaintiff on or about

July 12, 2007 in order to borrow \$9,000. Plaintiff brought the money to Defendant's store to deliver it to his wife, at which point she signed a handwritten acknowledgment that she received the money, which read specifically: "Receipt. Received Yi Tang's loan \$9,000 dollars (nine thousand dollars). Using this as a receipt. 7/12/2007."

On or about August 7, 2007, Defendant allegedly again approached Plaintiff asking to borrow \$70,000, an amount which both parties agreed would include the earlier loan of \$9,000. Plaintiff then tendered a check to Defendant's corporation, as requested by Defendant, for \$58,000, and additionally gave Defendant \$3,000 in cash. Defendant signed a piece of paper with the following language handwritten in Chinese: "Loan note Now borrowing seventy thousand U.S. dollars from Mr. Tang Yi. Receipt. Mr. Xu Liu is responsible for the loan." The note was dated August 7, 2007 and signed by the Defendant. Plaintiff alleges to have orally agreed with Defendant contemporaneously to the signing of the note that the term of the loan would be no longer than one year; therefore, Defendant was required to repay the note before August 7, 2008. Upon reminding Defendant on May 16, 2008 of the upcoming deadline, Defendant ceased contact with Plaintiff and refused to repay the loan. Plaintiff seeks repayment of \$70,000 loan and dismissal of Defendant's counterclaims.

Defendant alleges in his cross-motion that the money given by Plaintiff was actually a receipt acknowledging prepayment for materials from Defendant's corporation. Defendant alleges that a oral contract existed between himself, in the capacity of representative for his corporation and not personally as an individual, and Plaintiff, in order to provide materials for the renovation to Plaintiff's property. Defendant additionally alleges that Plaintiff tendered \$58,000 and that upon completion of services, an invoice was sent to the Plaintiff for the full amount of \$77,891.37.

Defendant provides only an invoice from his company, dated September 25, 2008, after Plaintiff's alleged loan was to be repaid. This invoice contains a list of materials that Defendant allegedly installed, along with their prices and copies of Plaintiff's business card. Defendant provides no other documentation reflecting a contractual agreement between himself and Plaintiff, and nothing containing Plaintiff's signature. Defendant seeks \$19,891.37, the difference between the \$58,000 deposit and the total cost of goods and services rendered, and dismissal of Plaintiff's complaint.

There is no dispute that on or about August 7, 2007, Plaintiff and Defendant entered into an exchange resulting in a check for \$58,000 being tendered from Plaintiff to Defendant.

What is in dispute, and not capable of being resolved by the papers submitted herein, is the validity of the agreement between Plaintiff and Defendant, be it a loan as alleged by Plaintiff or a contract as alleged by Defendant. Also in dispute are how much money was actually tendered to Defendant by Plaintiff, whether Defendant made the agreement with Plaintiff in his personal capacity or as a representative for his company, and whether or not Defendant's company did indeed provide materials and renovation services to Plaintiff's property.

What is also clear is that this is the second action brought by the Plaintiff against the Defendant. The first action (Supreme Court Nassau County index number 15413/08) was dismissed for lack of personal jurisdiction following a traverse hearing on November 9, 2009. In his affidavit sworn to on May 22, 2009 in the previous action, Defendant Xi Liu states that "[o]n or about August 7, 2007, while Plaintiff Yi Tang and defendant Xu Liu were talking over lunch, Plaintiff Yi Tang agreed that he will lend Natural Product America INC. Seventy Thousand Dollars (\$70,000.00)."

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v Equitable Land Services, Inc.*, 207 AD2d 880,881 (2<sup>nd</sup>

Dept. 1994):

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank v McAuliffe*, 97 AD2d 607 [3<sup>rd</sup> Dept. 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320,324; *Zuckerman v City of New York supra*, at p. 562).

Summary judgment, however, is a drastic remedy which should be granted only when there is no clear triable issue of fact presented because it will deprive a party of their day in Court. Even the color of a triable issue of fact should foreclose this remedy. Therefore, in deciding a summary judgment motion, the evidence must be scrutinized carefully in the light most favorable to the non-moving party. Issue finding rather than issue determination is the key to the proper review of a summary judgment motion. See, *Ridnitsky v Robbins*, 191 AD2d 488 (2<sup>nd</sup> Dept. 1993); *Triangle Fire Protection Corp. v Manufacturers Hanover Trust Co.*, 172 AD2d 658 (2<sup>nd</sup> Dept. 1991).

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement as a matter of law by tendering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The movant's failure to meet their burden of proof requires the denial of summary judgment regardless of the sufficiency,

or lack thereof, of opposing papers. (*Liberty Taxi Management, Inc. v Gincherman*, 32 AD3d 276 [1<sup>st</sup> Dept. 2006]).

Here, Plaintiff possesses two documents that contain the signatures of Defendant and Defendant's wife. These documents use unambiguous loan language, and the Defendant admits to having signed one of the documents along with the receipt of a check for \$58,000. While the writing does not include all terms on its face to demonstrate a complete negotiable loan note, a mere failure to include details of repayment does not serve to release the maker of the note from liability, but rather results in a demand note, payable on demand (Unif. Commercial Code, 3-108[a][ii]). The language that is included in the loan note, along with the accompanying check for \$58,000, is *prima facie* proof that the Plaintiff indeed loaned money. However, a question of fact exists as to whom the loan was made – the Defendant or Defendant's business, NATURAL PRODUCT AMERICA INC. (to which the \$58,000.00 check was written). On a motion for summary judgment, the Court may “search the record”. Here, attached as Exhibit “G” to the moving papers is the Defendant's Affidavit, which raises a triable issue of fact. If the loan was to the corporation, a necessary party is missing from this lawsuit.

Further, on the August 7, 2007 signed “loan” document, a hand sketched diagram appears. Could this be part of the contract which the Defendant claims he had with the Plaintiff (first counterclaim)? The answer cannot be determined on these papers.

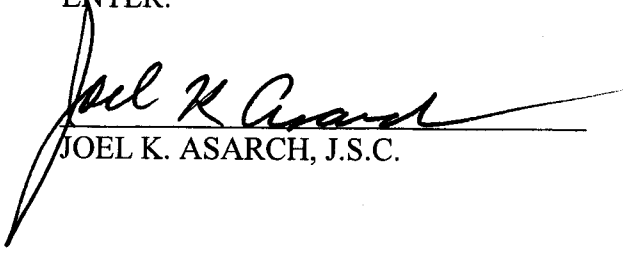
Accordingly, after due deliberation, it is

ORDERED, that the Plaintiff's motion and the Defendant's cross-motion, both for summary judgment, are **denied** as there are triable issues of fact present which cannot be resolved from the papers submitted.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
February 7, 2012

ENTER:



Handwritten signature of Joel K. Asarch in black ink, written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Wong, Wong & Associates, P.C.  
Attorneys for Plaintiff

Kevin Kerveng Tung, P.C.  
Attorneys for Defendant

**ENTERED**  
FEB 10 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE