

Addarich v Ford
2012 NY Slip Op 31365(U)
May 15, 2012
Sup Ct, New York County
Docket Number: 111852/11
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 111852/2011

ADDARICH, KIM

vs

FORD, PATRICK

Sequence Number : 001

DISMISS

PART 8

INDEX NO. 111852/11

MOTION DATE 12/6/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to 16, were read on this motion to/for pre-answer motion to dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-9

Answering Affidavits — Exhibits _____ | No(s). 10-15

Replying Affidavits _____ | No(s). 16

Upon the foregoing papers, It is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: May 15, 2012

FILED

MAY 22 2012

NEW YORK
COUNTY CLERK'S OFFICE, J.S.C.

JOAN M. KENNEY

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Kim Addarich,

Plaintiff,

-against-

Patrick Ford,

Defendant.
-----X

KENNEY, JOAN M., J.

DECISION AND ORDER

Index Number.: 111852/11

Motion Seq. No.: 001

Recitation, as required by CPLR 2219(a), of the papers considered in review of this pre-answer motion to dismiss.

FILED

Papers

Notice of Motion, Affirmation, Exhibits, and Memo of Law

Opposition Papers, Affirmation, Exhibits, and Memo of Law

Reply Papers

MAY 22 2012

Numbered

1-9

NEW YORK

10-15

COUNTY CLERK'S OFFICE 16

In this action, defendant Patrick Ford, seeks an Order, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), dismissing the complaint.

Factual Background

Both parties have co-habited with each other for many years. They have one daughter together and have never married.

Plaintiff was employed in the financial services industry for over two decades prior to the hiatus described in this claim. Plaintiff claims that she used to earn a salary in excess of \$200,000.00 per year. Defendant is a bartender, and has been employed at Smith & Wollensky's restaurant in the County, City, and State of New York for over twenty-six years.

Plaintiff claims that defendant has earned, and continues to earn, several hundreds of thousands of dollars in unreported income in addition to his regular salary at Smith & Wollensky's. Plaintiff alleges that most of the unreported income that defendant receives comes

from cash tips given to the defendant at his place of employment.

On or about January 1, 2009, the parties separated and plaintiff rented an apartment with the parties' daughter. From about January 2009 to about May 2010 plaintiff paid for all of their daughter's expenses, except for their daughter's school tuition and some domestic services that were paid by defendant.

In May, 2010 the parties reconciled and moved in together with their daughter, renting an apartment on East 54th St. (the apartment). Several months later plaintiff alleges that at the specific insistence and request of the defendant, the parties entered into an oral agreement that defendant would pay plaintiff \$100,000.00 for a period of one year, and in exchange, the plaintiff would sign up for and receive unemployment benefits, stay at the apartment, not seek further employment in the financial services industry, take care of their daughter, and perform such other further services for the defendant including, but not limited to, taking care of the household budget, cook, clean and maintain the apartment, oversee and administer the household budget, and do all other household chores that used to be performed by the full time servant employed by the defendant (the 1st oral agreement).

On or about June 1, 2011, the parties separated and defendant moved out of the apartment. It was at this time that plaintiff claims she demanded payment of the \$100,000.00 that defendant allegedly promised to pay in accordance with the 1st oral agreement. Plaintiff claims that defendant again orally admitted that he owed plaintiff \$100,000.00 and, on or about June 6, 2011, gave plaintiff a personal check in the amount of \$30,000.00 (on which defendant allegedly wrote "guilt money") which plaintiff claims defendant orally agreed that said monies were to be applied towards the monies he owed pursuant to the oral agreement (the 2nd agreement). When

plaintiff went to deposit the check, it is undisputed that defendant placed a stop payment request on the check.

Plaintiff further alleges that defendant broke into her apartment and, without permission, took plaintiff's diamond ring valued at \$30,000. The ring had been appraised at \$30,000 at the request of the defendant in November 2010. Plaintiff alleges that the defendant refused, and continues to refuse, to return the ring to her. Additionally, since June 2011, plaintiff claims that she has been demanding payment from defendant in accordance with the oral agreement. Plaintiff asserts that defendant refused, and continues to refuse, to pay any part of the monies due to their oral agreements.

On October 17, 2011 plaintiff commenced the within action seeking: (1) payment of \$100,000.00 pursuant to the oral agreement (1st cause of action); (2) damages for defendant's conversion of the diamond ring (2nd cause of action); (3) payment of \$30,000.00 towards payment of the \$100,000.00 in accordance with the 2nd oral agreement (3rd cause of action); (4) damages for defendant's alleged fraud by inducing plaintiff to enter into the oral agreements when defendant had no intention to pay (4th cause of action); and (5) damages for defendant's unjust enrichment in that defendant benefitted from plaintiff's labor and other household services without paying for said work (5th cause of action).

Arguments

Defendant contends that the action must be dismissed for failure to state a cause of action, pursuant to CPLR 3211(a)(7) and pursuant to CPLR 3211(a)(1), based on documentary evidence. Defendant argues that: (1) the contract claims are barred by the Statute of Frauds; (2) the conversion claim fails because defendant was entitled to the ring as it was an engagement ring in

contemplation of marriage and the marriage never took place; (3) the fraud claim is impermissibly duplicative of the contract claims; and (4) the unjust enrichment claim fails because it merely seeks to recovery for personal services rendered in the course of a romantic relationship, and is therefore against public policy.

Plaintiff argues that: (1) the contract for compensation for services rendered is not barred by statute, or case law, because it was to be performed within one year; (2) the unjust enrichment claim should not be dismissed because defendant used plaintiff for services that he used to get from a maid; (3) the conversion cause of action should not be dismissed because defendant intentionally deprived the plaintiff of her property when he took the ring, which was not an engagement ring; and (4) defendant's 3211(a)(1) motion is inadequate because it lacks any qualifying documentary evidence.

Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 A.D.2d 98, 489 N.Y.S.2d 231 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v. Weber*, 166 A.D.2d 130, 569 N.Y.S.2d 955 [1st Dept, 1991]). A motion to dismiss is made pursuant to CPLR 3211(a)(7), which allows such a motion

on the ground that the pleading fails to state a cause of action. The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced.

A contract is an agreement by which the parties undertake a legal obligation to do or to refrain from doing a particular thing. Although the parties must usually intend to enter into a contract, the outward manifestation of their intentions is sufficient for a binding contract. The requirements of a contract, in general are: a. an offer; b. an acceptance; c. consideration or some substitute therefor; d. legal capacity; e. legal subject matter; and f. other special requirements such as e.g., certain contracts must be in writing under a statute of frauds.

New York General Obligations Law § 5-701 (NYGOL) requires certain agreements to be in writing, to the extent that they are void, unless the agreement, or some note or memorandum thereof, was in writing and subscribed by the party charged therewith, or by his lawful agent. Where the contract comes within the provision of this statute, therefore, it will be a defense that it was not in writing, as required (*Harmon v. Alfred*, 243 N.Y. 473, 154 N.E. 314 [1926]).

In an action for a breach of contract, the plaintiff must prove all of the following elements: the making of a contract (offer by plaintiff, acceptance by defendant); the terms of the contract; consideration; performance by the plaintiff; breach by the defendant; and damages to

plaintiff.

Here, defendant moves to dismiss the first cause of action for breach of contract by claiming that the plaintiff is barred by the statute of frauds. Defendant's argument is that since plaintiff allegedly began working for him on June 1, 2010 and allegedly did not ask for payment until June 6, 2011, the plaintiff did not meet the statute of frauds writing requirement for contracts taking over a year to complete.

It is unnecessary to even address defendant's argument on the 1st cause of action, because it is not yet ripe for review. Before the contract can be examined for statute of frauds deficiencies, it must first be determined that there was, in fact, a contract for employment services formed at all. This is a question of fact, as plaintiff claims there were oral agreements and defendant avers there was none. In fact, defendant insists that they only contracted to marry, while plaintiff insists there was only a contract for employment. If the trier of fact finds that there was a legally binding oral contract for plaintiff to work for defendant, then the statute of frauds issue will be ripe for review.

Defendant moves to dismiss plaintiff's 2nd cause of action for conversion based on his assertion that he was entitled to possession of the ring because it was an engagement ring and they never got married. Plaintiff alleges that it was a gift and therefore she was entitled to its possession. This precludes dismissal of this cause of action at this juncture. A conversion action may be based on a wrongful taking of property, or its wrongful withholding. Conversion deprives plaintiff of the possession of property which s/he owns, and to which s/he is entitled. Plaintiff must either be the owner of the property at the time of conversion or have an existing right to its

immediate possession. (*Clements v. Yturris*, 81 N.Y. 285). Here, plaintiff factually disputes that the ring was an “engagement” ring at all.

Defendant also moves to dismiss the 3rd cause of action, for breach of the 2nd oral agreement to pay \$30,000.00 towards the 1st oral agreement to pay \$100,000.00. Plaintiff claims that defendant’s action of putting a stop payment on the \$30,000.00 check is a breach the promise to pay for the services that plaintiff provided. Again, this is a factual issue as defendant disputes plaintiff’s claim that the check was for payment towards the \$100,000.00 plaintiff claims defendant owed her and disputes ever entering into any agreement to pay for any services.

The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages. Plaintiff must show not only that she actually relied on the misrepresentations, but also that such reliance was reasonable. Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations. (*Stuart Silver Associates, Inc. v. Baco Dev. Corp.*, 245 A.D.2d 96, 98-99, 665 N.Y.S.2d 415, 417 [1st Dept. 1997]). While plaintiff alleges that defendant’s representation that he would pay her the \$100,000.00 to “work” at home, knowing he had no intention to pay, defendant claims plaintiff was watching the child and doing housework because she wanted to; not because of an agreement. Clearly, there is a dispute as to what “agreement/representations” were made between the parties at all. Here, plaintiff claims, in essence, that defendant fraudulently entered into oral agreements with her, and upon reliance on the oral agreements, plaintiff stayed home and worked as aforementioned.

Plaintiff's last cause of action that defendant is moving to dismiss is for unjust enrichment. To prove a case of unjust enrichment a plaintiff must state: the performance of services in good faith; the acceptance of the services by the person to whom they are rendered; an expectation of compensation therefor; and the reasonable value of the services. (*Jaworski v. Carrucci*, 63 A.D.3d 487, 881 N.Y.S.2d 56 [1st Dept. 2009]). Unjust enrichment is a claim under "a contract implied ... in law to pay reasonable compensation." (*Snyder v. Bronfman*, 13 N.Y.3d 504, 893 N.Y.S.2d 800 [2009]).

Here, plaintiff's complaint asserts she performed household services, that defendant accepted said services, that she expected compensation for the value of the services as agreed between the parties for the value of the services. It is noted that although an unjust enrichment claim has been stated, a factual dispute still exists as to whether there was an agreement to compensate for services rendered.

CPLR 3211 (a), governing motions to dismiss a cause of action, states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence. The determination thereon must be on the basis of documentation and not on affidavits, although the latter may be used to bring out or explain the nature or authenticity of the evidence." It is not clear to this Court what document(s) defendant relies upon for dismissal of this action as a concise argument was not stated. The documentation referenced in defendant's memo of law (the ring appraisal), is insufficient to warrant dismissal of this case in accordance with CPLR 3211(a)(1), as there are overwhelming factual disputes between the parties and/or no document(s) have been presented

entitling movant to dismissal at this pre-answer/pre-discovery juncture of this litigation, it is hereby

ORDERED that defendant's motion is denied, in its entirety; and it is further

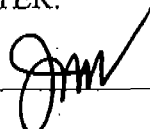
ORDERED that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 304, 71 Thomas St., New York, NY 10013, on June 28, 2012, at 9:30am.

Dated: 5-15-12

ENTER:



Joan M. Kenney, J.S.C.

FILED

MAY 22 2012

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