Katz v Kupferman
2016 NY Slip Op 31100(U)
June 14, 2016
Supreme Court, New York County
Docket Number: 161099/2013
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 43

----------X

SANDRA C. KATZ,

Plaintiff,

-against- Index No. 161099/2013

STEPHANIE KUPFERMAN,

Defendant.

----------X

ROBERT R. REED, J.:

This is an action by plaintiff Sandra C. Katz (Katz) to recover for moneys allegedly owed to her by defendant Stephanie Kupferman (Kupferman). Kupferman moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

The complaint, which asserts causes of action for breach of contract and unjust enrichment, alleges that, in or about March 2002, Katz and Kupferman entered into an oral agreement to share costs related to their respective law practices. According to the complaint, the plaintiffs operated their law practices out of offices located at 425 Park Ave, New York, N.Y. from approximately March 2002 through May 31, 2008.

The complaint alleges that Katz and Kuperfman each paid her own rent, but that, pursuant to their agreement, they each would pay half of the office expenses, including but not limited to the telephone bill, FedEx costs, malpractice insurance premiums, monies paid to 1099 recipients'[1] office supplies and internet

[1] 1099 recipients were independent contractors such as Sam Noel, an administrative or clerical person, and Danielle Kohn, an

services (Shared Office Expenses).

The complaint further alleges that between May 2006 and May 31, 2008, Katz paid more than her share of the Shared Office Expenses and that, as a result, Kupferman owes her as follows: $5,500 for 2006; $23,261 for 2007; and $47,375 for 2008; for a total of $76,136.

According to the complaint, in a letter dated May 15, 2008, Kupferman confirmed in writing that, pursuant to the agreement, she owed Katz a balance of $5,500 for costs arising in 2006, and on or about January 6, 2009, Katz wrote to Kupferman indicating that, after adjustments between the two, Kupferman owed Katz $23,261 for costs incurred in 2007.

The complaint alleges that, although Katz made a demand for moneys owed, Kupferman failed or refused to pay moneys owed to Katz.

Kupferman moves, pursuant to CPLR 3212 for: a) summary judgment dismissing the complaint as violative of the statute of frauds under General Obligations Law (GOL) § 5-701 (a) (2); and, alternatively, b) partial summary judgment dismissing the complaint with respect to claims accruing prior to November 27, 2007, on the basis of the statute of limitations.

---

attorney, who allegedly worked for both Katz and Kupferman, and the costs of whose salaries were allegedly shared by Katz and Kupferman. *See* deposition of Sandra C. Katz, annexed to affirmation of David K. Fiveson, exhibit E at 36-37, & 69-70.

GOL 5-701 § (a) (2) states as follows:

> "(a) Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> * * *
>
> (2) Is a special promise to answer for the debt, default or miscarriage of another person."

Kupferman submits an affidavit in support of her motion stating that Katz acted as "of counsel" to the law firm of Kupferman & Kupferman, L.L.P., that the alleged oral agreement was for Kupferman to pay half of the obligations of the law firm and not the obligations of Kupferman individually; that the various emails and letters to and from Katz contained the address, or were on the letterhead of, the L.L.P.; that checks were written to or from the L.L.P.; and that because Katz has no written agreement with the L.L.P., the alleged agreement is barred by the statute of frauds.

Kupferman relies on several cases in which alleged agreements to guarantee the debt of another were found insufficient to satisfy the statute of frauds. *See Ho Sports, Inc. v Meridian Sports, Inc.*, 92 AD3d 915, 916-917 (2d Dept 2012)("A corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally" [internal quotation marks and citation omitted]); *Rosenheck v Calcam Assoc.*, 233 AD2d 553, 554

(3d Dept 1996)(claim properly dismissed where there is "no evidence in [the] record suggesting the existence of a writing evincing an intent by defendant to act as guarantor for [debtor's] debt"). In *Rosenheck*, however, the Court specifically noted that "in a situation where a party's alleged promise to pay is made directly to the debtor rather than the creditor, it is clearly not a promise to pay the debt of a third party and thus does not fall within the meaning of the Statute of Frauds." *Id.* at 554-555, citing *G. Carver Rice, Inc. v Crawford*, 84 AD2d 866, 867 (3rd Dept 1981); *see also Rowan v Brady*, 98 AD2d 638, 638 (1st Dept 1983) (denying summary judgment where "the issue to be resolved was whether the defendant's alleged oral promise to pay for all legal services rendered by the plaintiff attorney to the corporation is in fact a collateral, secondary one merely super-added to that of the corporation and therefore subject to the Statute of Frauds or rather, an original primary obligation"). Relying on Kupferman's May 15, 2008 letter, Katz contends that Kupferman's was a primary obligation.

Contending that, at most, the alleged agreement was for her to guarantee the debt of the law firm, Kupferman points to the fact that her May 15, 2008 letter was on law firm letterhead. She quotes sections of the letter referring to obligations of the "Firm" ("I told you *ad nauseum* I concede owing you $ for having covered firm debt"; "I went through my check register and see

that I made payments on behalf of the firm"). Letter from Stephanie Kupferman to Sandra C. Katz, annexed to Fiveson affirmation, exhibit J at 2 (Kupferman letter). In response, Katz argues that the letter does not indicate that Kupferman signed on behalf of the law firm and that, therefore, it was signed in her personal capacity. Katz quotes portions of the same letter in which Kupferman refers to "debts that should have been divided equally between us" and "the amount I owed you," and her statement "I concede to owing you $." *Id.* In the same letter, Kupferman also states that "I paid you $3,000 this morning leaving an outstanding balance for 2006 of $5,500," and "I do not currently except [sic] any influx of funds until the first of second week of June at which point I will again pay you a much as I am able." *Id.*

Although both parties state that Katz was "of counsel" to the Kupferman & Kupferman law firm, neither indicate the meaning of the "of counsel" status. Kupferman contends in her affidavit that all of the written communications between her and Katz were on law firm letterhead and reimbursement and "salary" checks written to Katz were law firm checks, however, Katz asserts in her deposition that, although some of her client's checks were made out to the law firm, the checks indicated that the payments were to go to her and the moneys would then be directly paid to her. Such an arrangement raises questions of some sort of pass-

through rather than signifying a salary.

"[T]he 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 demonstrate the absence of any material issues of fact," and the opponent must then "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Because the entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). When weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Here, the text of the May 15, 2008 letter, which is relied on by both the plaintiff and defendant, raises triable issues of fact as to whether the alleged oral agreement between Katz and Kupferman was made by Kupferman in her personal capacity, and therefore, is not governed by the statute of frauds (*Rosenheck v*

Calcam Assoc., 233 AD2d at 554-555), or was made by her as a member of the L.L.P., to cover the debts of the L.L.P., and was governed by GOL § 5-701 (a) (2). For example, even where, in her letter, Kupferman speaks of Katz "having covered firm debt," Kupferman states that "I concede to owing you $," rather than stating that the firm owes Katz "$". *See* Kupferman letter at 2.

With respect to debts incurred before November 27, 2007, the date on which this action was filed, Kupferman contends that any claims regarding those debts are barred by the six-year statute of limitations under CPLR 213. Citing *Erdheim v Gelfman* (303 AD2d 714 [2d Dept 2003]), Katz argues that when, in 2008, Kupferman paid a portion of her 2006 debt to Katz and acknowledged in her May 15, 2008 letter that the balance remained unpaid, the statute of limitations for the earlier obligations was tolled. As the Court stated in *Erdheim*,

> "There are two ways in which the statute of limitations may be tolled. One involves part payment of the debt and the other a signed acknowledgment. As to part payment, the statute will be tolled if the creditor demonstrates that it was payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder."

303 AD2d at 714-715 (internal quotation marks and citation omitted).

Kupferman argues that the May 15, 2008 letter does not sufficiently acknowledge an existing debt to Katz by her, rather

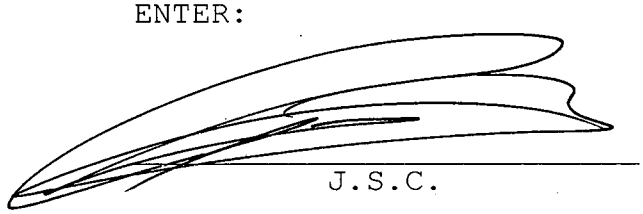
than by the firm, to satisfy GOL § 17-101 and toll the statute of limitations. However, here again, there are questions of fact as to the capacity in which Kupferman signed the letter and recognized the debt that preclude summary judgment as to the tolling of the statute of limitations. Moreover, as Katz argues, here, there is not merely a written acknowledgment of a continuing debt, but recognition of contemporaneous partial payment of the debt. The court notes that, although there is no discussion of the 2007 expenses in the May 15, 2008 letter, there is evidence of payments of shared expenses made by Kupferman during 2007 (*see* defendant's response to plaintiff's demand for bill of particulars, ¶ 8), that raise questions of fact regarding the 2007 expenses as well.

Accordingly, for the foregoing reasons, the court need not reach plaintiff's argument regarding the timeliness of defendant's motion for summary judgment, and it is hereby

ORDERED that defendant Stephanie Kupferman's motion for summary judgment is denied.

Dated: 6/14/16

ENTER:



J.S.C.