Ghaly v Farber
2017 NY Slip Op 30451(U)
February 28, 2017
Supreme Court, New York County
Docket Number: 154368/2014
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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MAGED GHALY,

Plaintiff,

-against-

LEONARD A. FARBER, and
TANYA TOHILL-FARBER

Defendants.

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Index No.154368/2014

Seq. No. 002

Decision and Order

Kelly O'Neill Levy, J.:

Defendants, Leonard Farber, M.D., and Tanya Tohill-Farber, seek an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint brought by Maged Ghaly, M.D. Plaintiff opposes the motion.

Plaintiff and defendant Leonard Farber are both physicians. However, they disagree as to several facts about their relationship. In his affirmation in opposition to the motion for summary judgment, Plaintiff states he met Dr. Farber in 2005 or 2006 while Dr. Farber, in his affirmation in support, states he became acquainted with Plaintiff in 2009. Plaintiff states that in 2008, Dr. Farber asked if he would be interested in investing in and working for a new radiation/oncology center Dr. Farber planned to open called The Farber Center. Dr. Farber states that it was Plaintiff who expressed to Dr. Farber a desire to join in the business venture of The Farber Center. Although Plaintiff and Dr. Farber agree that they discussed the possibility of Plaintiff investing $3 million in The Farber Center for a 25% ownership interest, Plaintiff contends that the amount was later changed to $1 million for a 10% interest.

Central to this case, Plaintiff argues that he attempted to finance an investment in The Farber Center in exchange for an ownership interest, but was ultimately unsuccessful. Plaintiff

argues that during the course of attempting to secure financing for his investment, he made five personal loans to Defendants in the amounts of $20,000, $35,000, $44,000, $66,000, and $5,000 between December 2008 and June 2009. In contrast, Dr. Farber argues that Plaintiff made four loans constituting business loans as part of his investment in The Farber Center in the amounts of $20,000, $35,000, $44,000, and $66,000.

The parties agree that per the instructions of Defendants, several of Plaintiff's payments were wired directly to Todd Van Natta, the mortgage broker for The Farber Center. Mr. Van Natta was subsequently convicted of several counts of fraud. In May 2014, Plaintiff filed this action seeking damages related to nonpayment of his loans to Dr. Farber. In September 2014, allegedly due to Mr. Van Natta's fraudulent schemes, the financing for The Farber Center failed and it filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Plaintiff had until October 9, 2014 to file a proof of claim as a creditor in the bankruptcy proceeding. In order to preserve his rights in the bankruptcy proceeding, Plaintiff filed same on October 8, 2014, arguing that there was some evidence that the loans were business loans. The Bankruptcy Court rejected Plaintiff's proof of claim, reasoning that "the claim does not constitute an obligation against, or a claim of, the debtor." Defendants now seek summary judgment dismissing the instant action on the grounds that the loans made by Plaintiff were business loans and Plaintiff is now seeking a second opportunity for the same relief.

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The court's function on a motion for summary judgment is issue-finding,

rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997).

Here, there are genuine issues of fact as to whether the loans made by Plaintiff to Defendants were personal loans or business loans. While a copy of the check for $20,000 dated April 24, 2009 includes in the memo section "For The Farber Center," and several of the sums were directly wired to Mr. Van Natta as The Farber Center's mortgage broker, several emails shared between Plaintiff and Defendants raise genuine issues of fact. *See Sakow v. 633 Seafood Rest., Inc.*, 186 A.D.2d 31, 32 (1st Dep't 1992) (summary judgment denied where issues of fact exist regarding "critical question of whether one-third of plaintiffs' substantial advancement was an investment or a loan").

With respect to the amounts loaned first-in-time–the $35,000 and $44,000 sums–defendant Tanya Tohill-Farber requested to borrow these amounts and also stated she would pay back Plaintiff in two weeks, on December 30, 2008. In an email dated September 29, 2009, Dr. Farber asked Plaintiff to send him paperwork "on all [his] wire transfers" so he "can wire back the funds" to him. Plaintiff's responded by email dated September 30, 2009, which provides the amounts of $20,000, $66,621, $35,000, and $44,000. An email from Dr. Farber dated March 12, 2010 states, "Will have your total monies back in 45 days solid. Tanya is emailing you[.] [T]odd turned ou[t] to be a scam so please do what her email ask[s.] [I]t will help us get the monies back but you will get your[s] regar[d]less." On December 1, 2010, Plaintiff emailed Dr. Farber referring to $170,000 of loans as "personal demand loan[s]." In emails dated April 2, 2011, Defendants state that "[f]or the money you lent us, we are still going to pay [] as soon as we can" and "we will pay you the money you lent us directly as soon as we have it."

These communications raise issues of fact with regard to the nature of the loans. *See Zucker v. Hirschl & Adler Galleries, Inc.*, 170 Misc.2d 426, 435 (N.Y. Sup. Ct. 1996) (material issue of fact exists regarding whether sums in question constitute a loan or an advance against commission). Furthermore, Plaintiff in his affidavit states that he understood himself to be making personal loans to Defendants because the sums loaned were much smaller than the amounts of $3 million and $1 million discussed as his potential investment in The Farber Center and because Defendants promised to pay him back, whereas if he were making business loans as investment he would be granted an ownership interest and not be paid back. *See Chomsky v. Olshin*, 2001 WL 1470328 (1st Dep't 2001) (holding that "[t]riable issues of fact exist as to whether the monies advanced by plaintiff . . . represented payment for stock in defendant's newly created corporation or constituted a loan to defendant under the terms of the parties' oral agreement").

For the reasons stated above, it is hereby

ORDERED that the motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: February 28, 2017 ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.