Carnuccio v upton
2004 NY Slip Op 30362(U)
July 14, 2004
Supreme Court, New York County
Docket Number: 121930-2002
Judge: Carol R. Edmead
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SCANNED ON 8/2/2004

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

VICTOR CARNUCCIO

- v -

RICHARD UPTON

INDEX NO. 121930/2002

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 16 were read on this motion to/for DISMISS

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-9
Answering Affidavits — Exhibits	10-15
Replying Affidavits	16

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff Carnuccio's motion to dismiss defendant Upton's Second Amended Fifth Counterclaim is granted to the extent that the Second Amended Fifth Counterclaim seeks recovery for (1) loans allegedly made by Upton to Carnuccio by check between the years 1985 and 1992; and (2) loans allegedly made by Upton to third-parties on Carnuccio's behalf to cover the costs of Carnuccio's "gym membership," "travel and vacation expenses," and "medical and other expenses;" and it is further

ORDERED that Carnuccio's motion to dismiss Upton's Seconded Amended Sixth Counterclaim is granted; and it is further

ORDERED that Carnuccio's motion to dismiss Upton's Eleventh Affirmative Defense is denied; and it is further

ORDERED that Carnuccio's motion to dismiss, or, in the alternative, have re-pled Upton's Seventh Counterclaim is denied; and it is further

FILED
AUG 02 2004
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/14/2004

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

ORDERED that counsel for plaintiff Carnuccio is directed to serve a copy of this Order and Decision along with Notice of Entry upon counsel for defendant Upton within 20 days from the date of entry.

This constitutes the Decision and Order of the Court.

Dated: July 14, 2004
Page 2 of 2

Hon. Carol Edmead, J.S.C.

FILED
AUG 02 2004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

Victor Carnuccio,

Index No. 121930-2002

Plaintiff,

DECISION/ORDER

-against-

Richard Upton,

Defendant.

---------- X

HON. CAROL EDMEAD, J.S.C.

In this action for partition and declaratory judgment concerning a Soho Loft which is located on the fifth floor of 547 Broadway (the "Fifth Floor Loft") and which comprises two separate spaces (the "Broadway side" and the "Mercer Street side"), plaintiff Victor Carnuccio ("Carnuccio") moves by way of an Order to Show Cause for an order (1) dismissing defendant Richard Upton's ("Upton") Second Amended Fifth Counterclaim for failing to satisfy the particularity requirement of CPLR §3013; (2) dismissing Upton's Second Amended Sixth Counterclaim as an unpermitted amendment of Upton's pleading; (3) dismissing Upton's Eleventh Affirmative Defense as mertiless; and (4) either dismissing Upton's Seventh Counterclaim or requiring that it be re-pled.

FILED
AUG 02 2004
COUNTY CLERK'S OFFICE

Upton's Second Amended Fifth Counterclaim

As originally pleaded in Upton's Verified Answer With Counterclaims, Upton's Fifth Counterclaim alleged:

> 52. In addition to the sums herein described, defendant advanced loans to plaintiff, by check and in cash, which plaintiff promised to repay upon demand.
>
> 53. Such loans, in an amount to be determined at trial, total at least $475,000.

54. Plaintiff never repaid any portion of such loans, which are now due and owing.

55. Accordingly, defendant is entitled to judgment against plaintiff in an amount to be determined of at least $470,000, with interest.

Thereafter, Upton amended his Fifth Counterclaim to allege:

1. Defendant advanced loans to plaintiff, by check and in cash, which plaintiff promised to repay upon demand.

2. Defendant's loans to plaintiff by check total approximately $230,000.

3. Defendant's cash loans to plaintiff total approximately $241,000.

4. Such loans, in an amount to be determined at trial, total at least $470,000.

5. Plaintiff never repaid any portion of such loans, which are now due and owing.

6. Accordingly, defendant is entitled to judgment against plaintiff in an amount to be determined of at least $470,000, with interest.

The Court then directed Upton, in an Order dated May 4, 2004, to re-plead his Amended Fifth Counterclaim to indicate "the time of [the] alleged transactions, the nature of the promises and whether the alleged promises [were] oral or written; and the dates of defendant's alleged payments to third parties on plaintiff's behalf. . . ." In response to that directive Upton submitted a Second Amended Counterclaims in which he alleged:

1. Defendant advanced loans to plaintiff, by check and in cash, which plaintiff orally promised to repay upon demand.

2. Defendant's loans to plaintiff by check total approximately $230,000 and were made during the years 1985 through 1998.

3. Defendant's cash loans to plaintiff total approximately $241,000 and were made during the years 1984 through 1996.

4. Such loans, in an amount to be determined at trial, total at least $470,000.

5. In addition, defendant advanced funds on plaintiff's behalf to various third parties, to

cover the costs of plaintiff's health insurance premiums, travel and vacation expenses, gym membership, medical, and other expenses, which plaintiff orally promised to repay on demand. These advances, repayable as loans, were made during the years 1983 through 2000 and total at least $220,000.

6. Plaintiff never repaid any portion of such loans, which are now due and owing.

7. Accordingly, defendant is entitled to judgment against plaintiff in an amount to be determined of at least $691,000, with interest.

In moving to dismiss Upton's Second Amended Fifth Counterclaim, Carnuccio, through the affirmation of his attorney, Neal Johnston, argues that he has persistently sought the particulars of the loans alleged in Upton's Second Amended Fifth Counterclaim on the theory that the claims for most, if not all of the money Upton seeks to recover through this counterclaim are barred by the relevant statute of limitations. According to Carnuccio, Upton intends to argue that the loans allegedly made by Upton to Carnuccio are demand obligations and that Carnuccio's duty to repay these demand obligations did not arise until Upton demanded repayment. Carnuccio contends, however, that pursuant to CPLR § 206, the statute of limitations on a debt due on demand begins to run when the right to make the demand for repayment is complete, which Carnuccio argues is when the loan was made. Carnuccio further contends that Upton's counterclaims relate back to October 4, 2002, the date Carnuccio commenced this action. Therefore, because the statute of limitations on debts such as the ones alleged in Upton's Second Amended Fifth Counterclaim is six years, Carnuccio argues that Upton may not be heard to seek repayment of loans made to Carnuccio prior to October 1996.

In opposition, Upton, through the affirmation of his attorney, Steven Rosen, argues that New York State has long been a "notice pleading" jurisdiction and that his Second Amended Counterclaims afford Carnuccio ample notice of the transactions alleged in Upton's Second

Amended Fifth Counterclaim. Moreover, Upton contends that Carnuccio has been given extensive detail regarding the transactions alleged in the Second Amended Fifth Counterclaim through the voluminous documentation Upton has provided Carnuccio in discovery, which Upton claims includes a series of spreadsheets (the "spreadsheets") and the underlying documents used to produce them. Upton further contends that there is no legal basis to support Carnuccio's argument that all of the details concerning the transactions alleged in Upton's Second Amended Fifth Counterclaim must be laboriously included in Upton's pleading. Furthermore, Upton argues that the loans alleged in his Second Amended Fifth Counterclaim fall within CPLR § 206 [a] [2], a statutory exception to CPLR § 206 and that a cause of action for repayment of demand loans such as these does not arise until the demand for repayment is made and refused. Therefore, Upton argues, the loans asserted in his Second Amended Fifth Counterclaim are not time-barred as a matter of law.

Through the Neal Johnston reply affirmation, Carnuccio argues in reply that although New York has long been a "notice pleading" jurisdiction, it has also long been a jurisdiction which, pursuant to CPLR § 3013, requires the material elements of a cause of action to be pleaded with particularity. Carnuccio also argues that the loans alleged in Upton's Second Amended Fifth Counterclaim do not fall within CPLR § 206 [a] [2], as this exception addresses escrowed funds, bailments and the indefinite loan of works of art. Moreover, Carnuccio argues that Upton's claim that a cause of action for repayment of demand loan does not arise until the demand for repayment is made and refused, while correct, has nothing to do with the statute of limitations governing such a loan, which Carnuccio reiterates runs from the date the loan was made, not the date repayment was demanded.

Upton's Second Amended Sixth Counterclaim

As originally stated in Upton's Verified Answer With Counterclaims, Upton's Sixth Counterclaim alleged:

> 56. In addition to the sums herein described, defendant advanced funds on plaintiff's behalf to various third parties, to cover the costs of plaintiff's health insurance premiums, travel and vacation expenses, gym membership, medical, and other expenses, which plaintiff promised to repay.
>
> 57. Defendant advanced such funds on plaintiff's behalf in an amount to be determined at trial of at least $220,000, no part of which has been repaid by plaintiff.
>
> 58. Accordingly, plaintiff is liable to defendant for repayment of such advanced funds, in an amount to be determined at trial of at least $220,000 with interest.

As with his Fifth Counterclaim though, Upton also amended his Sixth Counterclaim. As pleaded, Upton's Amended Sixth Counterclaim alleged:

> 7. In addition to the sums herein described, defendant advanced funds on plaintiff's behalf to various third parties, to cover the costs of plaintiff's health insurance premiums, travel and vacation expenses, gym membership, medical, and other expenses, which plaintiff promised to repay.
>
> 8. Defendant advanced funds on plaintiff's behalf to pay for the costs of plaintiff's health insurance in the amount of $28,000.
>
> 9. Defendant advanced funds on plaintiff's behalf to pay for the costs of plaintiff's travel, vacation, gym, and medical expenses in the amount of $50,000.
>
> 10. Defendant advanced funds on plaintiff's behalf to pay for the costs of plaintiff's student loans in the amount of $3,700.
>
> 11. Defendant advanced funds on plaintiff's behalf to pay for the costs of plaintiff's other personal expenses in the amount of $139,000.
>
> 12. Defendant advanced such funds on plaintiff's behalf in an amount to be determined at trial of at least $220,000, no part of which has been repaid by plaintiff.
>
> 13. Accordingly, plaintiff is liable to defendant for the repayment of such advanced funds, in an amount to be determined at trial of at least $220,000 with interest.

However, in addition to directing Upton to re-plead his Amended Fifth Counterclaim, the Court's Order dated May 4, 2004 also directed Upton to re-plead his Sixth Counterclaim to indicate "the time of [the] alleged transactions, the nature of the promises and whether the alleged promises [were] oral or written; and the dates of defendant's alleged payments to third parties on plaintiff's behalf . . . ." In accordance with that directive, Upton drafted a Second Amended Sixth Counterclaim in which he alleged:

> 8. In the alternative, in the event the payments made by defendant as alleged in the Fifth Counterclaim are deemed monies paid toward the joint expenses of the parties, rather than loans to the plaintiff, such payments would be "deemed to be a gift" pursuant to ¶4 of the Memorandum, and thus would be "deemed to be joint property of both parties" pursuant to ¶2 of the Memorandum, if the Memorandum is deemed enforceable.
>
> 9. In such event, defendant would be the owner of one half of any "gift" he may have made to plaintiff through monies defendant paid toward the joint expenses of the parties from the effective date of the agreement.
>
> 10. In such event, the value of defendant's interest in such gifted joint property recoverable from plaintiff is an amount to be determined at trial of at least $345,000.

The "memorandum" Upton refers to in his Second Amended Sixth Counterclaim is the parties' 1983 agreement which, on an earlier motion, the Court found to be valid and enforceable, and the pertinent portions of which read:

> 2. Gifts given jointly or from one party to another shall be deemed to be joint property of both parties.
>
> 4. All monies heretofore or in the future paid by either party toward the joint expenses of the parties and all services heretofore or in the future including legal work by Upton; and renovation, design and repair work by Carnuccio on the loft - performed or rendered by one party for the other or in connection with the parties [sic] ownership interest in the Corporation, their occupancy of the front portion of the loft and the rental occupancy of the 5th floor rear of such premises shall be deemed to be gift to the other and any ownership interest arising therefrom shall be deemed to be held as tenants in common with the rights of survivorship.

In moving to dismiss Upton's Second Amended Sixth Counterclaim, Carnuccio argues that Upton's original Sixth Counterclaim concerned monies allegedly paid by Upton on Carnuccio's behalf to various third parties. Now, Carnuccio argues, "this subject matter has been shoved up into the Fifth Counterclaim and a wholly new notion patted into place as a Sixth Counterclaim." Carnuccio contends that the time within which Upton could amend his pleadings as of right to assert an entirely new theory of liability has long since passed. Carnuccio also contends that Upton's "new" Sixth Counterclaim should be dismissed as "patent nonsense." According to Carnuccio, paragraphs two and four of the parties' 1983 agreement address the commonality of Carnuccio and Upton's interest in the Fifth Floor Loft, half of which they lived in together and half of which they used as rental income. Carnuccio claims that Upton, through his "new" Sixth Counterclaim, is now demanding repayment for the monies he allegedly spent for the couple's maintenance charges on their Fifth Floor Loft, for their vacations together, for Carnuccio's medical insurance and for other out-of-pocket expenses which Carnuccio argues are simply not contemplated by paragraphs two and four of the 1983 agreement.

In opposition, Upton argues that his Second Amended Sixth Counterclaim merely states a different legal theory for recovery of the sums sought in his Second Amended Fifth Counterclaim. Upton contends that this counterclaim is not "new," but that the theory of recovery underpinning his Second Amended Sixth Counterclaim is already contained in his Second Counterclaim, which Upton suggests seeks repayment of monies paid by him toward the joint costs of acquiring, improving and maintaining the parties' Fifth Floor Loft. Upton claims that his Second Amended Sixth Counterclaim merely extends the theory of his Second Counterclaim to outright gifts made to or on behalf of Carnuccio, such as gifts of cash, goods and

free travel, which Upton argues are joint property under the terms of the parties' 1983 agreement. Moreover, Upton claims that Carnuccio's argument that the Second Amended Sixth Counterclaim is untimely ignores the rule that leave to amend pleadings is freely granted.

In reply, Carnuccio contends that while Upton is correct in stating that leave to amend is freely granted, Upton ignores the fact that he never actually sought such leave from either Carnuccio or the Court. Carnuccio also argues that even if Upton had sought leave to amend his pleading, at this late date, Upton's "intrusion" would nevertheless have been impermissible.

Upton's Eleventh Affirmative Defense

As stated in Upton's Verified Answer With Counterclaims, Upton's Eleventh Affirmative Defense asserts:

> 33. In the alternative, to the extent there was ever an enforceable agreement between plaintiff and defendant, plaintiff breached that agreement, *inter alia*, by renting a portion of the Fifth Floor without defendant's consent in violation of ¶7.
>
> 34. In the alternative, to the extent there was ever an enforceable agreement between plaintiff and defendant, plaintiff breached that agreement, *inter alia*, by refusing to comply with the procedures set forth in ¶9.
>
> 35. To the extent there was ever an enforceable agreement between plaintiff and defendant, plaintiff's breaches of that agreement excused the duty of performance, if any, on the part of defendant.

Paragraph seven of the parties's 1983 agreement states "[n]either party may rent any portion of the space occupied by the parties without the consent of the other." Paragraph nine [b] of the agreement provides "the parties shall apply to 547 Broadway Realty Corporation to sever their joint interest in 547 Broadway Realty, Inc., one-half to one party and one-half to the other party; so that each party shall be entitled to the shares of stock for which a lease for either the front or rear of the fifth floor is appurtenant."

In moving to dismiss Upton's Eleventh Affirmative Defense, Carnuccio contends that the argument presented by Upton in his Eleventh Affirmative Defense is that because he and Carnuccio only lived on the Broadway side of the Fifth Floor Loft in 1983, Upton is now free to have a roommate on the Mercer Street (rental income) side of the Fifth Floor Loft, but Carnuccio cannot now share the Broadway side of the loft with a roommate without Upton's permission. According to Carnuccio though, the intended meaning of paragraph seven was that neither Carnuccio nor Upton would unilaterally enter into a sublease for the Mercer Street side of the Fifth Floor Loft and that all future rental arrangements would require the consent of both parties. Furthermore, Carnuccio contends that there is no legal authority to support Upton's proposition that a breach by Carnuccio of the "no roommate" provision of the 1983 agreement results in a surrender by Carnuccio of his ownership interest in the Fifth Floor Loft. Moreover, Carnuccio claims that if he did in fact breach the 1983 agreement by taking in a roommate, Upton's remedy was in equity, not law.

With respect to paragraph nine [b] of the parties' 1983 agreement, Carnuccio contends that Upton is ignoring the fact that paragraph nine [b] states that "the parties shall apply" and that nothing in paragraph nine [b] makes time of the essence. Carnuccio also claims that Upton is ignoring the fact that the underlying relief sought by Carnuccio in this action is to require Upton to cooperate with Carnuccio in doing exactly what is required by paragraph nine [b]. Finally, Carnuccio contends that Upton is ignoring the fact that nothing in the parties' 1983 agreement, in logic, or in the law requires that a breach of paragraph nine [b] invalidates entirely the parties' 1983 agreement.

In opposition, Upton argues that the papers in support of Carnuccio's motion do not

establish that Upton consented to Carnuccio's subletting of the portion of the Fifth Floor Loft occupied by the parties when the 1983 agreement was signed, nor that Upton consented to the financial terms of the sublet of his jointly-owned property, nor that Upton agreed that Carnuccio could keep all of the income derived from that sublet. Upton also contends that Carnuccio breached the 1983 agreement by renting out a portion of the Fifth Floor Loft in 1997, well before Upton terminated the 1983 agreement. Moreover, Upton claims that whether Carnuccio's rental of a portion of the Broadway side once occupied by the parties without Upton's consent, or his other alleged breaches of the 1983 agreement were so material as to excuse Upton's duty to perform is a question of fact that cannot be resolved before trial.

In reply, Carnuccio contends that Upton has offered no reason or argument why his Eleventh Affirmative Defense requires a trial. Carnuccio claims that he has proposed to the Court that as a matter of law, Carnuccio's purported breach of the parties' 1983 agreement by taking in a roommate renders inconsequential the core provision of the 1983 agreement that should the parties ever separate, each would take and own one of the two separated halves of the Fifth Floor Loft the parties had jointly acquired.

Upton's Seventh Counterclaim

As stated in his Verified Answer With Counterclaims, Upton's Seventh Counterclaim alleges:

> 59. On information and belief, plaintiff has been collecting rents on account of the leasing of space on the Fifth Floor since in or about 1997, without sharing any part of these rents with defendant.
>
> 60. On information and belief, the amount of such rents collected by plaintiff exceed $100,000.

61. As the sole owner of the cooperative interest in the fifth floor space, defendant is entitled to any rents and profits derived from plaintiff's leasing activities.

62. Alternatively, if the Memorandum is deemed enforceable, ¶7 prohibits any leasing of the space without defendant's consent, which was never sought or obtained.

63. Accordingly, defendant is entitled to recover from plaintiff rents in an amount to be determined at trial, on information and belief, of at least $100,000, with interest.

In moving to have Upton's Seventh Counterclaim either dismissed or repled to limit its claims to rent collected by Carnuccio prior to Upton's termination of the parties' 1983 agreement, Carnuccio contends that the obvious import of paragraph seven of the 1983 agreement, which is quoted *supra* at page 8, is to require agreement between the parties concerning any sublease of the Mercer Street side of the Fifth Floor Loft, the portion of the loft the parties utilized for the purpose of generating rental income. Therefore, according to Carnuccio, it is illogical to assume that the parties intended paragraph seven of the 1983 agreement to limit each other's living arrangements in the event their relationship failed.

Carnuccio further contends that even if his conduct of taking in roommates to help cover his living expenses after Upton moved out of the Fifth Floor Loft in the fall of 1996 violated the terms of paragraph seven, Upton is estopped from complaining about that conduct because Upton expressly approved of Carnuccio's finding a way to cope with the economic stress Carnuccio endured as a result of losing Upton's substantial financial support. Moreover, if his actions did constitute a breach of the 1983 agreement, Carnuccio argues, Upton's remedy is equitable, not legal. Furthermore, Carnuccio claims that because Upton terminated the parties' 1983 agreement in April of 1998, Upton cannot now use the agreement as a basis to seek damages for a breach that allegedly occurred after the agreement had been terminated.

In opposition, Upton argues that, as a matter of law, his seventh counterclaim cannot be dismissed because he and Carnuccio are joint owners of the Fifth Floor Loft and as such, Upton is entitled to share in the rents generated by the property. Upton also contends that his claim to a share of the rent income derived from the Fifth Floor Loft exists independently of the parties' 1983 agreement.

In reply, Carnuccio argues that the 1983 agreement contemplated that, in the event of a break-up between the parties, each man would take over one of the two separate Fifth Floor Loft apartments. However, because of Upton's refusal to acknowledge Carnuccio's ownership interest, the parties have been unable to complete the legal division of their joint ownership interest in the Fifth Floor Loft. To permit Upton to profit from this "greedy intransigent refusal," Carnuccio contends, would be both inequitable and unjust.

Analysis

As mandated by CPLR § 3013, "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3026, on the other hand, provides that "[p]leadings are to be liberally construed and that "[d]efects shall be ignored if a substantial right of a party is not prejudiced." Applying these standards to Upton's Second Amended Fifth Counterclaim, Upton's allegation that "[d]efendant's cash loans to plaintiff total approximately $241,000 and were made during the years 1984 through 1996," as amplified by the spreadsheets containing a category entitled "cash," is sufficiently particular to provide Carnuccio with adequate notice of the cash transactions Upton intends to prove at trial. The Court, however, invites Carnuccio to move to dismiss the

first-party cash loan allegations pleaded in Upton's Second Amended Fifth Counterclaim on statute of limitations grounds. However, because the spreadsheet category entitled "checks to V.C." lists payments allegedly made to Carnuccio only for the period 1993 through 1998, Upton's allegation that "[d]efendant's loans to plaintiff by check total approximately $230,000 and were made during the years 1985 through 1998" is modified to allege "[d]efendant's loans to plaintiff by check total approximately $230,000 and were made during the years 1993 through 1998." As with Upton's allegations regarding cash loans made to Carnuccio, the Court also invites Carnuccio to move to dismiss this branch of Upton's Second Amended Fifth Counterclaim on statute of limitations grounds.

As for the allegations in Upton's Second Amended Fifth Counterclaim regarding loans advanced by Upton to various third-parties on Carnuccio's behalf, one of those allegations, as pleaded and as amplified by the spreadsheets, satisfies the particularity requirement of CPLR § 3013, while the others do not. Specifically, Upton's allegation regarding the third-party loans he allegedly advanced to cover Carnuccio's health insurance premiums is sufficient in light of the fact that the spreadsheets provided to Carnuccio in discovery list payments made by Upton for a category entitled "V.C. Insrnce." Once again though, the Court invites Carnuccio to move to dismiss this portion of Upton's Second Amended Fifth Counterclaim on statute of limitations grounds.

On the other hand, Upton's allegations regarding payments made to cover Carnuccio's "travel and vacation expenses, gym membership, medical and other expenses . . ." are neither particular, nor amplified by Upton's spreadsheets, which do not contain categories entitled "gym membership," "travel and vacation expenses," or "medical and other expenses." Moreover, the

spreadsheet category entitled "V.C. Misc." is simply too vague to adequately amplify the third-party loans allegedly made by Upton to cover these expenses. Accordingly, Upton's Second Amended Fifth Counterclaim is dismissed to the extent that it seeks recovery for (1) loans made to Carnuccio by Upton by check prior to 1993; and (2) loans made by Upton to third-parties on behalf of Carnuccio to cover Carnuccio's "gym membership," "travel and vacation expenses," and "medical and other expenses."

Upton's Second Amended Sixth Counterclaim also warrants dismissal, though not because its allegations lack particularity, but because it is an entirely new counterclaim interposed by Upton in violation of CPLR § 3025. As Upton correctly points out, CPLR § 3025 [b] provides that leave to amend or supplement a pleading "shall be freely given." What Upton fails to point out, however, is that CPLR § 3025 [b] also provides that "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time *by leave of court or by stipulation of all parties*." [emphasis added]. While it is clear that Carnuccio did not stipulate to Upton amending his pleading to allege a new Sixth Counterclaim, it is equally as clear that the Court's May 4, 2004 Order requiring Upton to re-plead his Amended Sixth Counterclaim to allege "the time of [the] alleged transactions, the nature of the promises and whether the alleged promises are oral or written; and the dates of defendant's alleged payments to third parties on plaintiff's behalf" did not grant Upton leave to assert an entirely new Sixth Counterclaim. Moreover, the fact that Upton's Second Amended Sixth Counterclaim is predicated on the same theory of recovery as his Second Counterclaim[1],

[1] In an Order and Decision dated February 9, 2004, the Court granted Carnuccio's motion to dismiss Upton's Second Counterclaim, but only to extent that the Counterclaim sought use and

though reducing the degree of prejudice to Carnuccio, indicates that had he chosen to, Upton could have asserted the theory of recovery alleged in his Second Amended Sixth Counterclaim in either his Verified Answer With Counterclaims or his Amended Counterclaims. He chose not to. Therefore, in light of the fact that Upton amended his pleading to assert a new counterclaim without Carnuccio's consent and without leave of this Court, in violation of CPLR § 3025 [b], Upton's Sixth Amended Sixth Counterclaim is dismissed in its entirety.

In contrast, both Upton's Eleventh Affirmative Defense, which alleges that Upton's duty of performance, if any, under the parties' 1983 agreement, was excused by Carnuccio's alleged breaches of the agreement, as well as Upton's Seventh Counterclaim, which asserts that Upton, pursuant to the 1983 agreement, is entitled to recover from Carnuccio any rents collected by Carnuccio from the Fifth Floor Loft since in or about 1997, are immune from dismissal at this juncture because each involves a question of contract interpretation. The fundamental, neutral precept of contract interpretation is that agreements are to be construed in accordance with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, 477 NE2d 1099, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). Because the vast majority of disclosure in this matter had, to date, been limited to ascertaining whether or not the parties' 1983 agreement was actually valid and enforceable, any attempt by the Court at this juncture to determine Carnuccio and Upton's intent regarding the 1983 agreement would be premature. As such, Carnuccio's application to dismiss Upton's Eleventh Affirmative Defense and to have Upton's Seventh Counterclaim dismissed or, in the alternative, re-pled is denied.

Footnote 1 (cont'd) occupancy from Carnuccio since July 1998.

Accordingly, it is hereby

ORDERED that plaintiff Carnuccio's motion to dismiss defendant Upton's Second Amended Fifth Counterclaim is granted to the extent that the Second Amended Fifth Counterclaim seeks recovery for (1) loans allegedly made by Upton to Carnuccio by check between the years 1985 and 1992; and (2) loans allegedly made by Upton to third-parties on Carnuccio's behalf to cover the costs of Carnuccio's "gym membership," "travel and vacation expenses," and "medical and other expenses;" and it is further

ORDERED that Carnuccio's motion to dismiss Upton's Seconded Amended Sixth Counterclaim is granted; and it is further

ORDERED that Carnuccio's motion to dismiss Upton's Eleventh Affirmative Defense is denied; and it is further

ORDERED that Carnuccio's motion to dismiss, or, in the alternative, have re-pled Upton's Seventh Counterclaim is denied; and it is further

ORDERED that counsel for plaintiff Carnuccio is directed to serve a copy of this Order and Decision along with Notice of Entry upon counsel for defendant Upton within 20 days from the date of entry.

This constitutes the Decision and Order of the Court.

FILED
AUG 02 2004

Dated: July 14, 2004

Hon. Carol Edmead, J.S.C.