

Samet v Binson

2013 NY Slip Op 33809(U)

June 25, 2013

Supreme Court, Kings County

Docket Number: 15032/1998

Judge: Bert A. Bunyan

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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of June, 2013.

PRESENT:

HON. BERT A. BUNYAN,
Justice.

-----X
MICHAEL SAMET, as Executor of the estate of Andrew Samet, Deceased,

Plaintiff,

- against -

Index No. 15032/1998

ISAAC I. BINSON,

Defendants,

-----X

The following papers number 1 to 9 read herein:

	<u>Papers Numbered</u>	2013 JUN 27 AM 8:22
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-5	
Opposing Affidavits (Affirmations) _____	6, 7	
Reply Affidavits (Affirmations) _____	8, 9	
_____ Affidavits (Affirmations) _____		
Other Papers _____		

Upon the foregoing papers, plaintiff Michael Samet, as executor of the estate of Andrew Samet, deceased, moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing each of the alleged counterclaims.¹ Defendant Isaac J.

¹ Plaintiff also claims that "no genuine material issue of fact remains to be tried, and plaintiff is entitled to summary judgment as a matter of law" However, this court notes that since plaintiff has previously moved for summary judgment on the issue of liability (*Samet v Binson*, 79 AD3d 1005 [2010]), the rule against successive motions for summary judgment therefore bars plaintiff from presently seeking summary judgment on the issue of liability (*see e.g. Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Sons*, 91 AD3d 693 [2012]). Accordingly, this court considers plaintiff's motion only insofar as it seeks summary judgment dismissing defendant's counterclaims.

Binson moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the amended verified complaint.

Procedural History

Plaintiff's decedent (and father) commenced the instant action on May 4, 1998. The original verified complaint asserted a cause of action against defendant sounding in money had and received; in essence, alleging an outstanding debt balance. Defendant did not timely interpose an answer, and, consequently, on November 13, 1998, this court entered a default judgment in plaintiff's favor. There was no activity in this action until 2006, when defendant moved, by order to show cause, for an order vacating the default judgment. Extensive motion and appellate practice ensued.

Testimony and evidence adduced at a traverse hearing, held on March 15, 2007, convinced a Judicial Hearing Officer (JHO) of this court that service of process was defective. Shortly thereafter, plaintiff moved to reject the JHO's recommendation; defendant cross-moved for an order: (1) confirming the recommendation; (2) finding that this court lacked personal jurisdiction over him; and, consequently (3) vacating the default judgment. By order dated September 17, 2007, this court: (1) denied plaintiff's motion; and (2) granted defendant's motion only to the extent that the complaint was dismissed, but with leave for plaintiff to properly serve an amended pleading on defendant within 120 days.²

² Both parties appealed from this order, which was affirmed by the Appellate Division (*Samet v Binson*, 67 AD3d 988 [2009]). Plaintiff subsequently moved for leave to reargue his motion; by order dated September 19, 2008, this court denied leave to reargue. Thereafter, plaintiff lost an appeal from the order denying reargument (*Samet v Binson*, 67 AD3d 989 [2009]).

Subsequently, plaintiff's decedent timely served and filed an amended verified complaint.³ In response, and on or about November 30, 2007, defendant interposed a verified answer with counterclaims.⁴

Plaintiff's father subsequently died and the action was consequently stayed. On July 18, 2008, plaintiff was appointed the executor of his father's estate, and, by stipulation so-ordered by this court on August 6, 2008, the caption was amended to reflect the substitution of plaintiff.

In early 2009, plaintiff moved for summary judgment and defendant cross-moved for dismissal. By order dated January 20, 2010, this court denied both motions and ordered that the parties proceed with discovery.⁵ Discovery ensued, and on August 29, 2012, plaintiff filed a note of issue and certificate of readiness, indicating that the instant action is ready for trial. Thereafter, each party moved for summary judgment.

Arguments Made By Plaintiff In Support Of His Motion

In support of his motion for summary judgment dismissing the counterclaims, plaintiff characterizes the counterclaims as spurious. Specifically, plaintiff contends that the alleged

³ The amended verified complaint asserts, in essence, the same claim in the original complaint, but adds the allegation that on or about January 1, 2000, defendant voluntarily signed an alleged "Promissory Note" in favor of decedent for the principal amount of defendant's indebtedness to decedent. New causes of action assert, among others, a breach of contract and an account stated.

⁴ The counterclaims allege, in sum, that decedent was defendant's business partner in the RDC Jewelry Company (RDC), and that from 1993 to 1996, decedent wrongfully took possession of RDC cash, as well as various items of jewelry and precious metals. Plaintiff, in his reply to the counterclaims, asserts that the subject items were "grossly inadequate security, for the monies lent to defendant".

⁵ Plaintiff appealed from the order denying summary judgment and lost (*see* n 1, *supra*).

facts underlying the counterclaims are false, and made in an attempt to "try to offset plaintiff's legitimate claims for monies lent and not repaid, account stated, and so forth." Plaintiff suggests that it is incredible that defendant has owed decedent (and plaintiff, as successor-in-interest) the principal sum of \$900,000.00 since 1996, but that defendant waited until 2007 to seek redress in court for the alleged wrongful behavior of decedent. Plaintiff further claims that, contrary to defendant's suggestion, it is "totally absurd" that his father had access to RDC's office, cash or inventory of jewelry and precious metals.

Also, plaintiff submits a copy of a handwritten document, allegedly signed by defendant, which states that defendant waived his right to the subject collateral if defendant did not repay the debt to plaintiff's father within three weeks of July 23, 1997. Plaintiff alleges that defendant repaid no part of the loan in the specified time, and, therefore, the subject collateral became the property of plaintiff's father. Plaintiff asserts that he later rightfully sold the goods for a "salvage value" representing much less than the debt balance.

Plaintiff claims that this handwritten document establishes that defendant's counterclaims should be dismissed. More specifically, plaintiff suggests that defendant would not have agreed to provide collateral to plaintiff's father if defendant believed that plaintiff's father was helping himself to RDC cash and inventory without permission. Further, plaintiff notes that the subject note (which is, according to plaintiff, an I.O.U.) makes no reference to collateral or any of the facts alleged by defendant in support of the counterclaims.

Additionally, plaintiff asserts that the counterclaims are time-barred. Specifically, plaintiff notes that, as alleged in the counterclaims, his father's wrongful acts occurred no later than 1996. Plaintiff reasons that since defendant did not assert his counterclaims until November of 2007, the counterclaims are time-barred by the applicable limitations period.⁶ For these reasons, plaintiff concludes that he is entitled to an order granting him summary judgment dismissing the subject counterclaims, and that, therefore, this court should grant his motion.

Arguments Made By Defendant In Support Of His Motion

In support of his motion for summary judgment dismissing the amended complaint, defendant first argues that the subject note is unenforceable as a matter of law. Defendant asserts that the subject note does not contain any waivers of defenses, and asserts that lack of consideration is a viable defense to performance. Specifically, defendant points out that the note does not describe any consideration, nor does the note state that it was executed "for value received." Indeed, claims defendant, plaintiff's purported consideration is an alleged outstanding debt, incurred by defendant "[d]uring the late 80's and 90's" to plaintiff's father at the time the note was executed. Defendant asserts that this alleged debt does not constitute consideration for the note, executed in 2000; specifically, defendant argues that "past consideration is no consideration." Thus, reasons defendant, the alleged note is unenforceable under the common law of contracts for lack of consideration. Moreover,

⁶ Plaintiff raised the affirmative defense of an expired limitations period in his reply to defendant's counterclaims.

defendant argues that since the note does not contain any reference to the former debt, there is no applicable provision of the General Obligations Law that renders the note enforceable. Defendant claims that, therefore, as a matter of law, the note is unenforceable. Reasoning that plaintiff's claim all stem from the unenforceable note, defendant concludes that he is entitled to summary judgment dismissing the amended complaint.

Alternatively, defendant asserts that he is entitled to summary judgment dismissing the complaint because of spoliation of evidence. Defendant states that it is undisputed that plaintiff's father took possession of jewelry when RDC ceased business in the 1990s. Defendant claims that this was done wrongfully, despite plaintiff's assertion that the jewelry taken was collateral that secured the subject debt. Defendant argues that, under either point of view, the value of the subject jewelry is a "central issue" in this matter.

Defendant notes that plaintiff's deposition testimony indicates that plaintiff has recently disposed of the subject jewelry. Defendant suggests that the items were possibly worth more than the alleged indebtedness, and by selling the items, plaintiff has discarded key evidence that would support defendant's affirmative defenses and counterclaims. Defendant acknowledges that, in some instances, a negative inference charge is an appropriate sanction for spoliation of evidence. However, contends defendant, in this case, since plaintiff's assertion that the items were collateral for the loan is disputed, and since the plaintiff disposed of the items without any independent inventory or appraisal, defendant concludes that he can no longer prove his affirmative defenses and counterclaims. Thus, reasons defendant, summary judgment dismissing the complaint is the appropriate remedy

for plaintiff's act of spoliation. Accordingly, defendant asserts that his motion should be granted and plaintiff's amended verified complaint should therefore be dismissed.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

The court denies both motions. Since it appears that defendant has not been deposed, summary judgment should not be granted; each motion could properly be denied on this independent ground (CPLR 3212 [f]; see also *Harvey v Nealis*, 61 AD3d 935 [2009]; *Sportiello v City of New York*, 6 AD3d 421 [2004]; *Destin v New York City Tr. Auth.*, 303 AD2d 713 [2003]; *Rajan v Inslar*, 300 AD2d 463 [2002]).

Additionally, plaintiff's motion for summary judgment dismissing defendant's counterclaims as time-barred should also be denied on its merits. Resolving, as it must, all

inferences in favor of defendant opposing plaintiff's motion (*see e.g. Dorival v DePass*, 74 AD3d 729, 730 [2010], citing *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2009]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]), this court cannot summarily accept plaintiff's argument that the facts alleged in the subject counterclaims are "spurious" or false. Accordingly, for the purposes of plaintiff's motion, this court must accept that defendant and plaintiff's decedent were equal partners in RDC from 1993 to 1996, and may not summarily rule on whether plaintiff's decedent wrongfully seized RDC items and cash.⁷ Moreover, and again resolving all inferences in favor of defendant in opposition to plaintiff's motion, the alleged debt and whether the items retained by decedent were intended as collateral securing the debt relate to defendant's counterclaims.

"[C]laims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the statute of limitations even though an independent action by the defendant might have been time-barred at the time when the action was commenced. Counterclaims that would otherwise be barred by the statute of limitations are not barred so long as they arise from the same transaction or occurrences as the primary claim" (75A NY Jur 2d, Limitations and Laches § 308, citing *Juliano v Juliano*, 30 AD3d 737 [2006]);

⁷ Unsurprisingly, plaintiff disputes the defendant's allegation that the debt relates to a business relationship between defendant and plaintiff's father. Specifically, plaintiff avers that neither he nor his father "had access to RDC's safe, nor did we even have keys to RDC's office, not that we would go there anyway. Anyway, my father was the one lending the money. Defendant was the one taking the money!" This court, however, cannot summarily credit as truthful plaintiff's statements that contradict the statements made in defendant's counterclaims, since "the credibility of persons possessed of exclusive knowledge of the facts should not be determined by affidavits" (*Kripp v Aetna Life & Cas. Co.*, 103 AD2d 252, 262 [1984]).

LaFiosca v LaFiosca, 31 Misc 3d 973 [2011]; *Messinger v Mount Sinai Medical Center*, 279 AD2d 344 [2001]). Therefore, since the instant action to recover the money lent was timely commenced, defendant's related counterclaims are timely interposed.

Moreover, even if the counterclaims would have been time-barred if brought as an independent action, "[u]nder CPLR 203 (d), claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced . . . [t]he provisions of CPLR 203 (d) allow a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief" (*Carlson v Zimmerman*, 63 AD3d 772, 774 [2009] [internal quotations omitted], quoting *Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001] and *DeMille v DeMille*, 5 AD3d 428, 429 [2004]; see also *Delta Funding Corp. v Murdaugh*, 6 AD3d 571, 571-572 [2004]; *Rothschild v Industrial Test Equip. Co.*, 203 AD2d 271, 272 [1994]). For these reasons, this court denies plaintiff's motion for summary judgment dismissing defendant's counterclaims as time-barred.

The court also denies the motion of defendant. As stated above, defendant has not appeared for an examination before trial; defendant's motion for summary judgment should be denied on this basis alone (*Yerushalmi & Assoc., LLP v Westland Overseas Corp.*, 21 AD3d 1098, 1099 [2005] [defendant motion for summary judgment denied as premature because it "many of the essential issues of fact in this case are within the knowledge of

individuals who had not yet been deposed”], citing *Plaza Invs. v Kim*, 208 AD2d 704 [1994]; *Lewis v Agency Rent-A-Car*, 168 AD2d 435 [1990]).

Furthermore, this court rejects defendant's contention that the alleged note is unenforceable as a matter of law. To be sure, and as the Appellate Division has already observed, defendant may ultimately convince a trier of fact that his affirmative defense of lack of consideration discharges his obligation under the alleged note (*Samet v Binson*, 79 AD3d 1005, 1005 [2010] [“the defendant raised a triable issue of fact with respect to the bona fide defense of lack of consideration for the note”]). Also, defendant correctly notes that the alleged note “does not state that defendant received funds from plaintiff or that the note was executed for value received” (*Mastro v Carroll*, 296 AD2d 802, 802 [2002]). However, the fact that lack of consideration is a viable defense does not render the alleged note unenforceable; instead, “consideration of parol evidence in such a case is proper” (*Mastro*, 296 AD2d at 803, citing *DeVito v Benjamin*, 243 AD2d 600 [1997]; *Adirondack Bank v Simmons*, 210 AD2d 651 [1994]; 58 NY Jur 2d, Evidence and Witnesses § 576; cf. *Schmitz v MacDonald*, 250 AD2d 533 [1998], *lv denied* 92 NY2d 809 [1998]). Since the subject note, like the note in *Mastro*, is “not unambiguous on its face” (*Mastro*, 296 AD2d at 802), the resolution of any ambiguity is for the trier of fact (*Pellot v Pellot*, 305 AD2d 478, 497 [2003], citing *State of New York v Home Indem. Co.*, 66 NY2d 669 [1985]; see also *Fopoco, Inc. v General Coatings Technologies*, 107 AD2d 609, 610 [1985] [“If proven at trial, lack of consideration is a perfectly viable defense”]; cf. *Shmiel v Williams*, 136 Misc 464, 466 [1930] [court found L.O.U. instrument “constitutes an admission of every element

which is necessary to create a valid debt, including a consideration”)].⁸ For these reasons, this court rejects defendant’s assertion that the alleged note is unenforceable as a matter of law.

Lastly, this court rejects defendant’s assertion that plaintiff disposed of key evidence. Viewing the record in the light most favorable to plaintiff, the opponent of defendant’s motion for summary judgment (*Schaffe v SimmsParris*, 82 AD3d 867 [2011], citing *Rizk v Cohen*, 73 NY2d 98 [1989]; *Jablonski v Rapalje*, 14 AD3d 484 [2005]), the items retained by Andrew Samet was collateral, kept to secure defendant’s debt. Defendant disputes that Andrew Samet took possession of the items to serve as collateral for defendant’s debt, but such an assertion contradicting plaintiff’s statements presents an issue of credibility, which this court may not resolve on summary judgment (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004] [“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment”], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). Therefore, and again providing plaintiff opposing defendant’s motion the benefit of favorable inferences, plaintiff’s father and defendant entered into a secured transaction;

⁸ Defendant cites *Gutman v Gutman* (31 AD3d 709 [2006]) for the proposition that his alleged past indebtedness to plaintiff’s father is insufficient consideration for the note. However, this court notes that the plaintiffs in *Gutman* were not allowed equitable relief because they sought the same with unclean hands (*id.* at 710). In this action, there is no indication that plaintiff may not seek recovery on his first cause of action, sounding in monies had and received, if the alleged note is found to be unenforceable.

the subject items were held by plaintiff's father as security for the sums lent to defendant, and plaintiff, as successor-in-interest, had the right to dispose of the items in any commercially reasonable manner (*see e.g. LI Equity Network, LLC v Village in the Woods Owners Corp.*, 79 AD3d 26, 30 [2010]). Defendant's protestations (contained in affirmations) to the contrary simply raise issues of fact, and his motion for summary judgment may properly be denied on this additional ground.

Lastly, defendant has not demonstrated that he is entitled to summary judgment against plaintiff as a sanction for spoliation of evidence. "The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" (*Lentz v Nic's Gym, Inc.*, 90 AD3d 618, 618 [2011]; *see also Iannucci v Rose*, 8 AD3d 437, 438 [2004]). Here, this court exercises its broad discretion and declines to impose any sanction. First, sanctions for spoliation are inappropriate where there is no prejudice to the other party (44A NY Jur 2d, Disclosure § 427). Defendant claims that he is prejudiced by plaintiff's disposition of the items, but this court rejects defendant's contention. Defendant (who attached an inventory of the items to his papers as an exhibit) knows what the items are and can testify (and/or call appraisers to testify) about their value; thus, defendant has "other information" about the items, and retains the ability to defend against plaintiff's complaint and assert counterclaims (*id.*). Accordingly, defendant is not "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 [1997] [internal quotation omitted]). Defendant's motion is denied on this alternative ground.

Conclusion

For the foregoing reasons, this court denies both the motion of plaintiff Michael Samet and the motion of defendant Isaac I. Binson.

The foregoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'Bert A. Bunyan', enclosed within a large, hand-drawn oval. Below the signature, the initials 'J. S. C.' are printed.

**HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT**

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