

<b>Pearlman v Faulisi</b>
2013 NY Slip Op 31963(U)
August 7, 2013
Supreme Court, Suffolk County
Docket Number: 15123-2011
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY



Present:

HON. EMILY PINES  
J. S. C.

Motion Date: 04-09-2013; 05-14-2013  
Submit Date: 05-14-2013  
Motion No.: 002 MD  
003 MD

\_\_\_\_\_ X

LEE R. PEARLMAN,

Plaintiff,

- against -

PETER FAULISI, PROTOSTORM, LLC., and  
LEAN FOR LIFE, LLC.,

Defendant.  
X

Attorney for Plaintiff  
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*Relevant Factual and Procedural Background*

The only causes of action remaining between the parties are the First and Second causes of action set forth in the Amended Verified Complaint dated August 23, 2011, the remaining causes of action having been dismissed pursuant to a stipulation between the parties dated January 22, 2013.

In the Amended Verified Complaint, the plaintiff, Lee R. Pearlman ("Plaintiff") alleges, among other things, that on or about July 13, 2007, he tendered \$125,000 to defendant Peter Faulisi ("Faulisi") in accordance with an agreement with Faulisi pursuant to which Plaintiff "purchased the rights to one half of any and all proceeds payable or attributable to Faulisi, whether directly from Faulisi's claims in [a legal

malpractice action pending in Federal court] or from his share of any monies paid to Protostorm, in an anticipated legal malpractice lawsuit to be brought by Protostorm and Faulisi against various attorneys.” Plaintiff alleges that he and Faulisi entered into a written contract regarding the Protostorm case and that Faulisi maintained sole custody of the written contract. Plaintiff claims that after they entered into the contract, Faulisi failed to respond to Plaintiff’s repeated requests for a copy of the contract and documents regarding the Protostorm case. In the First cause of action, Plaintiff seeks a declaratory judgment and accounting from the defendants declaring that Plaintiff is entitled to 50% of Faulisi’s proceeds from the Protostorm case. In the Second cause of action, Plaintiff seeks equitable relief (injunction, attachment, receivership) to safeguard Faulisi’s proceeds from the Protostorm case given what Plaintiff calls Faulisi’s extensive pattern of fraud, deceit and unsavory business practices. A copy of the alleged written contract is not annexed to the Amended Verified Complaint. Neither party produced the original or a copy of the written contract during discovery.

Defendants now move (Mot. Seq. 002) for summary judgment dismissing the First and Second causes of action. In an affidavit in support of Defendants’ motion, Faulisi states, among other things, that the \$125,000 check given to him by Pearlman on July 13, 2007, was a personal loan, and that there was no arrangement of any kind, or even any discussion, that the \$125,000 was in exchange for a 50% interest in the Protostorm case. Defendants argue, among other things, that Plaintiff cannot meet his burden of demonstrating the existence of an enforceable contract between the parties because there is no writing signed by the parties containing the terms of such an agreement. Defendants contend that the \$125,000 was nothing more than a loan between Pearlman and Faulisi, to be repaid when Faulisi or Lean for Life Products, LLC, a start-up company of which Faulisi is Chief Operating Officer, had sufficient funds.

Plaintiff opposes Defendants’ motion for summary judgment and cross-moves (Mot. Seq. 003) for spoliation sanctions in the form of a negative inference against Defendants for their failure to produce the written agreement. In an affidavit, Plaintiff states, among other things, that there was a written agreement between the parties, a draft

of which was initially prepared by Faulisi and then edited by Plaintiff after they had come to an oral agreement as to its terms. Plaintiff states that both parties signed the agreement on July 13, 2007. Faulisi maintained exclusive possession, custody and control of the original agreement. Plaintiff states that he may have had a copy of the agreement but he moved his residence twice since July 13, 2007, and either discarded and/or lost numerous documents. Plaintiff searched his possessions but has not been able to locate either the original or a copy of the agreement. Plaintiff contends that Faulisi's deposition testimony that the terms of the transaction were not discussed between them on July 13, 2007, when Plaintiff tendered the check, is incredible. Plaintiff specifically denies that the check was for a loan or that it was tendered for any purpose other than his purchase of rights from Faulisi. Plaintiff asks this Court to consider his affidavit as secondary evidence of the terms of the written agreement, and he sets forth details of the execution of the agreement on July 13, 2007, as well as several terms and provisions he claims were in the written agreement. Plaintiff argues that Defendants' motion should be denied because the conflicting evidence demonstrates the existence of numerous questions of fact.

#### *Discussion*

“On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v Nassau County*, 111 AD2d 212 [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649 [2d Dept 1984]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). Although Plaintiff will have the burden of proof on his claims at trial, as the parties seeking summary judgment, the Defendants bear the burden of establishing, by proof in admissible form, their prima facie entitlement to judgment as a matter of law (*see* CPLR 3212[b]; *Zuckerman v City*

of *New York*, 49 NY 2d 557 [1980]; *Shafi v Motta*, 73 AD3d 729 [2d Dept 2010]).

Here, the Defendants allege that a written agreement forming the basis of the First and Second causes of action asserted by the Plaintiff never existed and contend that summary judgment must be granted because Plaintiff cannot produce the agreement and, therefore, cannot prove the existence of an enforceable contract. However, the Defendants cannot satisfy their initial burden by merely pointing to gaps in Plaintiff's case (see *Johnson v Culinary Institute of America*, 95 AD3d 1077, 1078 [2d Dept 2012]). Moreover, the Defendants have failed to establish, as a matter of law, that secondary evidence of the contents of the agreement would be inadmissible at trial under the best evidence rule (see *Schozer v William Penn Life Ins. Co. of New York*, 84 NY2d 639, 644 [1994]; *Matter of Eshaghian*; 100 AD3d 751, 752 [2d Dept 2012]).

“The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven (see *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644 [1994]). Under an exception to the rule, ‘secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith’ (*id.* [citations omitted]; see *Lipschitz v Stein*, 10 AD3d 634, 637 [2004]). ‘Once a sufficient foundation for admission is presented, the secondary evidence is “subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact”’ (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d at 646, quoting *United States v Gerhart*, 538 F2d 807, 809 [1976])”

(*Kliamovich v Kliamovich*, 85 AD3d 867, 869 [2d Dept 2011]).

Therefore, the Defendants failed to establish their prima facie entitlement to summary judgment and the Court need not consider the sufficiency of the opposing papers (see *Matter of Eshaghian*; *supra*). In any event, the evidence submitted by

Plaintiff in opposition to the motion for summary judgment demonstrates the existence of multiple highly contested issues of fact, including whether the parties entered into the written agreement as alleged by Plaintiff. Accordingly, the Defendants' motion for summary judgment is denied.

Additionally, the Plaintiff's cross-motion for spoliation sanctions in the form of a negative inference against Defendants for their failure to produce the written agreement is denied. Plaintiff has failed to make a prima facie showing that the document in question actually exists, that it is under the Defendants' control, and that there is no reasonable explanation for failing to produce it (*see Jean-Pierre v Touro College*, 40 AD3d 819, 820 [2d Dept 2007]). Accordingly, it is

**ORDERED** that the motion and cross-motion are denied in their entirety.

**Dated:** August 7, 2013  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.

Final  
 Non Final