

**Zelik v Rubashkin**

2019 NY Slip Op 33760(U)

December 11, 2019

Supreme Court, Kings County

Docket Number: 501618/17

Judge: David B. Vaughan

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11<sup>th</sup> day of December, 2019.

P R E S E N T:

HON. DAVID B. VAUGHAN,  
Justice.

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JOSEPH ZELIK,  
Plaintiff,

- against -

YITZCHOK DOVID RUBASHKIN, ET AL,  
Defendants.

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**DECISION AND ORDER**

Index No. 501618/17

Mot. Seq. No. 4-5

The following e-filed papers read herein:

NYSCEF No.:

Order to Show Cause/Notice of Cross Motion, Supporting Affirmations (Affidavits), and Exhibits Annexed _____	<u>145-170, 181-185</u>
Reply Affirmation in Further Support and Exhibits Annexed _____	<u>188-191</u>
Opposition to Defendant's Cross Motion and Exhibits Annexed _____	<u>192-197</u>
Attorney's Affirmations and Exhibits Annexed _____	<u>198-199, 200-201</u>

In this action on, among other things, a promissory note in the principal amount of \$250,000 and the related mortgage, both dated July 13, 2013 (the second note and mortgage, respectively), plaintiff Joseph Zelik (plaintiff) moves by order to show cause, dated Sept. 5, 2019, for an order (1) pursuant to CPLR 3101 (d) (1) (i), striking the handwriting expert's report submitted by defendant Yitzchok Dovid Rubashkin (defendant) questioning the authenticity of his signatures on the second note and mortgage; or, alternatively, (2) pursuant to CPLR 3101 (d) (1) (i) and 2004, granting plaintiff additional time to investigate, serve written discovery demands, and conduct depositions concerning defendant's claim that the signatures on the second note and mortgage are not his, and, in addition, extending the deadline to serve and file a note of issue until Sept. 5, 2020 (Seq. No. 4). Defendant cross-moves for leave, pursuant to CPLR 3025 (b), to amend his answer to delete his prior

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admission therein that he signed the second note and mortgage, and to assert forgery as an affirmative defense (Seq. No. 5).

### *Discussion*

#### *Plaintiff's Motion*

“CPLR 3101 (d) (1) (i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party” (*Cutsogeorge v Hertz Corp.*, 264 AD2d 752, 753-754 [2d Dept 1999] [internal quotation marks omitted]).

In this pre-Note of Issue case, the record does not support a conclusion that defendant's delay in retaining his expert or in serving his expert report was intentional or willful (*see Burbige v Siben & Ferber*, 115 AD3d 632, 633 [2d Dept 2014]). Further, any potential prejudice to plaintiff can be ameliorated by granting the alternative relief he has requested (*see Elgart v Berezovsky*, 123 AD3d 970, 972 [2d Dept 2014]). Accordingly, the initial branch of plaintiff's motion is denied, whereas the alternative branch of his motion is granted as set forth more fully in the decretal paragraphs below.

#### *Defendant's Cross Motion*

“Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit” (*Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]). “The sufficiency or underlying merit

of the proposed amendment is to be examined no further” (*id.* at 732). “[A] motion for leave to amend is committed to the broad discretion of the trial court” (*Ravnikar v Skyline Credit-Ride, Inc.*, 79 AD3d 1118, 1119 [2d Dept 2010]).

CPLR 4538 provides, in relevant part, that:

“Certification of the acknowledgment or proof of a writing . . . in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so.”

Although a certificate of acknowledgment is prima facie proof of the authenticity of a signature (CPLR 4538), such proof is not conclusive. “In other words, the prima facie proof of the authenticity of a signature may be rebutted by proof, credible to the trier of fact” (*Dart Assoc. v Rosal Meat Market Inc.*, 39 AD2d 564, 564 [2d Dept 1972]). Here, defendant’s deposition testimony and his supporting affirmation denying the authenticity of his signatures on the second note and mortgage must be accepted as true for the purposes of his cross motion (*see Langford v Cameron*, 73 AD2d 1001, 1002 [3d Dept 1980]). Defendant’s repeated averments that his signatures on the second note and mortgage are a forgery, along with the supporting expert affidavit, are not palpably insufficient or patently devoid of merit to preclude leave to amend (*see Estaba v Estaba*, 129 AD3d 601 [1st Dept 2015]; *accord Hoffman v Kraus*, 260 AD2d 435, 436 [2d Dept 1999]).

Plaintiff’s reliance on the Court’s prior decision and order, dated Feb. 26, 2018, is misplaced. Although the Court therein struck certain of defendant’s affirmative defenses, the Court had no opportunity at that time to address the affirmative defense of forgery which



was first raised at defendant's deposition approximately one year later on May 20, 2019. Considering that plaintiff is to be afforded additional discovery on the issue of forgery, he is not unfairly surprised or prejudiced by the proposed amended answer (*see Wells Fargo Bank, N.A. v Confino*, 175 AD3d 536, 538 [2d Dept 2019]; *see generally Lucido v Mancuso*, 49 AD3d 220, 226-227 [2d Dept 2008], *appeal withdrawn* 12 NY3d 813 [2009]). Nothing herein precludes plaintiff from subsequently moving for dismissal of the newly asserted affirmative defense of forgery (*see e.g. Valenzano v Valenzano*, 98 AD3d 661, 661-662 [2d Dept 2012]). Accordingly, defendant's cross motion for leave to amend is granted as more fully set forth in the decretal paragraphs below.

#### ***Conclusion***

Based on the foregoing and after oral argument, it is

ORDERED that plaintiff's motion in Seq. No. 4 is *granted to the extent* that (1) he is accorded additional time to investigate, serve written discovery demands, and conduct pretrial depositions concerning defendant's claim that the signatures on the second note and mortgage are not his; and (2) the deadline to serve and file a note of issue is hereby extended through and including Friday, Sept. 4, 2020; and the remainder of plaintiff's motion is denied; and it is further

ORDERED that defendant's cross motion in Seq. No. 5 for leave to amend is *granted*, and defendant's counsel is directed to electronically serve and file defendant's Amended Verified Answer in the form annexed to his cross motion as Exhibit D within 20 days after

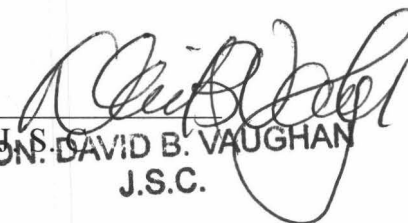
service of this decision and order with notice of entry by plaintiff’s counsel on defendant’s counsel, with such answer to be personally verified by defendant by manually signing his full name (*i.e.*, Yitzchok Dovid Rubashkin) to the verification;<sup>1</sup> and it is further

ORDERED that all future affirmations and other documents executed by defendant and filed in this action must be manually signed by him using his full name (*i.e.*, Yitzchok Dovid Rubashkin), and the typed name below his signature line must likewise state his full name (*i.e.*, Yitzchok Dovid Rubashkin); and it is further

ORDERED that plaintiff’s counsel shall electronically serve a copy of this decision and order with notice on entry on defendant’s counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

  
HON. DAVID B. VAUGHAN  
J.S.C.

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<sup>1</sup> The first note and mortgage which are *not* challenged by defendant were signed by “Yitzchok Dovid Rubashkin”; the second note and mortgage which *are* challenged by defendant were signed by “Yitzchok Rubashkin”; the Verified Answer which is *not* challenged by defendant was signed by “Dovid Rubashkin.” The proposed Amended Verified Answer likewise has “Dovid Rubashkin” as defendant’s name typed below his signature line. To be consistent with the caption of this action which names Yitzchok Dovid Rubashkin as a defendant, he must affirm and manually sign the Amended Verified Answer using his full name – Yitzchok Dovid Rubashkin – and the name typed below his signature line therein must likewise state Yitzchok Dovid Rubashkin.