

Schmidt v Kraus

2023 NY Slip Op 34082(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 650370/2022

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

RICHARD K. SCHMIDT

Plaintiff,

- v -

MITCHELL H. KRAUS,

Defendant.

-----X

INDEX NO. 650370/2022

MOTION DATE 04/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS.

This matter was recently transferred to Part IV as part of an administrative *en masse* reassignment (see June 28, 2023 Reassignment Order, NYSCEF Doc. No. 14).

Defendant moves to dismiss the complaint upon documentary evidence and for failure to state a claim. As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (see *e.g. Leon v. Martinez*, 84 NY2d 83 [1994]). “Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]). To the extent that the motion seeks dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ.*

of *City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

This matter is straightforward. Plaintiff alleges he sold his shares of an entity named Alcor to defendant for \$50,000, but that defendant never paid. Plaintiff seeks a declaratory judgment that he is the owner of these shares given defendant’s alleged nonpayment. Defendant alleges that he paid pursuant to wire instructions purportedly sent by plaintiff and therefore ownership of the shares lies with defendant.

Notably, no party has seen fit to provide this Court with the contract of sale for the shares relied upon by the parties or the correspondence between the parties regarding wiring instructions. Accordingly, to the extent that the motion seeks dismissal upon documentary evidence, it is easy work for this Court to deny same given that no documentary evidence has been submitted.

Turning to that portion of the motion seeking dismissal for failure to state a claim, and providing the complaint with every favorable inference, the four corners of the complaint make out a claim for declaratory judgment. A declaratory judgment claim may be both legal and equitable in nature, and here plaintiff has alleged that defendant failed to tender payment for the transfer/sale of plaintiff's shares (see e.g. *Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hosp. Center*, 59 AD3d 481 [2d Dept 2009]). This is sufficient.

Finally, to the extent that any party seeks this Court to render declaratory judgment, on this motion to dismiss, the Court declines such invitation as inappropriate and, more importantly, without any evidentiary support.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that within 20 days of this decision and order, counsel shall confer and file, via NYSCEF with courtesy copy via mail to chambers, a single joint proposed preliminary conference order addressing all known and anticipated outstanding discovery in accordance with the Part Rules. To the extent that agreement cannot be reached, counsel shall file, contemporaneously with the joint proposed conference order, a single joint letter outlining the dispute and the parties' position regarding same; and it is further
[continued on following page]

ORDERED that the failure to timely file the proposed conference order, as above, shall constitute waiver of any relief related to outstanding discovery.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

11/16/2023
DATE



HON. FRANK P. NERVO
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

J.S.C.

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE