

Casaceli v Casaceli

2011 NY Slip Op 31289(U)

March 23, 2011

Sup Ct, Nassau County

Docket Number: 2037/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**GREG CASACELI, ROSE CASACELI and
CEDAR PINE CONSTRUCTION CORP.,**

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 003
MOTION DATE: 3/2/11**

**GARY CASACELI, LINDA CASACELI, EQUITY
BILLING SERVICES, LLC, ADVANCED MEDICAL
BILLING, LLC and COMPLETE MEDICAL
SERVICES OF NYC, P.C.,**

INDEX NO.: 2037/08

Defendants.

The following papers having been read on the motion (numbered 1-):

Defendants' Motions for Summary Judgment.....1
Affirmation in Opposition.....2
Defendants' Memorandum of Law.....3
Plaintiffs' Memorandum of Law.....4

Defendants, Gary Casaceli, Linda Casaceli, Equity Billing Services, LLC and Advanced Medical Billing, LLC, move, pursuant to CPLR §3212, for an Order of this Court, granting them summary judgment dismissal of the plaintiffs' complaint in its entirety. The motion is decided as follows.

Plaintiffs bring this action seeking to recover, *inter alia*, for breach of several oral "loan agreements." As best as can be determined the facts are as follows:

Plaintiffs Greg Casaceli ("Greg") and Rose Casaceli ("Rose") are husband and wife. Greg is the president and sole shareholder of the corporate plaintiff, Cedar Pine Construction Corp. ("Cedar Pine"), a home improvement construction company, currently located at 10 Dorset Lane, Rockville Centre, New York. Prior to September 2005, and at all relevant times herein, Cedar Pine had maintained its offices at property known as 212 Maple Avenue, Rockville Centre, New York, which property was owned by non party Emil Casaceli, now deceased. Emil Casaceli is the father of plaintiff, Greg and the defendant Gary Casacali ("Gary") – i.e., Greg and Gary are brothers. Rose is not an officer, director or shareholder of Cedar Pine but she did bookkeeping for Cedar Pine.

Gary is married to the defendant Linda Casaceli (“Linda”). Linda is the sole owner of the defendant Equity Billing Services, LLC (“EBS”), a limited liability company in the business of providing medical billing services. Gary has no interest in EBS and has never been employed by EBS. Gary is a home improvement contractor who was employed by Cedar Pine. Defendant Advanced Medical Billing, LLC (“Advanced”) is a limited liability company in the business of providing medical billing services. Advanced was started by Linda but its owner was Gary. According to both Linda and Gary, Advanced, however, never “took off” (*Linda Tr.*, p. 41; *Gary Tr.*, p.7). Notably, at all relevant times herein, Cedar Pine, EBS and Advanced each maintained their offices at 212 Maple Avenue, Rockville Centre, New York.

It is undisputed that during the period of July 2003 to May 2004, plaintiffs advanced certain monies totaling the sum of \$49,932.00 to the defendants in order to enable the defendants to purchase computers and software programs for their business, EBS. Plaintiffs also claim to have advanced an additional \$7,800 in various cash payments to the defendants so as to enable the defendants to pay for other personal and business expenses. The central issue in this case is whether these sums constituted loan agreements or whether they were part of an investment by the plaintiffs, including plaintiff Cedar Pine, in the defendant, EBS.

With respect to the issue of how the plaintiffs obtained the amounts to advance to the defendants in the first place, the undisputed evidence confirms that the corporate plaintiff, Cedar Pine, took out a revolving loan with Signature Bank. The funds were then disbursed by the plaintiffs via checks on Signature’s account written by Linda and signed by Greg as president of Cedar Pine. Greg testified at his EBT that he did not recall who the specific checks or payments were made payable to. Further, plaintiffs allege that Linda not only forged Greg’s signature on a check to be drawn on the loan, but that at some point, she also overdrew on the account.

At his EBT, Greg stated that he did not discuss the loan made by Cedar Pine to EBS with his wife, Rose, before he made it. Rose learned about the Signature loan after Linda had drawn seven checks from it. Plaintiffs claim that despite repeated verbal demands, Linda and Gary never repaid Cedar Pine on the Signature loan. As a result, in order to pay the Signature loan in full, Greg and Rose, took a home equity loan from Washington Mutual Bank against their home. Notably, at his EBT, Greg, as president of Cedar Pine, testified that currently no defendants owe any money to Cedar Pine. Thus,

while Cedar Pine's Signature loan is, in fact, paid in full (with the proceeds obtained from the home equity loan), plaintiffs maintain that the defendants nevertheless still owe Linda and Gary personally.

It is plaintiffs' position that these sums were advanced as informal loan agreements made verbally and in good faith to their family members. Plaintiffs admit that they did not memorialize their various personal loans to the defendants by way of promissory note(s), personal guarantee(s), security agreement(s), or UCC-1 Statement(s). They further state that they did not consult with legal counsel when making these loans. Rather, based on their history and given that they are all family members, plaintiffs, who admit that they are not sophisticated lenders, loaned said monies to the defendants which they describe were not elaborate transactions. Plaintiffs maintain however that despite repeated demands therefore, made verbally and in writing, defendants have failed and otherwise refused to pay back the loans.

Defendants on the other hand maintain that these sums constituted an investment by the plaintiffs in the defendant, EBS. Defendants submit that Cedar Pine was to receive a percentage of the profits of EBS's business in return for the \$50,000 investment. Specifically, at her EBT, Linda testified, in pertinent part as follows:

- Q: Did there come a point in time that [EBS] received a loan from [Cedar Pine]?
- A: No. It was not a loan.
- Q: Did it receive monies from the company?
- A: Yes, I did.
- Q: What was that?
- A: That was an investment, 40/60.
- Q: 40/60?
- A: Yes.
- Q: Is that memorialized anywhere in any writing?
- A: Good faith.
- Q: What were the terms of that investment?
- A: Such as?
- Q: The terms of the investment. What does 40/60 mean?
- A: It's simple. I approached Greg. *** My company was in trouble. I had to update my computer system. I sold shares, 40 percent, 40/60, \$50,000. He

said yes, he gave me 47, and that was it.

Q: How were those monies paid?

A: To the best of my knowledge, checks from Cedar Pine.

Q: So you're saying that the monies that you received, \$47,000, were an investment and that it was a 40/60 split, if I'm –

A: Yes.

Q: – reiterating what you said correctly. What exactly does 40/60 split mean to you?

A: I owned 60, he owned 40.

Q: Of what?

A: Of [EBS].

(Linda Tr., pp. 52-54).

Linda further elaborated at her EBT that EBS was not profitable after 2003 for several reasons including the loss of a key customer. As a result, in 2005, defendants sold EBS's assets to a larger medical billing firm, HWLI, Inc. ("HWLI"). She stated that when EBS was ultimately sold to HWLI, she verbally notified Greg of the offer and told him that when she was paid by the new purchaser, she would pay Greg back his 40% share of EBS (*Linda's Tr.*, p. 54). She submits however that since she was never paid by the new purchaser, she has not been able to pay Greg back (*Id.* at 55). She states that since EBS's primary asset was its customer lists, which Linda had cultivated as EBS's principal, she was given an employment contract by HWLI. Linda claims that Greg agreed to the sale of EBS to HWLI in July 2005.

In seeking summary judgment dismissal of the plaintiffs' complaint, it is defendants' position that as evidenced by the fact that Rose did not know of the transaction by Cedar Pine to EBS, Cedar Pine's \$50,000 funding was a "silent" investment rather than a loan and therefore no payments were ever made against it and that is why the plaintiffs never demanded payment from them for five years after the investments were made. Their primary argument in seeking summary judgment is that pursuant to the General Obligations Law §5-701, commonly known as the Statute of Frauds, plaintiffs' claims are barred herein. Defendants also argue that while it is undisputed that no payments were ever made by EBS (or any of the defendants) to Cedar

Pine (or any of the plaintiffs) from the date of the \$50,000 funding by Cedar Pine in 2003 until the present, neither Cedar Pine, Greg, nor Rose ever made a demand for payment upon EBS (or any of the defendants) from 2003 until this action was filed in 2008. Therefore, defendants submit, plaintiffs' own conduct establishes that plaintiffs knew the alleged "loan" agreement could not be performed within one year as would be necessary to overcome the Statute of Frauds bar to their claim. Defendants also argue that Cedar Pine has been repaid the entire \$50,000 by means of the (home equity) loan taken by Greg and Rose from Washington Mutual Bank and therefore plaintiffs cannot now seek recovery for a loan that has been fully repaid. Further, defendants maintain that as neither Greg nor Rose received an assignment of any claims Cedar Pine may have had against defendants on account of the original \$50,000.00 investment into EBS, neither of them has a colorable claim for repayment of their mortgage loans against any of the defendants.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

On their motion, defendants have offered no admissible evidence of plaintiffs' purported equity interest in EBS. Defendants' conclusory assertions that the monies in question constituted investment are insufficient to establish their *prima facie* entitlement to judgment as a matter of law.

Even where a transaction is referred to or recorded as an "investment," it is not dispositive. For example, in *Sakow v. 633 Seafood Restaurant, Inc.*, 227 AD2d 249 [1st Dept. 1996], plaintiffs sought to recover money which they alleged had been loaned to defendant for the construction of a restaurant. Defendant argued that one-third of the funds was payment for stock in the restaurant and that the remaining two-thirds was a loan which was not repayable until defendant's financial condition permitted repayment. As in the instant case, there was no formal written agreement. There, both parties moved

for summary judgment. The trial Court determined that one-third of the funds was an equity investment, but that the remaining funds constituted a loan which was immediately payable. On appeal by both parties, the Appellate Division reversed, finding, *inter alia*, that substantial issues of fact existed with respect to whether any of the funds were an investment.

Although defendants in this case claim that the personal loans were an "investment," the deposition testimony of Greg affirming that the cash loans were personal loans to Linda and Gary, individually, presents an issue of fact precluding summary judgment as a matter of law. Accordingly, inasmuch as the defendants have failed to demonstrate via admissible evidence their claim that the monies advance to EBS were in fact an equity investment on the part of the plaintiffs, this Court herewith **denies** defendants' motion for summary judgment in its entirety (*Pisciotto v. Dries*, 306 AD2d 262 [2nd Dept. 2003]). The parties' oral agreements apparently made in "good faith" are ambiguous and unclear, and present issues of fact which cannot be resolved on the record before this Court (*Media Boosters v. Prelude Productions.*, 75 AD2d 577 [2nd Dept. 1980]; *cf.*, *Bianculli v. Bianculli*, 242 AD2d 647 [2nd Dept. 1997]). There are triable issues of fact with respect to, *inter alia*, whether the agreements were intended to constitute a loan or an equity investment (*Durban v. Smith*, 248 AD2d 502 [2nd Dept. 1998]).

Accordingly, defendants' motion for summary judgment is **denied** (*L.N.L. Construction v. M.T.F. Industries, Inc.*, 190 AD2d 714 [2nd Dept. 1993]; *Kardis v. Lennon*, 135 AD2d 613 [2nd Dept. 1987]; *Skiadas v. Terovolos*, 219 AD2d 635 [2nd Dept. 1995]).

This constitutes the Order of the Court.

Dated: 3/23/11


J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE