State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 27, 2024 CV-23-1398

MICHAEL CANCILLA,
Appellant,
v
MEMORANDUM AND ORDER
RYAN O'ROURKE, as Administrator of the Estate of BERNARD T. O'ROURKE, Deceased, et al.,
Defendants.

Calendar Date: October 17, 2024

Before: Garry, P.J., Egan Jr., Aarons, Lynch and Ceresia, JJ.

Costello Cooney & Fearon, PLLC, Syracuse (*Daniel R. Rose* of counsel), for appellant.

Garry, P.J.

Appeal from an order of the Supreme Court (Joseph A. McBride, J.), entered July 1, 2023 in Chenango County, which, among other things, granted defendant Laurie Isabell's cross-motion for summary judgment dismissing the second amended complaint against her.

According to plaintiff, in 2008, he and his mother verbally agreed to loan Bernard O'Rourke, a business acquaintance of plaintiff, $100,000 to purchase real property in a foreclosure sale, property that had previously belonged to O'Rourke's romantic partner. It is further alleged that O'Rourke orally agreed to repay that sum within several months, after taking title to the property and obtaining a mortgage thereon. Plaintiff's mother then

wired the funds to O'Rourke, allegedly on behalf of plaintiff and herself.[1] After O'Rourke purportedly used those funds to purchase said property via defendant BTO Resources, Inc., a corporation that he used for real estate transactions and of which he was the president, BTO Resources transferred title to the property to O'Rourke's partner, for nominal consideration, allegedly in contravention of the parties' agreement that the property would remain titled to the corporation until the loan was paid off. O'Rourke ultimately made no payments on the purported loan, and the transfer of the property to his partner allegedly rendered him and BTO Resources insolvent.

In 2010, plaintiff commenced this action against O'Rourke, BTO Resources and O'Rourke's partner for breach of contract, fraudulent conveyance and unjust enrichment. After those defendants joined issue, O'Rourke's partner transferred the subject property to her daughter, also for nominal consideration, while reserving a life estate for herself and O'Rourke. O'Rourke's partner died in 2017, and O'Rourke died in 2018. Their estates were substituted as defendants thereafter, and the daughter of O'Rourke's partner, defendant Laurie L. Isabell, was added as a party. Isabell joined issue, asserting, among other things, that this action is barred by the statute of frauds. In 2022, plaintiff moved for summary judgment, seeking an award of $100,000 and to nullify the deeds ultimately conveying title to the property to Isabell. Isabell opposed and cross-moved for summary judgment dismissing the second amended complaint against her. Supreme Court denied the motion and granted the cross-motion, dismissing the second amended complaint. Plaintiff appeals.

Addressing the initial issue posed, we agree with plaintiff that his breach of contract claim is not barred by General Obligations Law § 5-703. That statute of frauds requires, as relevant here, a signed writing for any agreement that purports to create an interest in real property (*see* General Obligations Law § 5-703 [1], [2]; *Bowers v Hurley*, 134 AD3d 1191, 1193 [3d Dept 2015]; *Hydro Invs. v Trafalgar Power*, 6 AD3d 882, 885 [3d Dept 2004]). An agreement to give a mortgage is a contract subject to General Obligations Law § 5-703 because a mortgage is "[a] conveyance or retention of an interest in real property as security for performance of an obligation" (Black's Law Dictionary [12th ed 2024], mortgage; *see Sleeth v Sampson*, 237 NY 69, 72 [1923]; Real Property Law § 240 [2]; *Barretti v Detore*, 95 AD3d 803, 806 [2d Dept 2012]). However, contrary to Supreme Court's conclusion, the alleged oral agreement here was not an agreement to provide mortgage financing (*compare Grimm v Marine Midland Bank*, 117

[1] It appears that plaintiff's mother has since assigned her interest in the alleged debt to plaintiff.

AD2d 901, 902 [3d Dept 1986]). There is no evidence, or claim, that plaintiff or his mother were to hold any interest in the subject real property as a security for their alleged loan (*see Moon v Moon*, 6 AD3d 796, 797-798 [3d Dept 2004]). In the absence of such an interest (*see generally Rimberg v Horowitz*, 206 AD3d 832, 833-834 [2d Dept 2022]; *Flyer v Sullivan*, 284 App Div 697, 698-699 [1st Dept 1954]), this monetary loan, allegedly to be paid back within one year (*see* General Obligations Law § 5-701 [a] [1]), is not subject to General Obligations Law § 5-703, despite the fact that the funds were later allegedly used to purchase real property.

However, plaintiff's motion for summary judgment was still properly denied. To establish prima facie entitlement to judgment as a matter of law on a cause of action alleging breach of contract, the moving party is required to demonstrate "the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 189 AD3d 1720, 1722 [3d Dept 2020] [internal quotation marks and citation omitted]; *see Ficel Transp., Inc. v State of New York*, 209 AD3d 1153, 1157 [3d Dept 2022]). To establish the existence of a contract, the movant must further demonstrate that there was "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Carroll v Rondout Yacht Basin, Inc.*, 215 AD3d 1190, 1191 [3d Dept 2023] [internal quotation marks and citations omitted], *lv dismissed* 41 NY3d 962 [2024]; *see Harris v Reagan*, 221 AD3d 1069, 1072 [3d Dept 2023]). "An oral agreement may be enforceable as long as the terms are clear and definite and the conduct of the parties evinces mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Galarneau v D'Andrea*, 184 AD3d 1064, 1066 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Kelly v Bensen*, 151 AD3d 1312, 1313 [3d Dept 2017]).

Initially, to the extent that plaintiff relies upon a notice to admit served upon O'Rourke's estate that has allegedly gone without response (*see* CPLR 3123 [a]), in our view, plaintiff's request improperly sought admissions of contested ultimate facts, several of which were outside of the estate's knowledge (*see American Bldrs. & Contrs. Supply Co., Inc. v Vinyl is Final, Inc.*, 222 AD3d 708, 709 [2d Dept 2023]; *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 665 [2d Dept 2013]; *Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]; *Kalabovic v Fort Place Coop.*, 159 AD2d 609, 609-610 [2d Dept 1990]). These alleged admissions thus do not constitute a basis for summary judgment.

As for his other submissions, plaintiff proffered an affidavit in which he briefly described the business relationship between himself – an attorney – and O'Rourke – a real estate broker on certain unrelated real estate transactions in which plaintiff was involved. That relationship led to a 2007 loan similar to the one at issue, whereby plaintiff loaned O'Rourke and O'Rourke's partner $54,000 to purchase certain other real property, and O'Rourke and his partner paid that loan back in several months by obtaining a mortgage on the property after they took title. In the limited excerpt of O'Rourke's deposition testimony submitted by plaintiff, O'Rourke acknowledged that prior loan and his repayment as described. As for the subject loan, plaintiff averred that, on June 26, 2008, O'Rourke contacted him to acquire $100,000 in order to purchase his partner's marital home in an imminent foreclosure sale. According to plaintiff, he placed O'Rourke on speaker phone and plaintiff's mother, who is also his secretary, was present for the call. During that call, plaintiff and his mother agreed to jointly lend O'Rourke $100,000 on the "same terms" as the prior loan. Because the mother had more liquidity at the time, she wired the money to O'Rourke. The affidavit of plaintiff's mother echoes much of the foregoing, and plaintiff submitted a bank statement showing a June 26, 2008 transfer of $100,000 from an account in the mother's name to an external account. That statement appears to also show that those funds were deposited into the mother's account that same day. Plaintiff also submitted the referee's deed by which BTO Resources took title to the subject property following a June 26, 2008 foreclosure sale. Also submitted was an affidavit from a mutual business acquaintance who had turned down O'Rourke's May 2008 request to borrow $100,000 to save the subject property from foreclosure. Plaintiff further asserted that, when he approached O'Rourke about repayment of the loan, O'Rourke advised him that both he and his partner were unemployed and thus had no means to repay the debt.

Plaintiff has set forth prima facie evidence of the existence of an oral contract, including an offer and acceptance, circumstances evincing an intent to be bound and a manifestation of mutual assent through conduct (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The law is generous in the well-established view of what may constitute consideration, and we therefore do not find it wholly lacking here. Although O'Rourke's promise to accept the alleged loan may not have been consideration for plaintiff's promise to make it, plaintiff purportedly extended the loan nonetheless, and the loan, if made, would be consideration enough for O'Rourke's alleged promise to repay it (*see* Restatement [Second] of Contracts § 71 [1981], Comment *c*, Illustration 8; *see also Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]; *Ferguson v Ferguson*, 97 AD2d 891, 892 [3d Dept 1983]). We also find that there was prima facie evidence of plaintiff's performance. Although the bank statement submitted by plaintiff does not reveal the

owner of the account to which plaintiff's mother wired the subject funds, plaintiff submitted by sworn affidavit that the funds were sent to O'Rourke. As there is also prima facie evidence of breach and damages, plaintiff met his initial burden on his breach of contract claim.

Isabell's submissions, however, raise material issues of fact necessitating a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). In opposition to plaintiff's motion and in support of her cross-motion, Isabell submitted deposition testimony from plaintiff's mother indicating that she – not plaintiff – loaned O'Rourke $100,000 from her personal finances, and that plaintiff would "vouch for it" based on his past dealings with O'Rourke. Plaintiff's mother indeed later commenced a separate action against O'Rourke and plaintiff seeking to be repaid the $100,000 she loaned, and, in connection therewith, plaintiff allegedly told her that he would make her whole if she could not recover the $100,000 from O'Rourke. This conflicting account regarding the circumstances surrounding the creation of the alleged oral contract creates an issue of credibility not amenable to summary resolution. Isabell also submitted a response to a disclosure demand in which O'Rourke, by and through his attorney, denied the existence of any loan. Therein, O'Rourke conceded that he received $100,000 from plaintiff on June 26, 2008 but asserted that the funds were in fact his own from plaintiff's IOLA account, which is allegedly evident in the documents supplied by plaintiff. Isabell further submitted documentation demonstrating that plaintiff did provide certain legal representation to O'Rourke, including before the Internal Revenue Service. Based on the foregoing, there are questions of fact as to the existence of the alleged oral contract, and thus the parties' performance thereunder, O'Rourke's breach thereof and any damages resulting from that breach.

As there are issues of fact as to whether plaintiff is in fact a creditor of O'Rourke, his request for summary judgment on his Debtor and Creditor Law cause of action must also be denied. Whether Isabell, who took the subject property for only nominal consideration in an intrafamilial transfer, is the rightful owner of the subject property is also still to be decided, and plaintiff's alternative unjust enrichment claim against her therefore must similarly await trial.[2]

[2] Given that Isabell failed to demonstrate the applicability of the statute of frauds and otherwise only highlights alleged gaps in plaintiff's proof, she is also not entitled to summary judgment (*see Umoh v Doolity-Mills*, 214 AD3d 1226, 1227-1228 [3d Dept 2023]).

Egan Jr., Aarons, Lynch and Ceresia, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendant Laurie Isabell's cross-motion; cross-motion denied; and, as so modified, affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court