

Weingrad v Schuster

2023 NY Slip Op 33424(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 655390/2017

Judge: Lyle E. Frank

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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**

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| <p>PRESENT: <u>HON. LYLE E. FRANK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>STEPHEN WEINGRAD, WEINGRAD & WEINGRAD P.C.</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>HOWARD SCHUSTER, MAJOR STUDIO PARTNERS INC.,</p> <p align="center">Defendant.</p> <p>-----X</p> | <p>PART 11M</p> <p>INDEX NO. <u>655390/2017</u></p> <p>MOTION DATE <u>10/04/2022, 06/28/2023</u></p> <p>MOTION SEQ. NO. <u>004 005</u></p> <p align="center">DECISION + ORDER ON MOTION</p> |
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The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

Upon the foregoing documents, defendants’ motion to dismiss the second amended complaint is granted in part, the portion of plaintiff’s cross-motion for summary judgment and to apply the relation back doctrine is denied and the motion to vacate the note of issue is denied.

The portion of plaintiff’s cross-motion that seeks a trial preference is granted.

This action arises out of the alleged failure to repay a monetary loan. Plaintiff commenced the instant action by filing a summons with notice on August 16, 2017. *See* NYSCEF Doc. 1. The summons with notice contained the allegation that defendant has failed to repay a \$70,000 loan. After a demand for the complaint was made, the complaint was filed that alleged a default of the \$70,000 loan as well as a \$2,000 loan, both loans alleged to have been made on August 25, 2011. Plaintiff subsequently filed an amended complaint, 6 months after the

original complaint and without leave of court, that changed the \$2,000 loan date from August 25, 2011, to June 12, 2013. *See* NYCEF Doc. 4.

Plaintiff was granted leave to amend the complaint, the second amended complaint, without prejudice to defendant and without a finding that plaintiff's amendments were timely. *See* NYSCEF Doc. 108. The second amended complaint contains two additional parties, plaintiff's law firm and a new defendant Major Studios Partners Inc. Plaintiff seeks to have the new parties relate back to its original pleading. Defendants move to dismiss the complaint.

It is well established that a party seeking to invoke the *relation back* doctrine must establish that: first, the claims arose out of the same conduct, transactions, or occurrence; second, that the new party is united in interest with the original defendant, and will not suffer prejudice due to lack of notice; third, that the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Buran v Coupal*, 87 NY2d 173, 178, [1995] internal citations omitted).

Plaintiff has failed to establish that the relation back doctrine applies. Plaintiff fails to identify how and if the parties are united in interest and that the newly identified defendant is not prejudiced by the lack of notice. The Court does not reach the issue of whether there are timely claims in which the relation back doctrine could apply as plaintiff has not satisfied the threshold issue of establishing the doctrine applies. Accordingly, the complaint is dismissed in its entirety as to defendant Major Studios Partners Inc.

As plaintiff has conceded, by way of the pleadings in its second amended complaint, that the purported loans, all but \$2,000.00 worth, were disbursed to a non-party, specifically Major Studios Partners Inc. *See* NYSCEF Doc. 113. Accordingly, the only viable cause of action that

remains is the breach of contract for failure to repay the alleged loan of \$2,000 as against defendant Howard Schuster.

Notwithstanding plaintiff's inconsistent pleadings with respect to the date the \$2,000 loan was made, it is a claim that has existed since plaintiff's initial complaint and once that remains timely, whether the loan was made on August 25, 2011, or June 12, 2013. Defendant has not established a basis to dismiss this cause of action.

Although it was procedurally improper for plaintiff to file a note of issue, as issue has not yet been joined, the Court finds that vacatur at this juncture is not necessary given that only one narrow issue remains, and that defendant has failed to identify what specific items are necessary to defend the action. However, the Court notes that defendant may seek discovery while the matter is on the trial calendar and to the extent not complied with defendant may raise those issues at the time of trial.

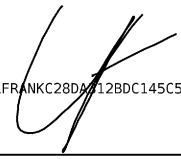
As to plaintiff's request for a trial preference, defendant does not oppose the request, and the Court finds that plaintiff establishes entitlement to the relief sought. Accordingly, it is hereby

ORDERED the complaint is dismissed in its entirety as against defendant Major Studios Partners Inc.; and it is further

ORDERED that defendant Howard Schuster is directed to answer the second amended complaint as to the only viable cause of action that remains, plaintiff's second cause of action erroneously titled fifth cause of action within 20 days of the date of this Order; and it is further

ORDERED that the parties are to appear for a pre-trial conference in Part 11, Room 308, 80 Centre Street on December 20, 2023, at 3:30 pm.

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10/3/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE