UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HOWARD RUBINSKY,

Case No.: 2:14-cv-01540

Plaintiff,

-against-

AHMED ZAYAT, a/k/a
EPHRAIM ZAYAT,

Defendant.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR REARGUMENT/RECONSIDERATION OF THIS COURT'S OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully submits this Memorandum in support of his motion pursuant to Federal Rules of Civil Procedure 59 and 60 for reargument/reconsideration of this Court's June 4, 2015 Opinion granting Defendant's Motion for Summary Judgment (the "Opinion"). Plaintiff respectfully submits that the Opinion overlooks three dispositive facts.

1. **Defendant's Actual Performance of His "Promise," Combined With The Written Promise Itself, Could Permit a Reasonable Jury to Conclude That Defendant Made an Unconditional Promise To Pay the Alleged Debt.**

Plaintiff testified that after receiving the text stating "I will mail you checks every Friday, just give me an address" quoted at page 2 of the Opinion, Defendant

in fact then made two payments, the last of which Plaintiff has a canceled check that conclusively proves that such payment was made. Bainton Declaration, Exhibit D.

This evidence is not addressed in the Opinion. Also not addressed is the fact that the **routine practice** in compromising claims is for the compromising party **to deny liability** for the compromised claim. Here, Defendant was very belatedly agreeing to pay over a year and 3.5 months on a weekly basis a sum of money he should have paid in full years earlier, so there can be no question that this "promise" represented a compromise.

The routine practice of the settling party denying liability while agreeing to make restitution to the aggrieved party or otherwise provide relief sought in a complaint was the topic of national attention during the last few years as the result of United States Senior District Judge Jed S. Rakoff's refusal to approve the settlement in SEC v. Citigroup Global Markets, Inc., 827 F. Supp2d 328 (SDNY 2011). In his opinion, Judge Rakoff observed the existence of "the SEC's long-standing policy – hallowed by history, but not by reason – of allowing defendants to enter into Consent judgments without admitting or denying the underlying allegations."

This practice Judge Rakoff went on to find in the circumstances of that case deprived "the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." Id at 332.

Both the SEC and Citigroup successfully appealed from Judge Rakoff's decision. United States v. Citigroup Global Mkts., 752 F.3d 285 (2nd Cir. 2014).

Accordingly, if Citigroup can lawfully settle a claim accusing it of creating a billion dollar fund containing what it knew to be mortgage-backed securities of dubious value and then sell interests in the fund to unwitting investors as attractive investments in blatant violation of the securities laws causing the investors to lose $700 Million while enabling Citigroup to make $160 Million while denying any liability, the thought of Defendant agreeing to settle a $1.65 Million gambling based obligation by making weekly $25,000 payments over a year and 3.5 months without admitting liability seems rather insignificant by comparison.

As recently as June 2, 2015, the **routine practice** of settling parties denying all liability again received national attention when Senator Elizabeth Warren wrote (and published widely) a letter to SEC Chairman Mary Jo White in which she sharply criticized the SEC's recent failures in enforcement actions to obtain admissions of wrongdoing in the context of settlement agreements. *See* Accompanying Request To Take Judicial Notice, Request No. 1.

Thus although the Opinion accepts at face value that "Defendant explicitly stated in his text messages that he does not owe Plaintiff – or anyone else – any money," given that Plaintiff can offer evidence at trial of the **routine practice** of settling parties denying liability, a reasonable jury might view those words with skepticism similar to that of Judge Rakoff or Senator Warren; reject them as untruthful; and instead construe this promise to pay weekly as consistent with settlements generally. Plaintiff respectfully submits that it is a question of fact for a jury to determine whether undertaking to pay $1.3 Million a year to a person whom Defendant testified he only met **"twice in my life or three times. I can't even recall that"** (ZTr. 57:21-58:11) is logically consistent with (a) helping someone or (b) paying off over less than a year and a half a $1.65 Million dollar debt.

Certainly a document that (a) denies liability and (b) then promises to pay weekly is ambiguous. The job of determining ambiguous documents is for the jury not the Court. Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575 (3rd Cir. 2009).

Accordingly, the language in the text message purporting to deny liability need not necessarily be accepted literally by a reasonable jury as the Court appears to have done in its Opinion. Plaintiff therefore respectfully submits that a reasonable jury could conclude that an enforceable promise was made on April 6,

2008 and there is no question that this action was commenced less than six years after that date.

2. Plaintiff's Complete Silence About Defendant's Gambling Activities With the Jelinsky Brothers from April 6, 2008 Until Forced to Defend Himself From Defendant's Defamatory Declarations on May 21, 2015 That This Action Was Commenced After This Year's Kentucky Derby To "Extort" and "Blackmail" Him As a "Fraud" and Product of "Insanity" Constituted Adequate Consideration

That Defendant is a public figure and frequently described by the press as a "colorful one" is something of which this Court can take judicial notice. That Zayat Stables, LLC filed a Chapter 11 Petition in this Court on February 3, 2010 and that a Plan of Reorganization was confirmed on July 15, 2010 are also facts of which this Court can take judicial notice. In re Zayat Stables, LLC, Docket No. 10-13130-DHS (N.J. Bkr. 2010).

The schedules filed in that case showed what Defendant characterized as "loans" were due to the debtor from Michael and Jeffrey Jelinsky for more than $605,000. By 2010 the Jelinsky's were convicted bookmakers. These disclosures in this Court led to investigations by gaming authorities in California, Kentucky and New York that were the topic of wide press coverage. *See* Request To Take Judicial Notice 2.

As Plaintiff had during the Uvari gambling investigation in New York during 2005 in consideration of earlier promises by Defendant to pay his debts, in consideration of the April 6, 2008 promise, Defendant once again kept his mouth

completely shut and did not volunteer what he knew about Defendant's gambling activities with the Jelinsky Brothers during these investigations. Reasonable minds can speculate and of course differ about whether there would be a Zayat Stables today if in 2010-2011 Plaintiff had shared with regulatory authorities and the press what he knew about Defendant's gambling activities and relationship with the Jelinsky Brothers.

But obviously selfishly motivated by Defendant's promise to pay him and recognizing the need for Defendant to have the resources with which to do so, Plaintiff stood silent as he had for so long. Defendant very publicly stated that Zayat Stables would emerge successfully from Bankruptcy Court and then prosper. If it did so, obviously Defendant would then be in a position to resume his payments because (a) there was no criminal investigation involving Defendant on the horizon and (b) Defendant's financial affairs would have recovered from the disruption caused by the world-wide Financial Crisis beginning in 2008 which caught Defendant off guard.

Indeed, the fact that the complaint in this action does not use the word "gambling" or suggest in any way that this action arises from Defendant's gambling activities confirms that for as long as he could Plaintiff honored his obligation to shelter Defendant's public reputation from the truth.

It was only after the very recent extraordinary success of Plaintiff's horse, American Pharoah [sic], that the press scouring for information about Defendant apparently came upon the matters about Defendant's gambling disclosed in the summary judgment papers[1].

That Defendant wagered with the Jelinsky Brothers is a fact that he admitted under oath at his deposition in this action. He testified that he placed bets through the Jelinsky brothers and later learned from law enforcement officials that he had been "scammed" by the Jelinsky Brothers. ZTr. 61:24-66:18.

Accordingly, Defendant again promising to pay Plaintiff what he had previously promised to pay Plaintiff, which was no more than what in fairness Defendant owed Plaintiff, in order to secure Plaintiff's continuing discretion/silence about the circumstances giving rise to Defendant's original obligation to Plaintiff was more than fair consideration. Again, the language of the complaint in this action confirms that Plaintiff continued to honor his part of the deal to the bitter end.

Upon reflection Plaintiff may not have made this obvious point as clearly as he should have in his motion papers. But Defendant has suffered no prejudice

[1] In response to inquiries from the press about this action, Defendant made a number of declarations to the world-wide press to which Defendant had to respond. Those declarations included the assertion that this action was commenced after both the 2015 Kentucky Derby and Preakness to "extort" and "blackmail" him; was a "fraud;" and was a product of "insanity." When contacted by the press in response to Defendant's accusations, Defendant obviously had to respond by telling the truth, including the indisputable fact that this action was commenced before American Pharoah [sic] ran his first race.

whatsoever by Plaintiff's failure to perhaps make as clear as he should have the obvious. A Google™ or comparable search for "Zayat and Rubinsky" will find no references to Plaintiff prior to May of this year as a consequence of Plaintiff honoring his half of the deal.

When in 2010 the press and California, New York and Kentucky gaming authorities were very publicly investigating Defendant's dealings with the Jelinsky Brothers[2], Plaintiff kept very silent which is proven beyond any reasonable doubt by the facts that (a) there is zero mention in the press in 2010 (following the text message promise to pay) of the circumstances giving rise to that promise, namely Defendant's gambling activities with the Jelinsky Brothers and Plaintiff's role in connection therewith and (b) the huge amount of interest by the press in those facts that has emerged as a result of the press' discovery of some of those facts courtesy of www.pacer.gov.

Accordingly, Defendant's April 6, 2008 text message renewal of his longstanding promise to honor his gambling debts, i.e. to be a "Stand Up Guy," was adequately supported by Plaintiff's undertaking to continue to be a "Stand Up Guy" by keeping private Defendant's gambling activities particularly given the well-known sensitivity of gaming authorities to persons in the position of Defendant gambling millions of dollars with persons convicted of gambling related

[2] *See* Request to Take Judicial Notice, Exhibits B,C and D.

felonies such as the Jelinsky Brothers. The public record of which this Court can take judicial notice shows that Plaintiff honored that promise, so therefore Defendant should be adjudged to honor his promise should the jury determine that the ambiguous text message means what Plaintiff contends it means.

Conclusion

As his deposition transcript plainly shows, Plaintiff waited patiently while Defendant suspended payments every time he was directly or indirectly involved with a gambling investigation. In 2008 Plaintiff secured what a reasonable jury could conclude was a written promise from Defendant to finally pay the balance of a long overdue debt in exchange for Plaintiff's continued "discretion," a discretion that Plaintiff has honored for many years. Defendant then started making the promised weekly payments and then stopped. Plaintiff brought this action within six years of Defendant making of the text promise and, therefore, well within six years of the breach, which of course was the first "missed payment."

Based upon the Defendant's written text message/promise; incontrovertible proof of partial performance of that promise by Defendant; and proof of Plaintiff's promised "discretion" embodied last in the language of the complaint in this action; Plaintiff respectfully submits that a reasonable jury could conclude that he is entitled to the relief that he seeks.

Because the Opinion overlooks (a) the canceled check; (b) the existing (and lately much criticized) routine practice of settling parties denying liability; and (c) Plaintiff's continuing silence about Defendant's gambling activities with the Jelinsky Brothers in exchange for Defendant's promise to honor his gambling obligations; Plaintiff respectfully submits that his motion for reargument/reconsideration should be granted and this action should proceed to a jury trial.

Dated: New York, New York
June 5, 2015

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