

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of August, 2010.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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SHIFRA MENDELOVITZ,

Plaintiff,

- against -

Index No. 17390/05

**DECISION**

**AND**

**ORDER**

ELYAHU COHEN, ALAN FALLAS AND 183

LORRAINE STREET, LLC,

Defendants.

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This case was tried before the court without a jury over four days in February, 2010 following several appeals from prior decisions of this Court. In her complaint, plaintiff sought damages for breach and/or specific performance of an alleged oral joint venture agreement and for fraud and imposition of a constructive trust. This Court’s prior grant of the defendants’ motion for dismissal, premised upon insufficiency in pleading and documentary evidence, was reversed as to the first cause of action based upon the allegations of an oral agreement, and affirmed as to the fraud and constructive trust claims. (*Mendelovitz v Cohen*, 37 AD3d 670 [2d Dept, 2007]). Following discovery and the filing of the Note of Issue, defendants moved for summary judgment dismissing the remaining cause of action. This Court’s denial of that motion was affirmed by the Appellate Division. (66 AD3d 849 [2009], affirming 20 Misc 3d 1146(A)). Accordingly, the issue at trial was whether a binding oral contract had been formed among the parties to be associated in a joint venture, such that each party had agreed to contribute to the undertaking and share joint proprietorship and control over the venture in which profits and losses were to be shared.

Upon the evidence presented at trial, the Court makes the following findings of fact adapted from the submissions of the parties after trial:

1. Plaintiff, a high school graduate who also “took courses” at the Fashion Institute of Technology and had been working in the interior design field, assisting homeowners in the furnishing and interior design and lay-out of their homes and apartments, was interested in 183 Lorraine Street as the potential site for a design center in which merchants in the design and home furnishing business could sell their goods and services to consumers who would be able to find all of their home-furnishing needs met in a single location. Plaintiff’s model was the D&D Building in Manhattan.

2. Although plaintiff had never managed a design center, in addition to managing and operating a company involved in the fabrication and supply of windows and accessories to residential and commercial properties throughout the City of New York for sixteen years, she had operated an apparel business called Kloz for Girls, which she ultimately sold without repaying its creditors in full. However, plaintiff is experienced with contracts, lawyers and litigation. When she sold the assets of Kloz for Girls, she had a written agreement with the buyer upon which she ultimately sued. She has employed an attorney, Neil Goldstein, over the past 20 years in commercial transactions involving her clothing business, in leasing transactions and in other matters. Her husband is also an attorney.

3. In early 2004, plaintiff contacted the real estate agent Greiner-Maltz to assist her in finding a suitable property for her design center concept. She was seeking a property that had approximately 200,000-250,000 square feet of space with parking, and that was also accessible by highway and public transportation. On January 27, 2004, plaintiff was introduced by Mr. Feig of Greiner-Maltz to a property located at 183 Lorraine Street, Brooklyn, New York (the “Property”) and inspected it with him on that same day. The Property was listed by the seller, The Chetrit Group (“Chetrit”), for sale at a price of \$15 million.

4. In early March 2004, plaintiff contacted a mortgage broker, Pergolis Swartz.

5. On or about March 30, 2004, plaintiff made an offer to the owners of 183 Lorraine Street to buy the building for \$10 million. The owners did not accept that offer, and plaintiff made a second offer of \$11 million. There was no response to the second offer.

6. At approximately the same time, plaintiff met with representatives of the Brooklyn Chamber of Commerce regarding her idea for development of the Property as a design center, in order to explore incentives and tax benefits that might be available for such a project in an Empire Zone in the Southwest Brooklyn area. She met with Steve Kapenski and a Mr. Thou of the Brooklyn Chamber of Commerce who referred her to the Southwest Brooklyn Development Corporation, another not-for-profit organization interested in the development and revitalization of neighborhoods in Brooklyn. Based on this referral, plaintiff met with Phaedra Thomas, Director of the Red Hook and Gowanus Programs for the Southwest Brooklyn Development Corp. and conveyed that she was interested in purchasing the Property. Subsequently, Ms. Thomas called plaintiff to report that there were other individuals also interested in the Property and suggested she contact them to see if they had any interest in doing something together with plaintiff. Ms. Thomas referred plaintiff specifically to defendant Elyahu Cohen (“Cohen”). In advance of meeting with Mr. Cohen, plaintiff had her attorney, Mr. Goldstein, check Mr. Cohen’s financial credentials.

7. Defendants Elyahu Cohen and Alan Fallas (“Fallas”) are friends and neighbors who have known each other since the 1990s. Prior to their investment in the 183 Lorraine Street building, they had purchased another building in Red Hook together, called the Kentile Building, which they used jointly as a warehouse for their respective businesses.

8. In early 2004, Cohen and Fallas learned about the 183 Lorraine Street building when they asked Phaedra Thomas of the Southwest Brooklyn Development Corporation to help them locate a new

building. Thomas suggested that Cohen and Fallas meet with plaintiff, who was also looking at the 183 Lorraine Street building.

9. Based on the information given to plaintiff by Ms. Thomas, plaintiff called Mr. Cohen to arrange a meeting regarding the Property. The meeting took place in Cohen's office in New York City in April of 2004, and was attended by plaintiff and defendants Cohen and Fallas. The Court does not accept the testimony of Fallas that the first meeting between the parties occurred at the Property as it is not corroborated by either plaintiff or Cohen.

10. It is plaintiff's contention that during that first meeting, the parties reached definitive agreement on all of the elements necessary for a joint venture, to wit: (1) an intent by the parties to be part of a joint venture; (2) a contribution on the part of the joint venturers, such as skill, knowledge or finances towards the joint venture; (3) a joint proprietorship in the joint venture, with plaintiff in charge of the renovation, hiring of architects and engineers and obtaining a management company for the completed project; (4) a sharing of the profits and losses amongst the joint venturers, and (5) that Cohen and Fallas would have a 50% share, and plaintiff would have a 50% share.

11. At the meeting, plaintiff described her vision of developing the Property as a design center and told defendants of her earlier offers to buy. Specifically, she talked to Cohen and Fallas generally about the expenses of such a project, including construction and renovation costs, as well as projected rental incomes once the renovation was complete. Plaintiff represented that the space could be rented for \$20-\$25 per foot, but that it would take one to two years to do the renovation work once the Property was purchased, during which time there would be no rental income. When asked if she had written commitments from prospective tenants, she told them she did not, explaining that she could not induce prospective tenants to enter into leases unless she first acquired the building, but acknowledged that letters of intent from prospective tenants would be necessary to obtain a construction loan.

12. According to plaintiff, at that first meeting, the parties also discussed how the Property would be operated. Cohen and Fallas agreed that it would be plaintiff's responsibility to oversee the day-to-day renovations and be in charge of implementing the design center concept. The parties also agreed that management of the Property would be chosen by plaintiff and that the selection and supervision of the contractor and architect for the project would also be plaintiff's responsibility.

13. Because he had a prior relationship with Chetrit, as well as "better connections," and could negotiate a better price, it was agreed that Cohen would handle the purchase negotiations and that plaintiff should refrain from making any offers for the Property on her own.

14. Plaintiff admitted that when defendants asked her how she planned to fund her investment, she responded that she was hoping to fund her investment with help from outside investors, but did not know who her investors would be, or how much of her own money she would invest. In her interrogatory responses, plaintiff indicated she had not "identified specific individuals who had committed to investing any specific amount." (Ex. G at 5, item 4.)

15. Plaintiff testified that, after the parties had reached an agreement on acquiring the Property, she proposed a letter of intent to memorialize their oral joint venture agreement, to which Cohen responded that it would be unnecessary and counter-productive because "My word is as good as gold," and that the parties should "not bring in any lawyers" since they will ruin the deal between them. Nonetheless, in anticipation of a meeting with their lawyers in August, plaintiff had her attorney prepare a Memorandum of Understanding ("MOU") reflecting her understanding of the agreement that had been reached (Plaintiffs' Ex. 21). This document was never executed and plaintiff acknowledged that some of its provisions had not been agreed. The MOU was not provided to Cohen or Fallas in advance of the August meeting.

16. Cohen and Fallas both firmly denied that, at the meeting in Cohen's office, they agreed to be plaintiff's partner, or that plaintiff could own 50% of the building, or that they would share profits and losses with her, or share the cost of the business for a couple of years until it became profitable. They further testified that plaintiff spoke only of certain renovations for a design center that would cost approximately \$5 million and that there was no discussion of spending \$100 per square foot or of a total renovation budget of \$40 million, which was later projected from calculations made by plaintiff, her lawyer, and a consultant. Defendants testified that they told plaintiff they were interested in the idea of a design center, but needed much more firm information, including the cost of renovations, the proposed tenants' commitments and the identity of the investors who would back her, in order to consider the proposal further.

17. Plaintiff's testimony that the parties agreed to spend \$100 per square foot for renovation and development at the meeting in Cohen's office in April 2004 is contrary to the preponderance of the evidence. Plaintiff's attorney Neil Goldstein testified that he, plaintiff and a consultant named Leibov (who was plaintiff's brother-in-law) developed the \$100 per square foot estimate in May 2004 or later. Plaintiff herself testified that Leibov's spreadsheet setting forth the \$100 per square foot renovation budget estimate was developed in May. The weight of the evidence thus suggests that plaintiff had not worked out an estimate of \$100 per square foot in April 2004 and could not have discussed it at the meeting in Cohen's office, as she claims.

18. The lack of any joint documentation of the first meeting undermines plaintiff's claim that the parties reached a binding definitive agreement at that meeting. It is undisputed that the parties did not put anything on paper, and plaintiff did not follow up by sending Cohen and Fallas a letter or email to confirm anything they had discussed. As noted, plaintiff is an experienced businessperson, familiar with contracts, lawyers and litigation. Even before she met Cohen, she had Goldstein investigate him. The

preponderance of the evidence establishes that Cohen and Fallas did not make a firm commitment to become plaintiff's partners, but said they were willing to continue discussions pending plaintiff's delivery of specifics about the budget, her ability to fund, and prospective tenants.

19. On July 1, 2004, Cohen signed the purchase Contract in the name of 183 Lorraine Street, LLC. The Contract indicates that the price was ten million dollars, although plaintiff testified that Cohen told her the purchase price would be \$13 million, but that the contract would show a purchase price of \$10 million, with \$3 million paid to the seller "under the table" so as to obtain a better purchase price. Cohen provided plaintiff with a copy of the Contract (Plaintiff's Exhibit 20 in Evidence), together with copies of emails, an invoice and wire transfer instructions indicating that he was moving forward with the acquisition of the Property (Plaintiff's Exhibit 26 in Evidence).

20. Plaintiff forwarded the Contract to her transactional lawyer, Neil Goldstein, who, on July 19, 2004, prepared a summary of the Contract provisions (Plaintiff's Exhibit 4 in Evidence).

21. Subsequent to the initial meeting in Cohen's office, a later meeting occurred, in the spring or summer of 2004, also in Cohen's office, at which, in addition to Cohen, Fallas and plaintiff, Ken Cayre was present. Plaintiff contends that this meeting took place after the August 2, 2004 meeting with counsel. The evidence does not establish precisely when the meeting took place, although it may have been in late July based upon the evidence that plaintiff may have produced a prospectus or "booklet" for Cayre's inspection. Fallas and Cayre described the purpose of the meeting as an opportunity for plaintiff to present her idea to Cayre, who was brought in by Cohen and Fallas as a potential investor in the project, and to provide information regarding costs of construction, financial backers she had lined up, and to produce letters of intent from prospective tenants, or identify a large anchor tenant. None of this information was supplied, although Cayre acknowledged receiving a "booklet" that may have been the prospectus which plaintiff had prepared by Roth & Company Consulting (Plaintiff's Exhibit 12 in

Evidence). Plaintiff's Exhibit 11, which is the unsigned Roth Services Agreement dated July 15, 2004, states that the "numbers" were needed by July 25, 2004. A more complete document with detailed cost projections was subsequently prepared (Plaintiff's Exhibit 13 in Evidence), but was not available until the August 2d meeting. Plaintiff admits that she never "identified specific individuals who had committed to investing any specific amount" and did not have written commitments from any prospective tenants.

22. According to Cohen, Fallas and Cayre, when they met with plaintiff, Cohen and Fallas did not agree to be plaintiff's partner to create a design center, and did not discuss a construction budget of \$40 million. Cayre testified that he pointed out to plaintiff, based on his own research, that other design centers in remote areas of New York City had failed, although managed by operators with a history in the design center business, and that he believed the property was not right for a design center. Cayre stated he was not interested in such an investment. Plaintiff was apparently unaware of the failure of other design centers similar to that she proposed to create, revealing a lack of due diligence on her part.

Not disclosed to plaintiff at this meeting was the fact that Cayre, Cohen and Fallas had informally agreed among themselves to purchase the Property and that the intended use was as a storage facility.

23. After the Contract for the purchase of the Property was signed, in addition to Bernard Leibov, whom she consulted regarding the development of the design center, plaintiff met with architects and engineers, marketing consultants and potential tenants. In July 2004, she met with both Handel & Associates, an architectural firm, and Desimone, a structural engineering firm. In August 2004, she met with Jeffrey Rosenberg, another architect, to discuss a proposal for the Property to be converted into a design center. She also received a proposal from the engineering firm of Marino Gerazounis & Jaffe Associates. (Plaintiff's Exhibits 7, 8, 9 and 10 in Evidence). None of these proposals were provided to

defendants, nor did defendants request or authorize plaintiff to contract with any third parties on behalf of a joint venture.

24. In an effort to secure investors for her project, plaintiff engaged the firm of Roth & Co. to prepare a draft of a "Prospectus" in July 2004. A copy of the shorter document, which did not include financial projections or plaintiff's "guarantee" to investors of a ten percent return on investment contained in a longer version, was ultimately provided to Cohen and Fallas (Plaintiff's Exhibit 12 in Evidence). While plaintiff relies on the details set forth therein, particularly references to the Property and a 50-50 "partnership" with an unidentified investor she claims is the defendants, it is clear that the document is merely a self-serving marketing tool which did nothing to bind defendants. Plaintiff contends that defendants' failure to dispute the representations contained in the "Prospectus", which did not identify them by name, constitutes acknowledgment of a binding contract. However, given defendants' continuing interest in plaintiff's proposal and their own concerns that she secure tenants and investors, there was no reason for them to discourage plaintiff's efforts. The contents of the prospectus was entirely within plaintiff's control and were intended to generate the interest of investors other than defendants. The longer version of the prospectus (Plaintiff's Exhibit 13 in Evidence) was never shared with defendants as plaintiff did not deem it "relevant" to them.

25. Plaintiff testified that she also had spoken to Baruch Singer, a substantial real estate investor in the metropolitan area, who orally committed to her that he would fund all or any portion of the 50% of her joint venture interest. At the time, Mr. Singer had a net worth of \$200 million and liquid assets of \$6 million. Mr. Singer's interest was not made known to defendants until subsequent to defendants' rejection of plaintiff's proposal. The Court rejects as incredible plaintiff's testimony that she met with Cohen and Singer in June in light of all the other evidence of plaintiff's continuing efforts to secure investors, which would have been unnecessary had Singer promised to fund her project. By her own

account, plaintiff did not even mention the 183 Lorraine Street property to Singer until “June or July” 2004. Moreover, plaintiff omitted any mention of a meeting with Singer and Cohen in her response to an interrogatory defendants propounded asking her to identify the meetings she had with them prior to October 2004. (Exhibit G in Evidence). Elsewhere in her interrogatory responses, plaintiff identifies her own meetings with Singer and states that they concerned negotiations to buy the Property from Cohen and Fallas. (Ex. G at 5, item 3(m).) According to plaintiff’s own testimony, negotiations to buy Cohen and Fallas out occurred after she became estranged from them.

26. On August 2, 2004, plaintiff, her attorney Neil Goldstein, Cohen, Fallas, and their attorney Victor Didia met in Didia’s office. Cohen and Fallas testified that the meeting in Didia’s office was arranged in order to see if plaintiff could provide the information Cohen and Fallas needed to consider her offer. Plaintiff testified that the purpose of the meeting was to “formalize” the parties’ “agreement.” However, the prospectus and proposed memorandum of understanding plaintiff brought with her to the meeting support the conclusion that the parties still did not have an agreement, and plaintiff was still trying to put together a deal. The events at the meeting itself also support that conclusion.

27. Cohen and Fallas testified that at the meeting in Didia’s office, plaintiff first informed them that her project would require a budget of \$40 million, including construction costs of \$100 per square foot. Plaintiff testified that costs of \$100 per square foot had been discussed earlier, but even she admitted that the parties never discussed a comprehensive budget. The weight of the credible evidence is that the meeting in Didia’s office was the first time plaintiff spelled out to defendants that she expected them to invest with her in a project that would require in excess of \$40 million. Defendants told plaintiff they thought it would be impossible to obtain financing for a project of the size she had in mind, when she did not even have a single tenant committed. Even Goldstein recognized that the availability of credit would be an issue.

28. Cohen and Fallas testified that at the meeting of August 2d, they told plaintiff that they were not interested in her project. Plaintiff testified that she was “uneasy” but still believed she was going to “work it out” with defendants. The weight of the evidence supports the testimony of Cohen and Fallas. Even plaintiff testified that Cohen and Fallas indicated that they were unwilling to spend more than \$5 million on renovations. That undisputed fact is fundamental. Once Cohen and Fallas said they were unwilling to spend more than \$5 million on renovations, plaintiff could not possibly have believed the parties were “going to work it out.” The weight of the evidence is that the parties broke off negotiations at or very soon after the meeting at Didia’s office because it became clear at that meeting that they had never had the same interests in, or understanding of, the proposed venture, or a firm agreement.

29. Plaintiff subsequently recognized that she had no agreement with Cohen and Fallas, as evidenced by the fact that she wrote Cohen a letter, dated September 8, 2004, offering to buy out his interest in the 183 Lorraine Street property. (Plaintiff’s Ex. 14 in Evidence). The letter states, “you must agree at the closing that the property will be developed as a Design Center” indicating that, as of the date of the letter, plaintiff knew that Cohen and Fallas had not agreed to such venture.

30. The purchase of the Property closed on September 20, 2004. The purchaser of record was 183 Lorraine Street LLC, owned equally by Red Hook Properties LLC, an affiliate of Cayre, and E&A Lorraine LLC, owned by defendants (Plaintiff’s Exhibit 29 in Evidence). Fallas testified that he owned 20 percent of E & A, though the Operating Agreement states Cohen is the sole member of E & A. The price was \$10 million, of which the buyers paid \$3 million by the closing date and obtained financing from the seller for the remaining \$7 million. They also incurred closing costs of \$243,602. The Property is currently leased to an entity owned by Cayre, as a self storage facility.

31. In contrast to plaintiff's contention that defendants had made a binding oral contract with her, Cohen and Fallas had a written agreement with each other at the time they closed on the 183 Lorraine Street property. Similarly, Cayre, Cohen and Fallas also had a written agreement by the time they closed on the Property together. Cayre stated he considered himself a partner only when he put up his money and signed the agreement. Such evidence of written contracts, even among long-standing friends and business associates, undermines the credibility of plaintiff's claim that the defendants formed a binding oral contract with a complete stranger upon the first meeting.

#### DISCUSSION

The preponderance of the evidence clearly establishes that, although defendants were initially genuinely interested in plaintiff's proposal of a design center, which she represented would generate rents far in excess of the going rate for property in the area, no firm agreement was ever reached among the parties. Defendants sought additional information upon which to assess the probable success of the proposed venture and were concerned about the plaintiff's financial commitment. Although there were several meetings among the parties, and plaintiff was given a copy of the Contract for purchase of the Property as evidence of defendants' good-faith efforts, when they were finally told of the actual anticipated cost of renovation, defendants unequivocally declined to participate. Notwithstanding plaintiff's wishful thinking, the Court finds that there was never a meeting of the minds among the parties to join in a joint venture for the development of a design center. Rather, all of the evidence points to negotiations which were merely investigatory and ultimately unsuccessful.

Plaintiff did not provide any funding toward the purchase price and her total out-of-pocket investment of \$13,604, which included her own attorney's fee for which defendants would not be responsible, is attributable to plaintiff's own marketing effort to secure funding and defendants' participation in her project. There is no credible indication that plaintiff changed her position in

reliance upon defendants' alleged promise. Although plaintiff suggests that she suspended her own bidding on the Property in deference to defendants' request, which is denied by defendants, it is not plausible that she would have prevailed in securing the Property for herself alone in light of the seller's failure to respond to her larger \$11 million offer and the lack of reliable evidence that she possessed the resources to conclude the purchase. Any damages alleged to have accrued as a result of plaintiff's forbearance from competitive bidding on the Property are purely speculative. Moreover, as plaintiff has been steadfast in her insistence that the Property be developed as a design center in conformity with the alleged joint venture, even to the point of declining offers by defendants to include her as a partner in the ownership of the building as a storage facility, there is no need to address a theoretical claim that plaintiff might have had to an interest in the Property independent of the joint venture. The cause of action for constructive trust did not survive appeal and the claim before the Court at trial was limited to the alleged joint venture to create a design center.

Although this Court's decision is premised upon findings made upon the evidence adduced at trial, it is appropriate to address the argument raised in Defendants' Pre-Trial Brief that even if a joint venture agreement had been formed, such joint venture would be terminable at will and that, in fact, it was effectively terminated, leaving plaintiff with no right to claim damages for breach of contract.

The Statute of Frauds provides that any agreement which, by its terms, is not to be performed within a year is void unless reflected in a writing subscribed by the parties to be thereby bound. (General Obligations Law §5-701(a)(1)). As observed by Judge Jasen in *D & N Boening v Kirsch Beverages, Inc.*, "[t]he entire Statute was intended to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury." (63 NY2d 449, 453 [1984]). It is noted that the parties here expressly understood, as reflected in Plaintiff's Exhibit 13 in

Evidence at page 33, that the project would take at least two years to complete, during which period, there would be no income. Performance of the alleged joint venture could not, therefore, by its terms, be accomplished within the year from the making of the oral agreement, which plaintiff contends occurred in March of 2004. However, it has been repeatedly held that the Statute of Frauds is not applicable to a joint venture “ because, absent a definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will” which is terminable at any time without liability for breach of contract. (*Foster v Kovner*, 44 AD3d 23,27 [1<sup>st</sup> Dept 2007]; see also, *Mendelovitz v Cohen*, 66AD3d at 850, and *F.S. Intertrade Office Prods, Inc. v Babina*, 199AD2d 95, 96 [1<sup>st</sup> Dept 1993], and cases cited therein).

In this case, affirming the denial of summary judgment, the Appellate Division stated: “[T]he defendants failed to make a prima facie showing that the alleged joint venture was terminable at will which, if true, would entitle them to terminate it without liability”. (66AD3d at 850). In *Hooker Chemicals & Plastics Corp. v International Minerals & Chemical Corporation* ( 90 AD2d 991 [4<sup>th</sup> Dept 1982]), which was cited by the Appellate Court herein, it was held that, although a joint venture, like a partnership, is terminable at will where the agreement does not specify a definite term, where the object of the venture is “the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished”(quoting *Hardin v Robinson*, 178 App Div 724, 728, aff’d 223NY 651). Thus, if the purported joint venture had a definite term of at least two years by virtue of the object to open a design center, and was enforceable as such, the Statute of Frauds would void such agreement in the absence of a writing; if the term was indefinite and the agreement was not void under the Statute of Frauds, which appears to be the case since the continued operation of the design center was contemplated (see *Rutecki v S.H. Gow & Company, Inc.*, 289 AD2d 1066, 1067 [4<sup>th</sup> Dept 2001]), defendants terminated it

as of right prior to the closing on the Property and cannot be held liable to plaintiff in damages for breach of contract. In either event, judgment must be given to the defendants.

#### CONCLUSION

Upon the evidence presented at trial, plaintiff has failed to sustain her burden to prove the formation of a binding contract with defendants to undertake a joint venture to create and operate a design center. Accordingly, judgment is awarded to defendants dismissing the complaint.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.