

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35016
Y/kmb

_____AD3d_____

Argued - March 29, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2011-03707

DECISION & ORDER

Stephen Hamburg, et al., appellants, v Westchester
Hills Golf Club, Inc., respondent.

(Index No. 11537/10)

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y. (Eric
J. Mandell of counsel), for appellants.

Gaines, Gruner, Ponzini & Novick, LLP, White Plains, N.Y. (Joseph M. Buderwitz
of counsel), for respondent.

In an action, inter alia, for injunctive relief, the plaintiffs appeal from an order of the
Supreme Court, Westchester County (Murphy, J.), entered February 17, 2011, which denied their
motion for summary judgment on the cause of action seeking an injunction compelling the defendant
to remove a certain fence based upon an oral agreement purportedly reached on July 24, 2005, and
granted the defendant's cross motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied the plaintiffs' motion for summary judgment
on the cause of action seeking an injunction compelling the defendant to remove a certain fence
based upon an oral agreement purportedly reached on July 24, 2005, and granted the defendant's
cross motion for summary judgment dismissing the complaint. "The statute of frauds, as
incorporated in section 5-701(a)(1) of the General Obligations Law, provides that an agreement is
void if it is not in writing and 'subscribed by the party to be charged therewith' when the agreement
'[b]y its terms is not to be performed within one year from the making thereof'" (*Sheehy v Clifford
Chance Rogers & Wells LLP*, 3 NY3d 554, 559-560, quoting General Obligations Law § 5-
701[a][1]). "In order to remove an agreement from the application of the statute of frauds, both

parties must be able to complete their performance of the contract within one year” (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d at 560; *see Cron v Hargro Fabrics*, 91 NY2d 362, 367-368; *Meyers v Waverly Fabrics Div. of Schumacher & Co.*, 65 NY2d 75, 79).

Here, the defendant established its prima facie entitlement to judgment as a matter of law by tendering evidence that the alleged oral agreement between the parties was incapable of performance within one year and was, therefore, barred by the statute of frauds (*see* General Obligations Law § 5-701[a][1]; *Solomon v Urban Dental Mgt., Inc.*, 39 AD3d 529). In opposition to this prima facie showing, the plaintiffs failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

DILLON, J.P., BALKIN, ENG and CHAMBERS, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court