SHORT FORM ORDER **INDEX NO.: 34326-11**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-11-12
SUBMITTED: 6-28-12
MOTION NO.: 001-MG; CASE DISP

DWAYNE S. WAGNER,

Plaintiff,

-against-

135 MAIN STREET, LLC, DAVID WILSON, AND RICHMAN BRY,

Defendants.

LAW OFFICES OF DWAYNE S. WAGNER, P.C.
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Upon the following papers numbered 1-17 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-14 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15-16 ; Replying Affidavits and supporting papers 17 ; it is,

ORDERED that the branch of the motion by the defendants which for an order dismissing the complaint is granted; and it is further

ORDERED that the motion is otherwise denied as academic.

The plaintiff, Dwayne Wagner, alleges that the parties entered into an oral joint-venture agreement to renovate and operate a parcel of commercial real property located in Westhampton Beach, New York. The property is owned by Wagner's limited liability company, Georgia Pond Associates, LLC ("Georgia Pond Associates"), and the defendant135 Main Street, LLC ("135 Main Street"), as tenants in common. The defendants David Wilson and Richman Bry are the managing members of 135 Main Street. In November 2004, Georgia Pond Associates and 135 Main Street entered into a tenants-in-common agreement, which set forth their mutual understandings with respect to their ownership of the property and their respective rights and obligations as tenants in common. That agreement was amended on April 25, 2006,

and October 2, 2007, respectively. On October 10, 2007, Wagner and Georgia Pond Associates executed a promissory note in favor of 135 Main Street in the principal amount of $195,217.02. Also on October 10, 2007, 135 Main Street and Georgia Pond Associates executed an amended, restated, and consolidated promissory note in favor of Morgan Stanley Mortgage Capital Holdings, LLC, in the principal amount of $2.56 million. Wagner and Georgia Pond Associates defaulted on the promissory note in favor of 135 Main Street, and 135 Main Street moved for summary judgment in lieu of complaint (Index No. 10319-11). The motion was granted without opposition by an order of this court dated September 15, 2011, and a default judgment was entered against Wagner and Georgia Pond Associates on October 6, 2011. Wagner and Georgia Pond Associates' motion to vacate the default judgment was denied by an order of this court dated February 6, 2012.

Wagner commenced this action on November 9, 2011, to recover for services he purportedly rendered to the joint venture. Wagner alleges that Wilson and Bry were passive investors living in California and that he performed all of the necessary tasks to renovate and operate the property. Wagner alleges that he provided professional and management services to the joint venture in reliance on the defendants' representations that he would receive the reasonable value thereof. The complaint contains causes of action for breach of contract and unjust enrichment. The defendants move to dismiss the complaint or, alternatively, to consolidate this action with the prior action for summary judgment in lieu of complaint.

Contrary to the defendants' contentions, neither the tenant-in-common agreement, as amended, nor the amended, restated, and consolidated promissory note is applicable to Wagner's claims. Wagner is not a party to either of those agreements, which he signed in his representative capacity as the managing member of Georgia Pond Associates. Moreover, the promissory note executed by Wagner and Georgia Pond Associates in favor of 135 Main Street does not cover the dispute that is the subject of this action. That promissory note merely covers the repayment to Wilson and Bry of capital advanced by them to renovate the property.

The defendants contend that the alleged oral joint-venture agreement is barred by the statute of frauds. General Obligations Law § 5-701(a)(1) provides that an agreement, promise, or undertaking is void unless embodied in a writing or writings and signed by the party to be charged if, by its terms, it is not to be performed within one year from the making thereof. The key issue is whether the purported oral joint-venture agreement was capable of performance within one year. Wagner does not allege that his purported agreement with the defendants contained a term certain for its duration, nor does he allege that either or both parties, pursuant to the terms of their purported agreement, could discontinue their activities as a matter of right within one year (*see*, **North Shore Bottling Co. v Schmidt & Sons**, 22 NY2d 171, 175-178). When, as here, the purported oral agreement is one of indefinite duration and can only be terminated within one year by its breach during that period, it falls within the bar of General Obligations Law § 5-701(a)(1) and is void (*see*, **D & N Boening, Inc. v Kirsch Beverages, Inc.**, 63 NY2d 449, 456-457). Accordingly, the first cause of action for breach of contract is dismissed.

It is well-settled that, under New York law, a plaintiff may not escape the statute of frauds by attaching the label "quantum meruit," "unjust enrichment," or "promissory estoppel" to the underlying contract claim (**Morgenweck v Vison Capital Advisors, LLC**, 410 Fed Appx 400, 402 n 1 [and cases cited therein]). Accordingly, the second cause of action for unjust enrichment is also dismissed.

Dated: September 24, 2012

J.S.C.