

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

----- X
RELIABLE REALTORS, LLC,
Plaintiff,

- against-

Index No. 15615/08
Motion Date: 4/1/09
Motion Cal. No. 22

MANUEL GUERRE, R&L EQUITY HOLDING
LLC AND PEDRO J. GUERRE,
Defendants.

----- X
The following papers numbered 1 to 13 read on this motion by defendants for an order, inter alia, pursuant to CPLR 3211(a)(5) and GOL § 5-701 and GOL § 5-703 to dismiss the action on the basis of the Statute of Frauds; pursuant to CPLR 3211(a)(7) and 3016 (b) and cross-motion by plaintiff for an order pursuant to CPLR 3211 dismissing the second, third, fourth, and thirteenth affirmative defenses.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5-8
Reply & Affirmation in Opposition.....	9-10
Reply Affirmation.....	11-13

Upon the foregoing papers it is ordered that defendant's motion for an order, inter alia, pursuant to CPLR 3211(a)(5) and GOL § 5-701 and GOL § 5-703 to dismiss the action on the basis of the Statute of Frauds; pursuant to CPLR 3211(a)(7) and 3016 (b) is denied; and cross-motion by plaintiff for an order pursuant to CPLR 3211 dismissing the second, third, fourth, and thirteenth affirmative defenses is denied, for the following reasons:

The plaintiff's allegations, which must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770), are as follows: Plaintiff, RELIABLE REALTORS LLC (hereinafter "Reliable"), is a limited liability company duly organized and authorized to do business in the State of New York and defendant, R & L EQUITY HOLDING LLC (hereinafter "R & L"), is a limited liability company duly organized and authorized to do business in the State of New York. Defendant, GUERRA was a member and the Chief Executive Manager of Reliable and he and Reliable entered into an agreement in which it was agreed that GUERRA would locate properties for purchase by Reliable for the purpose of development The agreement further provided that Reliable would invest the moneys necessary to purchase, renovate and/or construct

the properties and that GUERRA, for a fee, would oversee the purchase, construction and development of the properties and would handle all of the financial transactions with respect to the purchase, construction/renovation and sale of the properties. In accordance with the agreement, Reliable, through its ten other members, advanced certain sums in the approximate amount of \$1,000,000.00 to GUERRA for the purchase and construction/renovation of the properties. Defendant, GUERRA, has failed to account for the moneys advanced by Reliable and the moneys received by GUERRA from the sale and/or refinance of the properties.

Plaintiff brought the instant action and claims the following seven causes of action: The first cause of action seeks an accounting of all moneys advanced to GUERRA by Reliable. The second cause of action is for breach of the agreement and claims that GUERRA failed to purchase and construct/renovate the properties despite receiving the money from Reliable and purchased and/or constructed/renovated the properties with Reliable's moneys for the benefit of others including GUERRA, R & L and Pedro J. GUERRA rather than for the benefit of Reliable. Plaintiff seeks damages against GUERRA in the approximate amount of \$1,000,000.00 together with interest, attorneys' fees and costs. The third cause of action is for breach of fiduciary duty by GUERRA to plaintiff. Plaintiff seeks damages against GUERRA in the approximate amount of \$1,000,000.00 together with interest, attorneys' fees and costs. The fourth cause of action is for conversion. Plaintiff seeks damages against GUERRA in the approximate amount of \$1,000,000.00 together with interest, attorneys' fees and costs.

The fifth cause of action is for fraud and claims that GUERRA falsely and fraudulently stated and represented to Reliable that the proceeds entrusted to him would be invested in properties purchased or owned by Reliable. The representation made by GUERRA was false and, in truth, the properties purchased by GUERRA with Reliable's moneys were purchased in the name of various third parties. At the time the false representations were made, they were known by GUERRA to be false and were made by GUERRA with the intent to deceive and defraud Reliable and to induce the members of Reliable to invest in Reliable and entrust Reliable's moneys to Guerra. At the time the false representations were made by GUERRA, Reliable and its members did not know the true facts but believed the representations were true, relied upon it and were induced to invest in Reliable and entrust Reliable's moneys to GUERRA. As a result of the false representations, GUERRA was able to purchase various properties and/or was able to construct/renovate various properties in his own name and that of various nominees including R & L and Pedro GUERRA. Plaintiff seeks damages against GUERRA in the approximate amount of \$1,000,000.00 together with interest, attorneys' fees and costs.

The sixth cause of action seeks an equitable lien on the property known as 101-15 37th Avenue, Queens, New York based upon GUERRA having transferred these premises to

defendant, R & L. These premises were renovated and/or constructed utilizing, in whole or in part, Reliable's money and plaintiff seeks to rescind the deed and the properties should be transferred to Reliable.. The seventh cause of action seeks an equitable lien on the property known as 22-16 98th Street, Queens, New York based upon Pedro GUERRA having purchased these premises in his name. These premises were purchased, in whole or in part, with Reliable's money and plaintiff seeks to rescind the deed and the properties should be transferred to Reliable.

The branch of defendants' motion seeking to dismiss the complaint on the grounds that the allegations are based upon oral agreements in violation of the statute of frauds, pursuant to CPLR3211(a)(5) and GOL § 5-701 and GOL § 5-703 is denied. The Statute of Frauds provides, in pertinent part, that "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing ... if such agreement, promise or undertaking ... by its terms is not to be performed within one year from the making thereof" (General Obligations Law § 5-701[a][1]). This provision does not apply to an agreement that "appears by its terms to be capable of performance within the year; nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year" (North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171, 176); it applies to "those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year" (D & N Boening v Kirsch Beverages, 63 NY2d 449, 454). GOL § 5-703 states in pertinent part that, "A contract to devise real property. . . or any interest therein, is void unless the contract or some note or memorandum thereof, expressing consideration, is in writing, subscribed by the party to be charged therewith, or by his lawfully authorized agent."

First, the Statute of Frauds concerns only those agreements which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" As long as the agreement may be " 'fairly and reasonably interpreted' such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame" Radnay v. Charge & Ride, Inc., 266 A.D.2d 194 (2d Dept 1999.) (Citations omitted.) Here, the agreement at issue was not by its very terms or necessary construction to endure longer than one year. Rather, although the agreement was capable of an indefinite continuance, the agreement could have been fully performed within a year of the making thereof. Thus, the agreement was not within the Statute of Frauds. *Id.* Second, contrary to defendants' claim, the underlying actions do not involve the creation of property interests. Rather, the agreement involved the creation of a business interest, or a joint venture wherein GUERRE would locate and develop property and the other members of the Reliable LLC would provide the funding. An arrangement of this type is not subject to the

Statute of Frauds. Ackerman v. Landes, 112 A.D.2d 1081 (2d Dept 1985.)

The branch of defendants' motion seeking to dismiss the complaint on the grounds that the LLC, Reliable, has no legal authority to bring this action in violation of LLC §§ 401, 407 and 418 and CPLR 3211 (a)(3) is denied. Defendants claim that the instant lawsuit was brought by a member of Reliable without the written consent of all board members. In fact, defendants' claim that no meeting was ever conducted to authorize the lawsuit. Plaintiff has submitted a meeting notice and agreement that is sufficient evidence that the instant lawsuit was agreed upon by members of the LLC. The Court notes that given the allegations by the LLC against one of its own members, any requirement that all members of the LLC must agree to this lawsuit would not apply.

The branch of defendants' motion seeking to dismiss the complaint, pursuant to CPLR 3211 (a) (7) on the grounds that the allegations in the complaint are vague and conclusory is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

In particular, defendants claim that the fourth and fifth causes of action are not supported by any facts to support a finding that any fraudulent act was committed. In order to state a cause of action for fraud, a plaintiff must allege a misrepresentation or material omission of fact which was false and known to be false by the defendant and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the

misrepresentation or material omission, and injury. Lama Holding Co. v Smith Barney, 88 N.Y.2d 413 (1996.) The complaint alleges that defendant GUERRA used money given to him by Reliable to purchase certain properties and he failed to provide complete information concerning these purchases to Reliable. This is specific as to how defendant misrepresented these facts. Thus, the plaintiff have set forth a meritorious claim for conversion and fraud. Bernstein v. Kelso & Co., 231 A.D.2d 314 (1st Dept 1997.) Regarding the other causes of action, defendants do not raise any particular objections to them; however, upon review, these causes of action sufficiently state a cause of action.

The branch of the motion seeking an order cancelling the Notice of Pendency is denied. Pursuant to CPLR 6501, a notice of pendency may be filed in any action in which the judgment would affect the title, possession, use or enjoyment of real property. (See, 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313.) While monetary damages have been sought in the first through fifth causes of action, the sixth and seventh causes of action seek an equitable lien and the transfer of title of the subject properties. In light of the foregoing, this action affects the title to real property and the filing of a notice of pendency was proper. (CPLR 6501; see, Urgo v Patel, 279 AD2d 518 (2d Dept. 2001); Mitchell Field Realty Corp. v United Artists Communications, 188 AD2d 451 (2d Dept. 2001.)

The cross-motion by plaintiff for an order pursuant to CPLR 3211 dismissing the second, third, fourth, and thirteenth affirmative defenses is denied. The above denial of defendants' motion indicates that there is no basis to dismiss the complaint on the grounds of statute of frauds, standing, and failure to state a cause of action and no basis to vacate the notice of pendency. However, plaintiff has not submitted a sufficient basis to dismiss defendants' affirmative defenses based on these grounds. Moreover, as plaintiff acknowledges, there has not been any discovery in this action and the parties should be given an opportunity to do such.

Based on the above, the defendants' motion is denied in its entirety and the cross-motion by plaintiff is denied.

Dated: April 7, 2009

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ORIN R. KITZES, J.S.C.