

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

132

CA 25-00732

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

EUGENE LAUN, JR., INDIVIDUALLY,
AND DERIVATIVELY ON BEHALF OF 5 & 20 MARINE, LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN STEWART, ROBERT STIVERS AND DONNA STIVERS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

GREGORY L. SILVERMAN, ESQ., PLLC, GENEVA (GREGORY L. SILVERMAN OF
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SCHIARO LAW OFFICE P.C., ROCHESTER (CHRISTOPHER A. SCHIANO OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT JOHN STEWART.

SANTIAGO BURGER LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS ROBERT STIVERS AND DONNA STIVERS.

Appeal and cross-appeals from an order of the Supreme Court,
Seneca County (Daniel J. Doyle, J.), entered October 10, 2024. The
order denied the motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting those parts of the motion
of defendants Robert Stivers and Donna Stivers seeking summary
judgment on their fifth counterclaim and seeking summary judgment
dismissing the fourth, fifth, and sixth causes of action against them,
and by granting those parts of the motion of defendant John Stewart
seeking summary judgment dismissing the first, third, fifth, sixth,
and eighteenth causes of action against him, and as modified the order
is affirmed without costs.

Memorandum: Plaintiff, individually and derivatively on behalf
of 5 & 20 Marine, LLC (the LLC), commenced this action against
defendants, John Stewart, Robert Stivers, and Donna Stivers, seeking
damages for, inter alia, breach of contract, breach of the covenant of
good faith and fair dealing, and breach of fiduciary duty. Plaintiff
and Robert Stivers (Stivers) started a business flipping houses and
opened joint accounts to further that venture. Stewart owned a marina
that was in a deteriorated condition, and Stivers approached him
seeking to purchase it. Stewart agreed to lease the marina to Stivers
and Donna Stivers (collectively, Stivers defendants) and plaintiff for
a period of five years, with an option to purchase. Approximately a
year and half before the five-year period expired, plaintiff and the

Stivers defendants had a falling out and effectively ended their business relationship. When the end of the five-year lease period approached, plaintiff's attorney reached out to Stewart's attorney to indicate that plaintiff was prepared to exercise the purchase option in his sole name or with the Stivers defendants. The Stivers defendants also reached out to Stewart to express their interest in purchasing the property from him, without plaintiff. The option was not exercised before the end of the five-year lease period and, shortly thereafter, the Stivers defendants purchased the property from Stewart.

Plaintiff commenced this action and asserted the following relevant causes of action: breach of contract by Stewart (first); breach of the covenant of good faith and fair dealing by Stewart (third); tortious interference with contract by the Stivers defendants (fourth); determination of claims to real property (fifth); cancellation of the deed (sixth); breach of fiduciary duty by the Stivers defendants (twelfth and seventeenth); and aiding and abetting breach of fiduciary duty by Stewart (eighteenth). The Stivers defendants moved for summary judgment dismissing the fourth, fifth, sixth, and seventeenth causes of action against them and for summary judgment on their counterclaim seeking reformation of the lease. Stewart moved for, inter alia, summary judgment dismissing the first, third, fifth, sixth, and eighteenth causes of action against him and joined in that part of the Stivers defendants' motion seeking to reform the lease. Plaintiff moved for partial summary judgment on the third and eighteenth causes of action against Stewart and the twelfth and seventeenth causes of action against the Stivers defendants. Supreme Court denied all motions in their entirety. Plaintiff now appeals and Stewart and the Stivers defendants separately cross-appeal.

We agree with defendants in their cross-appeals that the court erred in denying those parts of their motions seeking to reform the lease, and we therefore modify the order by dismissing the first, fourth, fifth, and sixth causes of action. There is a "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]), and "a correspondingly high order of evidence is required to overcome that presumption" (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]). However, "[i]n the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement" (*id.* at 573; see *George Backer Mgt. Corp.*, 46 NY2d at 218-219). "In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Assoc.*, 66 NY2d at 573; see *Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]; *Stache Invs. Corp. v Ciolek*, 174 AD3d 1393, 1394 [4th Dept 2019]). Thus, " '[w]here there is no mistake about the agreement and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected' " (*Harris*, 24 NY2d at 467; see *George Backer Mgt. Corp.*, 46 NY2d at 219). "Because the thrust of a reformation claim is that a writing does not set forth the actual

agreement of the parties, generally neither the parol evidence rule nor the Statute of Frauds applies to bar proof" (*Chimart Assoc.*, 66 NY2d at 573; see *Stache Invs. Corp.*, 174 AD3d at 1394).

The lease entered into by the parties, drafted by Stivers, was for a term of one year, from October 15, 2016 to October 14, 2017, with the option to renew "on an annual basis for five (5) separate, annual one (1) year periods of time." Thus, a plain reading of the contract shows that the term of the lease plus the option years would be a total of six years. However, the Stivers defendants submitted in support of their motion the deposition testimony of Stewart and plaintiff and the affidavits of the Stivers defendants. All the parties testified or stated that, at the time they signed the lease, they intended the term of the lease to be five years. We therefore conclude that defendants established their entitlement to reformation of the lease to a total period of five years, including the term of the lease and the option years.

Contrary to plaintiff's contention, his deposition testimony and statement in his affirmation in opposition to the motion did not raise a triable issue of fact. He testified that, after the parties signed the lease, he looked it over and recognized the error and told Stivers how it read. He testified that Stivers looked at him and said "Okay. That's our ace in the hole." He gave a similar recounting of the conversation in his affirmation, adding that he asked Stivers whether they should tell Stewart that the lease read as a six-year term, and Stivers responded no. In a reply affidavit in support of the Stivers defendants' motion, Stivers denied that this conversation ever occurred. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that Stivers's statements showed, at most, that he learned of the mistake after the lease was signed, and plaintiff's contention that Stivers's statements showed an intention at the time of signing for the lease period to be six years is based on mere speculation. There was no statement by Stivers that he was aware that the lease read as a six-year lease at the time the lease was executed. In addition, there was no evidence of the parties' conduct after execution by which we could reasonably infer that any party believed the lease term was six years. To the contrary, all parties acted with urgency shortly before five years after the lease was signed to address the option deadline.

We reject plaintiff's contention in his appeal that he is entitled to partial summary judgment on the third and eighteenth causes of action against Stewart, and we agree with Stewart in his cross-appeal that the court erred in denying that part of his motion seeking dismissal of those causes of action. We therefore further modify the order accordingly. "[A]ll contracts imply a covenant of good faith and fair dealing in the course of performance" (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002]; see *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The "covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (511 W. 232nd

Owners Corp., 98 NY2d at 153; *see Dalton*, 87 NY2d at 389; *Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 940-941 [4th Dept 2019]).

Plaintiff alleges that Stewart breached the covenant of good faith and fair dealing as well as aided and abetted the Stivers defendants' alleged breach of fiduciary duty, by agreeing before the option deadline to sell the property to the Stivers defendants after the deadline expired. In support of his motion, Stewart submitted evidence establishing that the business and personal relationship between plaintiff and the Stivers defendants ended in May 2020 and that both plaintiff and the Stivers defendants reached out to him before the option deadline to express interest in exercising the option without the other party. Stewart submitted further evidence, including his deposition testimony and letters sent to the parties, establishing that he would not agree to allow just one party to exercise the option. It was not until the lease, and thus the option, expired that he sold the property to the Stivers defendants. Stewart thus established that nothing he did had " 'the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (511 W. 232nd *Owners Corp.*, 98 NY2d at 153). Contrary to plaintiff's contention, Stewart's testimony regarding the conversations he had with the Stivers defendants about selling the marina did not establish that he hindered or prevented plaintiff and the Stivers defendants from exercising the option together. When the Stivers defendants asked Stewart whether he would be willing to sell the marina to them if the option was not exercised, he simply told them that it would depend on whether the terms of the sale were similar to those set forth in the lease and that he would consider it. His testimony therefore did not show that an agreement had been made with the Stivers defendants prior to the lease period and the option expiring.

Contrary to the contentions of plaintiff in his appeal and the Stivers defendants in their cross-appeal, respectively, plaintiff was not entitled to summary judgment on the breach of fiduciary duty cause of action as stated in the seventeenth cause of action, and the Stivers defendants were not entitled to summary judgment dismissing that cause of action. We note that, although plaintiff moved for partial summary judgment on the twelfth cause of action, which also alleged breach of fiduciary duty, he makes no argument in his brief regarding it. Plaintiff alleges that the Stivers defendants breached their fiduciary duties by excluding him from their purchase of the marina. The elements of a cause of action for breach of fiduciary duty are " '(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct' " (*Golobe v Mielnicki*, 44 NY3d 86, 93 [2025], *rearg denied* 43 NY3d 1013 [2025]; *see South Shore Eye Care, LLP v Lane*, 242 AD3d 792, 796 [2d Dept 2025]; *Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1400-1401 [4th Dept 2019]; *McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420 [4th Dept 2011], *lv denied* 17 NY3d 712 [2011]). "[A] 'fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' " (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-593 [2012],

rearg denied 19 NY3d 1065 [2012])).

Plaintiff alleges, inter alia, that the Stivers defendants owed him a fiduciary duty as either a joint venturer or as a member of the LLC. "A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge" (*IPA Asset Mgt., LLC v Schuman*, 239 AD3d 619, 621 [2d Dept 2025] [internal quotation marks omitted]). "The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise[,] and a provision for the sharing of profits and losses" (*id.* at 621-622 [internal quotation marks omitted]; see *Alper Rest., Inc. v Catamount Dev. Corp.*, 137 AD3d 1559, 1561 [3d Dept 2016]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]). " 'An agreement to enter into a joint venture may be oral and may be inferred from the totality of the parties' conduct in performance of the joint venture' " (*IPA Asset Mgt., LLC*, 239 AD3d at 622).

Although we agree with the Stivers defendants that plaintiff did not plead the existence of a joint venture in the amended complaint, he pleaded facts from which a joint venture can be inferred. Plaintiff alleges that he and the Stivers defendants formed the LLC to make improvements to and operate their business at the marina. He further alleges that he and the Stivers defendants contributed capital from the proceeds of their business flipping houses into the LLC and contributed labor to make improvements to the marina.

Contrary to the contentions of the parties, there is an issue of fact whether the joint venture was terminated at the time the Stivers defendants purchased the property. In general, if there is no written agreement setting forth the duration of a joint venture agreement, it is terminable at will by either party (see *Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 450 [1957]; *Rutecki v Gow & Co.*, 289 AD2d 1066, 1067 [4th Dept 2001]). However, " 'where a partnership has for its object 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' " (*Hooker Chems. & Plastics Corp. v International Mins. & Chem. Corp.*, 90 AD2d 991, 991 [4th Dept 1982]; see generally *Meinhard v Salmon*, 249 NY 458, 463-464 [1928]; *Mendelovitz v Cohen*, 66 AD3d 849, 850 [2d Dept 2009]). "Whether the relationship is at will or for a fixed term or until the accomplishment of a particular undertaking is a question of fact" (*Hooker Chems. & Plastics Corp.*, 90 AD2d at 991-992). We further conclude that there are issues of fact whether the LLC was terminated at the time the Stivers defendants purchased the property and whether the Stivers defendants breached their fiduciary duty to plaintiff as either joint venturers or members of the LLC by not exercising the option with plaintiff and thereafter purchasing the property from Stewart.

We have reviewed plaintiff's remaining contention and conclude that it lacks merit.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court