

Dinizio and Cook, Inc. v Duck Creek Marina at Three Mile Harbor Ltd.
2002 NY Slip Op 30072(U)
September 4, 2002
Supreme Court, Suffolk County
Docket Number:
Judge: Alfred Weiner
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SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART XXXII, SUFFOLK COUNTY

PRESENT: HON. MARY M. WERNER
JUSTICE OF THE SUPREME COURT

..... X
DINIZIO AND COOK, INC.,
DOUGLAS DINIZIO AND WALTER COOK,

Plaintiffs,

- against -

DUCK CREEK MARINA AT
THREE MILE HARBOR LTD., JOE DRAGOTTA,
MICHAEL FASANO as Executors under the Last
Will and Testament of FRANK DRAGOTTA, and
ROBERT GRAU,

Defendants.

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A motion to dismiss at the conclusion of the plaintiffs case in the non-jury trial of this matter has been made and is decided as follows.

The plaintiffs' causes of action consist of an action for unjust enrichment, for reformation of the written agreements because of defendant's fraud, for an accounting of monies received by defendants from August 1988 to the present and for a permanent injunction to prevent defendants from assigning or transferring ownership of a note and from enforcing any of the collateral instruments given at the closing of May 15, 1991.

The written agreements plaintiffs seek to reform are as follows all signed at the closing on May 15, 1991:

- Note for \$1,750,000.00 (Exhibit 40)
- Note for \$50,000.00 (Exhibit 41)
- Assignment of Lease (Exhibit G)
- Mortgage and Leasehold Mortgage (Exhibit H)
- Security Agreement for \$1,750,000.00 (Exhibit I)
- Security Agreement for \$50,000.00 (Exhibit J)
- Assignment of Lease (Exhibit K)
- Assignment of Leases and Rents (Exhibit L)
- Letter regarding Assignment of Lease (Exhibit M)

Proxy (Exhibit N)
Document Re: Lease (Exhibit O)
Document Re: Lease (Exhibit P)

The first issue that the court had to address was whether or not parol evidence would be received and whether the Statute of Frauds would apply.

Because the thrust of a reformation claim is that a written contract 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, in the form of parol or extrinsic evidence, of the claimed agreement (Chimart Assoc. v. David L. Paul, 66 N.Y.2d 570 [1986] [Citations omitted]). See also Bersani v. General Accident Fire and Life Assurance Corp. Ltd., 36 N.Y. 2d 457; Richardson, Evidence §11-101, 11-204 at 741,748 [Prince 11th ed]).

The court allowed parol evidence to be admitted and considers it on this motion.

The whole of plaintiffs case comes down to their claim that in November 1988, there came into effect an oral partnership agreement between them and the defendants but that written documents showing a straight buy sell arrangement were executed solely for the tax benefit of defendants and the assurance that these documents were not to be enforced constitutes the fraud plaintiffs claim justifies reformation.

Plaintiffs now seek to reform those writings to conform to this alleged “oral agreement.”

Procedurally, there is a “heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties” (Backer Mst. Corp. v. Acme Quiltins Co., 46 N.Y. 2d 211, 219) and a correspondingly high order of evidence is required to overcome that presumption. (Id. at pp. 219 - 220) The proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties” (Backer Mst. Corp. v. Acme Quiltins Co., at p.219 supra.) (Chimart Assoc. v. David L. Paul, 66 N.Y. 2d 570, 573-4).

The court finds the plaintiff has not met this burden.

The plaintiff, Douglas Dinizio, testified for seven days and the following is a summary of that testimony.

In 1988, Douglas Dinizio and Walter Cook were young men looking for a marina on the East End of Long Island to purchase and turn into a “Dockominium” that is to sell each boat slip individually as one would when a parcel of real property goes condominium.

The Duck Creek Marina at Three Mile Harbor (“Duck Creek”) seemed the perfect property. It was in a run down condition but in a good location and had an adjoining parcel with a pool and restaurant. Duck Creek was owned by Joe Dragotta and Robert Grau. Joe Dragotta has since died and is now in this action by Michael Fasano, as Executor.

Defendants tried to rebuild the marina but ran into difficulties with the Town of East Hampton obtaining permits as well as with the neighboring property owners. In August of 1988, a contract of sale (Exhibit 3) between Duck Creek Marina at Three Mile Harbor Ltd. as seller was signed by Dragotta and Grau and Douglas John Dinizio and Walter J. Cook, Jr. as buyers for the marina. The purchase price was \$2.8 million dollars with closing to take place on or before July 1, 1989 and time was of the essence. Paragraph 30 is a merger clause. The sellers were given a 99 year lease on two slips and if the ‘condo’ or ‘co-op’ plan were to succeed, defendants would receive deeds to those two slips.

The rider to the contract ran to thirty-eight typed and two handwritten paragraphs. The signatures of Frank Dragotta, Douglas J. Dinizio and Walter J. Cook appear on this contract of sale and were witnessed by attorney John T. McGowan. Between the date of this original contract, August 23, 1988, and the closing on May 15, 1991, many documents were signed. Financing was obtained through North Fork Bank for \$900,000.00 as a construction loan. The closing date was extended to January 1990 and then to January 1991. The price was raised to 3.7 million dollars in a second contract of sale but a further side agreement of April 4, 1989 shows this was only for the purpose of showing such documents to other investors. However, on December 15, 1989, another agreement changed the price to 3.7 million. Financing was obtained through the good offices of the defendants and several documents and letters to bank personnel appear to confirm this. All four parties signed personal guarantees with North Fork Bank; a professionally drawn construction loan proposal was drafted showing several scenarios depending on the speed with which the slips were sold and listing only Dinizio and Cook as sponsors. The plan was to close on the cooperative corporation once fourteen slips were sold in the amount of \$750,000.00 and to repay 1.4 million once other slips sold or alternatively to amortize the 1.4 million debt over thirty years.

Mr. Dinizio testified that he and Walter Cook tore down and rebuilt the marina, obtained all the necessary permits and were then caught in the recession of the early 1990’s. Sales were slow. Maidstone Harbor Marina, Inc. (“Maidstone”) was organized by Dinizio and Cook, Inc. to operate and maintain the ninety-eight boat slips as well as the pool, and related facilities on what has been referred to as the “upland”.

On June 1, 1990, Dinizio and Cook submitted a 134 page Cooperative Offering Plan (Exhibit 32) in the name of Maidstone to the New York State Attorney General listing Dinizio and Cook as the sponsors. This plan listed the purchase price as \$5.26 million dollars and contained a separately signed and sworn certification which inter alia reads as follows:

".... We jointly and severally certify that the Offering Plan does, and that documents submitted hereafter by us which amend or supplement the Offering Plan, will:

(i) Set forth the detailed terms of the transaction and be complete, current, and accurate . . .

(iii) not omit any material fact;

(iv) not contain any untrue statement of material fact;

(v) not contain any fraud, deception, concealment, suppression, false pretense of fictitious or pretended purchase or sale;

(vii) not contain any representation or statement which is false where we:

(a) knew the truth . . .

This certification is made under the penalties of perjury for the benefit of all persons to whom this offer is made. We understand that violations are subject to civil and criminal penalties under the General Business Law and Penal Law."

This plan does not list the defendants as partners or as participants in any way.

The contract of sale was amended again on April 29, 1991, extending the closing to May 1, 1991, changing the purchase price to 4.2 million and giving the defendant sellers a 60% interest in the upland leases, with the seller waiving his share of the proceeds from the restaurant rental for the '91, '92, and '93 seasons.

On May 15, 1991, the closing took place over the course of nine hours. Present, were plaintiffs and defendants, their lawyers, John Kanas of North Fork Bank and its attorney and a representative of a title company. A deed was executed (Exhibit E) and a note (Exhibit 40) for a \$1,750,000.00 loan from Duck Creek to Maidstone was signed by Douglas Dinizio as President of Dinizio and Cook, Inc. and was notarized by attorney John T. McGowan. It provided for repayment of \$425,000.00 on May 15, 1992, \$450,000.00 on May 15, 1993 and \$875,000.00 on May 15, 1994. Accompanying this note was a security agreement (Exhibit I) with Duck Creek and mortgage (Exhibit H) with North Fork Bank. Another note for \$50,000.00 was also signed by Dinizio (Exhibit 40) along with a security agreement (Exhibit J). Dinizio and Cook assigned the leases on the unsold slips and their interest in the upland property to Duck Creek (Exhibits K and L) as security for the above loans; Dinizio as President of Dinizio and Cook, Inc.

appointed Francis Dragotta and Robert J. Grau as Proxies on all of the shares of the stock of Maidstone Harbor Marina held by Dinizio as President (Exhibit N).

On November 17, 1992, a modification agreement (Exhibit 43) concerning the notes was signed by Dragotta as President of Duck Creek and Dinizio for Dinizio and Cook, Inc. extending the time to repay, reducing the yearly payments and providing for interest in the event of non-payment of the full amounts.

On May 26, 1993, an amendment to this modification agreement (Exhibit 44) was signed by the same parties reducing again the yearly payment for '93 and increasing the last payment in '97.

On February 1, 1994, a Second Amendment (Exhibit 47) to the Modification Agreement of November 17, 1992 was signed and notarized reducing the payments and extending repayment through 1998. A third amendment was subsequently signed, (Exhibit 48) which only changes some terms of the original note concerning the sale of the two slips for Dragotta and is undated. Both of these amendments include a paragraph that if Dinizio and Cook, Inc. does not sell the two slips belonging to the defendants, #3 and #25, the amendment was to be null and void.

The theory of plaintiffs case is that while they signed these and other documents purchasing the Duck Creek Marina from the defendants, their relationship was that of a partnership pursuant to an oral agreement made in November 1988.. Plaintiff Dinizio testified extensively that defendants were mentors to him and Walter Cook, that defendants wanted the deal to be structured as a straight purchase and sale for their tax benefit and that the defendants assured plaintiffs that the documents that they signed at the nine hour closing on May 15, 1991 were not to be considered enforceable and that the plaintiffs' could and should trust defendants who were their partners.

The court notes that plaintiffs were both college educated. The Request for Construction Loan, (Exhibit 13) a nineteen page document, lists the background of both plaintiffs, as the sponsors. According to this document, Mr. Dinizio earned a Bachelor of Science degree in Marketing from St. Michael's College in Vermont, and attended Queen Mary College of London where he studied Economics. He then earned his commission as an officer in the U.S. Air Force, was trained as a jet pilot and was subsequently employed by Gull Systems as West Coast Product Manager and conducted field research for Boeing and United Airlines.

Walter Cook earned a Bachelor of Science degree in Marketing from Northwestern University and attended the U.S. Coast Guard Academy. He was later employed by A. T. & T. as Promotion Manager, responsible for a team of fifteen and later as a manager for General Electric coordinating over one hundred and fifty retail outlets. While plaintiffs' counsel characterizes these individuals as "fresh out of college" and the defendants as "seasoned real estate developers" and claims a "mentor protege relationship" the court rejects any implication that Dinizio and Cook did not know what

they were signing or that they should be excused from the obligations which they undertook. Plaintiffs have offered no evidence other than Dinizio's testimony of a partnership nor have they offered any evidence which would justify this court rejecting the numerous written, signed, notarized documents in evidence.

Even if assuming arguendo that defendants agreed to an oral partnership agreement and even if plaintiffs relied it is quite clear from the evidence that such reliance would not have been reasonable. The two plaintiffs were both educated holding degrees in Business, both having had real business experience and for them to claim that they signed numerous documents, swore to the truth of those documents all the while relying on a prior oral agreement completely to the contrary is in this court's opinion beyond belief. (See, Heffernan v. Marine Midland Bank, N.A., 267 A.D. 2d, 83 [2d Dept 1991]).

If a partnership existed from 1988 then the plaintiffs' own evidence shows that they deliberately misled the Town of East Hampton in their permit applications as well as the New York State Attorney General in their Co-op Offering Plan, the latter possibly a serious violation of New York Penal Law §§210.40 and 175.30.

In their pleadings as well as the plaintiffs' counsel's Pre-trial Memorandum, plaintiffs assert in support of their partnership claim that defendants "introduced the plaintiffs as their partners to the Bank's President and Corporate Executive Officer, John Kanas" but neither of these individuals were called as witnesses and plaintiff offered no explanation for their absence. While these witnesses were not technically under the control of plaintiffs, they were clearly available to them. The court therefore draws the inference that they would not have testified favorably to the plaintiffs' case. See, PJI 1:75.

While plaintiffs have signed numerous documents (supra) the only documents specifically at issue are the notes and related loan documents dated May 15, 1991 (Exhibits 40, 41 and G - P). These documents they seek to rescind and reform and argue that those other documents, specifically those that amend and amend the amendments are proof of the alleged oral partnership. The court has examined all of the documents and finds no evidence of oral partnership nor any basis to reform the documents of May 15, 1991.

In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (see, Channel Master Corp. v. Aluminium Ltd. Sales, 4 N.Y. 2d 403, 176 N.Y.S. 2d 259, 151 N.E. 2d 833; New York Univ. v. Continental Ins. Co., 87 N.Y. 2d 308, 318, 639 N.Y.S. 2d

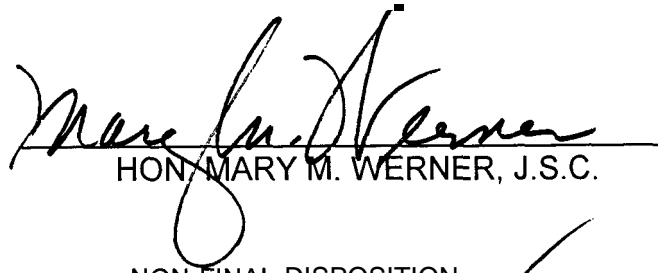
283, 662 N.E. 2d 763). (Lama Holding Company v. Smith Barney Inc., 88 N.Y. 2d 413, 421 [1996]).

Once the claim for oral partnership is denied there is no basis for the unjust enrichment claim, nor for an accounting of monies received by defendants and the claim for a permanent injunction is likewise without foundation.

"In considering the motion for judgment pursuant to CPLR 4401 the Court must afford plaintiff every inference and consider the facts in the light most favorable to the non-movant" (Szczerbiak v. Pilat, 90 N.Y. 553, 556). But this Court finds there is no valid line of reasoning that could possibly lead to the conclusion plaintiffs seek. Plaintiffs claim that in spite of signing and swearing to many formal documents, some in the presence of attorneys, they just didn't mean it and neither did the defendants, is patently unbelievable. Mr. Dinizio's encyclopedic recall of meetings and conversations over a six year period thirteen years ago, his testimony that he read the documents before signing them combined with the complete lack of any corroboration, lead the court to conclude that his testimony is not credible. Plaintiffs have selected only those documents for reformation that obligate them to pay substantial sums while maintaining the validity of the deed signed simultaneously.

The defendants' motion to dismiss at the end of plaintiffs' case for failure to prove a prima facie case is granted.

Dated: 9/4/02


HON. MARY M. WERNER, J.S.C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION ✓