

Badler v Best Equities LLC

2005 NY Slip Op 30561(U)

June 20, 2005

Supreme Court, Richmond County

Docket Number: 100691/05

Judge: Robert J. Gigante

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

STUART BADLER, BUCKINGHAM BADLER
ASSOCIATES, INC. and 286 RICHMOND VALLEY
ROAD LLC.,

Plaintiffs,

-against-

BEST EQUITIES LLC, MARVIN BEINHORN
AND BENJAMIN STOLZBERG,

Defendants.

X
DCM PART 4

Present:

HON. ROBERT J. GIGANTE

DECISION & ORDER

Index No. 100691/05
Motion No. 909 - 001

The following papers numbered 1 to 4 were used on this motion this 6th day of
April, 2005:

Order to Show Cause with Supporting Papers
Affirmation in Opposition
Affidavit in Opposition
Reply Affirmation

Papers Numbered
1
2
3
4

RICHMOND COUNTY CLERK
2005 JUN 30 P 2:21
DIVISION OF LAW & EQUITY

Upon the foregoing papers, defendants' order to show cause dated March 24, 2005 to, *inter alia*, dismiss the complaint pursuant CPLR 3211(a)(5) and 3211(a)(7) due to plaintiffs' failure to comply with the Statute of Frauds, and cancel the notice of pendency pursuant to CPLR 6514(a) is granted, in part, and denied, in part, in accordance with the following.

This action is predicated upon a purported verbal joint venture agreement between the parties concerning certain real property located at 236-286 Richmond Valley Road, Staten Island, New York. Allegedly, the subject property consists of approximately 8.45 acres of land upon which two warehouses and a commercial building are situated. Insofar as it appears on the papers before the Court, plaintiff

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Buckingham Badler Associates, Inc. ("BBA") became the tenant of said building pursuant to a written lease agreement dated May 18, 2000 with Nassau Metals Corporation, the former owner. According to plaintiffs, by late 2003 they became interested in purchasing a portion of the subject property upon which its leasehold was situated, but the owner/landlord was only interested in selling the entire parcel. Allegedly to this end, plaintiff Stuart Badler, with the assistance of his broker, obtained an introduction to defendants Beinhorn and Stolzberg (the principals of defendant Best Equities, LLC) and according to plaintiffs these parties entered into a joint venture agreement concerning the acquisition of the subject property in or about February 2004. It is uncontested that on or about June 29, 2004, Nassau Metals Corporation conveyed title to the entire property to Best Equities, but plaintiffs maintain that defendants thereafter failed to comply with the balance of their alleged agreement regarding, e.g., plaintiffs' acquisition of the sub-parcel on which the building was located.

In this action, plaintiffs seek to enforce, *inter alia*, the purportedly verbal joint venture agreement pursuant to which defendant Best Equities was to acquire title to the *entire* parcel and, thereafter, (1) subdivide the subject property into two separate lots, (2) address certain environmental contingencies and (3) secure financing for BBA's acquisition of the newly created lot (consisting of approximately 2.0320 acres and the commercial building situated thereon), known as proposed tax lot 270 for the undisputed purchase price of 1.4 million dollars.

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Plaintiffs further allege that Best Equities was to retain ownership of the remainder of the subject property and was to be granted an easement for access across proposed tax lot 270.

According to plaintiffs, despite their payment of (1) sums in excess of \$42,000.00 towards the closing costs, (2) \$14,000.00 per month to Best Equities from July 1, 2004 through February 28, 2005 as and for plaintiffs' share of the "carrying charges" on the subject property and (3) more than \$20,000 to carry out their obligations under the purported joint venture agreement (e.g., for the subdivision application; preparation of the easement, including mapping and the related survey; securing environmental clearances; conducting necessary title searches; arranging for financing; and forming an entity known as 286 Richmond Valley Road LLC to take title to the proposed new tax lot), defendants repudiated and breached the parties' alleged oral agreement by refusing to convey title to proposed tax lot 270 to plaintiffs on or about February 15, 2005. In their complaint, plaintiffs have asserted various causes of action based upon defendants' failure to comply with this purported oral agreement concerning the acquisition of the subject parcel(s).

In moving to dismiss the complaint for failure to state a cause of action, defendants maintain that the Statute of Frauds requires that a contract for the sale of real property be in writing and subscribed by the party to be charged (*see* General Obligations Law §5-703). Here, defendants have produced an unexecuted Purchase and Sale Agreement bearing the date of July 20, 2004 which relates to the sale of that

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part of the property upon which the subject building is located. According to defendants, said proposed contract of sale was transmitted to plaintiffs' attorney on August 17, 2004 and was rejected on August 24, 2004 when the draft was returned to defendants' attorney with "major revisions and markups". Defendants maintain that the parties "never came to terms on the transaction" thereafter, and that a purchase agreement was never entered into.

Defendants also deny that any joint venture existed between the parties, claiming that plaintiffs have mischaracterized the nature of the transaction in order to enforce the purported oral contract for the conveyance of real property. Additionally, defendants maintain that the essential elements of a joint venture have not been pleaded, nor do they exist in this case.

Finally, defendants maintain that plaintiffs' cause of action to impose a constructive trust is legally deficient since it is well settled that a constructive trust may only be imposed where, *inter alia*, property is parted with on faith of an oral promise to reconvey. No such transaction is alleged to have occurred in the case at bar.

In reply, plaintiffs concede that they never had any interest in the property prior to obtaining defendants' alleged oral promise to convey title to the newly created tax lot to them, but claim that their alleged contribution of money, time and effort may be deemed to satisfy the foregoing requirement (*see Eickler v Pecora*, 12 AD3d 635 [2nd Dept 2004]).

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In considering a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), it is well settled that the pleadings must be liberally construed (CPLR 3026), and the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275; *see* Doria v. Masucci, 230 AD2d 764, 765 [2nd Dept 1996]). In any such inquiry, the facts pleaded are presumed to be true and are accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see* Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414; Morone v. Morone, 50 NY2d 481). Moreover, a court may freely consider affidavits submitted by plaintiffs to remedy defects in the complaint (*see* Leon v. Martinez, 84 NY2d 83, 88; Rovello v. Orofino Realty Co., 40 NY2d 633, 636).

In the instant matter, plaintiffs' claims are predicated in large part upon the alleged existence of an oral joint venture agreement between the parties. In this regard, it is well established that the required indicia of a joint venture include (1) acts manifesting the intent of the parties to be associated as joint venturers; (2) a contribution by the coventurers to the joint undertaking through a combination of property, financial resources, effect, skill or knowledge; (3) a degree of joint proprietorship and control over the enterprise; and (4) a provision for the sharing of profits and losses (*see* Richbell Information Services v. Jupiter Partners, L.P., 309

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AD2d 288, 298 [1st Dept 2003]).

Here, viewing the evidence in the light most favorable to plaintiffs, some of these essential elements are clearly lacking, e.g., there are no allegations that the parties contemplated the sharing of profits and losses, an indispensable element of any joint venture agreement, oral or written (*see Schnur v Marin*, 285 AD2d 639 [2nd Dept 2001]). As a result, the first and fifth causes of action, both of which are predicated upon the purported joint venture agreement must be dismissed.

Notwithstanding that plaintiffs have failed to allege facts that support the necessary elements of a joint venture agreement, it is the opinion of this Court that the remaining factual allegations which are not flatly contradicted by the record are legally sufficient to support causes of action for, *inter alia*, specific performance, a declaratory judgment, breach of an oral agreement for the sale of real property where there has been part performance, imposition of a constructive trust and monetary damages. Thus, dismissal of these claims would be premature at this early stage of the proceedings (*see Barash v Estate of Sperlin*, 271 AD2d 558 [2nd Dept 2000]).

Accordingly, it is

ORDERED, defendants' application to dismiss the complaint and cancel the notice of pendency is granted to the extent of severing and dismissing the first and fifth causes of action in the complaint; and it is further

ORDERED, that the balance of the application is denied; and it is further

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ORDERED, that the Order of this Court dated April 20, 2005 shall remain in full force and effect pending the further order of this Court; and it is further ORDERED, that the Clerk enter judgment accordingly.

ENTER,

Dated: 6/20/05

[Handwritten Signature]
J.S.C.
HON. ROBERT J. GIGANTE

GRANTED
JUN 26 2005
[Handwritten Signature]
CLERK
COUNTY CLERK