

<b>Gladstein v Martorella</b>
2007 NY Slip Op 32113(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0604161/2006
Judge: Rolando T. Acosta
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. ROLANDO T. ACOSTA

PRESENT: \_\_\_\_\_

PART 61

Justice

Jane Gladstein, individually, and  
Harvey Gladstein, as executor of the  
Estate of Joyce Gladstein

INDEX NO. 604161/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

Christopher H. Martorella and  
Metropolitan Housing Partners, LLC

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

see  
attached

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

SO ORDERED

Dated: 7/9/07



ROLANDO T. ACOSTA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

---

Jane Gladstein, individually, and Harvey Gladstein,  
as Executor of the Estate of Joyce Gladstein,

Plaintiffs,

– against –

Christopher H. Martorella and Metropolitan Housing  
Partners, LLC,

Defendants.

---

**DECISION/JUDGMENT**

Index No. 604161/06

Seq. No. 1

Present:

**Rolando T. Acosta**  
Supreme Court Justice

The following documents were considered in reviewing plaintiff Jane Gladsteins' motion for partial summary judgment on her first cause of action (breach of contract) and defendants' cross-motion for an order denying or continuing plaintiff's motion on the ground that facts essential to justify opposition to the motion may exist but cannot now be stated. CPLR 3212(f):

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Rule 19-a Statement, Affidavit and Memorandum of Law</b>	<b>1-2 (Exhibits 1-4; A-I)</b>
<b>Notice of Cross-Motion, Rule 19-a Statement, Affidavit and Memorandum of Law</b>	<b>3-4 (Exhibits A-F)</b>
<b>Reply Affidavit &amp; Memorandum of Law</b>	<b>5-6 (Exhibits 1-4; A-J)</b>

Background

Jane Gladstein and Christopher H. Martorella together owned Metropolitan Housing Partners, LLC ("MHP"), a real estate investment partnership, and in 2005 decided to sever their business relationship. Accordingly, they entered into prolonged negotiations resulting in a Settlement Agreement pursuant to which Martorella agreed to purchase Gladstein's interest for \$8 million. See Settlement Agreement, dated December 15, 2005, and Amendment dated March 9, 2006, Plaintiff's Exhibits D & E. Pursuant to Section 2 of the

Agreement, \$4 million would be paid at closing and the remaining \$ 4 million payable in two, \$2 million installments provided in Section 2(a)(ii) and (iii). Section 13 of the Settlement Agreement provides for the award of cost and attorneys fees incurred by the party seeking to enforce the Settlement Agreement.

Section 3 of the Settlement Agreement contains a release pertaining to any matters, whether known or unknown, or suspected or unsuspected, including

all actions, claims, causes of action, complaints, liabilities, obligations, suits, damages . . . reckonings, theories of relief and/or demands of any nature whatsoever, in law and/or in equity, whether known or unknown, suspected or unsuspected, claimed absolute or contingent that [Martorella and MHP] ever had, now have or in the future shall or may have . . . arising out of, based upon or related to, or involved with or are in connection with any acts, facts, circumstances, claims, transactions, events, occurrences, . . . representations, omissions, or failures to act, or matters of any kind or nature whatsoever to the extent any such acts, facts, circumstances, claims, transactions, events, occurrences, disclosures, statements, representatives, omissions or failures to act, or other matters, arise or occur prior to the Closing date.

In her first cause of action for breach of contract, plaintiff seeks the first of the two \$2 million installments, which became due on November 8, 2006. In his answer, defendants raise five affirmative defenses: usury, equitable estoppel, unclean hand, mandatory mediation, and breach of fiduciary duties.

### Analysis

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that . . . defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," *id.*, "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender

an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra*, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.* at 562.

Here, plaintiff Jane Gladstein has established her prima facie entitlement to summary judgment. Pursuant to Section 2 of the Settlement Agreement, the first of the two \$2 million instalments was due on November 8, 2006, and pursuant to Section 13, she's entitled to cost and attorneys fees. She has also established that none of the affirmative defenses have any merit. First of all, it should be noted that both plaintiff and Martorella are sophisticated business people and had first rate legal representation draft the Settlement Agreement. That agreement has a very broad release provision, which clearly precludes all of defendants' defenses. Citibank, N.A. v. Plapinger, 66 N.Y.2d 90, 95 (1985); Mahn Real estate Corp. v. Shapolsky, 178 A.D.2d 383 (1<sup>st</sup> Dept. 1991).

In any event, defendant's claim that the instant dispute is subject to mandatory mediation has no merit. The mandatory mediation provision that defendants rely on is contained in the Operating Agreement, which provided for the operation of MHP. Plaintiff, however, sold her interest in MHP to Martorella. The instant dispute has nothing to do with the operation of MHP, but rather defendants' breach of the Settlement Agreement, which does not have a mediation clause. In fact, it specifically states that all claims arising out of the Settlement Agreement are to be maintained in State of Federal Court in New York County. See this Court's Decision and Order under Seq. 2.

Equally lacking in merit is defendants' affirmative defense that plaintiff breached her fiduciary duties to defendants by speaking with Michael F. McGoldrick, MHP's CFO, about her plans of starting a similar enterprise. Indeed, the evidence indicates that Martorella actually gave plaintiff permission to speak with McGoldrick. Moreover, there is no indication, or for that matter no claim, that plaintiff was able to obtain a better value for her share because of information concerning MHP that she became aware of and which was unknown to Martorella or that she benefitted in any specific way be reason of her discussions with McGoldrick. See Global Minerals and Metals Corp v. Holme, 35 A.D.3d 93 (1<sup>st</sup> Dept. 2006).<sup>1</sup>

---

1. On March 20, 2007, Justice Lowe III, dismissed all of McGoldricks's claims against Jane Gladstein, in McGoldrick v. Metropolitan Housing Partners, LLC, et al., New York County Index No. 108485/06. Thus, any allegations that Gladstein breached her fiduciary obligations to defendants or somehow committed fraud by not disclosing that she had

Having established her entitlement to summary judgment, the burden shifted to defendants to raise triable issues of fact, which they have failed to do. Defendants's reliance on CPLR 3212(f) to defeat summary judgment is unavailing. As noted above, defendants negotiated a Settlement Agreement with a very broad release clause, and defendants allegations of fraud and breach of fiduciary obligations are supported with nothing more than speculation. Accordingly, based on the above it is

ADJUDGED that plaintiff Jane Gladstein have partial summary judgment against defendants on her first causes of action for \$2,000,000, plus statutory interest as of November 8, 2006, and costs and attorneys fees, to be determined at an attorney's fees hearing to be scheduled at a later date; and it is further

ORDERED that an attorneys fees hearing is scheduled for September 27, 2007 at 9:30 a.m.; and it is further

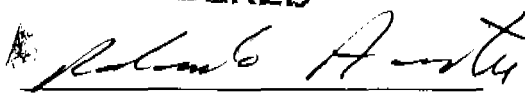
ORDERED that the remainder of the action is severed; and it is further

~~ORDERED that the severed action is scheduled for a Preliminary Conference to be held on October 4, 2007, at 10:00 a.m., in Part 61.~~

This constitutes the Decision, Order and Judgment of the Court.

The parties will be asked to settle judgment after the attorneys fees hearing.

Dated: July 9, 2007

**SO ORDERED**  
  
**ROLANDO T. ACOSTA**, J.S.C.  
J.S.C.

\_\_\_\_\_ sexually harassed McGoldrick, have no merit.

Lawrence M. Rosenstock, Esq.  
Markewich and Rosenstock LLP  
8 East 41<sup>st</sup> Street, Fifth Floor  
New York, NY 10017  
Attorneys for Plaintiff Jane Gladstein

Charles A. Stewart, III, Esq.  
Stewart Occhipinti, LLP  
1350 Broadway, Suite 2200  
New York, NY 10018  
Attorneys for Defendants