

Omansky v Whitacre

2008 NY Slip Op 30134(U)

January 10, 2008

Supreme Court, New York County

Docket Number: 0601897/2004

Judge: Herman Cahn

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

PRESENT: Justice Cahn
Justice

PART 49

Index Number : 601897/2004
OMANSKY, LAWRENCE A.
vs.
WHITACRE, DRU
SEQUENCE NUMBER : 007
SUMMARY JUDEGMENT

INDEX NO. 601897/04
MOTION DATE 10/11/07
MOTION SEQ. NO. 7
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JAN 17 2008

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

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

Dated: 1/10/08

Alan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 49

-----X
LAWRENCE A. OMANSKY AND NICOLINA
OMANSKY, a/k/a LINDA OMANSKY

Plaintiffs,

-against-

Index No. 601897/04

DRU WHITACRE, DRU WHITACRE MEDIA
SERVICES, LTD., and PETER ANDROS

Defendants.

-----X
DRU WHITACRE, DRU WHITACRE MEDIA
SERVICES, LTD.,

Third Party Plaintiffs,

-against-

THIRD PARTY
Index No.591172/05

64 NORTH MOORE ASSOCIATES, a New York State
Partnership, 64 NO MORE LLC, a New York State
Limited Liability Company, ROBERT GURLAND,
MARK OUDINE, BOMARK ASSOCIATES LLC, a New
York State Limited Liability Company, SUZANNE
WINKELMAN and MARK WINKELMAN,

Third Party Defendants.

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Herman Cahn, J.

Defendants Dru Whitacre and Dru Whitacre Media Services, Ltd. (collectively, Whitacre) move for summary judgment dismissing the action. CPLR 3212.

The complaint alleges two causes of action, one based on an oral agreement between plaintiffs Lawrence A. Omansky (Omansky) and Nicolena Omansky, and Whitacre; the other seeks legal fees incurred by Omansky in connection with Whitacre's alleged breach of the oral agreement.

The relevant facts alleged in the complaint are that both Omansky and Whitacre were partners in 64 North Moore Associates (64 North Moore), along with several other

individuals. 64 North Moore owned a building located at 64 N. Moore Street, New York, New York (the building). The building contained a commercial space (the premises), which forms the subject of this action.

Omansky claims that he had a right of first refusal to purchase the premises, according to the terms of the 64 North Moore partnership agreement. This right of first refusal was subordinate to the rights of shareholders in the residential portion of the building, known as the Spice Condominium. However, Omansky claims that he relinquished his right of first refusal when he entered into an oral partnership with Whitacre to purchase the commercial unit as partners.

Omansky claims that Whitacre's attorney drafted a proposed partnership agreement and that he drafted a proposed counter agreement. Omansky concedes that no written partnership agreement was ever entered into with Whitacre. However, Omansky claims that in June 1997, Omansky announced to other members of the Spice Condominium that he, Nicolena Omansky and Whitacre would be buying the commercial unit together.

After an alleged delay in the closing of the sale of the premises, Omansky claims that he and Whitacre agreed to bring separate lawsuits against various interested parties to force the sale of the premises to them.

In June 1998, Whitacre entered into a stipulation of settlement in the action he had commenced. The stipulation withdrew the Omansky/Whitacre offer to purchase the premises, and Whitacre entered into a new partnership, with individual members of the 64 North Moore partnership, creating the 64 No More partnership. It was this newly constituted partnership which ultimately purchased the commercial premises.

In the first cause of action, plaintiffs allege that Whitacre violated their oral partnership agreement by withdrawing their contract to purchase the commercial unit, and by entering into the 64 No More partnership. Omansky seeks \$500,000 in damages, plus interest, costs and disbursements as a result of this breach.

In the second cause of action, Omansky seeks legal fees incurred in connection with the prosecution of his rights under the oral partnership agreement.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Whitacre has met his burden of establishing a prima facie case of entitlement to summary judgment. Whitacre claims that no partnership agreement, oral or written, was ever entered into with Omansky for the purchase of the commercial unit.

Whitacre claims that even if a valid partnership agreement had been entered into with Omansky, that the statute of limitations on Omansky's claim for breach of that agreement started to run on June 2, 1998, when Whitacre entered into the stipulation of

settlement, and expired before Omansky commenced this lawsuit on June 18, 2004. Further, Whitacre argues that if a partnership existed, he was authorized to settle the lawsuit on behalf of Omansky, who was not named in the litigation. Finally, Whitacre claims that Omansky breached any alleged partnership agreement by failing to contribute capital to the partnership.

Omansky has failed to sustain his burden of coming forward with evidence which raises a material issue of fact. Omansky argues that the statute of limitations on the first cause of action for breach of the oral partnership agreement did not begin to run until the deed transferring title to the 64 No More Partnership was signed, in May 1999.

Absent evidence of an agreement setting forth a definite term of duration in the partnership alleged by Omansky, the partnership with Whitacre, if it existed as all, was a partnership at will. *Shandell v Katz*, 95 AD2d 742 (1st Dept 1983).

A partnership at will is dissolved when any of the partners expresses an intent not to continue any longer as a partnership. *Bayer v Bayer*, 215 App Div 454 (1st Dept 1926).

Whitacre's action in settling the lawsuit against third parties, commenced by agreement with Omansky but to which Omansky was not a party, constituted a clear expression of Whitacre's intention to dissolve the alleged oral partnership with Omansky.

Dissolution of an at-will partnership does not constitute a breach of the partnership agreement. The sole remedy of the non-breaching partner is to request an accounting. *McQuillan v Kenyon & Kenyon*, 220 AD2d 395 (2nd Dept 1995), *lv dismissed* 88 NY2d 1064 (1996).

Omansky's claim, based on the very act which dissolved the partnership, fails to state a claim upon which relief may be granted. Omansky has failed to come forward with any evidence which raises a triable issue on the first cause of action.

Omansky's argument, that the oral agreement was one for the creation of a partnership to purchase real estate, violates the statute of frauds, and fails to state a claim for relief. GOL § 5-703 (1) and (3); *see Gora v Drizin*, 300 AD2d 139 (1st Dept 2002).

Omansky has not alleged or proven that he made a capital contribution to the oral partnership, or that the oral partnership owned any tangible assets. Omansky has no basis for requesting a partnership accounting.

The second cause of action, for attorney's fees, is also dismissed. The general rule is that attorney's fees are incidental to litigation and that each party is responsible for his or her own attorney's fees unless the parties have agreed otherwise, or unless an award is authorized by statute or court rule. *Dupuis v 424 East 77th Owners Corp.* 32 AD3d 720 (1st Dept 2006). Omansky has failed to cite a provision in the parties' alleged oral partnership agreement which provided for the payment of his attorney's fees, or to refer to any statute or court rule which would require Whitacre to pay these fees.

The complaint fails to allege the existence of any agreement, oral or written, between Nicolena Omansky and Whitacre, and thus this plaintiff's claims are also

dismissed.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed.

Dated: Jan 10, 2008

ENTER:

Alan Cal
J.S.C.

FILED
JAN 17 2008
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