

Sohayegh v Sohayegh

2008 NY Slip Op 30307(U)

January 24, 2008

Supreme Court, Nassau County

Docket Number: 1571-06/

Judge: Leonard B. Austin

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No. 11571-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 9-28-07
Submission Date: 10-5-07
Motion Sequence No.: 004,005/MOT D

PAUL SOHAYEGH and BRAVO
MANAGEMENT LLC,

Plaintiffs,

- against -

COUNSEL FOR PLAINTIFF
Jaspan, Schlesinger, Hoffman LLP
300 Garden City Plaza
Garden City, New York 11530

SION SOHAYEGH a/k/a/ SHOKROLLAH
SOHAYEGH,

Defendant.

COUNSEL FOR DEFENDANT
Ronald A. Lenowitz, Esq.
7600 Jericho Turnpike - Suite 300
Woodbury, New York 11797

_____x

ORDER

The following papers were read on Plaintiffs' motion for summary judgment on their complaint and dismissing Defendant's counterclaims and upon Defendant's motion for leave to serve an amended answer and counterclaim:

Motion Sequence # 4

- Notice of Motion dated February 15, 2007;
- Affirmation of Barbara J. Graves, Esq. dated February 15, 2007;
- Defendant's Memorandum of Law;

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Motion Sequence # 5

Notice of Motion dated August 28, 2007;
Affidavit of Paul Sohayegh sworn to on August 24, 2007;
Plaintiff's Memorandum of Law;

Other Papers

Affirmation of Marci S. Zinn, Esq. dated March 9, 2007;
Affidavit of Paul Sohayegh sworn to on March 9, 2007;
Affidavit of Sion Sohayegh sworn to on September 21, 2007;
Affirmation of Ronald A. Lenowitz, Esq. dated September 19, 2007;
Affidavit of Rouhollah Sohayegh sworn to on September 19, 2007;
Affidavit of Maurice McKenzie sworn to on October 4, 2007;
Affirmation of Marci S. Zinn, Esq. dated October 4, 2007;
Affidavit of Paul Sohayegh sworn to on October 4, 2007;

Plaintiff's Memorandum of Law in Opposition to Defendant's motion for leave to serve an amended complaint:

Defendant's Reply Memorandum of Law in support of motion for leave to serve an amended answer.

Plaintiffs, Paul Sohayegh ("Paul") and Bravo Management, LLC ("Bravo"), move for summary judgment, pursuant to CPLR 3212, for declaratory relief, as well as for summary judgment dismissing the counterclaims alleged by Defendant, Sion Sohayegh ("Sion").

Sion moves, pursuant to CPLR 3025(b), for leave to amend his verified answer and counterclaims to add new affirmative defenses and counterclaims, and to amend two of the original counterclaims so as to make such claims against Bravo, as well.

BACKGROUND

Paul and Sion are brothers who, according to Sion, for more than a decade have worked together as partners in the purchase, development, and management of real property in New York City (Proposed amended answer, ¶ 27). At present, they allegedly

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co-own ten separate properties (*Id.*). Bravo is a limited liability company that was formed in July 1997. Originally, it had two members, but since July 2003, Paul has been the sole member of Bravo.

The two actions herein, which were consolidated pursuant to this Court's order dated October 17, 2006, concern a property located at 20 West 38th Street ("West 38th Property"). Sion apparently found the subject property, and according to Sion, proposed that Paul and he jointly acquire it. Sion states that he proposed that the brothers sell one of the buildings that they jointly owned at 146th Street ("146th Street Property") and use the proceeds to purchase the West 38th Property.

The contract for the purchase of the West 38th Property was signed by Sion, as President of 1100 Inc. ("1100"), a corporation that the brothers used to facilitate joint property acquisitions and in which the brothers hold equal interests. The brothers each allegedly contributed \$100,000 to fund the down payment by 1100. Each brother also contributed \$5,750 to obtain the mortgage for the West 38th Property.

After a fire at the 146th Street Property prevented its sale, Paul used funds from the sale of a separate property to fund the purchase of the West 38th Property by Bravo. At the closing on January 2, 2004, 1100 assigned the contract to Bravo, which obtained a mortgage of \$2,250,000. The mortgage was personally guaranteed by Paul.

The two actions herein concern Sion's claims that Paul and he had an oral agreement and that Bravo would act as the nominee for both Paul and him. According to Sion, once he paid his share of the funds advanced by Bravo to purchase the West 38th Property, Bravo's Operating Agreement was to be amended by Paul to reflect Sion's 50% ownership interest therein.

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In support of Sion's claim of an oral agreement, he has submitted two documents. The first is a handwritten document (Proposed amended answer, Exhibit C) that Sion describes as follows:

Sion suggested to Paul that they execute an acknowledgment of the Agreement. Paul consented to do so and instructed Sion write down the terms of the Agreement. Paul and Sion each signed a sheet of loose leaf paper that, per Paul's instruction, Sion filled in shortly thereafter to include the essential terms of the Agreement.
(Proposed amended answer, ¶ 35.)

The handwritten document, dated November 4, 2003, states that Sion will repay Paul half of the money needed to close when funds from the sale of the 146th Street Property become available, and 50% of the subject property would belong to Sion.

Paul denies that the signature on the handwritten document is his. He further suggests that the handwritten document is recently created, as neither the complaint in Sion's action nor Sion's original answer in Paul's action mention such a document.

Sion also states that the attorneys for Bravo drafted a memorialization of the brothers' agreement dated January 2, 2004 (Proposed amended answer, Exhibits E). This unsigned agreement, *inter alia*, provides that Bravo was acting as nominee for both Paul and Sion. Sion alleges that he did not press Paul to sign the agreement at the closing because he relied upon his close relationship with Paul, their longstanding business practice of joint 50/50 ownership of properties through LLCs, the handwritten document and the attorney's understanding of the brothers' intent to share 50/50 ownership of the West 38th Property through Bravo (Proposed amended answer, ¶ 38).

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In their complaint, Paul and Bravo seek a judicial declaration that Paul is the sole member of Bravo and that Sion has no right, title, or interest of any kind in Bravo or the West 38th Property. Paul now moves for summary judgment on the basis of documentary evidence from the closing on the West 38th Property.

In his original answer, Sion denied the allegations of the complaint, alleged three affirmative defenses and alleged counterclaims against Paul for declaratory relief, specific performance and breach of contract. Sion moves for an order pursuant to CPLR 3025(b), allowing him to amend the answer to include two new affirmative defenses, new counterclaims for unjust enrichment and tortious interference with contract and to permit him to allege two of the original counterclaims plead only against Paul, against Bravo, as well.

In their reply, Paul and Bravo deny the allegations of the counterclaims and allege four affirmative defenses; namely, statute of frauds, unclean hands, another action pending and waiver/estoppel.

In Sion's action, Sion alleges three claims which are the same as his three counterclaims in his original answer in Paul's action. In his answer in Sion's action, Paul denies the allegations of the complaint and alleges the same four affirmative defenses that are set forth in the reply served by Bravo and him.

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DISCUSSION

A. Summary Judgment - Standard

Summary judgment is the procedural equivalent of a trial. Capelin Assoc., Inc. v. Globe Mfg. Corp., 34 N.Y. 2d 338, 341 (1974). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact. Alvarez v. Prospect Hosp., 68 N.Y. 2d 320, 324 (1986). On a motion for summary judgment the court should refrain from making credibility determinations. Ferrante v. American Lung Assn., 90 N.Y. 2d 623, 631 (1997); and Capelin Assoc., Inc. v. Globe Mfg. Corp., *supra*.

B. Leave to Amend

Although leave to amend should be freely granted absent prejudice or surprise (CPLR 3025 [b]), there should be a proper basis for granting the motion. Darbonne v. Goldberger, 31 A.D.3d 693 (2nd Dept. 2006). The party seeking leave to serve an amended pleading must make some evidentiary showing that the claim can be supported. Joyce v McKenna Assoc., Inc., 2 A.D. 3d 592 (2nd Dept. 2003). The proposed amendment must not be palpably insufficient or devoid of merit. Long Island Title Agency, Inc. v. Frisa, 45 A.D. 3d 649 (2nd Dept. 2007); and Negvesky v. United Interior Resources, Inc., 32 A.D. 3d 530 (2nd Dept. 2006).

C. Plaintiffs' Motion for Summary Judgment

1. *As to the Complaint*

The contract of sale for the West 38th Property, and the amendment thereto, are both between the seller, Twenty West Associates, and, the buyer, 1100. By Assignment dated January 2, 2004, 1100 assigned all of its rights to the amended contract of sale thereof to Bravo. The bill of sale and the deed were executed in favor of Bravo by Twenty West Associates. The mortgage on the subject property was executed by Bravo, and Paul, as the sole guarantor.

Thus, Plaintiffs have made their *prima facie* case for the relief sought in the complaint. See, Alvarez v. Prospect Hosp., *supra*. The burden shifts to Sion to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Id.*; and Zuckerman v. City of New York, 49 N.Y. 2d 557 (1980).

Sion's claim that Paul orally agreed to convey a 50% interest in Bravo to him, such that Sion would then have a 50% beneficial ownership of the subject property describes an oral contract that is barred by the statute of frauds. General Obligations Law 5-703(3); Gora v. Drizin, 300 A.D. 2d 139 (1st Dept. 2002); Friedman v. Ocean Dreams, LLC, 15 Misc. 3d 1146(A)(Sup. Ct. Kings Co. 2007). See, Spodek v. Riskin, 150 A.D. 2d 358 (2nd Dept. 1989). Paul and Bravo allege the statute of frauds as one of the affirmative defenses in their reply.

To satisfy the statute of frauds, a document evidencing a contract must be subscribed by the party to be charged, must identify and describe the subject matter,

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and state all of the essential terms of a complete agreement. Nesbitt v Penalver, 40 A.D. 3d 596 (2nd Dept. 2007). Sion offers the handwritten document and the unsigned memorialization.

In order for a breach of contract to exist there must be a meeting of the minds on the agreement said to have been reached. Mainline Electric Corp. v Pav-Lak Industries, Inc., 40 A. D. 3d 939 (2nd Dept. 2007); Miranco Contracting, Inc. v. Perel, 29 A.D. 3d 873 (2nd Dept. 2006); and Winiarski v. Duryea Assoc., LLC, 14 A.D. 3d 697 (2nd Dept. 2005). Here, assuming, for the purposes of this argument only, the truth of Sion's statements regarding the handwritten document, his admission that the signatures were placed on a blank page and that he filled in the terms afterward with no further tangible evidence of assent compels the conclusion that there was no meeting of the minds. Indeed, the handwritten document contradicts the closing documents as it makes no mention of Bravo, and simply states that 50% ownership of the subject property belongs to Sion. Under these circumstances, the handwritten document fails to raise a triable issue of fact in support of Sion's claims.

Unsigned drafts do not satisfy the statute of frauds. Nemelka v. Questor Mgt. Co., LLC, 40 A.D. 3d 505 (2nd Dept. 2007); and Steinbuch v. Kapell, 5 A.D. 3d 374 (2nd Dept. 2004). Consequently, the unsigned memorialization fails to raise a triable issue of fact in support of Sion's claims.

In addition, the doctrine of part performance, codified in General Obligations Law 5-703(4), is an exception to the statute of frauds (Messner Vetere Berger McNamee

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Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC, 93 N.Y. 2d 229, 235 [1999]), but only if the part performance is “unequivocally referable” to the agreement alleged. *Id.*; and Anostario v. Vicinanza, 59 N.Y. 2d 662, 664 (1983). The acts of part performance must have been those of the party insisting on the contract. Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC, *supra* at 237.

Here, the acts by Sion, including execution of the contract, partial payment of the down payment, payment of some closing costs and execution of the Assignment of the Contract are equivocal, as these acts can be reasonably explained by the possibility of other expectations or preparatory steps toward consummation of an agreement in the future. Anostario v. Vicinanza, *supra* at 664. Nor is the payment of attorneys fees related to the closing unequivocally referable to the alleged oral agreement. Sion’s claims of part performance do not withstand scrutiny.

2. *As to the Affirmative Defenses*

The affirmative defenses set forth in Sion’s original answer are also unavailing. The first affirmative defense of another action pending is moot as the two actions have been consolidated pursuant to this Court’s order dated October 17, 2006.

Sion’s second affirmative defense of unclean hands, laches, waiver, estoppel, and the applicable statutes of limitations, improperly alleges multiple conclusions of law without any factual basis whatsoever. Plemmenou v. Arvanitakis, 39 A.D. 3d 612, 613 (2nd Dept. 2007); and Petracca v. Petracca, 305 A.D. 2d 566, 567 (2nd Dept. 2003).

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The third affirmative defense of failure to state a claim upon which relief may be granted cannot be raised as an affirmative defense in the answer. Citibank, NA v Walker, 12 A.D. 3d 480, 481 (2nd Dept. 2004); and Bentivegna v. Meenan Oil Co., 126 A.D. 2d 506, 508 (2nd Dept. 1987). In any event, upon the granting of summary judgment on Plaintiffs' complaint, this affirmative defense is rendered academic.

Based on the foregoing, the three affirmative defenses in Sion's original answer must be dismissed.

3. *Conclusion*

Paul and Bravo have presented a *prima facie* showing for summary judgment for a declaration that Paul is the sole member of Bravo, that Bravo is the owner of the subject property and that Sion has no right, title or interest in Bravo or the West 38th Property. Sion has failed to raise a triable issue of fact in opposition, and his affirmative defenses should be dismissed.

Under these circumstances, Sion's counterclaims for specific performance, breach of contract and a judicial declaration that he is entitled to a 50% interest in Bravo must also be dismissed.

D. Defendant's Motion to Amend His Answer

1. *Affirmative Defenses*

Sion seeks leave to allege the counterclaims for specific performance and declaratory relief against Bravo in addition to Paul. Since the statute of frauds bars consideration of all testimony in the record of any contract between Paul and Sion

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regarding Bravo, and the documentary evidence fails to pass muster as an enforceable writing, leave to amend the answer to allege the first two counterclaims against Bravo, as set forth in the proposed amended answer, must be denied.

The new affirmative defenses are similarly defective. The new proposed third and fourth affirmative defenses, respectively, consist of allegations that Plaintiffs' claims are barred under the terms of Paul and Sion's Agreement and that Sion's conduct has been consistent with the terms, conditions and obligations of Paul and Sion's Agreement with regard to Bravo. These affirmative defenses are barred by the statute of frauds, as well.

The proposed fifth affirmative defense, a reservation of the right to assert additional defenses, is not an affirmative defense at all. Therefore, leave to amend to include this affirmative defense must be denied.

2. *Counterclaims*

Sion's two new proposed counterclaims are for unjust enrichment and tortious interference with contractual relations.

With regard to a claim for tortious interference, the essential elements of such a claim are the existence of a valid contract between the pleader and a third party, the opponent's knowledge of the contract, the opponent's procuring of the breach of the contract, and damages. Foster v. Churchill, 87 N.Y. 2d 744, 749-750 (1996). As no valid contract has been established between Sion and Paul, Sion can have no claim against Bravo for tortious interference with contract. Therefore, leave to add this counterclaim must be denied.

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This leaves the proposed new counterclaim for unjust enrichment. To prevail on a claim of unjust enrichment, the pleader must establish that the opponent benefitted at the pleader's expense and that equity and good conscience require restitution. Whitman Realty Grp. Inc. v. Galano, 41 A.D. 3d 590, 593 (2nd Dept. 2007). Unjust enrichment does not require the performance of any wrongful act by the one enriched. Cruz v. McAneney, 31 A.D. 3d 54 (2nd Dept. 2006).

Sion describes monies that he paid, allegedly in connection with the purchase of the West 38th Property by Bravo. No explanation for these payments has been provided by Paul. Under these circumstances, the proposed new fourth counterclaim does state a claim by Sion for unjust enrichment. There is enough of an evidentiary showing in the record at this time to support the requested amendment. For this reason, leave to amend the answer to allege the proposed fourth counterclaim for unjust enrichment should be granted.

As Plaintiffs seek no monetary damages but only declaratory relief in their complaint, and no "articulable reason" has been presented to warrant the imposition of any conditions on the entry of judgment for Plaintiffs in view of the outstanding counterclaim (Robert Stigwood Organisation, Inc. v. Devon Co., 44 N.Y. 2d 922 [1978]. See also, Young & Young v. Saland, 236 A.D. 2d 468 [2nd Dept. 1997]), summary judgment is appropriate. Accordingly, it is,

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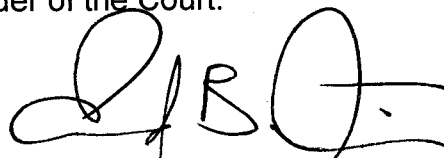
ORDERED, that Plaintiffs' motion for summary judgment on their complaint is **granted** and this Court hereby declares that Paul Sohayegh is the sole member of Bravo Management, LLC and is the owner of the property located at 20 West 38th Street, New York, New York. Sion Sohayegh has no right title or interest in Bravo Management, LLC or the aforementioned property; and it is further,

ORDERED, that Plaintiffs' further request for summary judgment, dismissing the counterclaims alleged by Defendant Sion Sohayegh in his original answer, is **granted**; and it is further,

ORDERED, that Defendant's request for leave to amend his answer and counterclaims to add new affirmative defenses and counterclaims is **granted** as to the proposed fourth counterclaim for unjust enrichment which is now severed and continued, and **denied** as to all of the other proposed affirmative defenses and other proposed counterclaims; and it is further,

ORDERED, that counsel for the parties shall appear for a status conference on February 29, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.



HON. LEONARD B. AUSTIN, J.S.C.

Dated: Mineola, NY
January 24, 2008

ENTERED

JAN 29 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**