

Pasagelis v Milestone Maintenance, Inc.

2008 NY Slip Op 30350(U)

January 28, 2008

Supreme Court, Nassau County

Docket Number: 7590-07/

Judge: Leonard B. Austin

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INDEX
No. 7590-07

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

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 9-7-07
Submission Date: 10-26-07
Motion Sequence No.: 001/MOT D

DIMITRIOUS PASAGELIS,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Agovino & Asselta, LLP
170 Old Country Road - Suite 608
Garden City, New York 11501

MILESTONE MAINTENANCE, INC. and
JOHN ANDREAS,

Defendants.

COUNSEL FOR DEFENDANTS
Francis X. Moroney, Esq.
497 Westbury Avenue
Carle Place, New York 11514

_____x

ORDER

The following papers were read on Defendants' motion to dismiss the complaint:

- Notice of Motion dated August 20, 2007;
- Affidavit of John Andreas sworn to on August 20, 2007;
- Affidavit of Dimitrious Pasagelis sworn to on October 17, 2007;
- Affidavit of Harry Pasagelis sworn to on October 17, 2007;
- Affirmation of Steven R. Miller, Esq. dated October 17, 2007;
- Affidavit of John Adreas sworn to on October 24, 2007;
- Affirmation of Francis X. Maroney, Esq. dated October 24, 2007.

Defendants move pursuant to CPLR 3211(a)(1) to dismiss the complaint.

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BACKGROUND

Defendant, Milestone Maintenance, Inc. ("Milestone"), was incorporated in June 2004. Defendant, John Andreas ("Andreas"), claims that, at all times, he was Milestone's sole shareholder.

In November 2005, Dimitrious Pasagelis ("Pasagelis") sought to purchase an interest in Milestone.

Andreas admits that, in November 2005, Pasagelis invested \$200,000 in Milestone. Although Pasagelis invested this money in Milestone and served as an officer and director of Milestone, Andreas claims that Pasagelis was never a Milestone shareholder.

Pasagelis asserts that, as a result of his investment in Milestone, he became a 50% owner of Milestone. In addition, prior to his investment in Milestone, it was not operating. His investment permitted Milestone to purchase the equipment it needed to bid on and obtain contracts. Pasagelis claims that as a result of his efforts, Milestone was able to obtain contracts with the New York City Department of Transportation. It was also through infusion of cash, Milestone was able to secure the payment and performance bonds need to obtain these contracts.

Pasagelis was a signatory on the corporate bank account and personally guaranteed Milestone's obligations on its lease. Pasagelis asserts that he never would have personally guaranteed any of Milestone's obligations if he was not a shareholder in the corporation.

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Even though Pasagelis claims that he was a shareholder in the corporation, he was never issued a stock certificate evidencing his stock ownership. Milestone did not issue a K-1 to Pasagelis for 2005 or 2006. Nor did he ever receive a distribution of the profits.

Pasagelis asserts that Andreas excluded him from the management and operation of the business.

Because of their deteriorating relationship, Andreas and Pasagelis met in August 2006 to discuss Andreas buying Pasagelis' interest in Milestone. Pasagelis' father attended this meeting.

Pasagelis claims that Andreas offered to return the \$200,000 investment in exchange for Pasagelis' interest in Milestone. This offer was rejected.

Pasagelis told Andreas that he was seeking not simply a return of his capital but also wanted a return on his investment. Andreas allegedly agreed to this in principle. Pasagelis advised Andreas he would get back to him a few days with the amount he would be willing to accept for his interest in Milestone.

A short time later, Andreas and Pasagelis met at Pasagelis' father's home. Pasagelis avers that at this meeting Andreas agreed to pay him \$220,000 for his interest in Milestone. Pasagelis accepted that offer.

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After reaching this agreement, the parties executed a writing dated September 9, 2006 ("Agreement"). The Agreement was allegedly prepared by Andreas or his wife. It was not reviewed by an attorney prior to its execution.

The Agreement provides:

AGREEMENT BETWEEN DIMITRIOUS PASAGELIS OF
ROSLYLN, (sic) NEW YORK AND JOHN ANDRES (sic) OF
OYSTER BAY, NEW YORK

AGREEMENT BETWEEN DIMITRIOUS PASAGELIS AND
MILESTONE MAINTENANCE, INC.

I DIMITRIOUS PASAGELIS RESIGN FROM MILESTONE
MAINTENANCE, INC. AS OFFICER OR IN ANY OTHER
CAPACITY. ALL AGREEMENTS MADE BETWEEN
DIMITRIOUS PASAGELIS AND JOHN ANDRES ARE
NULL AND VOID. ALL AGREEMENTS MADE BETWEEN
DIMITRIOUS PASAGELIS AND MILESTONE
MAINTENANCE ARE NULL AND VOID.

DIMITRIOUS PASAGELIS WILL NOT BE LIABLE FOR
PURCHASES, RECEIPTS, ACCOUNTS PAYABLE,
VENDORS, INSURANCE, TAXES ACCOUNTING LEGAL,
LOANS OR BANKING TRANSACTIONS. DIMITRIOUS
PASAGELIS WILL NOT BE LIABLE FOR THE RENTAL
AGREEMENT BETWEEN LANDLORD OF 3 AUDREY
AVENUE AND MILESTONE MAINTENANCE, INC.
DIMITRIOUS PASAGELIS WILL NOT BE LIABLE FOR ANY
CLAIMS INCURRED BY CONTRACT D260190

DIMITRIOUS PASAGELIS WILL NOT PUT ANY CLAIMS
ON MILESTONE MAINTENANCE, INC. OR JOHN ANDRES
FOR PURCHASES, RECEIPTS, ACCOUNTS PAYABLE,
VENDORS, INSURANCE, TAXES ACCOUNTING, LEGAL,
LOANS OR BANKING TRANSACTIONS, MILESTONE
MAINTENANCE WILL BE RESPONSIBLE FOR THE LEASE
BETWEEN LANDLORD AT 3 AUDREY LANE, OYSTER
BAY, NEW YORK 11771.

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DIMITRIOS PASAGELIS' (sic) ORIGINAL DEPOSIT OF \$200,000 (TWO HUNDRED THOUSAND DOLLARS) IS BEING RETURNED TO HIM IN CONSIDERATION OF THE ABOVE TRANSACTION. ALL EXPENSES INCURRED BY DIMITRIOS PASAGELIS HAVE BEEN PAID TO HIM IN FULL.

\$200,000 WILL BE RETURNED TO HIM NO LATER THAN SEPTEMBER 9TH, 2006.

The Agreement is executed and dated 9/9/06 by both Pasagelis and Andreas.

Their signatures on the Agreement are notarized.

Pasagelis was paid \$200,000 on September 9, 2006.

Andreas asserts the one page document is the full agreement between he and Pasagelis and him. He further asserts that the agreement had a second page which states:

AGREEMENT BETWEEN DIMITRIOS PASAGELIS AND
MILESTONE MAINTENANCE, INC.

INTEREST DUE AND OWING TO DIMITRIOS
PASAGELIS WILL BE PAID ON OR BEFORE SEPTEMBER
30TH 2006."

Although this page contains the typewritten names of Milestone Maintenance, Inc. and John Andreas after the quoted language, the second page does not have signature lines and is not signed by Pasagelis, Andreas or a representative of Milestone. Pasagelis claims that this second page reflects Andreas agreement to pay him \$220,000 for his interest in Milestone. Pasagelis asserts the payment date for the additional \$20,000 was extended to September 30, 2006 to give Andreas and Milestone the time needed to get the additional money.

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Andreas specifically denies that the second page was part of the Agreement. Even if it was, Andreas argues that Pasagelis has sued for improper relief. Pasagelis seeks a declaratory judgment declaring that since he invested in Milestone and since Milestone and Andreas did not pay the full amount due pursuant to the Agreement: (1) Pasagelis is and remains a 50% owner of Milestone; (2) Milestone should be compelled to issue a stock certificate to him evidencing his 50% ownership interest; (3) Milestone and Andreas should be compelled to account for all income, revenue, expenses and disbursements of Milestone; (4) Milestone should be dissolved; and (5) Agreement should be recinded. Even though Andreas denies agreeing to pay Pasagelis an additional \$20,000, he asserts that the facts as alleged by Pasagelis would give Pasagelis a cause of action for money breach of contract seeking to recover the unpaid \$20,000.

DISCUSSION

An action will be dismissed pursuant to CPLR 3211(a)(1) when the documentary evidence submitted in support of the motion conclusively establishes a defense to the action as a matter of law. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); 730 J & J LLC v. Fillmore Agency, Inc., 303 A.D.2d 486 (2nd Dept. 2003); and Berger v. Temple Beth-el of Great Neck, 303 A.D.2d 346 (2nd Dept. 2003). The court must find the documentary evidence "...utterly refutes plaintiff's factual allegations." Goshen v. Mutual Life Ins. Co. of New York, 98, N.Y.2d 314, 326 (2002).

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The Agreement is a contract. A contract is documentary evidence sufficient to support a dismissal pursuant to CPLR 3211(a)(1). 150 Broadway N.Y. Assocs., L.P. v. Bodner, 14 A.D.3d 1 (1st Dept. 2004).

A clear and complete written agreement should be enforced in accordance with its terms. South Road Assocs., LLC v. International Business Machines Corp., 4 N.Y.3d 272 (2005); and Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990). In interpreting a contract, the court must give "...practical interpretation to the language employed and the parties reasonable expectations." Slamow v. Del Col, 174 A.D.2d 725, 726 (2nd Dept. 1991) *aff'd*, 79 N.Y.2d 1916 (1992). See also, AFBT-II, LLC v. Country Village on Mooney Pond, Inc., 305 A.D.2d 340 (2nd Dept. 2003); and Del Vecchio v. Cohen 288 A.D.2d 426 (2nd Dept. 2001).

The court may not add or delete provisions of an agreement under the guise of interpretation nor may the court interpret the language of an agreement in such a way as would be contrary to the intent of the parties. Petracca v. Petracca, 302 A.D.2d 576 (2nd Dept. 2003); and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept. 2001). The court should not interpret an agreement to impliedly contain provisions that are not specifically stated. Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 N.Y.3d 470 (2004).

The question of whether an agreement is ambiguous is a question of law to be determined by the court. White v. Continental Cas. Co., 9 N.Y. 3d 264, 267 (2007);

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W.W.W. Assocs. v. Giancontieri, *supra*; and JJFN Holdings, Inc. v. Monarch Investment Properties, Inc., 289 A.D.2d 528 (2nd Dept. 2001).

Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. See, Uribe v. Merchants Bank of New York, 92 N.Y.2d 336 (1998); and Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514 (2nd Dept. 1996). Ambiguity does not exist simply because the parties urge different interpretations of its terms. Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456 (1957); and Elletson v. Bonded Insulation Co., Inc., 272 A.D.2d 825 (3rd Dept. 2000).

Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. South Road Assocs., LLC v. International Business Machines Corp., *supra*; and 767 Third Avenue, LLC v. Orix Capital Markets, LLC, 26 A.D.3d 216 (1st Dept. 2006).

The Agreement specifically and unequivocally states that in consideration of return to Pasagelis of his \$200,000 investment, all agreements made between Pasagelis and Andreas and/or Milestone are null and void. The Agreement further states that in consideration of payment of Pasagelis original deposit of \$200,000, he would not make any claims against Andreas or Milestone. The Agreement acts both as a contract whereby Andreas purchased Pasagelis interest, if any, in Milestone and a release whereby Pasagelis released all claims he had against Andreas and Milestone relating to this transaction.

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Pasagelis admits receipt of \$200,000. While the second page indicates interest due and owing Pasagelis will be paid on or before September 30, 2006, the amount is not stated. If Pasagelis and Andreas had agreed upon an amount, it should have been stated.

Pasagelis and Andreas went to the trouble of signing the Agreement before a notary public. Yet neither party signed the second page.

The Agreement makes no mention of any amount beyond \$200,000 being due Pasagelis. Pasagelis is attempting to modify the Agreement, which is clear and unambiguous, through the use of parol evidence.

Furthermore, to obtain the relief Pasagelis seeks in the complaint, he would first have to obtain rescission of the Agreement.

"In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof. (Citation omitted)" Babylon Assocs. v. County of Suffolk, 101 A.D.2d 207, 215 (2nd Dept. 1984). If rescission is based upon a breach of the contract, the breach must be willful and material or, if not willful, so substantial as to defeat the purpose of the contract. *Id.* See also, Clarke Contracting Co. v. City of New York, 229 N.Y. 413 (1920); and Callanan v. Keeseville, Ausable Chasm and Lake Champlain Railroad Co., 199 N.Y. 268 (1910).

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The complaint does not allege fraud, failure of consideration, inability, to perform or a substantial breach. The factual underpinning of the complaint is Defendants' alleged failure to pay the full agreed upon amount. This gives rise to a cause of action for money damages for breach of contract; not rescission.

Additionally, to rescind the contract, plaintiff must offer to return what plaintiff has received and make tender upon trial. Motor Vehicle Manufacturers Assoc. of the United States v. State, 75 N.Y.2d 175 (1990); and Vail v. Reynolds, 118 N.Y. 297 (1890). Plaintiff has failed to make such an allegation in the complaint. From a reading of the complaint, Pasagelis wants to keep the money he has already received and be reinstated as a shareholder. This approach is untenable.


Finally, Pasagelis alleges he does not have an adequate remedy at law. This is not so. Pasagelis has the remedy of an action for breach of contract to recover the balance due. See, Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986).

Accordingly, it is,

ORDERED, that Defendants' motion to dismiss the complaint is **granted** and the complaint is hereby dismissed without costs.

This constitutes the decision and Order for the Court.

Dated: Mineola, NY
January 28, 2008


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

ENTERED
FEB 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE
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