

Baum v Leviev Dev., LLC

2008 NY Slip Op 30398(U)

February 13, 2008

Supreme Court, Greene County

Docket Number: 0020060/1281

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT
FRED BAUM

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 06-0128

THE LEVIEV DEVELOPMENT, LLC and
KONSTANTINE LEVIEV

Defendant.

Supreme Court Greene County All Purpose Term, December 3, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Dennis B. Schlenker, Esq.
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Albany, New York 12210
Attorney for Plaintiff

Mark T. Walsh, Esq.
Gleason, Dunn, Walsh, & O’Shea
40 Beaver Street
Albany, New York 12207
Attorneys for Defendants

TERESI, J.:

Defendants (“The Leviev Development” or “Mr. Leviev”) bring this motion, seeking summary judgment pursuant to CPLR §3212. Plaintiff (“Mr. Baum”) opposes the motion.

This motion for summary judgment arises from the alleged breach of an oral agreement between Plaintiff and Defendants. Plaintiff is an independent real property developer

who engages in the purchase, development, promotion, and sale of multi-unit developments. Defendant Konstantine Leviev is a businessman, who had no prior dealings in real estate development at the time he was introduced to Plaintiff. Defendant, The Leviev Development, L.L.C., is a Delaware corporation authorized to do business in New York. Plaintiff alleges that Mr. Leviev entered into and later breached an oral Joint Venture Agreement with Plaintiff to acquire and develop over 400 lots in the “Sleepy Hollow Lake Community.”

Plaintiff alleges that he needed a partner to fund the development project, and approached Defendant regarding this matter. Plaintiff further alleges that Defendant orally agreed that the two would be joint venturers, but that the joint venture was to operate through Defendant company, The Leviev Development, L.L.C. Plaintiff and Defendant allegedly agreed, as part of the oral agreement, to share profits and losses on a 60/40 basis, Defendant to receive 60% and Plaintiff to receive 40%. Additionally, the alleged agreement indicated that Plaintiff was to control construction and development, and Defendant was to control expenditure. Plaintiff argues that the Statute of Frauds does not apply to joint venture agreements. Plaintiff also argues that triable issues of fact exist as to whether a joint venture existed, thereby precluding summary judgment. Finally, Plaintiff asserts that the joint venture agreement entered into is not so vague as to be unenforceable.

Defendants argue that Plaintiff was essentially a building contractor who, in order to earn 40% commission, had to build and sell houses; however, Plaintiff failed to do so. Additionally, Defendants argues that because there was no meeting of the minds and no definite, material terms were discussed. Therefore, no oral agreement was ever formed. Finally, Defendants argues that the Statute of Frauds does apply, therefore even if an oral agreement was

entered into it is unenforceable.

“Summary judgment is a drastic remedy and ‘should not be granted where there is any doubt as to the existence of a triable issue.’” Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether summary judgment is warranted, the court’s primary function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to satisfy the requirement that “. . . one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form.” Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

“It is well settled that a contract must be definite in its material terms in order to be enforceable.” Clifford R. Gray, Inc. v. LeChase Const. Services, LLC, 31 A.D.3d 983 (3d

Dept. 2006). Therefore, an agreement to agree, where material terms are left for future negotiations, is unenforceable. Id. A joint venture is a special combination of two or more persons who are seeking joint profit in some specific venture without any actual partnership or corporate designation. Chalmers v. Eaton Corp., 71 A.D.2d 721, 722 (1979). The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking, some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses. Ackerman v. Landes, 112 A.D.2d 1081, 1082 (2d Dept. 1985).

After full review of the record, this Court will grant Defendants' motion for summary judgment for the following reasons.

The alleged terms of the oral agreement are indefinite and vague; therefore the contract is unenforceable as there was no meeting of the minds. Plaintiff admits in his deposition testimony that he and Defendant never entered into a contract that they could agree on. In fact, he admits that no material terms were discussed at all. In addition, Defendant has submitted a "letter of intent," which contradicts the alleged intent of the parties' oral agreement. There was no other evidence submitted by Plaintiff sufficient to show otherwise. Plaintiff's statements in his sworn affidavit as to the alleged terms of the alleged oral agreement are not enough to create a material issue of fact, as these statements contradict his earlier sworn deposition testimony that no material terms had been discussed. [A party] cannot "avoid summary judgment by alleging issues of fact created by self-serving affidavits contradicting prior sworn deposition testimony." Greene v. Osterhoudt, 251 A.D.2d 786 (1998); see also Ferber v. Farm Fam. Cas. Ins., 272 A.D.2d 747 (2000).

The Statute of Frauds is generally inapplicable to joint venture agreements. See Chalmers v. Eaton Corp., 71 AD.2d 721 (3d Dept. 1979). However, the Statute of Frauds applies to oral agreements for joint ventures that are incapable of being performed within one year. See Sugar Creek Stores, Inc. v. Pitts, 198 A.D.2d 833 (4th Dept. 1993); see also RTC Properties, Inc. v. Bio Resources, Ltd., 295 A.D.2d 285 (1st Dept. 2002). In determining whether agreement can be fully performed within one year, as required by statute of frauds, the court must consider the duration of entire agreement and not merely a single phase. RTC Properties, Inc. v. Bio Resources, Ltd., 295 A.D.2d 285 (1st Dept. 2002). Plaintiff and Defendant have admitted that the project was to take place in phases. Plaintiff has admitted in his sworn deposition testimony that it was impossible for this project to be completed within one year, and that it would take at least five to seven years to complete. There was no writing here memorializing the alleged agreement, thereby rendering the alleged oral agreement unenforceable. Additionally, Plaintiff's argument that this case falls within the joint venture exception to the Statute of Frauds is unavailing, as Plaintiff has failed to set forth proof in admissible form raising a triable issue as to the existence of a joint venture agreement between the parties. Again, Plaintiff's inconsistent statements are insufficient to create a triable issue of fact.

Therefore, Defendants' motion for summary judgment is granted and all papers, including this Decision and Order, are being returned to the attorney for the Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED

Dated: February 13, 2008
Albany, New York

A handwritten signature in cursive script, appearing to read "Joseph C. ...", is written over a horizontal line.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, with Exhibits A-F, dated November 7, 2007.
2. Affidavit of Konstantin Leviev in Support of Motion, dated November 6, 2007.
3. Affidavit of Mark T. Walsh, Esq. In Support of Motion, with Exhibits A-L, dated November 6, 2007.
4. Reply Affidavit of Mark T. Walsh, Esq. In Support of Motion, with Exhibits M-N, dated December 7, 2007.
5. Affidavit of Plaintiff in Opposition to Motion for Summary Judgment, with Exhibits A-Y, dated November 27, 2007.
6. Affidavit of Marshall Schiff, Esq., with Exhibits A-F, dated November 6, 2007.
7. Affidavit of Dennis B. Schlenker, in Opposition to Motion for Summary Judgment, with Exhibit 1, dated November 30, 2007.