

Tharanco Real Estate II, LLC v Lalwani

2008 NY Slip Op 32614(U)

September 22, 2008

Supreme Court, New York County

Docket Number: 0115208/2007

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Index Number : 115208/2007
THARANCO REAL ESTATE II, LLC
vs
LALWANI, JAI
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

is motion to/for summary judgment

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

PAPERS NUMBERED
1
2-3
4

Cross-Motion: Yes No

*Repl mem
+ supp-repl M1-M2
memo*

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/22/08

[Signature]
MARCY S. FRIEDMAN J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
THARANCO REAL ESTATE II, LLC,

Plaintiff(s),

Index No.: 115208/2007

- against -

JAI LALWANI,

DECISION/ORDER

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

This is an action to enforce an alleged oral agreement between plaintiff Tharanco Real Estate II, LLC (“Tharanco”) and defendant Jai Lalwani (“Lalwani”) for defendant to buy out plaintiff’s membership interest in a business venture. Plaintiff moves for summary judgment, pursuant to CPLR 3212, on its breach of contract claim against Lalwani.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

In support of its motion for summary judgment, plaintiff contends that defendant made an

oral agreement to purchase plaintiff's stake in the business venture. Plaintiff's principal, Haresh Tharani, submits an affidavit in which he attests that at a meeting on June 14, 2007, defendant agreed to pay plaintiff the amount of its initial investment of \$700,000 plus a 50 percent return, totaling \$1,050,000. (Tharani Aff. in Support, ¶ 6.) This affidavit is sufficient to make a prima facie showing as to the existence of the oral agreement.

In opposition, defendant submits an affidavit in which he denies that he agreed to buy out plaintiff's share due to plaintiff's alleged lack of performance of certain obligations as a member of the business venture, and to the lack of financing. (See Lalwani Aff. in Opp., ¶¶ 9-10.) While defendant acknowledges that the parties were negotiating an agreement (*id.*, ¶ 11), he also contends that they never reached agreement on all of the terms of the agreement, including whether interest would be paid on the \$700,000 investment or on the \$1,050,000 total. (See *id.*)

It is well settled that the burden of establishing the terms of a verbal contract falls on the proponent and may present "a formidable obstacle to its enforcement." (Charles Hyman Inc. v Olsen Indus. Inc., 227 AD2d 270, 275 [1st Dept 1996].) Where, as here, there are conflicting contentions between parties as to the existence or terms of an oral agreement, issues of credibility arise which it is not the court's role to resolve on a motion for summary judgment. (See Mirchel v RMJ Sec. Corp., 205 AD2d 388 [1st Dept 1994]; Davis & Davis v S & T World Products, 154 AD2d 330 [2nd Dept 1989].)

In so holding, the court notes that plaintiff's claim is based on the existence of an alleged oral agreement, not on a written agreement reached by email. (See Supp. Reply, 4.) Moreover, the parties' email correspondence does not unambiguously support either party's claim as to whether an oral agreement was made. Lalwani's emails written closest in time the parties'

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meeting refer to financials in connection with the alleged buy out agreement. The June 22, 2007 email states: "The buy out was what you proposed a 50% return, waiting on a term sheet now from lender will forward it to you." (P.'s Motion, Ex. 2.) His June 21 email states: "Financials, We are in the process of getting the buy out agreements ready." (Id.) Thus, contrary to plaintiff's contention, these emails do not unambiguously confirm that the buy out was not contingent on Lalwani obtaining financing. While later emails appear to acknowledge an agreement, they are also ambiguous as to whether financing was a condition of the agreement. For example, Tharani's August 2, 2007 email states: "I said I will take 50percent if you close in 30 days and you agreed." Lalwani replies on the same day: "I will deliver just need time." (Id., Ex. 4.) The court cannot find that this informal language confirms an agreement that was not conditioned on financing. Indeed, Lalwani's August 12, 2007 email states: "I felt you were upset on downtown so told I will refinance it and get money out for you, it is in progress I am also procuring more investors to get funds out." (Id., Ex. 6.) Later emails show that the parties were continuing to negotiate over an essential term – whether interest would be paid on the \$700,000 investment or on the \$1,050,000 total. (See id., Ex. 8 [Lalwani's September 26, 2007 email: "I am fine with the Interest but the only issue...I have is the amount should be on \$700,000."].)

Therefore, this is not a case in which Lalwani's denial of the existence of an agreement is plainly contradicted by unambiguous documentary evidence. (See Robinson v Robinson, 303 AD2d 234 [1st Dept 2003], lv denied 6 NY3d 706 [2006].)


It is hereby ORDERED that plaintiff's motion for summary judgment is denied in its entirety.

ORDERED that the parties shall appear for a preliminary conference in Part 57 (80

Centre Street, Room 328) on Thursday, October 23, at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
September 22, 2008



MARCY FRIEDMAN, J.S.C.

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK