SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MASMO PROPERTIES, INC., and AMERICAN HOMES OF STATEN ISLAND, LTD.,

Plaintiffs,

-against-

MICHELE SLEDGE and CAMILLE STEWART-GARNER,

Defendants.

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DCM Part 6

Present:
Hon. Philip G. Minardo

DECISION AND ORDER

Index No. 100430/08
Motion No. 1852-001

The following papers numbered 1 to 2 were marked fully submitted on the 28th day of August, 2008:

Papers	**Numbered**
Notice of Motion by Defendants with Supporting Papers and Exhibits (dated June 11, 2008)	**1**
Affidavit in Opposition with Exhibits (dated August 20, 2008)	**2**

Upon the foregoing papers, defendants' motion is granted to the extent indicated and otherwise denied.

This is an action to recover compensatory damages based upon defendants' alleged breach of contract and unjust enrichment arising from a purported joint venture. Defendants move for summary judgment, or in the alternative, dismissal of the complaint based on plaintiff's alleged failure to join necessary parties.

Plaintiff Masmo Properties, Inc. ("Masmo") is a real estate development company. Plaintiff American Homes of Staten Island, Ltd. ("American") is a real estate brokerage. The defendants are real estate brokers, as are the individual principals of the plaintiff-companies.

In the complaint, plaintiffs allege that in or about November, 2006, the parties entered into an oral agreement pursuant to which they would form a corporation to effectuate their joint effort to advertise, list, sell and lease real estate on Staten Island. Among the alleged essential terms of the purported agreement were the following:

- The corporate plaintiffs and the defendants, as individuals, would form the "American Dream Team Realty Corp." (hereafter "ADTR").
- Capital contributions and start-up costs were to be divided equally between plaintiffs and defendants.
- Profits and losses to be divided 51% to defendants, 49% to plaintiffs.
- ADTR would manage the joint venture's business.
- Commissions from the sale of listed properties would be divided between plaintiffs and ADTR.
- ADTR would reimburse Masmo for its share of overhead expenses, and after six months, defendants would be solely responsible for all of ADTR's overhead.

Plaintiffs allege that the parties formed ADTR in or about January, 2007, and that it then began operation, in accordance with the parties agreement, at plaintiffs' place of business.

The parties subsequently exchanged proposed written drafts of a purported agreement between ADTR and plaintiffs, but none of the parties executed a final written contract. Nonetheless, plaintiffs allege, the parties operated under the terms of the oral agreement for approximately one year.

During this period, plaintiffs allege, they incurred $95,921.63 in overhead expenses, for which defendants have only reimbursed them $20,000. In addition, they allege that defendants have refused to pay $35,068.69 in commissions owed plaintiffs from the sale of various properties.

In moving for summary judgment, defendants argue that (1) there was no meeting of the minds on the essential terms of the purported agreement, and therefore no contract; (2) defendants did not participate in the purported joint venture in their individual capacities, but rather as principals of ADTR, a party that ought to be joined herein; (3) plaintiffs failed to join as necessary parties the individual principals of their respective corporations; and (4) as members of the Staten Island Board of Realtors, the parties are required to submit this dispute to arbitration rather than commence litigation.

In opposition, plaintiffs argue (1) notwithstanding the absence of a writing, the parties entered into, and performed under, an enforceable contract containing all the essential elements of their agreement; (2) ADTR is not a necessary party to this action because it was not a party to the joint venture agreement; (3) plaintiff-corporations, not their principals, were parties to the

agreement , and thus their principals are not necessary parties; and (4) because their claims arise from the alleged joint venture agreement , rather than from the parties' status as realtors, the dispute is not subject to arbitration.

It is well-settled that it is incumbent upon the party seeking summary judgment to demonstrate that there is no question of material fact and that it is entitled to judgment as a matter of law (CPLR 3212). Here, defendants allege that there was no contract between them and the corporate plaintiffs, and that they did not participate in the joint venture. However, it appears that the individual defendants joined with plaintiffs in forming ADTR, which transacted business at plaintiffs' offices, and at a minimum reimbursed plaintiffs for a portion of the latters' overhead attributed to ADTR. To that extent, then, there are issues of fact concerning the contractual relationship between the parties, and the breach, if any, of that contract by defendants. Therefore, that portion of defendants' motion as seeks summary judgment on the ground that there was no contract between the parties is denied.

Similarly without merit is defendants' argument that the individual principals of the plaintiff-corporations are necessary parties to this action. Viewing the facts in a light most favorable to plaintiffs, as the court must on a motion for summary judgment, it is alleged that defendants entered into an agreement with the plaintiff-corporations, not the latter's principals. Therefore the principals need not be joined as parties in order for this action to proceed

ADTR, however, is a proper defendant in this action. It is undisputed that the proposed contract between plaintiffs and ADTR was never executed and that ADTR was not yet in existence at the time of the purported joint venture agreement. However, both the complaint and the affidavit of Masmo's president aver that pursuant to the alleged joint venture agreement the parties agreed to bind ADTR, at a minimum, to manage the joint venture's business; divide its commissions equally with plaintiffs; and reimburse Masmo for its share of overhead expenses.[1]

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[1] Indeed, it appears that ADTR partially performed at least one of these obligations in reimbursing American Homes of Staten Island $20.000 for overhead expenses on October 2, 2007.

It is plaintiffs' position that they have received no share of the commissions and only partial reimbursement from ADTR for the associated overhead. To that extent, this action ought not to proceed in the absence of ADTR, and accordingly plaintiffs are directed to do join ADTR as a necessary party defendant (CPLR1003).

Finally, contrary to defendants' argument, the claims asserted by plaintiffs are not subject to arbitration. In essence, defendants argue that the instant dispute arose out of the parties' relationship as realtors and thus it should have been submitted to arbitration pursuant to Article 17 of the Code of the National Association of Realtors.

As here relevant, Article 17 of the Code states: "In the event of a contractual dispute . . . between Realtors (principals) associated with different firms, *arising out of their relationship as Realtors*, the Realtors shall submit the dispute to Arbitration in accordance with the regulations of their Board [of Realtors] rather than litigate the matter [emphasis added]." In general, a party's affiliation with an organization, such as the Staten Island Board of Realtors, whose written rules require the arbitration of disputes between its members or affiliates, can constitute an agreement to arbitrate if the parties have agreed to abide by such rules-- even where, as here, no mention of the rules is made in the particular contract that gives rise to the dispute *(see e.g. McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165 [2nd Dept 1986], *lv denied* 67 NY2d 606).

However, not all contractual disputes between realtors are arbitrable under the terms of the Code. The instant litigation arises out of the parties' relationship as joint venturers, not as realtors. To that extent, the business of the joint venture is irrelevant in determining the arbitrability of disputes arising from alleged breach of the business agreement. It is well-established that arbitration is a matter of contract and is governed by contract principles (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d at 168). Here, the alleged oral agreement underlying plaintiffs' claims does not contain an express and unequivocal arbitration clause, and an intent by the parties to be bound by the arbitration clause of the Code of the National Association of Realtors in an otherwise non-arbitrable dispute cannot be read into that agreement

(*Salmonson v Tucker Anthony, Inc.*, 216 AD2d 283, 284 [2nd Dept 1995]).

Nor is it dispositive that among the claims asserted by plaintiffs is one for unpaid sales commissions arising from real estate transactions undertaken by the purported joint venture. By its terms, Article 17 applies to contractual disputes between "realtors . . . associated with different firms." The claim for commissions here is between the joint venturers associated together in ADTR. Such intra-firm disputes are not subject to Article 17.

Moreover, even were the claim for commissions subject to arbitration under the Code, they are inextricably intertwined with the claims for breach of contract, which, for the reasons stated, are not arbitrable. Under such circumstances, the claims need not be severed, but should proceed in one forum in the interest of judicial economy (*Young v. Jaffe*, 282 AD2d 450 [2nd Dept 2001]).

Therefore, there exists no duty between the parties to arbitrate the issues raised in the complaint (*Salmonson v Tucker Anthony, Inc.*, 216 AD2d 302 [2nd Dept 1995]).

Accordingly, it is

ORDERED that defendants' motion is granted to the extent that plaintiffs are directed to join American Dream Team Realty, Inc. as a party defendant to this action within forty-five (45) days of this order or the action is dismissed pursuant to CPLR §3211(a)(10); and it is further

ORDERED that the balance of the motion is denied.

Clerk to notify all parties.

ENTER

DATED: October 8, 2008

s/ Philip G. Minardo
J.S.C.