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

PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

WARREN COLE,

Plaintiff,

- v -

HARRY MACKLOWE,

Defendant.

INDEX NO. 604787/99

MOTION DATE

MOTION SEQ. NO. 011

MOTION CAL. NO.

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: This is an action to enforce two written agreements, one of which is a contract dated July 22, 1996 and the other of which is an addendum dated November 20,1998, in which the plaintiff, Warren Cole, was given a 10% equity interest in numerous designated real estate properties owned by his employer, defendant Harry Macklowe, along with the right to purchase at cost an apartment in a building owned by Macklowe which is located at 145 East 76th Street in Manhattan. On April 17, 2001, this court issued a ruling which bifurcated this case so as to try the issue of liability first and then, if necessary, conduct a second trial on the issue of damages. The bench trial on liability commenced on October 15, 2001 and concluded on November 14, 2001. Following the parties' submission of post-trial memoranda and their successful appeal of the court's order unbifurcating the trial, the court issued a decision on January 3, 2006 finding that (1) the two agreements were not enforceable with respect to Cole's equity interest in Macklowe's various properties, (2) a $565,000 bonus which Macklowe offered Cole was enforceable and (3) the provision in the November 20, 1996 addendum giving Cole a right to purchase the apartment at 145 East 76th Street was enforceable. On appeal, the First Department modified the court's order by finding that the two agreements were, in fact, enforceable with respect to Cole's 10% equity interest in the designated properties and remanded the matter to this court for a determination of damages. *See Cole v. Macklowe*, 40 AD3d 396 (1st Dept 2007).

Cole has now moved, and Maclowe has cross-moved, for partial summary judgment on the issue of the proper measure of damages to which Cole is entitled as to his 10% equity interest. Cole also seeks summary judgment on his claim that, under the November 20, 1998 addendum, Macklowe owes him a total of $3,395,000.00 with respect to three buildings.

The parties offer entirely different perspectives as to the relief which Cole is entitled to obtain in this proceeding. Cole contends that the two agreements are not only enforceable but, despite their breach, continue to exist so that he has a present equity interest in the designated properties and in any monies from these properties which have already been distributed to Macklowe. Thus, Cole seeks a money judgment reflecting his proportionate 10% share of any distributions which Macklowe has, to date, actually made from any of the designated properties. In addition, he seeks a declaratory judgment requiring Macklowe to pay him his proportionate share of any distributions which Macklowe may make anytime in the future from any of these properties. Macklowe, on the other hand, contends that this is exclusively a breach of contract case for money damages resulting from Macklowe's total repudiation of the two agreements, that the contract is therefore no longer in effect and that Cole does not continue to hold a 10% equity interest in the designated properties. According to Macklowe, Cole is entitled only to be recompensed for the loss of his equity interests and that the value of these interests is measured through breach of contract damages calculated as of September, 1999, the time that Macklowe repudiated the two agreements. Macklowe

argues that, in addition to recovering the total distributions which had been withheld from Cole prior to September, 1999, Cole is entitled to recover the value of his interests based on market conditions which existed as of the time of the breach.

Discussion

A. Express Trust - - In arguing that the two agreements remain in effect and that he continues to hold equity interests in the designated properties, Cole asserts two grounds. First, pointing out that the July 22, 1996 agreement provided that Macklowe holds equity interests in certain properties for Cole's "benefit," Cole argues that Macklowe thereby created an express trust which cannot be terminated and under which Macklowe owes Cole a fiduciary duty. Cole therefore asserts that the trust has continued in existence despite Macklowe's repudiation of the two agreements in September, 1999, that Macklowe breached his fiduciary duty under the trust by thereafter distributing monies from some of the designated properties without paying Cole his proportionate share, that Cole is entitled to recover monies reflecting his proportionate share of these distributions and that Macklowe continues under the trust to be obligated to pay Cole his proportionate share of any distributions which may be made in the future.

Cole, however, did not assert an express trust claim in his pleadings, at trial or in his post-trial papers. Indeed, in his second amended complaint, Cole alleged that Macklowe had breached his fiduciary duty not as a trustee but, rather, as a managing member of a limited partnership and/or limited liability company of which Cole was a limited partner and/or member. Although the complaint alternatively sought the imposition of a constructive trust, such a trust entails elements such as unjust enrichment which are entirely different from the intentional creation of an express trust. *Compare Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976) and *Orentreich v. Prudential Ins. Co. of Amer.*, 275 AD2d 685 (1st Dept 2000). In any event, rather than seek to impose on Macklowe a continuing obligation as trustee to pay Cole his proportionate share of any distributions made from the designated properties, the complaint seeks a final judgment for money damages requiring Macklowe to pay Cole the fair market value of his interests in all of the properties, which is alleged to be at least $20 million.

Moreover, not only did Cole fail to even attempt to introduce any evidence at trial establishing the elements of an express trust, his counsel expressly denied that he was seeking to impose any continuing obligation on Macklowe to pay monies to Cole whenever distributions in the future would be made from the properties at issue. Thus, in response to the court's inquiry about whether Cole was seeking specific performance, counsel replied that his request was only for monetary damages. Based, in part, on this response and on the pleadings, the court observed in its January 3, 2006 decision that Cole sought only monetary damages arising from Macklowe's repudiation of Cole's equity interest in the designated properties. Similarly, as already noted, in its decision and order, the First Department remanded the matter to this court for a determination as to monetary damages. *See Cole v. Macklowe*, 40 AD3d at 396. There is no suggestion that Macklowe was to be considered a trustee having continuing obligations to Cole for the foreseeable future, or even longer.

Cole nevertheless argues that, by their very language, the two agreements satisfy the requisite elements of an express trust and that, under CPLR 3025(c), the court may allow the pleadings to be amended so as to conform to this evidence by asserting a claim for the creation of an express trust. The problem with this argument is that Cole seeks leave to amend his pleading with respect to the legal basis of Macklowe's liability after the court, as well as the First Department on appeal, have addressed and already determined the issue of liability during the first stage of a bifurcated trial. Since Macklowe's liability has been found to be based on breach of contract, it would be inappropriate to now change the plaintiff's theory of liability. It is one thing to conform the pleadings to the evidence at the close of trial

before a decision on liability is issued. It is quite another thing to seek to amend the pleadings after a determination is rendered. The plaintiff has not cited any cases where, under such circumstances, leave to amend has been granted pursuant to CPLR 3025(c).

In any event, the plaintiff's attempt to impose on Macklowe an indefinite express trust is inconsistent with the language of the July 22, 1996 agreement, which specifically stated that Cole's interests were to be in the form of limited partnership interests or membership interests. It is well established that no one can be forced to continue as a partner against his will and that a partnership may, even in breach of an agreement, be dissolved at any time by any partner, in which case the breaching partner "may be liable for breach of contract. Nothing more." *Cahill v. Haff*, 248 NY 377, 382 (1928). *See also Eskenazi v. Shapiro*, 27 AD3d 312, 313 (1st Dept 2006); *Napoli v. Domnitch*, 18 AD2d 707, 708 (2nd Dept 1962); Partnership Law § 62(2). Similarly, under the Limited Liability Company Law, the expulsion of a member shall not cause the LLC to be dissolved unless otherwise provided in the operating agreement. *See* LLCL § 701(b). The LLCL also provides that where membership is terminated through withdrawal, the withdrawing member is only entitled to receive "the fair value of his or her membership interest in the limited liability company as of the date of withdrawal based upon his or her right to share in distributions from the limited liability company."*See* LLCL § 509. Notably, the various draft operating agreements for the new limited liability company in which Cole was to be given a 10% membership interest included a provision that the withdrawal or expulsion of a member would not require the dissolution of the company without the consent of either two-thirds or, as provided in one of the drafts, 90% of the membership interests. Thus, if Macklowe had, as intended in the July 22, 1996 agreement, created a limited partnership or a limited liability company in which Cole was a partner or member, he could have terminated the relationship at any time and thereby been subject to damages for breach of contract. The imposition of an express trust would therefore provide Cole with rights which extend beyond those he bargained for and would have otherwise obtained had the agreement to fully document his interests been effectuated. The court declines to impose such a trust.

Finally, Cole alternatively seeks to impose a constructive trust. This request is also denied. A constructive trust may be imposed when property has been acquired under such circumstances that the holder of legal title may not in good conscience retain the beneficial interest. *See Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976). Although there are a number of factors which are typically applied for the imposition of a trust, such as the transfer of property in reliance on a promise, *id.* at 121, these factors are simply guidelines whose rigid application is not required. *See Kaufman v. Cohen*, 307 AD2d 113, 125 (1st Dept 2003); *Matter of Knappen*, 237 AD2d 677, 678-79 (3rd Dept 1997). Rather, it has been recognized that since "'the ultimate purpose of a constructive trust is to prevent unjust enrichment,'" it "'may be imposed whenever necessary in order to satisfy the demands of justice.'" *Matter of Knappen*, 237 AD2d at 679 (citations omitted). *See also Plotch v. Sheibar*, 201 AD2d 431 (1st Dept 1994).

Here, Cole cannot seriously argue that Macklowe has been unjustly enriched by refusing to live up to the terms of the two agreements. As this court found in its January 3, 2006 decision, over the final 56 months of Cole's employment, from the Fall of 1994, when Macklowe orally advised Cole that he had decided to give him a 10% equity interest in all investment projects going forward, to the end of April, 1999, when Cole submitted his resignation, Cole received compensation totaling approximately $4.3 million, an average annual salary of approximately $921,000. Moreover, over his entire 11-year career with Macklowe, Cole received a total of $5,347,449, representing an average annual compensation of approximately $484,000. Although Cole claimed in his testimony at trial that the annual market value of his services was $1 million, this claim was unsupported by any other testimony or evidence. Under the circumstances, Cole has failed to show that a constructive trust should be imposed.

B. The Applicability of the Doctrine of Anticipatory Repudiation - - The plaintiff's second argument in support of his claim that he continues to hold equity interests in the designated properties is that he is legally precluded from claiming a total breach of the two agreements since, as of the date this action was commenced, no distributions had been made with respect to a number of the designated properties and Macklowe's time for performance, i.e., the payment to Cole of his proportionate share of any such distributions, had not yet arrived. He claims that he is therefore unable to invoke the doctrine of anticipatory breach so as to treat the agreements as having been terminated and obtain damages resulting from their total breach.

Under the doctrine of anticipatory breach, if one party to a contract repudiates his duties thereunder prior to the time designated for performance, such repudiation entitles the nonrepudiating party to claim damages for total breach, thereby terminating the contractual relations between the parties. *See Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 (1st Dept 1995). *See also* 11 Lord, *Williston on Contracts*, (4th ed. 1999), § 63:29; 2 E. Allan Farnsworth, *Farnsworth on Contracts*, § 8.20 at 550 (3rd ed. 2004). It does not, however, generally apply to unilateral contacts or bilateral contracts that have been fully performed by the injured party and the only remaining obligation thereunder is for the breaching party to make periodic payments of money. *See Romar v. Ali*, 120 AD2d 420, 421 (1st Dept 1986). *See also* 11 Lord, *Williston on Contracts* at § 63:60. Indeed, the Restatement (Second) of Contracts specifically provides that a breach by nonperformance, even where accompanied by a repudiation, does not give rise to a claim for damages for total breach where, at the time of the breach, "the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another." Restatement (2nd) of Contracts, § 243(3). In such a case, the plaintiff must wait until each payment is due and owing before commencing an action alleging breach of contract. Although this exception is, for obvious reasons, invariably raised by the defendant wishing to delay his or her liability with respect to an act which he or she is not yet obligated to perform, it has nevertheless been invoked by the plaintiff herein. According to Cole, this case falls squarely within the exception to the anticipatory repudiation doctrine. The court disagrees.

As Macklowe points out, the exception has generally been restricted to cases involving loans, bonds, installment contracts, royalties and annuities since these disputes typically only involve an obligation on the part of the breaching party to pay money in scheduled installments. The two agreements at issue herein are substantially different from the agreements in these cases since Macklowe is under no obligation to make payments to Cole either in scheduled installments or in any periodic way. Rather, payments are only to be made if and when distributions are made from the designated properties. Far from being periodic, such payments may well be isolated and sporadic. Indeed, Macklowe is under no time constraints to ever make distributions from the designated properties and, in some instances, decades could elapse without any monies being owed to the plaintiff from a particular property. Cole has notably failed to cite any case applying the exception, and the court has found none, where the obligation to pay monies is even remotely similar to Macklowe's obligation to pay Cole his proportionate share if and when Macklowe decides to make distributions from any of the designated properties. Although in this case it may well be that the plaintiff would be entitled to more damages if the exception applies and he is precluded from declaring a total breach , in all other cases it is invariably the defendant who is invoking the exception and the plaintiff who is seeking a total breach. For these vast majority of plaintiffs, it would be patently unfair to require that they await the time for performance if, as here, such performance is unscheduled, sporadic at best and wholly dependent on the unilateral business decision of the defendant.

Nor is the court persuaded that Macklowe's "only remaining duties of performance....are for the payment of money." Restatement (2nd) of Contracts, § 243(3). Unlike cases involving loans, bonds,

disability payments and annuities, the amount of monies to which Cole is otherwise entitled turns on Macklowe's efforts at operating a business, in this instance developing and managing the designated properties, as well as even adding capital, if necessary. In general, it would be unfair to require that the nonbreaching party rely on the future initiative, enthusiasm and acumen of a party which has repudiated their contract and their business relationship. Thus, this case involves not just Macklowe's obligation to pay Cole money at some unspecified point in time, but to develop the designated properties so as to maximize the amount of these payments. Under the circumstances, the court is persuaded that the exception to the doctrine of anticipatory repudiation does not therefore apply. *See Baer v. Durham Duplex Razor Co.*, 228 App Div 350, 353 (1st Dept 1930).

Where, as here, the doctrine of anticipatory repudiation may properly be invoked, the non-repudiating party has the option of either (1) seeking damages for a total breach of contract, thereby terminating the contractual relation between the parties or (2) continuing to treat the contract as valid and await the designated time for performance before bringing suit. *See Inter-Power of New York v. Niagara Mohawk Power Corp.*, 259 AD2d 932, 933 (3rd Dept 1999); 22A NY Jur 2d, Contracts, §§ 448-450 at 135-138. *See also Lucente v. Int'l Business Machines Corp.*, 310 F3d 243, 258-259 (2nd Cir 2002). As already discussed, in his complaint, at trial and in his post-trial papers, Cole clearly indicated that he was asserting a total breach of the agreements and seeking monetary damages with respect to all of the designated properties.

Where a party asserts a total breach of a contract, damages are calculated as of the time of the breach. *See Brushton-Moira Cent. School Dist. v. Fred H. Thomas Assocs.*, 91 NY2d 256, 261 (1998); *Simon v. Electrospace Corp.*, 28 NY2d 136 (1971). As the Second Circuit has observed, in so calculating damages, this rule takes expected lost future profits into account and rejects awards based on what the actual economic conditions and performance were in light of hindsight. *See Lucente v. Int'l Business Machines Corp.*, 310 F3d at 262; *Sharma v. Skaarup Ship Mgmt. Corp.* 916 F2d 820, 826 (2nd Cir 1990). Cole, however, now argues that insofar as Macklowe has made distributions from the designated properties since his repudiation and breach of the agreements in September, 1999, the damages should be calculated as of the time that such distributions were made. His argument is based on the general rule that damages for an anticipatory breach are calculated the same as in the case of a breach at the designated time fixed for performance. *See Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 AD2d at 266; *In re Marshall's Garage*, 63 F2d 759, 762-763 (2nd Cir 1933); Restatement (1st) of Contracts, § 338. Here, however, there was never a designated time fixed for performance. Rather, it was entirely within Macklowe's discretion and control as to when, if at all, to make distributions from the properties. It is one thing to calculate damages where, prior to trial, a specific date by which the breaching party was required to perform has passed. It is quite another thing to calculate damages where no time constraints for performance are imposed, where the breaching party is under no obligation to ever trigger the plaintiff's right to receive immediate payment and where, long after the contract has been repudiated, the breaching party ignores the agreement and proceeds as if it never existed. Under such circumstances, the actual breach occurred not when the defendant so proceeded but, rather, when the contract was repudiated. Cole has not cited any cases, and the court has found none, where the rule he has invoked has been applied in the absence of a designated time for performance. The court thus agrees with Macklowe that Cole's damages should be calculated based on (1) the total distributions which were withheld from Cole prior to Macklowe's repudiation of the agreements in September, 1999 and (2) the value of Cole's interests based on market conditions which existed as of the time of the breach..

There is no merit to Cole's assertion that this calculation of damages would improperly permit Macklowe, by repudiating the agreements, to have essentially forced Cole to sell his equity interests in

September, 1999. As the court has already noted, had Cole's interests actually been documented, as the parties intended, in the form of limited partnership interests or membership interests, Macklowe could have unilaterally terminated any such relationship, in which case he would have been liable to Cole, as he is now, for breach of contract damages. The fact that no such partnership or limited liability company was ever created does not extend to Cole any contractual rights beyond those he would have otherwise obtained.

C. Distributions of $3,395,000 Made from Three Properties - - In the November 20, 1998 addendum, Macklowe specifically acknowledged and agreed that distributions had been made from three properties, 245 Seventh /Escort Realty, 1412 Broadway and 3 East 54th Street, that Cole's proportionate share of these distributions totaled $3,395,000, that Cole had not received these distributions and that these undistributed monies should be considered loans from Cole to Macklowe. In view of the First Department's ruling that the addendum is enforceable, it is clear that Cole is entitled to summary judgment on his claim for this $3,995,000. Since the addendum does not provide for interest on these loans, interest did not begin to accrue until Cole demanded repayment. In their respective motion papers, it is far from clear when, in fact, Cole demanded such repayment. The court is therefore unable, at this time, to fix the date from which interest, at the statutory rate of 9% per annum, should be calculated. In any event, the court is persuaded that a single money judgment should be entered in this action and that the $3,395,000 owed to Cole should be included with all other amounts for which Maclowe is found, upon the conclusion of the damages portion of the trial, to be liable.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on March 10, 2009 at 2:00 p.m. for a status conference.

ENTER ORDER

Dated: 2/24/09

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [ ] FINAL DISPOSITION

[X] NON-FINAL DISPOSITION