

<b>Sherpaco, LLC v Kossi</b>
2009 NY Slip Op 30971(U)
April 24, 2009
Supreme Court, New York County
Docket Number: 103875/2007
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**LOUIS B. YORK**  
**J.S.C.**

PRESENT: \_\_\_\_\_

PART 2

Index Number : 103875/2007 *Justice*

SHPERPACO, LLC

vs

KOSSI, KRISTINI

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_ is motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the accompanying decision and order.*

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

**FILED**

APR 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/24/09

*Luigi*  
\_\_\_\_\_  
**LOUIS B. YORK**  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----x  
SHERPACO, LLC, and JOHN HOUSHMAND,

Plaintiffs,

-against-

KRISTINA KOSSI, Defendant.  
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Index # 103875/2007

**FILED**  
APR 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

YORK, J.:

Plaintiffs Sherpaco, LLC (Sherpaco) and John Houshmand move for an order pursuant to CPLR 3212 granting them summary judgment against defendant Kristina Kossi by issuing on the first cause of action a declaratory judgment that Sherpaco be adjudged the sole owner in fee of condominium loft units 3D and 3E located at 145 Avenue of the America, New York, New York (the property) and that Kossi be adjudged to have no right of ownership to or any interest in the property; and that upon Sherpaco being adjudged the property's sole owner, issuing an order on the second cause of action requiring Kossi to vacate the premises and deliver possession to Sherpaco. Alternatively, if the court adjudges Kossi to have an interest in the property, defendants seek on the third cause of action an order partitioning the property and dividing it according to the parties' respective rights, or if that can not be done without great prejudice to the owners, an

order for the sale of the property with the proceeds divided and apportioned among the parties according to their respective interests after appropriate costs and disbursements are paid. For the reasons discussed *infra*, the motion is denied.

#### BACKGROUND

In 1999 Houshmand and Kossi began a romantic relationship. In December 2001, Houshmand, who was involved in design and building renovation businesses, formed Sherpaco, and was its sole owner, officer and employee. Evidently, except for a prior hay business, Sherpaco was essentially inactive, until on May 9, 2005, when it closed on the property, which was conveyed by 145 Americas LLC to Sherpaco, "by John Houshmand , c/o Clark Construction." Houshmand was a member of 145 Americas LLC. (See motion, exh. J; See also Houshmand ebt at 48-49 in which he explains that before Sherpaco bought the property, he was a member of an LLC that owned the building in which the two units were located). The LLC was comprised of those who would eventually close on the units in the building). Sherpaco was recorded as the property's sole owner on the deed and tax records. The sole borrower on the property's mortgage was Houshmand, rather than Sherpaco.

At the time the property was purchased, Kossi, a business woman, who had interests in several nightclubs, was a long-time tenant, with her two sons, in a rent stabilized apartment on 51<sup>st</sup> Street in Manhattan, and paid about \$1300 a month in rent. Sometime in "early" 2005 Kossi's landlord, who was interested in having his building vacated, approached Kossi and offered her money to vacate her apartment. (See Kossi ebt at 42). According to Houshmand, Kossi came up with the idea of trying to negotiate a deal with her landlord to obtain \$400,000, so that she could buy an apartment. Houshmand ebt at 22-26. Kossi essentially denies this, and claims that Houshmand talked her into leaving her apartment, making various promises to her as an inducement. According to Houshmand, he allegedly suggested that Kossi look into getting a "fixer-upper, rather than a fancy finished place," and offered to help with the renovations, since he was in the renovation business. (*Id.* at 27). Kossi then allegedly looked into purchasing an apartment on Bleeker Street with the \$400,000 she hoped to get from her landlord, and sought help from Houshmand, possibly by creating a partnership, because she could not afford to buy it on her own, but, Kossi never bought that apartment.

Thereafter, and within 4-6 months after her landlord approached her about buying her out of her lease. Houshmand offered to bring Kossi into the project involving the property that is the subject of this lawsuit. At the time of the closing, there had been discussions about Kossi ultimately putting the money she received from her landlord into the project, although at that time it was thought that the amount would be \$400,000. Indeed, before closing title on the property Houshmand wrote his attorney to inquire how he could get Kossi on the title without her incurring any transfer tax. Houshmand testified at his deposition (at 65-66) that because that could not be accomplished, the issue was allegedly dropped.

Houshmand wanted to help Kossi become financially independent <sup>1</sup>, and brought her into the project with the thought that they would live in the bigger of the two units, improve them and then sell them, reinvesting the profits into the next project, and so on. In an undated letter signed by Houshmand, he stated that his goal was to help her achieve financial independence and that the loft commitment was permanent. The

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<sup>1</sup>It is claimed that Kossi was having some financial difficulties with her businesses and that Houshmand loaned her thousands of dollars to help her out on various occasions.

deal, according to Houshmand, with respect to the property was that Kossi would get a share of any profits based on the proportionate share of her investment. In addition, Kossi would pay \$1,300 monthly towards the carrying costs while she stayed in the apartment. Ultimately, Kossi obtained only \$190,000 from her landlord, which she invested, via two checks, in the property in December 2005 and January 2006.

Meanwhile, in May 2005 the first bank account was opened for Sherpaco at Citibank. Before then, Houshmand simply did his financial transactions for Sherpaco, including with respect to his hay business, through his personal account. On May 13, 2005, both Houshmand and Kossi were singly given unrestricted powers on behalf of Sherpaco to, among other things, sign checks, borrow money, open bank accounts, withdraw funds, contract for any of the bank's services and conduct any other business with Citibank, pursuant to a CitiBusiness General Deposit Resolution for Limited Liability Companies signed by Houshmand. Kossi's signature was placed on that document. According to Houshmand, who conceded that Kossi's powers were not limited to signing checks, the reason he had signed that document was to permit Kossi to sign

checks when he was out of town, but he took her name off when she started to withdraw funds.

Sometime after opening that account, and apparently in the fall of 2005, while Kossi was negotiating an agreement with her landlord, Houshmand, on Clark Construction letterhead, wrote Kossi's landlord-tenant attorney regarding a proposed stipulation of settlement. As is relevant, Houshmand indicated that Kossi would be using the \$190,000 to purchase and improve a new residence. (Kaplan aff., exh H.) Houshmand, noting that none of the \$190,000 had yet been paid, further stated that he had borrowed money on his own to continue the new residence, and that "the shortfall of \$190,000 had been a sticky wicket."

Kossi paid the 190,000, which was deposited in the Sherpaco account, and noted it as her "contribution." (*Id.* at 81-83). In December 2005, she and her two minor sons moved into the bigger of the two apartments that comprised the property. Within two months, she ended her romantic relationship with Houshmand, having allegedly begun a relationship with someone else. On March 21, 2006, Kossi e-mailed Houshmand indicating that she was in financial distress, but that her \$1,300 monthly obligation was a "priority," suggests, perhaps, that she should take in a

border. Houshmand's response indicated that Kossi had failed to make the requisite payments for three months and that he was "dealing with a huge amount of financial trouble," part of which was the loft. Sometime after that, Houshmand and Kossi agreed to sell the units, and Houshmand signed and had Kossi sign, on June 10, 2006, a broker's agreement with the Corcoran Real Estate Corporation, Houshmand's usual real estate broker.

Thereafter, Kossi apparently needed to get a mortgage to purchase another property, and had to show the seller of that other property that she would be coming into some funds from the sale of the property in issue in this case. Since there was a prospective purchaser for the property, Houshmand wrote a letter, on Clark Construction letterhead for Kossi addressed to "whom it may concern," regarding "Sherpaco/145 Avenue of the Americas #'s 3D-3E," advising that Kossi was a "limited partner" in the units, that her "capital contribution" had been \$190,000, that the units were being sold for \$2,600,000, and that if that deal closed, Kossi's equity would be returned with a projected profit of about \$150,000. At his deposition, Houshmand testified that the foregoing letter did not reflect reality, he simply wrote it to

help Kossi out, only intending to communicate that Kossi would be getting back her equity and profits.

Within several days of the date of that letter, there were several e-mail correspondences between Kossi and Houshmand in which Kossi claimed she had been "guaranteed [by Houshmand] a living environment for as long as needed," and to vacate the unit she required \$400,000, plus having her rent covered until she bought another property, assuming she could get a mortgage. If she could not, she would need more money to leave. Houshmand responded that if "we sell the lofts we have to leave," and that the money she needed for another project would be coming from her "share" of the proceeds of the sale of the property. See Rogers aff., exh R. Houshmand further responded that he required closure on their relationship, that the property had to be sold, and that, assuming the deal, which was pending, went through as expected, she would get back her equity, her "rent contribution," and her share of the profits, which in one e-mail he listed as 1/3, but in a later e-mail listed as about 1/5, and a specified allowance towards a year's rental fees. Kaplan aff., exhs. G, O. In that latter e-mail, although Houshmand indicated that, "[b]y nature and proportion of the money involved," Kossi was only

entitled to a return of her equity, her monthly payments and a share of the profits, which all allegedly totaled \$275,000. He then, evidently acquiesced to Kossi's demand for more money, and agreed to give her a total of \$416,000, thus, giving her a return on her investment of more than 100% in a year. Thereafter, at his deposition, Houshmand took the position that Kossi had no ownership interest in the property, but was merely entitled, on the sale, to a return of her investment and a proportionate share of the profits.

On March 21, 2007, movants commenced the instant action. A day later, Kossi, unaware that the complaint in this action had been filed, commenced her own action against movants, asserting four "causes of action," alleging a breach of contract, a breach of fiduciary duty, and estoppel, and seeking determinations as to whether she was a legal owner of the apartment, she and her minor children had the right to live there indefinitely, pursuant to an alleged agreement, Houshmand had a duty to fund a \$200,000 "war chest," pursuant to an alleged agreement, and whether Houshmand was obligated to pay indefinitely Kossi's monthly housing expenses to the extent they exceeded \$1,300. Under the first three causes of action, Kossi sought damages of \$1,500,000, the

amount she claimed it would cost to replace the value of the apartment she gave up on 51<sup>st</sup> Street. Kossi maintains that she was enticed by Houshmand to move out of her rent stabilized apartment by Houshmand's promises that she and her children could live at the property indefinitely, that she "would be a partner" in the ownership of the property "if she contributed toward" its purchase price and moved in, that she would only be required to pay \$1,300 monthly towards the property's mortgage payments, that if they ever decided to sell, she would get a proportionate share of the profits, that Houshmand would indefinitely pay any of her monthly rent, mortgage or maintenance payments, which exceeded \$1,300, and that he would fund a \$200,000 "war chest." See Kossi Complaint. At her deposition (at 33), Kossi testified that other than being required to pay \$1,300 monthly, she did not have "any understanding of any other obligations" she had with respect to the property. The complaint further alleges that in February 2007 Houshmand breached his agreement, except to the extent that he agreed to pay her a proportionate share of the sale proceeds, which, in any event, he allegedly improperly calculated. Because of the prior pendency of the instant action Kossi's action was dismissed, during the pendency of this motion, on movants' motion

in the Kossi action. No counterclaims have been asserted by Kossi in the instant case.

#### The Instant Motion

Houshmand and Sherpaco now seek summary judgment on their first two cause of action, asking that Kossi be declared to have no ownership or any interest in the property, and alternatively on their third cause of action for partition or sale. The motion is unsupported by any affidavit or deposition transcript from Houshmand, and to the extent that Kossi, in opposing the motion, relies on Houshmand's deposition transcript, movants, while relying on it in some respects, ultimately assert that it has no evidentiary weight because it not in compliance with CPLR 3116 (a), in that Kossi did not give Houshmand the requisite 60 days to review and execute the deposition transcript, which was only forwarded to Houshmand's counsel a few weeks before movants' reply papers were served. *Pina v Flik International Corp.*, 25 AD3d 772 (2d Dept 2006).

The essence of the motion is that Kossi is allegedly seeking to extort money from Houshmand, the same way she sought money from her prior landlord, that the sole owner of record of the property is Sherpaco, that the Statute of Frauds bars Kossi

from claiming that she has any interest in the property or in any partnership which allegedly owns the property, that Houshmand could not have conveyed an interest in the property to Kossi, since it was owned by Sherpaco, rather than Houshmand, that love notes written to Kossi by Houshmand, over the course of their relationship ("I will always and forever take care of you and the boys," " I am building you a fantastic home because I love you," "The \$200,000 war chest and loft commitment are permanent"[See e.g. Rogers aff., exhs. G,I,R]), which are allegedly the only writings which Kossi pointed to during discovery, as memorializing the alleged oral promises, are insufficient to overcome the Statute of Frauds. Oral contracts to provide housing or support indefinitely are unenforceable. Estoppel can not be used to overcome the Statute of Frauds. In any event any claimed reliance on any alleged promises which caused her to give up her lease, was not reasonable, since she knew that it was always possible that the romantic relationship could fail, thus putting her housing situation at risk. Movants further assert that the letter Houshmand wrote to Kossi's landlord-tenant counsel is too indefinite to overcome the Statute of Frauds, and that the February 21, 2007 "to whom it may concern" letter at most

"purports to give Kossi " a share of the property limited to the \$190,000 and a profit of \$150,000. See Movants' Memorandum of Law at 17. Movants alternatively urge, that if Kossi is found to have any ownership interest in the property, then they are entitled to have the property partitioned and divided, or sold, if necessary.

Kossi opposes the motion, and asserts that there is ample written evidence, sufficient to overcome any Statute of Frauds and to establish that she was a general partner in the property and had a beneficial interest in it, including the February 21, 2007 "to whom it may concern" letter, which was titled "Sherpaco," and recited that Kossi was a "limited partner," had made a \$190,000 capital contribution into units 3D and 3E at 145 Avenue of the Americas, and would, on the proposed sale, be getting back her equity plus a share of the profits, Houshmand's letter to Kossi's landlord-tenant attorney, which indicated that the \$190,000 would be used by Kossi to purchase and improve a new residence and that the delay in her receiving the money from her landlord created a problem for Houshmand, who borrowed funds "to continue the new residence. Moreover," Houshmand's February 2007 e-mails to Kossi, indicated that, when the property was sold,

Kossi would get back her equity, her monthly payments and proportionate share of the profits.

Kossi, via her affidavit submitted in opposition to movants' motion in the Kossi action, maintains that Houshmand, to allay her concerns about giving up her rent stabilized apartment, proposed a partnership which would own the property, which could only be sold by mutual agreement, which she could live in as long as she wanted. If sold, by mutual agreement, the profits would be reinvested into another property, where she could live as long as she wanted. If the property was not reinvested, Houshmand would pay her monthly living expenses over \$1,300. Kossi would be required to invest the proceeds of her lease buyout as a capital contribution and would contribute \$1,300 per month in expenses, and Houshmand would fund the "war chest." Kossi maintains that after she and Houshmand agreed to form this partnership, Houshmand prepared a document, entitled, "Draft by-laws for Sherpaco," which included "most" of the alleged agreement's terms, and which was then, "to the best of [Kossi's] recollection," forwarded it to "Sherpaco's" attorney, so that a formal agreement could be drawn up and "eventually executed." Kossi aff. at ¶ 10. Kossi alleges that all of this occurred before the "partnership (i.e. Sherpaco) purchased" the property.

A review of that document reveals that it was entitled "DRAFT/SHERPACO LLC," and recited that it consisted merely of "[c]onsideration points" for Sherpaco and questioned "would these be "By-laws." Kaplan aff., exh. Q. It then stated that the "[p]artners are" Kossi and Houshmand, and that the LLC existed to acquire real property, accumulate equity for the "partners" and provide a place for Kossi and her children to occupy. *Id.* It further provided that the percentage of ownership in the LLC would be based on the proportionate dollar value invested into Sherpaco's accounts or towards costs associated with the purchase, operation and maintenance of the LLC's real estate property. It further provided how the partners could dispose of their shares in the LLC.

Kossi, who fails to specifically claim that she never saw the Draft/Sherpaco LLC document, does not explain why she provided her signature on the Citibank LLC Resolution for Sherpaco, and does not allege that she ever saw or executed any formal agreement. She asserts that when they entered into the alleged partnership agreement, Houshmand did not indicate that Sherpaco, LLC would be used as the means to form the partnership. Kossi claims that in reliance on the alleged partnership agreement, she negotiated a lease surrender with her landlord,

gave up her rent stabilized apartment, invested in the property and in its maintenance, and moved into it with her two sons. Kossi reiterates the allegations of her complaint, that when their romance ended, Houshmand refused to honor any of the alleged partnership agreement, except for agreeing to provide her with her proportionate share of the sale proceeds. While it is not entirely clear, Kossi, who opposes this motion with her memorandum of law submitted in opposition to movants' motion in the Kossi action, claims that Houshmand used Sherpaco as a vehicle to create a "general" partnership between Houshmand and/or Sherpaco and herself, and agreed that the partnership would own the property (See Kaplan aff., exh. 1 at 8-9,13). Alternatively, Kossi's counsel apparently urges that Kossi has an ownership interest in Sherpaco (*Id.* at 12-13), but that in either case she has a beneficial interest in the property.

In reply, movants submit their reply memorandum previously offered on their motion in the Kossi action, and urge in response to Kossi's claim that the Statute of Frauds is inapplicable because a partnership agreement existed before the property was acquired by Sherpaco. In addition, movants contend that there

could not have been a partnership or joint venture because there was never an agreement by Kossi to share losses.

#### Discussion

Initially I note that, Kossi's claims that Houshmand agreed to take care of her and her sons and subsidize her housing for the rest of her life are unavailing, since they are either too vague, violate the Statute of Frauds (See, GOL § 5-701 [a],[1]; **Yedvarb v Yedvarb**, 237 AD2d 433 [2d Dept 1997], lv denied 90 NY2d 804). Moreover, as a matter of law, they are unsustainable since it is readily apparent that any promises to take care of her and subsidize her housing were made in the context of their romantic relationship, which always had the potential to end, and thus could not have been reasonably viewed as a permanent commitment. In addition, it cannot be said that all of the terms of the undated document entitled "Draft/Sherpaco LLC," which allegedly antedated the purchase of the property, constituted most of the alleged partnership agreement, since it is evident that it was only a draft which contained "consideration points" and was only an agreement to agree (see, **Richbell Info. v Jupiter**, 309 AD2d 288, 297 [1<sup>st</sup> Dept 2003]). As noted, Kossi stated in her affidavit that to the "best of [her] recollection" the draft was

forwarded to "Sherpaco's" counsel so that a formal agreement could be thereafter drawn up and executed. Further, it is readily apparent from the face of that document that what was being contemplated was Kossi's obtaining an interest in Sherpaco, and, possibly, although it may simply have been that the term "partner" was used loosely, that once that was accomplished the two shareholders, as between themselves only, would act as partners through Sherpaco. To the extent that Kossi's counsel may be suggesting that such document was drafted with the purpose of giving Kossi an ownership interest in Sherpaco, again that instrument was only an agreement to agree, and Kossi herself has not urged that that was the purpose of the draft document, and has neither testified nor provided her affidavit indicating that she was ever given an ownership interest in Sherpaco.

It is also apparent that no partnership was formed before Sherpaco took title to the property. Clearly, before the property was acquired by Sherpaco it was discussed that Kossi would have an interest in it. This is supported by Kossi's affidavit. The fact that Houshmand sought advice about getting Kossi on the title before the property was acquired, Houshmand's

deposition testimony <sup>2</sup>, and that right after the property closed, Kossi was made a signatory with unlimited powers on Sherpaco's bank account. However, Kossi's gaining an interest in the property and becoming a partner were dependent on her settling with her landlord, obtaining payment from it (in an amount that was yet to be determined), which did not occur until long after the closing, and contributing toward the price of the property (See Complaint in Kossi action, ¶ 12). Accordingly, the property, when it closed, was solely owned by Sherpaco, and was not partnership property which fell outside of the Statute of Frauds (see e.g. *Barash v Sperlin*, 271 AD2d 558 [2d Dept, 2000]; *Mattikow v Sudarsky*, 248 NY 404 [1948]). The Statute of Frauds would therefore be applicable to effect the transfer of an interest in the property from Sherpaco to the alleged general partnership. *Najjar v National Kinney Corp.*, 96 AD2d 836 2d Dept 1983).

While there are documents which suggest that thereafter a beneficial interest in the property may have been conveyed to

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<sup>2</sup>While it is true that Houshmand's deposition testimony is not admissible on this motion, since he was not given the requisite time to review and sign it, its lack of availability to resist the motion will be considered to the extent relevant under CPLR 3212 (f).

Kossi, none of them is sufficient to raise an issue of fact as to whether the documentary evidence satisfies the Statute of Frauds with respect to any claim that the property was conveyed to a general partnership. Although multiple documents may be pieced together, to satisfy the Statute of Frauds, not all of which must be signed, (*Strain v Strain*, 228 AD2d 491 [2d Dept 1996]), the essential terms of the agreement to transfer the property to the general partnership must be incorporated in those documents (see, *Donner v Septimus*, 137 AD2d 484,485 [2d Dept 1988]). This includes a designation of the parties to the agreement. *Id.* at 485. None of the documents relied upon by Kossi, whether such document antedates or postdates the conveyance to Sherpaco, sufficiently designates both parties to the alleged agreement to convey an interest in the property to a general partnership. The Draft/Sherpaco, LLC agreement and the "to whom it may concern letter," are inadequate to demonstrate a conveyance of property to a general partnership. The Draft/Sherpaco, LLC document, which allegedly antedates the conveyance of the property to Sherpaco, contemplates, not that an interest in the property would be conveyed from Sherpaco to

Kossi as a general partner, although the term "partner" is apparently loosely utilized, and Houshmand and Kossi may have been contemplating acting as partners only between themselves once Kossi acquired an ownership interest in Sherpaco, but rather that Kossi would be getting an ownership interest in Sherpaco, which as noted previously, Kossi herself does not urge was contemplated or ever occurred. And that was simply an agreement to agree. Also, the "to whom it may concern" letter refers to Kossi being a "limited partner" but does not recite specifically what she was a limited partner in, other than in the two units, and since the document was titled Sherpaco, which is a limited liability company, it appears again that the term "limited partner" was used loosely. In any event, Kossi does not state that she became a limited partner, and her memorandum of law alleges that she was a general partner. None of the documents, upon which Kossi relies to avoid the Statute of Frauds, specifically indicates that there was a conveyance of the property to a general partnership, certainly a material and

essential term of the alleged agreement. Thus the Statute of Frauds has not been satisfied in this regard.

Nonetheless, the motion to dismiss this action is denied since there is at least an issue of fact as to whether Kossi's actions, including her negotiating with her landlord, her giving up her rent stabilized apartment, her moving into one of the units with her two sons, her paying the \$190,000, which she received from her landlord, to Sherpaco, and her making monthly payments to Sherpaco constitute part performance "unequivocally referable" to an alleged agreement to transfer an interest in the property to her through a general partnership or joint venture. *Spodek v Riskin*, 150 AD2d 358 (2d Dept, 1989) citing *Anostario v Vicinanza*, 59 NY2d 662. In addition the documentary evidence "is probative with respect to the issue of whether [Kossi's] actions constitute[d] part performance". *Id.* at 360; see, also, *Barash v Sperlin*, 271 AD2d at 559. These documents include 1) the "to whom it may concern" letter, which identifies the property and Kossi's "capital contribution" and indicates that if the deal closed Kossi would get back her equity and a specified share of the profits, 2) the letter signed

by Houshmand to Kossi's landlord-tenant attorney, indicating that Kossi would be purchasing a new residence with the proceeds of the settlement, and effectively identifying the property by the reference to Houshmand's having to borrow money to continue the project on his own, 3) Houshmand's e-mails to Kossi, explaining what precisely she would be entitled to on the sale of the property, indicating that if "we sell the lofts, we have to leave", and stating that her money would be coming from her "share" of the proceeds, 4) the Citibank form that Houshmand had Kossi fill out, giving her unlimited signatory powers over Sherpaco's account and 5) the checks from Kossi deposited into the Sherpaco account. I also note Houshmand's unsigned deposition testimony, that he had Kossi fill out a real estate broker's contract to aid in the sale of the property, which testimony strongly supports Kossi's assertion that she has a beneficial interest in the property. Houshmand has failed to offer his affidavit on this application explaining the foregoing documents, most, if not all, of which were appended to the initial moving papers, and as noted earlier, he maintains that

his deposition is inadmissible, so that it can not aid movants on this application.

As to movants' claim, raised for the first time in their reply papers, that no partnership or joint venture arose because such an arrangement requires a sharing of losses, no affidavit was provided by Houshmand on this issue in the initial moving papers, even though it was evident from movants' initial papers that movants were aware that Kossi was basing her claim of entitlement to an interest in the property on the existence of a partnership. Further, such argument cannot be considered since Kossi never had a chance to respond to it. See, **Dannasch v Bifulco**, 184 AD2d 415 (1<sup>st</sup> Dept 1992). In any event, Kossi does not specifically deny on this motion that she would be liable for her share of the partnership's losses, and the memorandum of law submitted on her behalf appears to recognize that she would be liable for a proportional sharing of the profits and losses. See Kossi memo of law at 6. Moreover, even if it is ultimately found that Kossi's part performance is not referable to a partnership or joint venture, because, for example, of the failure to demonstrate that an agreement to share losses existed,

that does not necessarily mean that Kossi will be found not to have had any interest in the property. (See, *Natuzzi v Rabady*, 177 AD2d at 622 [2d Dept 1991]) (Absent an agreement to share profits and losses, results at most in a cotenancy.).

Accordingly, it is

**ORDERED** that Houshmand's and Sherpaco's motion is denied.

Dated: 4/24/09

Enter:

*Fley*

J.S.C.

**LOUIS B. YORK  
J.S.C.**

**FILED**

APR 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK