

Wenger v DMR Realty Mgt., Inc.

2009 NY Slip Op 32545(U)

October 23, 2009

Supreme Court, Suffolk County

Docket Number: 44413-08

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 46 SUFFOLK COUNTY

PRESENT: Hon. Emily Pines

LOUIS A. WENGER,

Plaintiff,

-against-

DMR REALTY MANAGEMENT, INC., JOSEPH
SPERANZA and DIANE ROCCA,

Defendants.

MOTION DATE: 04-06-2009; 06-16-2009

SUBMITTED: 08-05-2009

MOTION NO's.: 001 MD

002 MG

003 MG

CASEDISP

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Pursuant to the record, Wenger contends that prior to October 5, 2000, L.A. Wenger Contracting Co. Inc (a Corporation in which he was a principal) was the owner of two condominiums located in Fire Island (the "Sunset Properties"). It is alleged that in or about October 2000, defendants Speranza and Rocca loaned plaintiff \$149,800.00. Wenger claims that the parties agreed the loan would be paid back, however there was no time-frame for repayment set forth. Wenger further claims that the defendants demanded Wenger offer the Sunset Properties as collateral for this loan and as further security, title to such properties was to be held by DMR Realty Management, Inc. until the loans were repaid.

Plaintiff contends that on October 5, 2000, a closing for the loan took place at which time title to the Sunset Properties was transferred from L.A. Wenger Contracting Co, Inc. to DMR Realty Management, Inc. The Defendants rented out the Sunset Properties and continue to receive rental income from the properties averaging

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\$38,000 per year. Plaintiff claims that from 2001 through 2008 the defendants have collected over \$266,000 in rental income from the properties.

Plaintiff also claims that on August 10, 2008 the defendants acknowledged that the Sunset Properties served as collateral for the \$149,800 loan and sought to purchase the property from the plaintiff for the sum of \$800,000 less \$170,000.00 which defendants claim is the original amount of the loan \$149,800 plus costs associated with the maintenance of the property. Leaving a balance due Wenger of \$630,000. Wenger claims that he rejected defendants' offer to purchase.

The initial complaint sets forth several causes of action including but not limited to breach of contract, fraud, and conversion. First plaintiff claims that defendants are in breach of the contract for the above referenced loan by failing to return the Sunset Properties to Wenger. Wenger claims that since the Sunset Properties were to serve only as collateral for the loan, and that the defendants collected and kept all rents earned from the property from 2001 through 2008, the loan of \$149,800 was fully repaid, and title to the Sunset Properties should have been returned to him. Plaintiff further claims that the defendants fraudulently induced the plaintiff to transfer title to the Sunset Properties to DMR Realty through statements and misrepresentations made to him upon which he justifiably relied. Plaintiff seeks damages in the amount of \$1,400,000 which plaintiff claims represents the market value of the Sunset Properties.

The Plaintiff also seeks the imposition of a Constructive Trust and a declaratory judgment that he is the lawful and rightful owner of the Sunset Properties. Plaintiff alleges that despite due demand to the defendants for return of the Sunset Properties, the defendants remain in possession of such properties and continue to receive profits earned thereon.

Defendants deny that the properties were to be used as collateral for a loan and contend that on September 15, 2000, L.A. Wenger Contracting Co., Inc. as seller, and DMR Realty as purchaser, agreed to a written contract of sale in which the Sunset Properties would be sold for \$146,000. The closing took place on October 5, 2000 at which time Wenger Contracting delivered to DMR the deed for the Sunset Properties. The defendants claim that DMR Realty is the rightful owner of the Sunset Properties pursuant to the Contract of Sale

Turning to the motions now before the Court. There are

three motions currently before the Court in this matter. Plaintiff moved first (Motion Seq. #1) for trial preference based on the age of the plaintiff. In response, the defendants cross-moved for Summary Judgment (Motion Seq. #2). The Plaintiff then moved to Amend the Complaint (Motion Sequence #3). As previously discussed with the Court, in light of the nature of the motions now pending, they will not necessarily be discussed in the order in which they were filed, but all will be addressed herein.

The motion to Amend the Complaint (Motion sequence #3) seeks to amend the Complaint to assert additional claims based on the relationship between the parties. Pursuant to the motion, plaintiff's counsel claims that he recently became aware of a oral partnership agreement between the parties. Plaintiff argues that there was an agreement under which the plaintiff contributed the Sunset Properties and the defendants were to contribute their expertise and labor in managing the properties. According to the plaintiff this arrangement was a partnership to split the profits generated from the Sunset Properties however, the "partnership" was terminable at will. The plaintiff claims that once he repaid the loan, the partnership would be dissolved and the plaintiff would regain title to the properties. The amended complaint reflects these "new facts" and sets forth additional causes of action including dissolution of the partnership, specific performance and unjust enrichment.

It is well settled that motions to amend pleadings shall be freely given upon such terms as may be just (*Girardi v Community Hospital of Brooklyn*, 137 AD2d 788). Furthermore, leave to amend pleadings is freely granted, pursuant to CPLR 3025(b). A fair reading of the Amended Complaint demonstrates that plaintiff has set forth facts which may give rise to a claim for an oral partnership between the parties. Therefore the Court grants plaintiff's motion to Amend the Complaint as annexed to Motion Sequence #3).

Turning now to defendants' motion for Summary Judgment. As previously stated, the defendants cross-moved for Summary Judgment of the initial complaint. However, after several conferences with the Court, and in furtherance of judicial economy, it was acknowledged by all parties that the Court could consider the Summary Judgment motion against the Amended Complaint if appropriate. The defendants argue that the documentary evidence submitted in support of their motion warrants Summary Judgment in their favor. Additionally, the defendants argue that Louis A. Wenger lacks standing to bring this action individually and further argue that Diane Rocca in her individual capacity was not a party to any written agreement or contract with either Louis A. Wenger individually or Wenger Contracting.

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The defendants have submitted in support of this motion copies of the Contract of Sale dated October 5, 2000, a copy of the deed which proof of recording and proof of DMR's payment of the real estate transfer taxes all indicating that title to the Sunset Properties was transferred from L.A. Wenger Contracting Co. Inc. to DMR Realty Management Inc. for the purchase price of \$146,000.00. Additionally, the defendants have attached a copy of an affidavit dated July 13, 2001 sworn to by Louis A. Wenger in connection with an unrelated action entitled **Seaboard Surety Co. et ano. v L.A. Wenger Contracting Co., Inc., et al.**, Supreme Court, Suffolk County, Index No. 13263/2001. (The "Seaboard Case"). The plaintiff in that action never obtained the relief sought. **Id.**

Pursuant to the record, the affidavit was submitted in opposition to a preliminary injunction in the Seaboard Case. (The "Seaboard Affidavit"). The injunction sought the attachment of the Sunset Properties in connection with the enforcement of a judgment against L.A. Wenger Contracting for over five-million dollars. The allegations in that matter include claims that the Sunset Properties were transferred by L.A. Wenger Contracting as part of a fraudulent conveyance to avoid the judgment. In response to these allegations, Louis Wenger offered the affidavit which states in relevant portion:

"the property at 1 Ocean Road, Units 3 and 4, located at Ocean Beach, New York was conveyed for fair and proper consideration to DMR Realty Management Inc., a completely unrelated company. Said property was sold for \$146,000.00 ... The monies realized from said sale were utilized to keep Wenger Contracting operating."

In the action now before the Court, the defendants argue that the Seaboard Affidavit belies Wenger's contention that the Sunset Properties were used as collateral for a loan. In addition, this affidavit would also belie Wenger's allegations set forth in the Amended Complaint, *to wit*, that there was an oral partnership agreement. There is no mention of a partnership in the Seaboard Affidavit, in fact Wenger states that "the purpose of the sale was to keep Wenger Contracting operating". The defendants argue that Wenger is judicially estopped from now asserting these claims against the defendants.

In opposition to Summary Judgment, the plaintiff submits documents which he claims support his contention that there was a partnership between the parties. Plaintiff also submitted an affidavit in which he states that the Seaboard Affidavit is improperly offered as evidence in this matter and has no relevance to the present case. The Court disagrees with this position.

The well recognized doctrine of judicial estoppel is designed to protect the integrity of the Court system as a whole by prohibiting deliberate alteration of a stated position before the same or different courts in order to obtain favorable treatment. **New Hampshire v Maine**, 52 U.S. 742 (2001); **Festinger v Edrich**, 32 AD 3d 412, 820 NYS 2d 302 (2d Dep't 2006). The doctrine prohibits a party who, having obtained a favorable ruling based upon an asserted position, seeks to alter the position simply because the litigant's interests have changed. **Jones Lang Wooten USA v Leboeuf, Lamb, Greene & MacRae**, 243 AD2d 168, 674 NYS 2d 2890 (1st Dep't 1998), leave to appeal dismissed, 92 NY 2d 962, 683 NYS 2d 172, 705 NE 2d 1213 (1998).

Furthermore, the doctrine of unclean hands applies to this matter. In a recent decision, **Dolny v. Borck**, 2009 NY Slip Op 3129, the Appellate Division, Second Department directly ruled on this point. In **Dolny**, the plaintiff sought to impose a constructive trust upon certain real property and the defendants moved for summary judgment. The property was conveyed to the defendants in order to place the property beyond the reach of plaintiff's judgment creditors, while the plaintiff retained the beneficial ownership of the premises. The Court found that "given the plaintiff's involvement in the arrangement to convey the property to frustrate his creditors in the collection of their legitimate debts, his claim that the [defendants] should be compelled to convey title to the premises to him pursuant to the terms of that arrangement is barred by the doctrine of unclean hands". *Id.* at 818.

In the case now before the Court, the plaintiff annexed to his opposition papers the affirmation of Seymour Pienkny, plaintiff's real estate attorney involved in the conveyance of the Sunset Properties. Paragraph four of this affirmation states "it was the intent of the parties that Joseph Speranza and Diane Rocca hold the property in trust for Lou Wenger individually to avoid judgments he had or expected to have". It is clear that the plaintiff comes into this case with unclean hands warranting summary judgment in favor of the defendants.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (see, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Century Fox Film**

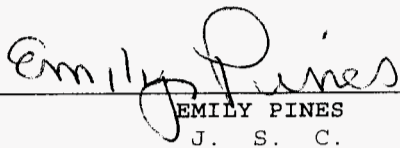
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Corp. supra at 404).

In view of the foregoing, the plaintiff's motion to Amend the Compliant is granted; the defendants' motion for Summary Judgment is granted as to both the initial and amended complaint; and plaintiff's motion seeking trial preference is moot.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 23, 2009
Riverhead, New York



EMILY PINES
J. S. C.