SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 012402/05

MOTION DATE: Oct. 23, 2009
Motion Sequence # 016

ARI YEMINI (also known as ARIEH YEMINI), both individually and in his capacity as a member of Peninsula Holdings, LLC and PENINSULA HOLDINGS, LLC,

Plaintiffs,

-against-

ODED GOLDBERG and GOLDBERG COMMODITIES INC., as the assignee of Oded Goldberg in and to Peninsula Holdings, LLC and ALAN MOORE,

Defendants.

-and-

ANO, INC., STERN, ADLER & ASSOCIATES, LLP f/k/a STERN, ADLER & WASSERMAN, JANET STERN and STEVEN ADLER,

Additional
Counterclaim-Defendants

ODED GOLDBERG and GOLDBERG COMMODITIES INC.,

Third-Party Plaintiffs,

-against-

YEMINI, et al v GOLDBERG, et al **Index no. 012402/05**

STERN, ADLER & ASSOCIATES, LLP f/k/a
STERN, ADLER & WASSERMAN, JANET
STERN and STEVEN ADLER,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affidavit.... X
Memorandum of Law..... X
Rule 19-A Statement..... X

This motion, by the attorneys for the defendants Oded Goldberg and Goldberg Commodities, Inc., for an order pursuant to CPLR 3001, 3212 and Business Corporation Law § 504(i) granting partial summary judgment on defendants' First, Second and Third Counterclaims: (a) declaring that Goldberg Commodities, Inc. is a 50% owner of ANO, Inc. and prohibiting plaintiff Ari Yemini from holding himself out as the sole shareholder of ANO, Inc.; (b) directing plaintiff Ari Yemini to issue and deliver certificates to Goldberg Commodities, Inc. reflecting its 50% ownership in ANO, Inc.; and (c) severing and continuing defendants' Fourth through Twelfth Counterclaims, is determined as hereinafter set forth.

Defendant Oded Goldberg (Oded) is the sole owner of defendant Goldberg Commodities, Inc. (Commodities).

In 1999 a New York State corporation called ANO, Inc. was created. In the Nominee Agreement dated July 1, 1999, between defendant Oded Goldberg (Oded) and plaintiff Ari Yemini (Ari), Oded was referred to as the "principal" and Ari Yemini the nominee. According to the Nominee Agreement, Oded, the principal, would be "the true owner of fifty (50%) percent of the common stock of ANO, Inc." The purpose of the Nominee Agreement was for the plaintiff to act as the nominee for Oded in connection with ANO, and in connection with the Stock Acquisition Agreement between ANO and Candlewood Holdings, Inc. (Candlewood) dated July 1, 1999 (referred to hereinafter as the Stock Acquisition Agreement). Plaintiff, Ari Yemini, and defendant, Oded formed

ANO to purchase an entity called Candlewood Holdings, Inc. In 1999, ANO purchased 50% of Candlewood. Plaintiff and Oded signed the ANO Nominee Agreement. The ANO Nominee Agreement states that Oded and plaintiff each own 50% of ANO. Oded asserts the nominee agreement was to allow the plaintiff to hold himself out to others as the only shareholder of ANO, but it would not change the fact that, as between them, Oded would own one-half of ANO. Oded asserts the name ANO stands for "Ari 'n' Oded." In or around July 1, 1999, Oded asserts Commodities arranged for a transfer of $206,000, that it borrowed, into a bank account plaintiff set up for ANO. Oded contends the plaintiff contributed less than $100 to ANO when it was formed. Later, ANO increased its stake in Candlewood to 66 2/3%, which it still currently holds. In 2000, Oded contends he loaned approximately $1,500,000 to Candlewood and/or its subsidiary Valle Auto Mall, Inc. ("Valle"). As part of the loan, plaintiff, Oded and others executed an agreement (the "Loan Repayment Agreement"). The Loan Repayment Agreement specifically states, "[w]hereas Goldberg and Yemini each own one-half (½) of the issued and outstanding shares of Ano . . . ." The Loan Repayment Agreement contained a provision stipulating that if Candlewood and Valle defaulted in repaying that loan, plaintiff, Oded and Alan Moore would each be personally liable to one-third (1/3) of each monthly payment. Plaintiff signed the Loan Repayment Agreement. At a preliminary hearing concerning Oded's interest in ANO, the attorney who formed ANO testified that Oded and plaintiff each owned 50% of ANO when it was formed.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (***Sillman v Twentieth Century Fox Films Corp.***, 3 NY2d 395, 404). A ***prima facie*** showing of a right to judgment is required before summary judgment can be granted to a movant. (***Alvarez v Prospect Hospital***, 66 NY2d 320; ***Winegrad v New York University Medical Center***, 64 NY2d 851; ***Fox v Wyeth Laboratories, Inc.***, 129 AD2d 611; ***Royal v Brooklyn Union Gas Co.***, 122 AD2d 133). The defendant Oded has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a ***prima facie*** right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (***Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.***, 46 NY2d 1065). Conclusory statements are insufficient. (***Sofsky v Rosenberg***, 163 AD2d 240, *aff'd* 76 NY2d 927; ***Zuckerman v City of New York***, 49 NY2d 557).

In opposition to the motion for summary judgment, the plaintiff asserts that at the date of the Candlewood closing Oded had not committed to investing in ANO. Plaintiff contends the Nominee Agreement had been prepared "in anticipation" of Oded becoming a co-shareholder in ANO and the Nominee Agreement was signed with the verbal agreement that it would immediately become effective when Oded contributed his share of the Candlewood purchase price. Plaintiff argues Oded never contributed the $236,000 cash, but rather the first $206,000 that was wired into ANO's account represented plaintiff's contribution toward ANO's purchase of an interest in Candlewood, not Oded's contribution. The plaintiff states in his affidavit in opposition (pg. 3) "[i]n fact, when Oded learned that I planned to use cash to pay ANO's down payment for its purchase of a 50% interest in Candlewood, he requested that I give him the cash instead and, in return, he would 'arrange' for a wire transfer of the money from a Panama company, Financiera Cantabria. The money was wired to ANO's account and I paid Oded $206,000 in cash. Thus, the $206,000 that was wired into ANO's account represented *my* contribution toward ANO's purchase of an interest in Candlewood, *not* Oded's." Plaintiff states that several months later Oden again needed cash, and the plaintiff arranged for another $30,000 to be wired to ANO. The plaintiff refers to a Promissory Note dated November 28, 2001 in the amount of $122,000.00. Plaintiff is the payee; Oded is the maker. Plaintiff has not offered any probative evidence such as a signed receipt to document that he gave cash to Oded in 1999. Nor did he submit any evidence that he actually had $236,000 in cash in June, 1999 to give to Oded. There is no connection between the Promissory Note dated November 28, 2001 in the amount of $122,000 and the $236,000 in transfers allegedly made from Commodities credit facilities, which Oded alleges was used to fund ANO's purchase of Candlewood. The plaintiff in sworn testimony at the preliminary injunction hearing testified that the monies forwarded to ANO were repaid to Oded. Although the plaintiff's attorney questions the source of the $236,000, the plaintiff does not. According to plaintiff's testimony he exchanged the money Oded received from Commodities' credit facility with the plaintiff's own $200,000. Plaintiff offers no proof that he ever had $200,000 or transferred $200,000 to ANO, yet acknowledges that Oded did cause $200,00 to be transferred into ANO.

When the parties set forth their entire agreement in a writing, a party may not introduce extrinsic evidence or prior or contemporaneous statements to establish that a different oral agreement exists . *(See e.g.* ***W.W.W. Associates, Inc. v Giancontieri***, 77 NY2d 157, 162) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing."; ***Braten v Bankers Trust Co.***, 60 NY2d 155) (refusing to enforce oral

agreement that contradicted the terms of the parties' written agreement; ***Harris v Hallberg***, 36 AD3d 857, 2nd Dept., 2007). Plaintiff's argument is contradicted by the express wording of the ANO Nominee Agreement that states the agreement is effective as of the date of the agreement.

There is nothing in a May 14, 2005 letter to support the plaintiff's statement that it was their verbal agreement that the Nominee Agreement would become effective only when Oded paid his share of the Candlewood purchase price. Oded's letter to plaintiff dated May 14, 2005 revoked the Nominee Agreement. The letter dated May 14, 2005 stated:

> In compliance with the terms and conditions of the above mentioned nominee agreement, and additionally to our verbal agreement, I hereby revoke and cancel said nominee agreement in its entirety including but not limited to the power of attorney. Section 4 Part A of said agreement requires nominee to act upon the express instructions of the principal, this notice is to inform you of my express instructions to no longer act as my nominee, and to discontinue your appointment as my true attorney-in-fact.

If plaintiff was not designated a nominee in 1999 there would be no reason to send a letter dated May 14, 2005 to cancel the designated nominee.

The ANO Nominee Agreement expressly states that it is the entire understanding between the parties with respect to its subject matter. Plaintiff's argument that the ANO Nominee Agreement does not truly represent his agreement with Oded, and that some other conditional agreement was intended, fails as a matter of law and is precluded by the parol evidence rule.

In addition to the ANO Nominee Agreement, there is no dispute that plaintiff also signed the Loan Repayment Agreement dated November 29, 2000. That agreement stated Oded owns one-half of ANO.

Prior to 1999 Candlewood was owned by Rosalie Moore. In 1999 Alan Moore (Moore), Rosalie's husband, entered into negotiations with the plaintiff and Oded for them to purchase 50% of Candlewood from Moore's wife. According to Moore, plaintiff

and Oded was each to acquire a 25% interest in Candlewood for a total of $450,000, payable in cash. The deal was changed to one where ANO paid $200,000 cash and issued a note for the $250,000.00. The plaintiff, not Oded, guaranteed payment of the note.

After the purchase, Moore, Oded and the plaintiff jointly ran Candlewood. According to Moore, as set forth in his sworn affidavit, they all participated in any major decisions for Candlewood, including the decision to establish a subsidiary in Massachusetts entitled Valle Auto Mall. All major decisions for Candlewood were decided by Oded, the plaintiff and Moore (on behalf of his wife). As far as Moore was concerned, he, along with the plaintiff and Oded, were all partners in Candlewood, no matter how plaintiff and Goldberg had structured their ownership interests. Moreover, Moore stated that when Oded mortgaged his home to loan $1.5 million to Candlewood and Valle, the three of them all agreed to be responsible for repaying 1/3 of the mortgage if Candlewood could not make the mortgage payments.

Plaintiff argues that Oded could not transfer his interest in ANO to his wholly-owned company, Goldberg Commodities, Inc. because of a provision in the Candlewood Shareholder's Agreement that prohibited any transfer of ANO's securities without Moore's consent. That provision was added to protect Moore's wife from any stranger becoming partners with them in Candlewood. Moore was concerned, and wanted to prevent, plaintiff or Oded from transferring their interests in ANO to third party. Moore argues that it was not intended to prevent Oded from transferring his interest in ANO to Commodities.

Moore and his wife had no objection to Oded's transferring his interest in ANO to Commodities as long as Oded remained the sole owner of Commodities. Moore also testified that, in 2005, plaintiff asked Moore to join him in buying out Goldberg's interest in ANO. Plaintiff has not disputed this fact.

Based on the Nominee Agreement dated July 1, 1999 and the Stock Agreement dated November 29, 2000, Oded has a 50% interest in ANO. There is nothing in the submissions to this court to demonstrate that the Agreement between Oded, Valle Auto Mall, Inc. (by Ari) and Candlewood Holdings by Moore "dated July 2, 2002 and to be effective as of November 29, 2000" vitiates the Nominee Agreement dated July 1, 1999 and the Loan Agreement dated November 29, 2000 as asserted by the plaintiff. Ari signed the Agreement dated July 2, 2002 as a representative of Valle, not individually. The Nominee Agreement was signed by Ari in his individual capacity.

Based on the validity of the Nominee Agreement, this Court can determine as a matter of law, that Oded had a 50% interest in ANO. Oded contends that he initially owned 50% of ANO in his individual capacity, and "seconds later" he "immediately" transferred his interest to Commodities. Oded asserts he wanted his interest in Candlewood to be owned by Commodities because the funds for his capital contribution were coming from Commodities via its lending facility and to take advantage of Commodities' tax situation. "It is irrelevant that Yemini at all times retained ownership of the ANO stock certificates." *(See* ***Yemini v Goldberg***, 60 AD3d 935, 937, citing ***Matter of Benincasa v Garrabbo***, 141 AD2d 636). The plaintiff contends he would have never consented to the transfer by Oded of his 50% interest in ANO to Commodities because the plaintiff did not want Commodities to appear as a shareholder since Commodities' pre-existing debt might impair Candlewood's ability to secure outside financing. There is no written agreement between plaintiff and Oded to prevent Oded from transferring his interest in ANO to Commodities. The boilerplate language in the ANO by-laws does not preclude Oded from transferring his interest in ANO to Commodities.

In the first, second and third counterclaims Oded seeks an order and judgment declaring him to be a 50% owner of ANO and directing the plaintiff to transfer to Oded title to 50% of ANO's capital stock. It is the determination of this court that Oded Goldberg is the owner of 50% of ANO, Inc. Ari Yemini is directed to issue and deliver shares of stock to Oded Goldberg reflecting his 50% ownership in ANO, Inc. The Fourth through Twelfth Counterclaims are severed and continued.

This decision is the order of the Court.

Dated NOV 17 2009

ENTERED

NOV 18 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.