Helfman v R&L Realty Assoc.

2009 NY Slip Op 32797(U)

November 20, 2009

Supreme Court, New York County

Docket Number: 602424/07

Judge: Jane S. Solomon

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SCANNED ON 12/1/2009

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

PRESENT: JANE S. SOLOMON, Justice — PART 55

Index Number : 602424/2007
HELFMAN, JACOB
VS.
R&L REALTY ASSOCIATES
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. ______
MOTION DATE 7/20/09
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
DEC 01 2009
NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/20/09

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55
- X

JACOB HELFMAN,

Plaintiff,

- against -

R&L REALTY ASSOCIATES, RUTH SHOMRON and MALI FUKS,

Defendants.

- X

Index No. 602424/07

DECISION and ORDER

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Defendants R&L Realty Associates (R&L), Mali Fuks, and Ruth Shomron move, pursuant to CPLR 3211(a)(5) and (7), for dismissal of the complaint on the grounds that defendants have not breached the "March 1995 Agreement," the statute of limitations bars the action, and the complaint fails to state a cause of action.[1]

Background

The amended verified complaint alleges as follows: R&L is the owner of the real property located at 205-209 West 103rd Street, New York, New York (Premises). Fuks and Shomron each hold a 50% partnership interest in R&L. R&L was the sponsor of the conversion of the Premises to a cooperative corporation in 1992, and R&L became the owner of the unsold shares and the

[1] Defendants contend that plaintiff is purporting to be pro se, but submitted opposition papers that appear to have been drafted by an undisclosed attorney, allegedly a violation of the "prohibition against pro se litigants using ghostwriters." Assuming the validity of this assertion as to a violation, the record supports plaintiff's explanation that the papers were drafted and submitted prior to the withdrawal of counsel for plaintiff in April 2009 (see Motion 005).

proprietary leases appurtenant thereto.

After the closing, R&L solicited individuals to purchase the interests in the apartments it retained (Sponsor Apartments), including plaintiff Jacob Helfman, who then was located in Israel. Based on representations of Fuks and Shomron, in April 1992, plaintiff paid R&L $60,000 for R&L's agreement to convey a Sponsor Apartment designated as Unit 6-C to him, and R&L issued a certificate for the shares allocated to this unit to plaintiff's son, Boaz Helfman. Again, based on representations of Fuks and Shomron, in December 1992, plaintiff paid R&L $40,000 as a partial payment for a second, renovated Sponsor Apartment. At that time, plaintiff and defendants agreed that the parties would later designate the particular two-bedroom Sponsor Apartment to be conveyed; in March 1993, Unit 6-E was so designated. Plaintiff was to reimburse R&L for the cost of renovating Unit 6-E , and R&L was to exchange Unit 6-C, a one-bedroom apartment, for a two-bedroom Sponsor Apartment, to be mutually agreed-upon by the parties.

Despite plaintiff's demands and continual promises by defendants throughout the Spring and Summer of 1993, defendants refused to transfer ownership or possession of any Sponsor Apartments to plaintiff or to return any of the $100,000 paid. In the Summer of 1993, however, defendants agreed with plaintiff that the $100,000 would accrue interest at the rate of 10% per year until R&L transferred the Sponsor Apartments designated as

Unit 6-D and Unit 6-E; they reaffirmed the interest agreement in 1994, and promised that, by the end of that year, R&L would convey the apartments to him together with the accrued interest, but they did neither.

On March 30, 1995, plaintiff and R&L entered into an agreement (March 1995 Agreement) that plaintiff's $100,000 would accrue interest at the rate of 10% per year, plaintiff had the option to own Unit 6-E, as fully renovated by R&L, in partial consideration of the $100,000, and that, in consideration of the balance of the $100,000 payment, plaintiff would either acquire another Sponsor Apartment or be repaid the balance in cash, with interest. In October 1995, plaintiff and defendants agreed that plaintiff would acquire ownership of Unit 6-D in consideration of the balance remaining from the $100,000 payment and interest. Then, in November 1995, R&L's counsel prepared an agreement providing for the transfer of the apartments to plaintiff, but Fuks refused to execute the agreement as a partner of R&L, and she suggested to Shomron that R&L should refuse to honor its obligations to plaintiff.

Fuks and Shomron then became involved in a bitter partnership dispute about the business affairs of R&L, resulting in litigation, also in this court. Although there may have been more than one lawsuit, the Complaint references *Shomrom, on behalf of R&L v Fuks* (Index No. 102882/02) (R&L Action). Fuks, and her now-deceased husband, threatened plaintiff with physical

and economic harm if he were to pursue his claims against R&L for the apartments. Continuously throughout the R&L Action, Shomron advised plaintiff to patiently wait for the resolution of that action, that all of plaintiff's rights as against R&L were preserved and all statutes of limitation were tolled, and that, upon resolution of the R&L Action, R&L would convey the apartments to plaintiff. Moreover, in the R&L Action, Shomron acknowledged and reaffirmed R&L's obligations owed to plaintiff, including the obligation to convey the apartments.

On November 16, 2006, the Honorable John E. H. Stackhouse signed an interlocutory judgment directing the dissolution of R&L, finding that Fuks perpetrated a fraud upon R&L and Shomron by tricking Shomron into agreeing to a sale of four Sponsor Apartments to secret investors that were actually entities controlled by Fuks. The interlocutory judgment appointed Shomron as partner in charge of R&L with 100% voting rights and designated Shomron as the partner to wind up R&L's partnership affairs. On February 8, 2007, plaintiff made written demand to R&L (now controlled by Shomron) to convey the apartments, but it refused. Plaintiff commenced this action in July 2007, several months later.

The amended complaint contains five causes of action. The first cause of action is for breach of the March 1995 Agreement, and it seeks an award of specific performance to compel defendants to deliver the shares allocated to the

apartments to him. The second cause of action is for breach of the March 1995 Agreement for refusing to pay plaintiff interest on the $100,000 payment. The third cause of action, for misappropriation based on the foregoing, seeks a money judgment reflecting the unrealized profit for the rental of the apartments and interest on the $100,000 payment until the actual delivery of title to the apartments to plaintiff. The fourth cause of action seeks injunctive relief to prevent defendants from conveying title to the apartments except to plaintiff. The fifth cause of action alleges that R&L has been unjustly enriched by the failure to pay the profits derived from the rental of the apartments and the interest on the $100,000 payment.

Defendants now seek dismissal of the amended complaint in its entirety pursuant to CPLR 3211(a)(5) (statute of limitations) and 3211(a (7) (failure to state a cause of action) based upon the following assertions. First, they have not breached the March 1995 Agreement by refusing to transfer apartments because the agreements fail to create valid, enforceable options. Second, plaintiff's claims are barred by the statute of limitations. Third, the misappropriation claim fails because the agreements are unenforceable. Fourth, the unjust enrichment argument fails because there is an express agreement governing the subject matter at issue here.

For the reasons that follow, none of these defenses entitles defendants to a pre-answer dismissal of the amended

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complaint, and the motion is denied.

Discussion

Defendants first contend that the alleged option for Unit 6-E violates the rule against perpetuities because it contains no limitation on duration; it merely states that plaintiff "has the option to own Ap 6E renovated as a partialy [*sic*] payment equal to the amount of 70,000 dollars." The rule against perpetuities provides, in relevant part:

> "(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult."

(Estates, Powers and Trusts Law § 9-1.1 [b]).

To the extent that the motion is brought pursuant to CPLR 3211(a)(7), the complaint is to be liberally construed, the allegations must be taken as true, and the plaintiff is entitled to the benefit of all reasonable inferences (*Sterling Fifth Assoc. v Carpentille Corp.*, 9 AD3d 261 [1st Dept 2004]). In applying this standard, the pleading cannot be fairly interpreted to imply that the option for Unit 6-E violates the rule against perpetuities, because the pleading does not establish that the alleged option can be exercised by anyone other than plaintiff (*see Reynolds v Gagen*, 292 AD2d 310 [1st Dept 2002]). Moreover,

defendants' submission of a copy of the March 1995 Agreement (in effect, seeking dismissal on the ground of a defense founded upon documentary evidence pursuant to CPLR 3211[a][1]) indicates that the rule was not violated, because the agreement states that the "debt should be paid by back by 1995" (Exhibit B to Affidavit of Ruth Shomron, sworn to February 2, 2009). When there is a construction that will not violate the rule against perpetuities, the court must determine that to be the construction the grantor intended (*Matter of Sanchez*, 57 AD3d 452 [1st Dept 2008]).

Defendants argue that the next alleged option (parties agree "mutually to keep an open option to the way the rest of the debt is returned A. owning another ap or return in monies the rest of the debt") is unenforceable as an agreement to agree, because it does not identify any of the terms of the option for another apartment in that no specific apartment is designated. Plaintiff claims, however, that the apartment at issue is Unit 6-D.

As the second ground for dismissal, defendants contend that, because the claims accrued in 1995, the six-year statutory period for bringing this contractual action expired in 2001, but plaintiff did not sue until 2007. Plaintiff, however, contends that since 1996 Shomron took the position that her litigation with Fuks prevented her (or R&L) from honoring the agreements at issue, but that she was preserving plaintiff's rights, and that in January 2007, Shomron admitted in writing to her obligations

and her intent to honor such obligations.

Here, the record contains two versions of a document written in Hebrew that Shomron signed in January 2007, and which acknowledge the prior agreements between the parties, and the failure of R&L to honor its obligations because of the dispute between Fuks and Shomron. In both of them Shomrom states her intention to honor R&L's contractual obligations. Defendants rely on their translated version that purports to limit the agreements to be honored to those executed after 1999 (*see* Exhibit C to Shomron Affidavit). Plaintiff's translated version has no such limitation (*see* Exhibit E to plaintiff affidavit). Plaintiff states that, in January 2007, Shomron came to Israel and executed a document in Hebrew on January 13, 2007, and, one week later, executed another in English, but that the English version has a typo in that the date 1999 instead of 1992 was inserted, and that Shomron never expressed an intent to so limit her obligations. There is merit to this assertion, because the agreements relevant to the dispute were executed prior to 1999.

Even if the court were to resolve this issue in defendants' favor (which it cannot on this motion) and construe the document to apply to only those agreements entered into after 1999, plaintiff's assertion of equitable estoppel is persuasive. Under this doctrine, a defendant is estopped from pleading a statute of limitations defense if the "'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a

timely action'" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007], quoting *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). To be sure, this is an extraordinary remedy (*Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509, 510 [1st Dept 2007]), the requirements of which are difficult to satisfy. It is applicable only where the defendant's affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding, the plaintiff must demonstrate reasonable reliance on defendant's misrepresentations, and the plaintiff must show due diligence in ascertaining the facts and commencing the action (*id.*).

Here, plaintiff *has* set forth sufficient factual allegations of acts of deception to raise a triable issue of fact as to whether the doctrine should apply to toll the statute of limitations (*Nick v Greenfield*, 299 AD2d 172 [1st Dept 2002]). For example, the documents discussed above, although signed by Shomron in 2007, support plaintiff's reliance on Shomron's acknowledgements of R&L's unsatisfied obligations to him. The record contains evidence of the long-standing feud and ensuing litigation between the two R&L partners. Indeed, in an affirmation in this action in opposition to plaintiff's prior motion for a default judgment, counsel for Shomron stated that Shomron sought to have R&L pay plaintiff the monies allegedly owed to him (*see* Exhibit F to plaintiff's affidavit) and, in her

counterclaims in the R&L Action, Shomron alleged that, contrary to Fuks' claim, the loans by plaintiff and others to R&L were valid (*see* Exhibit B to plaintiff affidavit). This supports plaintiff's belief that R&L's obligations to him would be satisfied upon resolution of R&L's own partnership dispute. Moreover, the claimed deception was separate and distinct from the acts underlying the action itself (*Duberstein v National Med. Health Card Sys., Inc.*, 37 AD3d 209, 210 [1st Dept 2007]).

Additionally, it appears on these papers that plaintiff was reasonably diligent in commencing this action. The interlocutory judgment was issued in the R&L Action in November 2006; in February 2007, plaintiff made his written demand to R&L to convey the apartments; Shomron refused on R&L's behalf and this action followed.

Defendants argue that the third and fourth causes of action, for misappropriation and injunctive relief, fail because the March 1995 Agreement does not confer upon plaintiff the legal right to acquire the apartments. As discussed above, the issue of the enforceability of these provisions has not yet been determined.

Defendants also argue that the unjust enrichment cause of action fails because there is an enforceable agreement governing the parties' rights. However, it is unclear from these papers whether there is an agreement governing the payment of rental income. Thus, this cause of action also is not dismissed.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 20 days after service of a copy of this order with notice of entry; and thereafter call Part 55 for a preliminary conference.

Dated: November 20, 2009

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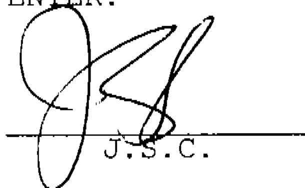

J.S.C.

JANE S. SOLOMON

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