[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

---------- x

JAMES TOTH

Plaintiff,

INDEX No. 104047/08

-against-

LISA SPELLMAN

Defendant.

---------- x

LEHNER, J.:

The portion of the motion whereby defendant seeks to vacate her default and restore her summary judgment motion to the calendar is granted (see July 16, 2009 hearing).

In this action plaintiff James Toth (Toth) seeks to recover $7,500,000.00 in damages or the imposition of a constructive trust on half of the value of all of the real property of his ex-girlfriend, Lisa Spellman (Spellman), based upon services Toth allegedly provided at her request pursuant to an oral agreement. Spellman now moves, pursuant to CPLR 3212, for summary judgment dismissing all four of plaintiff's claims. Toth opposes the motion.

Factual Background

The parties began living together in the Fall of 1995, in a

beach house in Montauk, New York. Plaintiff has two daughters from a previous relationship (Verified Complaint, ¶ 10). At the time they met, defendant owned and operated an art gallery in Manhattan, which is now known as "303 Gallery," which exhibits the works of contemporary artists, and plaintiff owned and still owns a sound system rental business.

It was at this time that the parties allegedly entered into an oral agreement that is the subject of this lawsuit. According to plaintiff, "an experienced historical restorer, woodworker" with "an extensive knowledge of construction and design," the parties orally expressly agreed in 1995, at the time they began to cohabitate, that "both parties' income and expertise would be utilized to increase the net worth of both parties ... [in that they would] equally share in all financial endeavors and as such equally benefit from their partnership" (Verified Complaint, ¶¶ 35, 36). Pursuant to this agreement (the Agreement), plaintiff maintains that he has performed business services at the request of defendant throughout the years with the expectation that he would receive full compensation for them and that defendant always accepted his services knowing that he expected compensation for them (*id.*).

On August 2, 1999, defendant purchased a townhouse at 41

Charlton Street, New York (the Townhouse), where the parties resided together for eight years. Plaintiff did not contribute to the payment of the mortgage or otherwise contribute funds towards the maintenance of the Townhouse during the eight years they lived together. Defendant also paid for groceries, insurance, landscaping, pest control, repairs, utilities, etc.

According to plaintiff, in September 2001, after 9/11, plaintiff's business went to nearly "zero income" and defendant stated that, since "the gallery had much greater earning potential than plaintiff's business," the "defendant would rather that plaintiff help her with the gallery and find a building to purchase for the gallery and that plaintiff's skills were much better utilized restoring the townhouse, maximizing the equity potential of the townhouse so that when they applied for a mortgage to purchase a gallery building, the value would be much greater" (*id.* ¶12). Defendant assured plaintiff to "never worry about money," that he was an equal partner in anything they did and that they would share equally in any profits (*Id.*). In reliance, plaintiff alleges that he spent the great majority of his time from September 2001 until the summer of 2007 restoring the Townhouse. Plaintiff contracted the work out, but most of the work plaintiff did himself.

During the years they lived together, as noted above, the parties agree that plaintiff engaged in a series of projects in which he altered various parts of the Townhouse. The intention behind these alterations is hotly disputed.

Plaintiff characterizes the projects as "renovations and remodeling" done with "the express purpose" of "increas[ing] their financial value thereat ... plaintiff was to utilize his labor and skill to design, construct, supervise and manage the renovation/remodeling and/or construction" (*id.*, ¶ 37). Plaintiff explains that he worked on the renovation of the Townhouse himself, with unskilled laborers to help him (*id.*,¶ 12) and that the value of the Townhouse "increased significantly as a result of plaintiff's efforts" (*id.*, ¶41). For five years after the purchase of the Townhouse, plaintiff asserts that he "organized gallery opening dinners there with as many as 50 guests for dinner 4 or 5 times a year" (*id.*, ¶ 11). Plaintiff maintains that in the summer of 2007, when defendant purchased a new building for the gallery, defendant used the Townhouse as collateral for some of the financing and had the Townhouse appraised for $7,000,000, which was $3,000,000 more than the house four doors down was sold for (*id.*, ¶ 14). Plaintiff also claims to have been "intimately involved" with the operation of

303 Gallery "for years" (*id.*,¶ 25) until defendant ~~he was~~ cut him off in the latter part of 2006 (*id.*,¶ 28).

On the other hand, defendant describes the work plaintiff did on the Townhouse as "unauthorized alterations and repairs" undertaken by plaintiff and performed in an unworkmanlike manner. Defendant maintains that she had to pay workman to correct plaintiff's mistakes throughout the years so that the Townhouse was habitable (Affidavit of Lisa Spellman ¶ ¶20, 21, 22, 23, 24 and 25; Answer at ¶ ¶ 24, 25, 26, 27 and 28). It is undisputed that throughout the years, until the parties separated in 2007, defendant advanced funds and paid monies enabling plaintiff to use the Townhouse as his home as well as the use of defendant's other properties in Stockton New Jersey and Montauk, New York. Defendant also permitted plaintiff to use her two vehicles, a 2002 BMW and a Volkswagen. In or about May 2004, defendant took out a $250,000 line of credit which defendant maintains was to be used for plaintiff to renovate, refurbish and repair his home in Great Barrington, Massachusetts which defendant maintains was used by plaintiff to pay off his debts and the debts of his daughters (Spellman Aff ¶¶ 28, 29, 30).

In December 2007, the parties separated and defendant asked

that plaintiff vacate the Townhouse. Plaintiff was thereafter directed to vacate the Townhouse on April 14, 2008, pursuant to a so ordered stipulation of settlement negotiated in Civil Court of the City of New York (Lisa Spellman v James Toth a/k/a Jim Toth, L&T Index No. 60019/08) (Spellman Aff, ¶ ¶7, 8 and 9). Thereafter, Toth temporarily used defendant's New Jersey residence in Stockton New Jersey until he was evicted on December 1, 2008.

In March 2008, plaintiff commenced the instant action seeking (I) damages based upon breach of express contract; (ii) the imposition of a constructive trust over the Townhouse and all assets acquired during the period of their Agreement owned by Spellman; (iii) his equal share of the partnership income or assets acquired during the period of the Agreement; (iv) quantum meruit for the alleged services performed by plaintiff in the amount of $7,500,000.00; and (v) also requests an accounting, apparently based upon plaintiff's claim of a partnership interest. Defendant asserts eight counterclaims for damages stemming from plaintiff's allegedly tortious conduct regarding her business and properties.

Legal Analysis

Defendant now seeks summary judgment, arguing that she has

made a prima facie showing that each "cause of action ... has no merit" (CPLR 3212 [b]) and that there is sufficient "evidentiary proof in admissible form" to demonstrate an absence of any material issues of fact sufficient to warrant the court to direct judgment in her favor as a matter of law (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In his opposition, plaintiff admits that he was never formally employed by defendant nor was he ever paid a salary, income or profits from any of her business endeavors (Affidavit in Opposition of James Toth dated March 4, 2009) and does not dispute that he failed to contribute towards the regular payments of maintenance of the Townhouse. However, he argues that these facts do not relieve defendant of her obligation to repay him for the "massive amounts" of valuable services that he was asked to perform over the years of their Agreement to be "economic partners," particularly the renovation and restoration of the Townhouse.

In addition, plaintiff vehemently contests defendant's arguments that the valuable services he "painstakingly" performed on various projects throughout the years were done

unprofessionally (see unlabelled exhibits concerning bills and estimates for various projects annexed to Plaintiff's Affidavit in Opposition). Plaintiff seems to alternatively aver that his claims "should not be barred solely because the defendant and plaintiff did not have a "piece of paper" which states that they were married (Verified Complaint, ¶ 6). Plaintiff argues that at minimum, his different characterization of the intention with which the work on defendant's properties was performed creates material issues of fact, requiring a trial of the action and warranting denial of the motion for summary judgment (CPLR 3212 [b]; *Vermette v Kenworth* Truck Co., 68 NY2d 714, 717 [1986]).

In her reply, defendant correctly argues that plaintiff was required to produce a factual affidavit accompanied by documentary evidence (*Lupinsky v Windham Const corp.*, 293 AD2d 317, 318 [1st Dept 2002]). Instead, counsel for plaintiff submits an unnumbered, 37-page memorandum of law, alleging evidentiary facts without any reference to Toth's six-page affidavit in opposition (Toth Affidavit dated May 20, 2009). Defendant is also correct that Toth's affidavit contains non-specific conclusory statements or expressions of hope. Feigned factual issues asserted are insufficient to defeat Spellman's

request for summary judgment (*Grullon v City of New York*, 297 AD2d 261 [1st Dept 2002]; *Darrow v American National Red Cross*, 295 AD2d 393 [2nd Dept 2002).

After a careful review of all of the evidence, liberally construing it all in a light most favorable to plaintiff (*Kesselman v Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]), the court finds that the documentary evidence before this court establishes that only the quantum meruit cause of action has merit.

Breach of Contract

In support of summary judgment, defendant denies that there was ever an Agreement, arguing that she had always refused to marry plaintiff and have him have an interest in her business because of his fiscal irresponsibility (Affidavit of Lisa Spellman dated January 31, 2009, ¶ 38), that plaintiff was never specifically employed by defendant or her gallery as a contractor, architect or project manager (Spellman Aff, ¶ 7);that they never had a conversation that he was on payroll (Spellman Aff ¶ 29); never presented an invoice to defendant (Spellman ¶ 29); contributed no monies toward the Townhouse's maintenance (Spellman Aff ¶¶ 8, 9); that plaintiff has no New York license for home improvement, contracting or architecture

(Spellman Aff ¶ 16); any "projects" he performed on her properties were unauthorized and done while she was out of town, without her permission (Spellman Aff ¶ 21); that he failed to complete work in the Townhouse (Spellman ¶25) and that he engaged in substandard work, necessitating repairs by others (Spellman ¶¶ 26, 27); made no downpayment on the Townhouse (Spellman Aff ¶ ¶ 8, 9); that he did not pay the mortgage or otherwise contribute funds toward the Townhouse, the Stockton property or the Montauk property (Spellman Aff ¶ 13); and tha he had no involvement in Spellman's art gallery (Spellman Aff ¶ 36).

Defendant maintains that, even if there were an agreement , the purported Agreement, that plaintiff "should not worry" because defendant will "take care of" plaintiff and "equally share in all financial endeavors and as such equally benefit" (Verified Complaint, ¶ 36) fails because it is merely an implied agreement between two lovers to care for each other and do "things which are ordinarily done by one person for another as a matter of regard and affection" (*Trimmer v Van Bomel*, 107 Misc 2d 201 [Sup Ct NY County 1980]).

Defendant correctly notes that such promises, admittedly made when parties were living together as lovers, were by their

terms an implied contract to perform "personal services between unmarried persons living together whose actions flow out of mutual friendship and reciprocal regard" (*id.*), and are against New York's public policy as is evidenced by the 1933 abolition of common-law marriages (see *Morone v Morone*, 50 NY2d 481, 488 [1980]).

In support of its ruling the Morone Court explained that:

> (t)he major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.... For the courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally contractual relationship runs too great a risk of error. Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid (id., at 488).

Thus, no cause of action for breach of an implied contract lies to the extent that plaintiff seeks to be recompensed for his love and affection over the course of his nonmarital personal relationship (*id.*). Defendant is also correct that the

breach of contract cause of action fails because there must be consideration for the contract to be enforceable (*Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 264 [1st Dept 1995]) and defendant admits that his business "went nearly to zero income for a period of time" after September 11, 2001, and thus, that there was no forbearance from a job opportunity established (Verified Complaint, ¶ 12). In any event, neither love and affection nor forbearance from a job opportunity, even if true, which defendant disputes, is consideration for the alleged promise to have an interest in the Townhouse (*Rose v Elias*, 177 AD2d 415 [1st Dept 1991]). Finally, defendant is correct that the statute of frauds precludes such an oral agreement. General Obligations Law § 5-703(1) provides that:

> 1. An estate or interest in real property ... cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

It cannot be disputed that the alleged creation of plaintiff's alleged interest in the Townhouse implicates the General Obligations Law. As this alleged transfer is undisputedly not in writing, this cause of action is barred by the statute of frauds (see also Real Property Law §§ 259 and

259-a).

Breach of Partnership Agreement

The breach of partnership cause of action repeats and realleges the same allegations as the breach of contract cause of action and then alleges that the parties entered into a partnership agreement in 1995, when they began to cohabit, where they orally agreed that they would be "equal partners in all endeavors and earnings generated by plaintiff and defendant's efforts."

Plaintiff maintains that he "devoted significant resources, time and effort to the increase and success of the defendant's real property acquisitions" (Verified Complaint Par 54).

A partnership results from an express or implied contract (*Joachim v Flanzig*, 3 Misc 3d 371 [Nassau Co 2004]). To establish the existence of a partnership or joint venture, the factors to be considered include the intent of the parties, whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property skill or knowledge" *(see, Blaustein v Lazar Borck & Mensch*, 161 AD2d 507 [1st Dept 1990]; *Cleland v Thirion*, 268 AD2d 842, 843 [3d Dept 2000]).) Plaintiff has the burden of proving the

existence of a partnership or joint venture (*Ramirez v Goldberg*, 82AD2d at 852). Where a partnership agreement is not reduced to writing, as the purported agreement herein, whether a partnership exists is to be determined from the testimony, conduct of the parties and especially from the documentary evidence *(Hanlon v Melfi*, 102 Misc 2d 170, 173 [1979]). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure, their respective contributions have become as one ... " (*Matter Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]).

Even if there were an express intent to establish a partnership demonstrated herein, there is admittedly neither a sharing of control nor a statement by plaintiff concerning the apportionment of losses. By plaintiff's own account, he had no money but was told "never to worry about money," that they "would always have plenty of money" (Verified Complaint ¶ 12). Plaintiff's counsel also admits that there has never been any equal sharing of income or profits or losses from the Gallery nor did he expect there to be, stating that plaintiff received no "direct cash disbursement of his share," nor did he share the monetary losses during the time of his relationship (see,

Memorandum of Law of Joseph J. Mainiero which Mr. Toth incorporates by reference in his Affidavit in Opposition dated March 4, 2009). Thus, it is clear from the evidence that the benefit flowed to Toth but he did not share in the losses (see *Needel v Flaum*, 248 AD2d 957 [4th Dept 1998]). Thus, there are no facts indicating that they agreed to any of the other elements of a partnership and therefore, plaintiff's partnership cause of action fails on this basis as well, and the claim for breach of the purported partnership agreement is dismissed.

Imposition of a Constructive Trust

Plaintiff alternatively alleges that equity requires the court to impose a constructive trust for the benefit of plaintiff of "one half of the value of all real property held in defendant's name, controlled or possessed by defendant" (Verified Complaint, ¶ 67 [b]) based upon the fact that plaintiff fulfilled his part of the purported Agreement by using "all of his skill, time and labor in the period from 1999 through present, to increase the financial holdings of" the parties (Verified Complaint, ¶ 46).

While the statute of frauds will ordinarily prevent enforcement of an oral agreement to convey an interest in land (General Obligations Law, §5-703), as noted above, "[a]

constructive trust will be impressed, however, when an unfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment (citation omitted)" (*McGrath v Hilding*, 41 NY2d 625, 628-629 [1977]). Thus, to impose a constructive trust on properties at issue here, Mr. Toth must meet a four pronged test which includes: (1) a confidential fiduciary relationship, (2) a promise, express or implied was made by defendant, (3) there was a transfer and reliance thereon, and (4) unjust enrichment caused by the breach of promise (*Valvo v Spitale*, 305 AD2d 668 [2d Dept 2003]).

"Constructive trusts have been imposed when the party seeking this relief has demonstrated a transfer of funds or expenditure of effort, in reliance on a promise over and above that which could normally be attributed to the give and take of the marital relationship" (*Tidball v Tidball*, 93 AD2d 954 [3d Dept 1983]). However the " mechanism of a constructive trust is not to be employed to bring about a judicially coerced community property law" (*id.*).

Even if a confidential relationship is assumed, plaintiff cannot meet a predicate for the imposition of a constructive trust because defendant has clearly established, and plaintiff

does not deny that plaintiff never owned nor had a proprietary interest in any of the properties prior to their transfer to defendant (Matter of Chaerne, 273 AD2d 18 [1st Dept 2000][denial of the imposition of a constructive trust when there is a failure to show some interest in the property prior to obtaining the promise that the property would be conveyed]).

While plaintiff is correct that the law of constructive trusts is not confined to reconveyance situations, and in taking a less restrictive view, the transfer concept may extend to instances where funds, time and effort are contributed in reliance on a promise to share in the result (*Hira v Bajaj*, 182 AD2d 435 [1st Dept 1992]); *Lester v Zimmer*, 147 AD2d 340 [3d Dept 1989]; *Mendel v Hewitt*, 161 Ad2d 849 [3d Dept 1990]), there is no evidence that plaintiff contributed any money toward the purchase, maintenance or improvement of the Townhouse or the other properties (*Tompkins v Jackson*, 22 Misc 3d 1128(A), 2009 NY Slip Op 50319[u] [Sup Ct NY County 2009]). In fact, plaintiff concedes this. Therefore, plaintiff's claim for a constructive trust of all of defendant's property is insufficient to defeat the statute of frauds defense to the Agreement and is hereby dismissed.

Quantum Meruit

As to quantum meruit, defendant argues that the services provided by plaintiff are of a nature which would ordinarily be exchanged without expectation of pay, and thus, an implied contract to compensate for such services cannot stand (see, *Trimmer v Van Bomel*, 107 Misc 2d 201, supra). In any event, any express contract to convey an interest in property for services performed is barred by the statute of frauds and while she does not dispute that plaintiff performed the work on the Townhouse over the years, she argues that he was not a licensed contractor and there was never a bill issued and the work was done in a less than "workmanlike manner", which required the engagement of contractors to remediate (Spellman Verified Answer ¶ 37).

In opposition, plaintiff argues that as a matter of equity, he is entitled to the value of his "work, labor and services" performed towards increasing the value of defendant's properties which he estimates to be "reasonably worth the sum of $7,500,000.00" (Verified Complaint, ¶ 66). Plaintiff presents documentary evidence supporting the fact that numerous hours were spent performing design, refurbishing and project management services on the Townhouse throughout the years of the relationship (Plaintiff's Ex B, annexed to Affidavit in Opposition). According to plaintiff, because defendant backed

out of her commitments, plaintiff has been running his business out of a two-car garage in New Jersey. While plaintiff admittedly "enjoyed the use of the real estate," he laments never enjoying the "benefits of the income" and it eventually became clear that "defendant was intentionally keeping him down to be able to maintain power and control over him. The pattern was becoming clear, to draw plaintiff in with promises for the future for him and his children and to later back out" (*Id.* ¶33).

In order to make out a claim in quantum meruit, the claimant must allege (1) that performance of the service is in good faith; (2) the acceptance of the services by the person to whom they were rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services (*Martin Bauman Assocs Inc v H & M Int'l Transport, Inc.*, 171 AD2d 479, 484 [1st Dept 1991]).

Plaintiff is correct that he may, in fact, be entitled to the value of his services on a proper showing notwithstanding the fact that an action in breach of contract does not lie, since a cause of action under a quasi contract theory, quantum meruit, "only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal

obligation imposed in order to prevent a party's unjust enrichment" (*Clark Fitzpatrick Inc., v Long Island Railroad Company*, 70 NY2d 382, 388 [1987]). Thus, "the fact that an express contract is unenforceable because of its failure to comply with the Statute of Frauds," as is argued by defendant herein, " does not mean that quasi-contractual recovery for the reasonable value of [plaintiff's] services rendered is therefore, necessarily unavailable [citation omitted]" (*Moors v Hall*, 143 AD2d 336, 337 [2d Dept 1988]). The question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based upon the evidence before it (*id.* at 338). The court finds that, at this early stage in the litigation, when there has been no discovery, plaintiff sufficiently raised a triable issue of fact by presenting evidence that he performed numerous hours of design and project management services on defendant's properties throughout the years of the parties' long standing relationship. In view of the foregoing, the court denies that part of defendant's motion which seeks summary judgment dismissal of the quantum meruit cause of action.

In sum, based upon the foregoing, it is hereby

ORDERED that the portion of the motion by defendant which

seeks to vacate defendant's default and restore the matter to the calendar is granted; and it is further

ORDERED that the portion of the motion by defendant which seeks summary judgment dismissing the complaint in its entirety is granted only to the extent of dismissing the first, second and third causes of action; and it is further

ORDERED that the action shall continue as to the fourth cause of action; and it is further

ORDERED that defendant serve a copy of this order with notice upon plaintiff within 20 days of entry.

Dated: DEC 24 2009

FILED
DEC 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.