Sherpaco, LLC v Kossi

2010 NY Slip Op 30072(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 103875/2007

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/15/2010

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Index Number : 103875/2007

SHPERPACO, LLC

VS.

KOSSI, KRISTINI

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION, returning this case to active status

FILED

JAN 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/6/09

LOUIS B. YORK J.S.C.

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

Check one: FINAL DISPOSITION X 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, Index No. 103875/2007

-against-

KRISTINA KOSSI, Defendant.

----------x

FILED
JAN 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS YORK, J.:

Motions 002 and 003 are hereby consolidated for disposition.

Defendant Kristina Kossi (Kossi) moves (motion 002) for an order, pursuant to CPLR 3025 (b), granting her leave to amend her answer to assert counterclaims against plaintiffs, Sherpaco, LLC (Sherpaco) and John Houshmand (Houshmand). Plaintiffs cross-move for an order, pursuant to CPLR 6514 (a), canceling the February 10, 2009 notice of pendency filed by Kossi. Kossi also moves (motion 003) for an order granting her leave to renew and reargue certain findings in my decision and order signed on April 24, 2009 denying plaintiffs' summary judgment motion.

Background

The facts of this case are set forth in the April 24, 2009 order, are hereby incorporated by reference, and will be supplemented and amplified as necessary, principally

through Houshmand's deposition testimony, which forms the basis for Kossi seeking leave to renew.

On March 21, 2007, Sherpaco and Houshmand commenced the instant action, in which they alleged that Kossi had no interest in condominium loft units 3D and 3E located at 145 Avenue of the Americas, New York, New York (the property) and, in essence, that any money she put into the property was to pay Houshmand back for monies he lent Kossi, and services he provided for her businesses. 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 breach of contract, breach of fiduciary duty, and estoppel, and seeking determinations as to whether, pursuant to a claimed partnership agreement, she was a legal owner of the property; she and her minor children had the right to live there indefinitely; Houshmand had a duty to fund a $200,000 "war chest"; and whether Houshmand was obligated to indefinitely pay Kossi's monthly housing expenses, to the extent that they exceeded $1,300. Under each cause of action, Kossi sought damages of $1,500,000, and specific performance of the alleged partnership agreement.

Kossi maintained 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;[1] that she would only be required to pay $1,300 monthly toward the property's expenses; 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. The complaint in Kossi's action further alleged 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 he improperly calculated.

Sherpaco and Houshmand then moved in the instant action for an order pursuant to CPLR 3212, granting them summary judgment against Kossi, by issuing on the first cause of action a declaratory judgment that Sherpaco be adjudged the sole owner in fee of the property; that Kossi be adjudged to have no right of ownership to, or any interest in, the property; and, upon

---

[1] In her proposed amended answer (¶ 11 [iv]), Kossi claims instead that a provision of the alleged partnership agreement was that she would negotiate a lease buyout with her landlord and contribute the proceeds to the partnership as her capital contribution.

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 adjudged Kossi to have an interest in the property, plaintiffs sought, on the third cause of action, an order partitioning the property and dividing it, according to the parties' respective rights, or, if that could 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 were paid.

The motion was unsupported by any affidavit or deposition transcript from Houshmand, and to the extent that Kossi, in opposing the motion, relied on Houshmand's deposition transcript, it had no evidentiary weight because it was not in compliance with CPLR 3116 (a), in that Kossi had not given Houshmand the requisite 60 days to review and execute the deposition transcript, which had only been 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).

While it was not entirely clear, Kossi, who opposed the underlying summary judgment motion with her memorandum of law

submitted in opposition to movants' motion in the Kossi action, evidently claimed 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. Alternatively, Kossi's counsel apparently urged that Kossi has an ownership interest in Sherpaco, but that, in either case, she had a beneficial interest in the property.

In reply, movants submitted their reply memorandum previously offered on their motion in the Kossi action, and urged, for the first time, in response to Kossi's claim that the statute of frauds was inapplicable because a partnership agreement existed before the property was acquired by Sherpaco, that there could not have been a partnership or joint venture because there was never an agreement by Kossi to share losses.

By order signed on April 24, 2009, I denied plaintiffs' motion, finding that, under the then-admissible evidence, no partnership was formed before Kossi settled with her landlord and paid the $190,000 to Sherpaco, and that, therefore, the property was at that time solely owned by Sherpaco, and was not partnership property which fell outside of the statute of frauds (*see e.g. Mattikow v Sudarsky*, 248 NY 404 [1928]; *Pisciotto v Dries*, 306 AD2d 262 [2d Dept 2003]. I therefore held that the

statute of frauds would 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 noting that it was not readily apparent what Kossi's theory was as to the creation of the partnership and how it acquired an interest in the property, I then found that there was at least an issue of fact as to whether Kossi's actions, as supported by the documentary evidence, constituted part performance, unequivocally referable to an alleged agreement to transfer an interest in the property through a general partnership. I therefore denied the plaintiffs' motion seeking a declaration that Sherpaco be adjudged the property's sole owner, and asking the court to issue an order for Kossi to vacate the premises, or alternatively, to order the partition or sale of the property, and dividing it according to the parties' respective rights. I also noted that Kossi's claim that Houshmand allegedly agreed to effectively subsidize Kossi's housing expenses for life was unsupportable in light of the statute of frauds (General Obligations Law § 5-701 [a], [1]; *Yedvarb v Yedvarb*, 237 AD2d 433 [2d Dept 1997]), and the fact that the alleged promise was made

in the context of a romantic relationship, and thus, could not be reasonably relied upon as permanent.

Because of the prior pendency of the instant action, Kossi's action was dismissed on Sherpaco's and Houshmand's motion in the Kossi action, by order signed on January 1, 2009, during the pendency of plaintiffs' summary judgment motion in this action.

Motion to Renew/Reargue

Kossi now seeks leave to renew and reargue those portions of my decision and order which held that no partnership arose before the property was conveyed to Sherpaco, and which "note[d]" that Kossi's claim that she was entitled to have her housing costs indefinitely subsidized was unsustainable. Kossi requests that I now consider Houshmand's deposition transcript, which was inadmissible on the earlier application; specifically disavows that there was any conveyance of the property from Sherpaco to the partnership (Defendant's Memorandum of Law in Support of her Motion to Renew and/or Reargue, at 11); and maintains that a partnership agreement existed before the closing.

Kossi points to Houshmand's nebulous deposition testimony, that, at the time of the closing, the agreement with Kossi about putting money into the property was not formal and was "very little," but that, in essence, he understood at that time that

funds would be coming into the property from Kossi. She further relies on her affidavit, in which she claims that, when she entered into the partnership agreement with Houshmand, they did not discuss the use of Sherpaco "as the vehicle to execute our partnership," and that she left it to Houshmand to implement the business's formation, take care of the closing and obtain financing. Houshmand also testified (in his EBT), that when asked if he had discussed with Kossi whose name would be on the deed, he responded, "nothing was ever finalized."

Kossi argues that there is no requirement that a partner make a financial contribution before a partnership is formed. She also urges that Houshmand's unilateral decision to use Sherpaco as a vehicle for the partnership is irrelevant, since the partnership preexisted. Kossi asserts that the statute of frauds does not bar Houshmand's promise to subsidize her housing expenses, because "contracts that do not have an end date and are terminable at will can be enforced." Kossi also maintains that her reliance on the promise to subsidize her housing was reasonable because it was not simply made in the context of a romantic relationship, but was part of a "*business and investment decision*," as allegedly admitted by Houshmand. See Motion to Renew/Reargue (emphasis in the original).

Plaintiffs oppose the motion to renew/reargue, claiming that Houshmand's deposition testimony supports his claim that (1)there was no partnership, much less one before the property was acquired by Sherpaco; (2)at most Kossi was only an investor in, rather than an owner of, the property; (3)Kossi failed to claim that any such partnership arose before Sherpaco closed on the property; (4)that Kossi renewed her lease with her landlord a few weeks before Sherpaco closed on the property, and continued to pay rent after the closing, demonstrated that no partnership arose or was discussed before the closing; and (5)that the court correctly determined that the alleged promise to indefinitely subsidize Kossi's housing costs was unenforceable under the statute of frauds, since only one party had the right to terminate that agreement, and since it was effectively an agreement to subsidize a romantic partner's housing for life.

Kossi's motion to renew and reargue is, in the exercise of my discretion, granted. A motion to renew may be granted "based upon new facts not offered on the prior motion that would change the prior determination ... and ... shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2), (3). A motion to reargue must be based on "matters of fact or law allegedly overlooked or

misapprehended by the court in determining the prior motion ... ." CPLR 2221 (d) (2).

There is reasonable justification for considering Houshmand's deposition testimony, since, on the prior motion, plaintiffs successfully objected to its admissibility. Plaintiffs do not dispute that it is now admissible. Accordingly, it shall be considered. Thus, renewal is granted. In addition, Kossi's theory, on the underlying summary judgment motion, as to the use of Sherpaco to create a general partnership was somewhat hazy, and her position in this regard was therefore misapprehended on the underlying summary judgment motion. Kossi has now clarified that she was not claiming that there was a conveyance of the property from Sherpaco to a general partnership. Leave to reargue is granted on this issue, and to reconsider Kossi's claims regarding her alleged entitlement to indefinitely receive, at her sole discretion, a housing cost subsidy.

Upon reviewing that testimony, and considering it together with previously submitted papers, I find that issues of fact have been raised as to whether a partnership existed before Sherpaco closed on the property, thereby obviating the need to satisfy the statute of frauds, and, thus, whether Sherpaco was simply a

conduit to hold title to the partnership's property (*Rinaldi v Casale*, 13 AD3d 603 [2d Dept 2004]; *Liffiton v DiBlasi*, 170 AD2d 994 [4th Dept 1991]).

"A partnership is an association of two or more persons to carry on as co-owners of a business for profit ... ." Partnership Law § 10 (1). Whether a partnership exists presents a question of fact. *Olson v Smithtown Medical Specialists, P.C.*, 197 AD2d 564 (2d Dept 1993). No individual characteristic is determinative of whether a partnership relationship exists, and among the factors to consider are the sharing of profits and losses, the parties' intentions, the ownership of the assets of the partnership, joint control, management and liability to creditors, compensation, the contribution of capital, and loans to the entity. *Brodsky v Stadlen*, 138 AD2d 662, 663 (2d Dept 1988); *see also American Business Training Inc. v American Management Association*, 50 AD3d 219, 225 (1st Dept 2008). An equal sharing of profits, losses and control is not required. *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298-299 (1st Dept 2003). Undertaking services can constitute a risk of loss, since the value of those services can ultimately be lost. *Ramirez v Goldberg*, 82 AD2d 850, 852 (2d Dept 1981).

In the instant case, there was Houshmand's equivocal deposition testimony as to whether there was an agreement between him and Kossi at the time of the closing, and his effective concession at his EBT that at the time of the closing, he was aware that funds would be coming into the property from Kossi. Also, his EBT testimony revealed that the property was designed to Kossi's specifications and likings, because she was essentially "the client," and that both she and Houshmand provided design services, this notwithstanding that Kossi did not settle with her landlord and move in until later. *See also* Kossi ebt, at 60-61. Houshmand also testified that he wanted to help Kossi become financially independent;[2] thus, he 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. *Id.* at 40-45. Houshmand added that she would be entitled, on a sale, to a proportionate share of the profits, as well as to her equity. *Id.* at 168. He anticipated that they would live in one of the property's units for at least a year or two, depending on the market. *Id.* at 43, 57-61.

---

[2]It is claimed that Kossi was having some financial difficulties with her businesses and that Houshmand lent and gave her thousands of dollars to help her out on various occasions.

Further, that, within days of the closing, Kossi accompanied Houshmand to Citibank to set up the account, which gave her unrestricted powers on behalf of Sherpaco, including the ability to sign checks, borrow money, open bank accounts, withdraw funds, contract for any of the bank's services and conduct any other business with Citibank, supports Kossi's claim that there was a partnership agreement in place well in advance of her settling with her landlord. Additionally, Houshmand testified that his letter to Kossi, referred to in the order signed on April 24, 2009, indicating that the loft commitment was permanent, meant that "we" would buy it, fix it up, sell it and reinvest the profits into the next project. *Id.* at 40-45, 125. There is also the February 21, 2007 letter from Houshmand, discussed in my prior order, reciting that Kossi was a limited partner in the property, and Houshmand's concession at his deposition that, in essence, Kossi did not instruct him about what to write in that letter. *Id.* at 172-173. Also, Houshmand testified (ebt, at 142-153) that he had Kossi sign an agreement with his real estate broker to allow the broker to market the property, and that later he e-mailed his attorney as to whether he needed Kossi's signature on a contract of sale, but could not "recall" whether he discussed that subject with his attorney. *Id.* at 150-153.

Further, as stated in my prior order Kossi deposited $190,000 into the Citibank account, which, according to Houshmand's February 21, 2007 letter, constituted her "capital contribution" to the partnership. *See also* Houshmand ebt, at 81-83. In addition, Kossi was required to pay $1,300 per month toward the enterprise's expenses; allegedly provided design services for the project (Kossi ebt, at 60-61), in that she claimed to have prepared drawings and designed the decor, the layout of where the rooms would be, and the layout of the kitchen. That assertion was, to some extent, supported by Houshmand's deposition testimony; and she was presumably aware that the property could depreciate, and that she could suffer a loss.

This evidence, as well as Kossi's affidavit, in which she asserts that the partnership agreement existed before the closing, tend to support Kossi's claim that there was a pre-existing partnership agreement. That Kossi renewed her lease with her landlord shortly before the closing is not determinative, since the only way that she could continue to negotiate the amount she would receive from her landlord was to continue her tenancy. Thus, there is sufficient evidence to

raise an issue of fact as to whether a partnership agreement existed at the time of the closing.

Although, generally, the creation of an interest in real property is subject to the statute of frauds (GOL § 5-703), as is the sale of stock of a corporation whose sole asset is an interest in real property (*Pritsker v Kazan*, 132 AD2d 507 [1st Dept 1987]), the existence of a preexisting partnership agreement to deal in the acquisition, ownership and sale of real property would fall outside of the statute of frauds, because the real estate becomes partnership property, which constitutes personalty. *Mattikow v Sudarsky*, 248 NY at 406; *Pisciotto v Dries*, 306 AD2d at 263. Further, "[a]n oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the Statute of Frauds." *Prince v O'Brien*, 234 AD2d 12, 12 (1st Dept 1996). Accordingly, if a partnership existed before the closing, the statute of frauds would be inapplicable to vitiate the entire agreement.

If no partnership agreement, incorporating a promise to indefinitely subsidize Kossi's housing expenses, were found to exist, her claim that Houshmand allegedly agreed to subsidize her housing costs indefinitely would be subject to the statute of frauds (GOL § 5-701 [a], [1]; *Yedvarb v Yedvarb*, 237 AD2d at

433), as any such promise would effectively be one for Kossi's lifetime, especially here, where Kossi had the unilateral power to terminate such agreement (*cf.* 61 NY Jur 2d Frauds, Statute of § 26 ["where the right or option to cancel or terminate the agreement is limited unilaterally to the plaintiff, while the defendant's liability endures indefinitely, it is illusory, from the point of view of the defendant, to consider the contract terminable or performable within one year"]). In addition, if there were no partnership agreement containing such a promise, Kossi's claim that equity would require plaintiffs to indefinitely subsidize her housing costs, until she determined otherwise, would be unavailing, since she could not have reasonably relied (*Hand v City of New York*, 67 AD3d 507 [1st Dept 2009]) on such a promise made in the context of a romantic relationship.

If it is found that there was a viable partnership agreement, it would not be "entirely unenforceable merely because it incorporate[d] promises that [could not] be fully performed within a year or a lifetime; rather," the sole effect would be to "convert it into a partnership at will." *Williams v Lynch*, 245 AD2d 715, 717 (3d Dept 1997); *see also Green v Le Beau*, 281 App

Div 836 (2d Dept 1953); *Cytron v Malinowitz*, 1 Misc 3d 907(A), 2003 NY Slip Op 51555(U) (Sup Ct, Kings County 2003).

Assuming, for argument's sake, that there was no partnership agreement which antedated the closing, this is not a case in which Kossi simply gave up her apartment and paid an equivalent in rent; she contributed $190,000, thereby raising an issue as to whether plaintiffs should be equitably estopped from urging that Kossi had no partnership or other interest in the property. The doctrine of equitable estoppel "is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another." *American Bartenders School, Inc. v 105 Madison Co.*, 59 NY2d 716, 718 (1983); *Buddman Distributors, Inc. v Labatt Importers, Inc.*, 91 AD2d 838 (4th Dept 1982). The question of "whether the circumstances are so egregious as to render it unconscionable to permit the defendant to invoke the Statute of Frauds," is for the trier of fact. *Buddman*, 91AD2d at 839; *Ackerman v Landes*, 112 AD2d 1081 (2d Dept 1985).

In light of the foregoing, Kossi's motion to renew and reargue is granted, and upon renewal and reargument, plaintiffs' summary judgment motion is denied, and the decision and order signed on April 24, 2009 is vacated and replaced by the instant decision and order.

Applications to Amend the Answer and Vacate the Notice of Pendency

Kossi also moves for an order granting her leave to serve an amended answer in the form annexed to her moving papers, so as to assert counterclaims against plaintiffs. The motion was served on February 10, 2009, during the pendency of the summary judgment motion, but was not fully submitted prior to the decision on that motion. Essentially, Kossi seeks to reassert the claims for breach of contract, breach of fiduciary duty, estoppel, and for a declaratory judgment, which she alleged in the action she previously commenced against plaintiffs, which action I dismissed. In a supplemental affirmation, Kossi's counsel also seeks to add to the proposed breach of contract cause of action, that Sherpaco promised to pay all real estate taxes, but failed to pay about $15,000, as evidenced by a 90 Day Notice of Intention to Sell Tax Liens. No affidavit was provided by Kossi to support this alleged promise, and in response, plaintiffs provided evidence that such taxes have since been paid.

In my decision signed on January 1, 2009, dismissing Kossi's action on the ground that there was another action pending, I held that the matter should proceed under the action earlier commenced by Sherpaco and Houshmand, and that there was no need

to consolidate the two actions, since all the issues could be resolved in the earlier action. I did not reach the branch of the motion which sought dismissal of the four causes of action on substantive grounds. *See* Kaplan aff. of 2/6/09, exh. E.

Initially, it should be observed that, because Kossi had essentially asserted the same claims she seeks to reassert here, and since she moved for leave to amend her answer fairly promptly after her action was dismissed, it cannot be said that plaintiffs will suffer any prejudice or surprise if Kossi is allowed to amend her answer, especially since my order dismissing her complaint clearly indicated that all the issues could be resolved in the instant action. Leave to amend a pleading should be granted freely where there is no prejudice or surprise to the other side (*Arellano v HSBC Bank USA*, 67 AD3d 554 [1st Dept 2009]), and where the proposed pleading is not "totally devoid of merit." *Rodriguez v Paramount Development Associates, LLC*, 67 AD3d 767, 767 (2d Dept 2009).

With these considerations in mind, Kossi's motion for leave to amend her answer to assert counterclaims, in the form annexed to her moving papers, sounding in breach of contract, breach of fiduciary duty and estoppel, and seeking a declaration, among

other things, that she is a legal and beneficial owner of the property, is granted in part, as follows.

The branch of Kossi's motion, which seeks to amend the answer to assert a counterclaim for declaratory relief, is granted. There is at least an issue of fact as to whether Kossi has a legal and beneficial interest in the loft. Therefore, it cannot be said that this counterclaim is totally without merit.

To the extent that Kossi moves to add allegations to her proposed breach of contract counterclaim, based on Sherpaco's alleged promise to pay all of the real estate taxes and its alleged failure to do so, such application is denied, since Kossi has provided no admissible evidence of that promise, and, in any event, plaintiffs have submitted evidence that those taxes have now been paid. Plaintiffs also oppose the balance of Kossi's application for leave to assert a breach of contract counterclaim, and maintain that any such claim would be barred by the statute of frauds, which generally requires a signed writing to convey an interest in realty or in an entity owning realty. Plaintiffs also claim that they did not breach the alleged partnership agreement because Kossi is still living in the loft, and they have not evicted her or sold the property, but have instead commenced this action.

The remainder of the branch of Kossi's motion which seeks to amend her answer to assert a counterclaim sounding in breach of contract is granted. First, in light of my determination that there is an issue of a fact as to the existence of a partnership before the closing, the statute of frauds does not at this point preclude the breach of contract claim. Second, although the alleged $200,000 "war chest" provision of the claimed partnership agreement is dubious at best, plaintiffs have failed to address it in their opposition to the application for leave to amend, except perhaps to the extent that they maintain that there is no document sufficient to overcome the statute of frauds. Thus, based on Kossi's affidavit (Kaplan aff. of 3/26/09, exh. 3, ¶ 9 [vi]), which supports that promise, there has been a sufficient showing of merit to support a breach of contract claim. Finally, Kossi claimed that the property could not be sold without the parties' mutual consent (Kossi ebt, at 63; Proposed Amended Answer, ¶ 13 [iii]), and that Houshmand was attempting to force her out, before this action was commenced. Thus, the breach of contract counterclaim is not totally without merit, and Kossi is granted leave to serve an amended answer to assert such a counterclaim, to the extent indicated.

The branch of Kossi's motion, which seeks leave to amend her answer to assert a counterclaim for breach of fiduciary duty is denied, because "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171, 173 (1st Dept 2000). Here, the allegations of the breach of contract and breach of fiduciary duty counterclaims, set forth in the proposed amended answer, are the same, and basically assert that plaintiffs failed to honor the provisions of the partnership agreement. Thus, leave to assert a counterclaim for breach of fiduciary duty is denied.

The branch of Kossi's motion which seeks leave to assert a counterclaim sounding in estoppel is opposed by plaintiffs on the grounds that estoppel is inadequately pleaded, that any injury suffered by Kossi was not unconscionable, and that Kossi has not alleged that any alleged promise was fraudulent when made. To establish a promissory estoppel cause of action, a party must allege a clear promise, "reasonable and foreseeable reliance by the party to whom the promise is made, and ... injury sustained in reliance on the promise." *Rogers v Town of Islip*, 230 AD2d 727, 727 (2d Dept 1996). A party asserting such a claim must at trial prove the "specific details of each of the elements

... [but] no such detailed showing is required to survive a motion to dismiss pursuant to CPLR 3211," (*Id.* at 728), and presumably no such detailed showing is required here. In addition, none of the foregoing three elements of the cause of action mandates that the promise be fraudulently made.

A review of the proposed pleading reveals that it sufficiently, for purposes of this motion, alleges the requisite three elements. *See* Proposed Amended Answer, ¶¶ 11-16. As previously noted, with respect to the renewal/reargument application, the issue of unconscionability is for the trier of fact, and as I determined, there was an issue of fact as to whether plaintiffs should be equitably estopped, at least from asserting that Kossi has no partnership or other interest in the property, here where Kossi contributed $190,000, and plaintiffs' complaint alleges that Kossi has no interest in the property, and that any financial contribution to the property was essentially in exchange for monies and service Houshmand gave Kossi for her businesses. Thus, it cannot be said that this proposed counterclaim is wholly without merit.

The cross motion, seeking an order canceling the notice of pendency, is granted. A notice of pendency may be filed in an action "in which the judgment demanded would affect the title to,

or the possession, use or enjoyment of, real property ... [and] is constructive notice ... to a purchaser from, or incumbrancer against, any defendant named in [the] notice of pendency ... ." CPLR 6501. Clearly, the statute contemplates that it is the judgment-demanding plaintiff who can file a notice of pendency. However, it has been held that a defendant who files a counterclaim demanding judgment affecting title to realty can also file a notice of pendency. *Rundquist v Rundquist*, 33 Misc 2d 107, 108 (Sup Ct, Nassau County 1962). In the instant case, Kossi, at the time she filed her notice of pendency, had asserted no counterclaims. Accordingly, her notice of pendency was invalid, and must be, and hereby is, canceled.

A notice of pendency, which is invalid when filed, cannot be sustained based on a subsequent amended pleading. *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 (1984). Moreover, even if I consider Kossi's proposed amended answer, it would be inadequate to support a notice of pendency. In deciding an application to cancel a notice of pendency, a court is restricted to examining the face of the pleading to see whether the allegations fall within the scope of CPLR 6501. *Piccirillo v Ravenal*, 161 AD2d 253, 254 (1st Dept 1990), *Oppenheim v Pemberton*, 164 AD2d 430, 432 (3d Dept 1990). The court must not

"investigate the underlying transaction in determining whether a [pleading] comes within the scope of CPLR 6501 [citation omitted]." *Piccirillo*, 161 AD2d at 254; *Oppenheim*, 164 AD2d at 432. A notice of pendency is inappropriate where the claimed interest is in a partnership that deals in realty, since such an interest constitutes personalty. *Liffiton v DiBlasi*, 170 AD2d at 994-995; *cf. Felske v Bernstein*, 173 AD2d 677, 678 (2d Dept 1991) (an interest in a joint venture that deals in real estate is personalty; thus, filing of notice of pendency was unjustified); *Yonaty v Glauber*, 40 AD3d 1193 (3d Dept 2007) (claimed interest in an LLC, which owned realty, was an interest in personalty, and did not support notices of pendency). It is readily apparent from the allegations in the proposed amended answer, that Kossi is basing her entitlement to relief on a claimed partnership interest in the property. Since any such interest would constitute personalty, she would not be entitled to file a notice of pendency.

Accordingly, it is

ORDERED that Kossi's motion for leave to renew and reargue is granted, and upon granting leave to renew and reargue, my decision and order signed on April 24, 2009, and filed on April

30, 2009, is vacated, and is replaced by the instant decision and order; and it is further

ORDERED that Houshmand's and Sherpaco's underlying summary judgment motion is denied; and it is further

ORDERED that Houshmand's and Sherpaco's cross motion to vacate the notice of pendency filed by Kossi in this action is granted, and the County Clerk is directed, upon service of a copy of this order with notice of entry, to cancel that notice of pendency; and it is further

ORDERED that the branch of Kossi's motion which seeks leave to amend her answer to assert a counterclaim for breach of contract is denied, to the extent that any such claim is based on plaintiffs' alleged failure to pay taxes, but is otherwise granted; and it is further

ORDERED that the branch of Kossi's motion which seeks leave to amend her answer to assert a counterclaim for breach of fiduciary duty is denied; and it is further

ORDERED that the branches of Kossi's motion which seek leave to amend her answer to assert counterclaims sounding in estoppel and for declaratory relief are granted; and it is further

ORDERED that Kossi shall, within 20 days of service of a copy of this order with notice of entry, file and serve an amended answer in the form annexed to her moving papers, but omitting the claim for breach of fiduciary duty and any claim for breach of contract based on a failure of plaintiffs to pay taxes; and it is further

ORDERED that plaintiffs shall serve a reply to the amended answer within 20 days from the date of its service.

Dated: Jan. 5, 2010

FILED
JAN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

LBY

J.S.C.

LOUIS B. YORK
J.S.C.