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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Wolff, Ivan

-v-

Kelman, Judith

INDEX NO. 107820/09

MOTION DATE 1/14/10

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for summary judgment

	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

FILED
FEB 11 2010
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Judith Kelman, aka Judith Scardino for summary judgment pursuant to CPLR §3212 dismissing the complaint by plaintiff Ivan Wolff is denied in its entirety; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties appear for a preliminary conference on March 30, 2010.

This constitutes the decision and order of the Court.

Dated: 2/8/10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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IVAN WOLFF,

Plaintiff,

-against-

JUDITH KELMAN aka JUDITH SCARDINO,

Defendant.

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Index No. 107820/09
Sequence 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action by former husband against his former wife, arising out of the parties' separation agreement, defendant Judith Kelman aka Judith Scardino ("defendant") moves for an order pursuant to CPLR §3212 granting summary judgment in her favor dismissing each of the five causes of action set forth in the complaint.

Background

Plaintiff Ivan Wolff ("plaintiff") and defendant were married in 1998. In June 2005 they entered into a separation agreement (the "agreement"), incorporated, but not merged, into a judgment of divorce. Pursuant to the agreement, the parties divided all their marital property except certain rugs and furniture (the "rugs") which remained in defendant's apartment after plaintiff moved out. Article XII, section C of the agreement states in relevant part:

> C. The husband and wife shall attempt to mutually agree upon a division of the items of personal property set forth in section C of this Agreement. In the event the parties are unable to agree upon a mutually satisfactory distribution of these items, the parties shall return to mediation to determine same, pursuant to the terms set forth in Article XV of this Agreement. In determining a distribution of the property set forth on Schedule "C" of this Agreement whether by agreement, mediation or application to a Court of competent jurisdiction, the parties agree to be guided and/or bound by the following general principles:

* * *

(2) It is the intention of the parties to equalize any disparities in value with a payment in cash or in kind approximately one (1) year from the date of execution of this Agreement, after each party has better determined his or her new living arrangement and ability to maintain the subject personal property . . .

* * *

(4) The parties shall attempt to ascertain the value of such items by agreement . . . . If the parties are unable to agree upon a value of such items, the parties will participate in mediation, pursuant to Article XV of this Agreement . . . . The parties shall equally share the cost of mediation.

In June 2006, defendant sent plaintiff an email asking whether he wanted any of the rugs. Plaintiff responded that he did not need the rugs "just right now; the time frame is more one year plus."[1] In an October 2006 email, again, in response to defendant's question concerning the rugs, plaintiff replied that he "probably [did] not need either furniture or rugs; Sue [his companion] has more than enough for two places."[2] In August 2007, plaintiff asked defendant to divide the rugs or their monetary value within the next several months and defendant responded that she would "be glad to pass things . . . back to [plaintiff] and . . . settle up."[3] Finally, in December 2008, plaintiff asked defendant to divide the rugs but she refused to do so. Unable to resolve the dispute, plaintiff requested that the parties engage in mediation, but defendant refused to mediate unless plaintiff covered the full cost. The parties engaged in mediation in March 2009, but to no avail. Defendant refused to divide the rugs or their value.

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[1] Plaintiff Affidavit, ¶ 7

[2] Plaintiff Affidavit ¶ 8.

[3] Id., Exhibit B.

The instant action for breach of contract, breach of an implied covenant of good faith and fair dealing, specific performance and attorney's fees ensued. In his first cause of action for breach of contract, plaintiff asserts that defendant breached the agreement by refusing to share the costs of mediation. In his second cause of action, also for breach of contract, plaintiff asserts that defendant breached the agreement by refusing to give plaintiff the rugs or to "equalize the disparity in value," *i.e.*, to divide the value of the rugs. In his third cause of action for breach of implied covenant of good faith and fair dealing, plaintiff asserts that defendant breached her implied covenant by refusing to mediate in good faith and construing the agreement as time barred. In his fourth cause of action for specific performance, plaintiff asserts that the rugs are unique, there is no adequate remedy at law for defendant's breach and thus, she is obliged to deliver the rugs to plaintiff. The fifth cause of action is for recovery of legal fees arising from the breach.

In her motion, defendant argues that the entire action, including the breach of contract claims, are time-barred. Defendant asserts that section C of Article XII of the agreement provides that mediation is a condition precedent to the commencement of the lawsuit, and that such demand to raise and resolve any disputes as to the rugs, must be made within one year of signing the agreement. Further, the parties may agree to shorten the six-year statute of limitations period applicable to breach of contract claims. Here, plaintiff waited more than three times the time period to raise the issue regarding the rugs. Plaintiff defeated the expectation of the parties, which was to provide certainty within a short period of time to all matters relating the personal property at issue. Defendant contends that she clearly expressed that she was proceeding to the mediation in 2009 without prejudice to her position that plaintiff's claims are time-barred.

Additionally, defendant contends that the cause of action for an implied covenant of good faith should also be dismissed as plaintiff simply tries to vary the express time limitation of the agreement.

Further, defendant asserts, that the cause of action for specific performance cannot be maintained because plaintiff specifically disclaimed his interest in the rugs.

Plaintiff opposes summary judgment, asserting that there are material issues of facts as to whether the parties contemplated that plaintiff would forfeit his share of the rugs if the division is not accomplished within "approximately" one year of signing the agreement; whether defendant waived the alleged one-year requirement by advising in her emails that she would honor her obligation to fairly divide the rugs; and whether plaintiff reasonably relied on defendant's willingness to divide the value of the rugs even after the supposed one-year date.

Plaintiff maintains that defendant ignores the plain language of the agreement, which unambiguously provides that the parties agreed to divide the rugs or "equalize any disparity in their value" "approximately one year" from the date of the agreement and after the parties determined their new post-separation living arrangements. Plaintiff further asserts that one year language was not intended by the parties as a deadline, but merely as an approximate estimate as to how long it would take each party to determine their respective living arrangements and to decide what items to keep.

Additionally, plaintiff asserts that defendant is equitably estopped from claiming that the agreement is unenforceable as time-barred because, by her email statements, she apparently "lulled [plaintiff] into inactivity and induced [him] to continue the negotiation until the expiration of the time within which the action could be maintained." Plaintiff also contends that the

agreement did not reduce the statute of limitations for breach of contract to one year because the agreement does not contain a "reducing statute of limitation" language. Plaintiff also contends that defendant breached her implied covenant of good faith because she never intended to negotiate with plaintiff in good faith. Further, plaintiff contends that even though his October 2006 email states that he probably did not need the rugs, he never disclaimed his ownership or waived his rights to the value of the rugs. Consequently, plaintiff requests that defendant's motion be denied in its entirety.

In her reply, defendant contends that her responses "OK" to plaintiff's emails do not qualify as modifications of the one-year provision of the agreement because of the "no waiver" clause in Article XX of the agreement, which requires any amendments or modifications to be in writing, executed with the same formality as the agreement. And even if plaintiff's interpretation of June 2006 email, stating that the time frame is "more one year plus" is correct and the one-year limit was extended for an additional year, plaintiff never complied with the new limitation period.

Further, defendant asserts that in her August 2007 email exchange, she specifically intended to exclude the rugs from the subject property referred to by her as "stuff," which she agreed to divide with plaintiff. Finally, defendant asserts, if plaintiff is permitted to bring his claim at this late date, she will suffer damages because she incurred more than $40,000 in architect and designer fees during the 2006 renovation of her apartment which needed to be "designed around the rugs."

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212

[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of

fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Based on a plain reading of the relevant portions of the agreement, the agreement does not contain explicit language evincing an intent that mediation within one year of the signing of the agreement is a condition precedent to commencing any action. In adjudicating the rights of parties to a contract, courts may not fashion a new contract under the guise of contract construction (*Camaiore v Farance*, 50 AD3d 471 [1st Dept 2008]), *quoting Slatt v Slatt*, 64 NY2d 966 [1985]); rather, they are required to discern the intent of the parties, "to the extent that [the parties] evidenced what they intended by what they wrote" (*Slatt v Slatt, quoting Laba v Carey*, 29 NY2d 302 [1971]). Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used (*id.*; *Rubin v Rubin*, 234 AD2d 185, 186 [1st Dept 1996]).

"[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Rooney v Slomowitz*, 1 AD3d 864, 784 NYS2d 189 [3d Dept 2004] citing *Unigard Security Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581, 584 NYS2d 290 [1992]). "The court cannot imply [a] condition that the parties chose not to insert in their contract" (*Camaiore v Farance*, at 471-472, *quoting Nichols v Nichols*, 306 NY 490, 496 [1954]). The agreement clearly and unambiguously states that in "determining a distribution of the property . . . *whether by agreement, mediation or application to a Court of competent jurisdiction.*" (Emphasis added). The agreement contemplates that a

distribution of property may occur by either one of three ways: by mediation or an agreement or application to the court. This language does not condition a commencement of any action upon the occurrence of a mediation within one year of the signing of the agreement.

Further, the agreement provides for the division of the rugs between the parties within "approximately one" year, after the parties each determine their new separate living arrangements. Parties to a contract may mutually agree to shorten the limitations period so long as the period is reasonable and expressly stated (*Rudin v Disanza*, 202 AD2d 202, 608 NYS2d 216 [1st Dept 1994]; CPLR §201). The intent to shorten the limitations period "must be set forth in a clear and unambiguous manner" (*USA United Holdings, Inc. v Tse-Peo, Inc.*, 23 Misc 3d 1114, 886 NYS2d 69 [Sup Ct New York County 2009]). Here, the language of the agreement indicates that the parties intended to accomplish the division of the rugs *not* within some rigid time frame, but at an estimated time of "approximately one (1) year." The language that follows (which defendant counsel curiously omits from paragraph 3 of his affidavit) - "after each party has better determined his or her new living arrangement and ability to maintain the subject personal property"- clearly evinces an intent of the parties to accomplish the division after each of them settles in their respective new post-separation households. Contrary to defendant's contention, the language in the agreement does not clearly represent an intent to shorten the statute of limitations period to one-year. The Court notes that in August 2007, more than two years after the parties signed the agreement, plaintiff asked defendant to divide the rugs or their monetary value *within the next several months* and defendant responded that she would *"be glad to pass things . . . back to [plaintiff] and . . . settle up.* (Emphasis added). Thus, defendant's statement undermines her contention that the parties intended to settle their personal property affairs within the one-year

period. As it cannot be said that the action is time-barred by the failure of the parties to mediate the issue of the division of the rugs or their values within one-year of the signing of the agreement, and dismissal of the action on this ground is denied.[4]

As to the third cause of action for breach of an implied covenant of good faith and fair dealing, "every contract contains an implied obligation . . . to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement" (*Miller v Almquist*, 241 AD2d 181 [1998]; *Greenwich Village Assocs. v Salle*, 110 AD2d 111 [1st Dept 1985]). Defendant's argument for dismissal is premised on her claim that plaintiff is seeking to "side step" the express limitations of the agreement. However, as noted above, the record does not establish that the parties expressly agreed to a limitations period of one-year. Further, the record raises an issue of fact as to whether defendant, by expressing willingness in her emails[5] to divide the rugs, notwithstanding the alleged one-year limitation, deliberately led plaintiff to reasonably believe that she was going to fulfill her obligation under the agreement and then later refused to do so. Thus, defendant's alleged conduct, in addition to plaintiff's assertion that it was understood between the parties that they would divide the rugs or their value after they each make new living arrangements and determinations as to the rugs, which could possibly extend beyond

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[4] The Court notes that defendant contends that plaintiff "will argue that the mere stating of his lack of interest in obtaining the *items* of furniture does not mean that he *also* waived his right 'to equalize any disparities in value with a payment in cash . . . ." (emphasis supplied). While defendant merely argues that plaintiff is precluded from asserting his right to the value of the rugs by failing to timely demand mediation of this issue, the Court notes that the evidence does not support the contention that plaintiff relinquished his ownership in or right to the rugs or to their value (see discussion *infra* at page 10).

[5] June 2006 email ("OK" in response to plaintiff's "time frame more one year plus") and August 2007 email ("let's figure out what's fair and settle up").

the one-year period, presents an issue of fact regarding defendant's compliance with her implied covenant of good faith. Therefore, summary judgment on this cause of action is also unwarranted.

Further, as to the fourth cause of action for specific performance, defendant failed to demonstrate, as a matter of law, that plaintiff relinquished his ownership in or right to the rugs or to their value.[6] A waiver of a contractual right "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage . . . and must be based on a clear manifestation of intent to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104, 817 NYS2d 606 [2006]; *see also Buckner v Buckner*, 158 AD2d 299 [1st Dept 1990] (issue of fact existed as to whether son's full-time employment and residence in his own apartment were "emancipation events" under the separation agreement and whether defendant father's acquiescence in those actions constituted a waiver of his rights under the agreement)). In June 2006, when defendant sent plaintiff an email asking whether he wanted any of the rugs, plaintiff responded that he did not need the rugs "just right now; the time frame is more one year plus." This statement indicates his indecisiveness as to the rugs. In plaintiff's October 2006 email, he replied that he "probably" did not need the rugs, demonstrating again his indecisiveness as to the rugs. Finally, in August 2007, plaintiff asked defendant to divide the rugs or their monetary value. All of these statements raise an issue of fact as to whether plaintiff waived his right to the rugs or their value. In any event, the parties' agreement requires any modification to be in writing and formally executed. Thus, the court is not persuaded that plaintiff's "mere failure to assert a right" in his email to the value of the rugs

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[6] Plaintiff's October 2006 email.

constitutes a waiver (*Rubin v Rubin, supra,* at 186; *Buckner v Buckner*, at 300; *Slatt v Slatt, supra,* at 967).

Finally, apart from arguing that all of the causes of action are time barred, defendant submits no basis for dismissal of the fifth cause of action for attorneys' fees. Therefore, dismissal of this cause of action is denied.

Consequently, defendant in this case failed to establish that plaintiff's causes of action have no merit, sufficient to warrant the court, as a matter of law, to direct judgment in her favor.

Conclusion

Accordingly, it is hereby

ORDERED that the motion by defendant Judith Kelman, aka Judith Scardino for summary judgment pursuant to CPLR §3212 dismissing the complaint by plaintiff Ivan Wolff is denied in its entirety; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties appear for a preliminary conference on March 30, 2010.

This constitutes the decision and order of the Court.

Dated: February 8, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD