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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

WILLARD STILLMAN,

Plaintiff,

INDEX NO.: 003874/2002
MOTION DATE: 04/30/2010
MOTION SEQUENCE: 009

-against-

EDWARD KALIKOW, KALIKOW DEVELOPMENT ASSOCIATES, LTD., EUGENE SHALIK, K&S PARKSIDE VILLAGE, LLC, K&S AUBURN, LLC, FLORIDAY DEVELOPMENT, MORRISVILLE SHOPPING CENTER, K&S WATERFORD PROJECT, K & S WATERFORD LAKES, LLC, and KEP MORRISVILLE REALTY, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion & Affirmation in Support 1
Exhibits "A" through "C" to the Affirmation in Support of Defendants' Motion for Summary Judgment 2
Exhibits "D" through "E" to the Affirmation in Support of Defendants' Motion for Summary Judgment 3
Exhibits "F" through "S" to the Affirmation in Support of Defendants' Motion for Summary Judgment 4
Exhibits "T" through "V" to the Affirmation in Support of Defendants' Motion for Summary Judgment 5
Defendants' Memorandum of Law in Support of Motion for Leave and for Summary Judgment 6
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion Pursuant to CPLR 3025, 3211(a)(5) and CPLR 3212 7

PRELIMINARY STATEMENT

Defendants, other than Floriday Development, move for leave to serve an amended answer to the Complaint filed under Index No. 008346/2005, to include affirmative defenses of res judicata and collateral estoppel, and thereafter dismissing the causes of action asserted in that Action in their entirety. In the alternative, Defendants seek an Order dismissing the Second, Fourth, Sixth and Eighth Causes of Action in the Second Action Complaint, and a declaration that, with respect to the Second Action, plaintiff is barred from seeking damages sustained prior to May 25, 1999, and with respect to the First, Second, Third and Fourth Causes of Action in the Second Action, plaintiff is barred from seeking damages sustained prior to January 2000.

Plaintiffs oppose the motion on the ground that the matter was certified for trial by Order dated December 22, 2009, and a Note of Issue was filed on January 7, 2010. The Certification Order directed that summary judgment motions were to be made within 45 days, but made no provision for a motion to amend pursuant to CPLR § 3025 or 3211(a).

BACKGROUND

This matter has an extensive history in this Court, commencing with the initiation of the first action on March 5, 2002. The action asserted six causes of action including, breach of contract, breach of express contract with respect to what is described as the Auburn Project, breach of express contract in connection with the matter entitled the Waterford Project, breach of express contract with respect to a project entitled the Morrisville/Davis Commons Project, punitive damages, and an accounting in conjunction with the Floriday Project.

The Verified Answer denies the essential elements of the complaint and sets forth nine affirmative defenses. These include statute of limitations, doctrine of waiver, laches, Gen. Obligations law, statute of frauds, claim that punitive damages does constitute a cause of action, for lack of entitlement to an accounting because there was no fiduciary duty, the lack of an agreement constituting a contract between the parties and that plaintiff is not a licensed real estate broker in either Florida or North Carolina.

At the conclusion of depositions both parties moved for summary judgment. Plaintiff's motion was denied in its entirety and defendant's motion was granted in part to the extent that it dismissed the fifth and sixth causes of action. Upon review, the Appellate Division also dismissed the third cause of action on the ground that plaintiff had failed to offer any evidence to support the claim for compensation in connection with the Waterford Project.

In February, 2005, plaintiff moved for leave to serve an amended complaint so as to include causes of action for breach of implied-in-fact contract and unjust enrichment. By order dated April 20, 2005 this Court denied the motion for leave to amend, at least in part on the grounds that this motion was made on the eve of trial and would unduly prejudice the defendant. Plaintiff then commenced the Second Action in which he asserted claims of breach of implied-in-fact contract and unjust enrichment, as had been alleged in the proposed amended complaint which was not permitted.

Defendants served the answer to the Second Action on June 25, 2005, shortly after plaintiff filed a notice of appeal from the order of this Court dated April 20. By decision dated July 5, 2006, the Appellate Division affirmed the denial of leave to amend which would have added a breach of implied-in-fact contract and unjust enrichment. Further depositions were conducted in conjunction with the second cause of action and significantly, according to defendants, plaintiff testified on June 9 that his claims for unjust enrichment and breach of implied-in-fact contract in the second complaint will based on the figure set forth in March 1998 memorandum between the parties which memorandum served as the basis for his claim for breach of contract in the first action.

Consequently, defendant claims that these affirmative defenses of res judicata and collateral estoppel are meritorious because the claims in the second action are identical to the claims in the first action which have already been dismissed, and their dismissal affirmed by the Appellate Division. Again, defendant contends that the second action should be dismissed in its entirety, but that if the Court determines not to do so at the least, the second, fourth, sixth and eighth causes of action of the second complaint, seeking equitable relief, should be dismissed on the ground that plaintiff has adequate legal remedies, including breach of express and implied-it in-fact contract claims.

The third and fourth causes of action involving the Waterford Project should also be dismissed on a separate ground in that they were previously determined by the Appellate Division to not be viable and were dismissed by them.. Defendant also claims that pursuant to the applicable statute of limitations with respect to the second action, claims are limited to those subsequent to May 25, 1999, six years before the commencement of this action. Claims of prior to January 2002 as set forth in the first, second, third, and fourth causes of action are also claimed to be barred because plaintiff has alleged in that complaint that he did not provide any services to defendants with respect to the Parkside and Auburn Projects before that date.

DISCUSSION

The Court will not consider motions pursuant to CPLR 3025 or 3211 (a) for essentially the same reasons that it would not consider such motions in 2002. This matter is scheduled for trial on June 14, 2010. It has proceeded back and forth between this Court and the Appellate Division for more than eight years and efforts to expand the pleadings are certainly untimely. (*Pellegrino v. New York City Transit Authority,* 177 A.D.2d 554 (2d Dept. 1991). The motion to amend the answer to include the defenses of res judicata and collateral estoppel are denied. The Court will address the question as to whether defendant is entitled to summary judgment in whole or in part with respect to the Second Action.

When presented with a motion for summary judgment, the function of a Court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as

true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the Court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

The Court will, therefore, review the Second Action Complaint in a light most favorable to plaintiff, with proof submitted in opposition accepted as true and all reasonable inferences drawn in favor of plaintiff. An initial comparison to the Proposed Amended Complaint is appropriate

The proposed Complaint asserts fourteen causes of action. First through Third relate to the project entitled Parkside Village and are based upon breach of contract, quantum meruit and unjust enrichment respectively. The Fourth through Sixth relate to the Auburn Project, and are similarly based upon breach of contract, quantum meruit and unjust enrichment. The same causes of action as they relate to the Waterside Project are contained in the Seventh through Ninth causes of action. The Tenth through Twelfth causes of action make the same claims with respect to the Davis Project.

The Thirteenth cause of action seeks punitive damages while the Fourteenth claims entitlement to an accounting with respect to work performed by defendants in conjunction with Angus Rogers d/b/a Floriday Development. Plaintiff contends that it was he who introduced defendants to Floriday, and that it was as a result of his efforts that additional projects were undertaken and for which plaintiff is entitled to an accounting so as to calculate the payment to which he claims entitlement.

The Second Action Complaint alleges eight causes of action involving the Parkside, Auburn, Waterford and KIP Morrisville Projects. For each project the complaint alleges breach of contract and unjust enrichment. The language is similar to the language of the proposed amended

complaint insofar as it makes these claims. Giving the Plaintiff the benefit of the doubt, the Court interprets the Second Action to allege breaches of contract and not quasi-contract claims asserting implied contracts.

In some respects it is difficult to conclude where CPLR § 3211 ends and § 3212 begins. In reality, the decisions relating to the standards applicable to § 3211 are very similar to those for a motion under § 3212.

On a motion to dismiss pursuant to § 3211 (a)(7), the Court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated" (*Malik v. Beal* 54 A.D.3d 910, 912 [2d Dept.2008]); (*Simmons v. Edelstein,* 32 A.D.3d 464, 465 [2d Dept.2006]); (*Manfro v. McGivney,* 11 A.D.3d 662, 663 [2d Dept.2004]).

The claims for unjust enrichment in the Second Action mirror the claims interposed in the proposed amended complaint in the First Action. These claims were disposed of by the Appellate Division in their July 5, 2006 Decision, in which they concluded that "[t]he proposed amended complaint did not adequately state causes of action for quantum meruit and unjust enrichment". This is the law of the case. Defendants' motion to dismiss the second, fourth, sixth, and eighth causes of action in the Second Action complaint is granted. The fifth cause of action relating to the Waterford Project is also dismissed. The Appellate Division determined that plaintiff was unable to make out a prima facie case on this claim. In reviewing the deposition testimony of Edward Kalikow of October 10, 2003, at pp. 159 et seq., and his further deposition on June 9, 2009, there is no basis upon which the Court could conclude differently than the Second Department with respect to the Second Action. In the 2009 deposition Mr. Stillman, responding to a question as to what projects he had been asked to produce a statement of what he was owed, responded that they were the Parkside, Auburn and Morrisville. The Waterford Project was not mentioned, and, in any event, it appears that the work he allegedly did on that project predated the filing of the Second Action by more than six years, and the claim is barred by the Statute of Limitations in any event. The motion to dismiss the claim for breach of contract concerning the Waterford Project, as set forth in the fifth cause of action, is granted.

The actions which remain viable, and are scheduled for trial commencing June 14, 2010,

are the claims for breach of contract in connection with the Parkside Project, in which plaintiff claims damages of $412,321; breach of contract concerning the Auburn Project, in which Plaintiff claims damages of $1,440,261.51; and breach of contract in connection with the Morrisville/Davis Commons Project, in which plaintiff claims damages in an amount to be determined at trial. The plaintiff is not entitled to recover under the quantum meruit theory where, as alleged, the parties entered into a contract that governs the subject matter. (*Hydraulitall, Inc. v. Jones Inlet Marina, Inc.*, 71 A.D.3d 1087 [2d Dept. 2010]).

Claims respecting statutes of limitations are treated as motions in limine. Generally speaking, however, the First Action was filed on March 5, 2002, and claims predating that date by more than six years are barred. To the extent it is relevant, the Second Action was filed on May 25, 2005, and the action is limited to events within six years of that dated.

The parties are directed to appear for a Pre-Trial Conference on June 8, 2010, at 9:30 A.M., jury selection on June 14, 2010, and trial on June 21, 2010.

This constitutes the Decision and Order of the Court.

Dated: May 11, 2010

J.S.C.