

Podstupka v Kolomick
2010 NY Slip Op 31283(U)
May 18, 2010
Sup Ct, Nassau County
Docket Number: 011363-09
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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STEVEN PODSTUPKA,
Plaintiff,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

-against-

Index No: 011363-09

DIANE KOLOMICK,
Defendant.

**Motion Seq. No. 4
Submission Date: 3/26/10**

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Papers Read on this Motion:

- Notice of Motion, Statement of Material Facts,
Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Further Support.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the court on the motion filed by Defendant/Counterclaim-Plaintiff Diane Kolomick ("Kolomick" or "Defendant") on December 1, 2009 and submitted on March 26, 2010. For the reasons set forth below, the Court denies Defendant's motion in its entirety.

BACKGROUND

A. Relief Sought

Defendant seeks an Order 1) pursuant to CPLR § 3212, granting Defendant summary judgment dismissing all of the causes of action asserted by Plaintiff/Counterclaim-Defendant Steven Podstupka ("Podsupka" or "Plaintiff"); and 2) pursuant to CPLR § 3212, granting Defendant summary judgment on her Second Counterclaim for breach of contract.

Plaintiff opposes Defendant's motion, submitting, *inter alia*, that 1) the motion does not comply with the requirements of CPLR § 3212(b) because it does not contain an Affidavit by a

person with knowledge of the facts attesting to the material facts at issue; 2) the deposition testimony of Plaintiff, on which Defendant relies in support of her motion, is not signed by Plaintiff or certified by the Court Reporter and therefore should not be relied on by the Court; and 3) the other exhibits submitted by Defendant are not in admissible form either because they constitute hearsay, do not contain a foundation for their admissibility or do not contain the required certification.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated December 9, 2009 ("Prior Decision") in which the Court 1) denied Defendant's motion for an Order, pursuant to CPLR § 2304, quashing the Subpoenas Duces Tecum served on certain financial institutions; 2) denied the motion by Defendant and designated non-parties, pursuant to CPLR § 3103, for a protective order relieving those non-parties of their obligations to respond to certain Subpoenas; and 3) directed the individuals and financial institutions to whom the Subpoenas were addressed to comply with those Subpoenas by a designated date.

As outlined in the Prior Decision, the parties are former romantic partners who also became involved in various business ventures during their relationship. Those business ventures included the purchase of a Cruiser Boat and the operation of a business called DSSR Beverage, LLC ("DSSR").

In addition, by an earlier decision dated November 6, 2009 ("November Decision"), the Court denied the applications by both parties for injunctive relief, and vacated all existing temporary restraining orders. The Court incorporates the Prior Decision and November Decision herein by reference.

Counsel for Defendant ("Counsel") provides a Statement of Undisputed Material Facts and Affirmation in Support in which he outlines the history of the parties and provides documentation, including 1) DSSR Articles of Organization, bank accounts and tax returns, 2) deeds regarding certain properties owned by Defendant, and 3) a Retail Installment Contract and Security Agreement regarding the Cruiser Boat in support of Defendant's application.

Counsel also makes reference to deposition testimony of Plaintiff on July 27, 2009 (Ex. D to D's motion), including the following: 1) Plaintiff did not remember how much money he and

Defendant put down on the Lee Avenue Property, did not sign the mortgage on that Property and had no records reflecting his contribution towards that Property (pp. 283-287); 2) Plaintiff could not recall the name of the person who transferred title in the Burkhard Avenue Property to Defendant and was not present at the closing on that Property (pp. 289-290, 294); and 3) with respect to the Cruiser Boat, Plaintiff did not pay \$2,501.01 every month to Defendant out of his own money (p. 158) and did not remove himself and his personal belongings from the Cruiser Boat on April 1, 2009 (p. 155)

That same deposition, however, includes the following testimony by Plaintiff: 1) the mortgage on the Lee Avenue Property was \$250,000, the down payment came from DSSR and approximately \$110,000 was spent on renovations (pp. 284-285); 2) with respect to the Burkhard Avenue Property, Plaintiff and Defendant's money was kept together and Defendant paid the bills (p. 291), Defendant sought Plaintiff's permission before switching insurance carriers on that Property (p. 292) and the money for the Burkhard Avenue Property came from DSSR (p. 294); and 3) with respect to the Cruiser Boat, Plaintiff recalled that the sum of \$2,501.01 was paid every month out of the DSSR account, approximately ½ of which came from Plaintiff's salary (pp. 155-157).

Counsel also outlines Plaintiff's alleged failure to comply with his child support obligations towards his children with his prior wife, who is not the Defendant, and provides documentation in support of those allegations. Finally, Counsel details Plaintiff's alleged efforts to conceal his income and provides documentation, including tax returns and deposition testimony, purportedly supporting those allegations.

Plaintiff opposes Defendant's motion submitting, *inter alia*, that 1) documents, including insurance company statements and Notices from the Rockland County Support Collection Unit and New York State Department of Taxation and Finance, are not properly certified or authenticated; and 2) in light of the inadmissible form of Defendant's submissions, Defendant has failed to demonstrate her entitlement to summary judgment.

C. The Parties' Positions

Defendant submits, *inter alia*, that 1) Plaintiff's technical objections to the documentation submitted by Defendant lack merit; 2) Plaintiff's causes of action for a constructive trust on the

Properties that are in Kolomick's name, breach of fiduciary duty, an accounting, unjust enrichment and constructive fraud are barred by the doctrine of unclean hands; 3) Plaintiff's explanations for why certain assets are owned solely in Defendant's name do not raise an issue of material fact; 4) the undisputed facts demonstrate that no joint venture existed; 5) the Statute of Frauds bars Plaintiff's second through eleventh causes of action; 6) and the causes of action for breach of fiduciary duty, fraud and negligent misrepresentation cannot proceed because they are duplicative of Plaintiff's breach of contract claims.

Plaintiff opposes Defendant's application.

RULING OF THE COURT

A. Applicable Principles

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct. *Jara v. Huerta*, 58 A.D.3d 600, 602 (2d Dept. 2009), quoting *Columbo v. Columbo*, 50 A.D.3d 617, 619 (2d Dept. 2008).

An oral agreement may be sufficient to create a joint venture relationship and the statute of frauds is generally inapplicable thereto. *Mendelovitz v. Cohen*, 66 A.D.3d 849, 850 (2d Dept. 2009), citing, *inter alia*, *Foster v. Kovner*, 44 A.D.3d 23 (1st Dept. 2007). In *Mendelovitz, supra*, the Second Department affirmed the trial court's denial of defendants' motion for summary judgment. In so holding, the Second Department concluded that the trial court properly decided that, accepting the plaintiff's version of the nature and terms of the transaction between the parties,

the plaintiff might be able to establish at trial the essential elements of a joint venture by showing 1) an agreement manifesting the parties' intent to be associated as joint venturers, 2) a contribution by the joint venturers to the undertaking, 3) some degree of joint proprietorship and control over the enterprise, and 4) an understanding with regard to the sharing of profits and losses. *Id.*

B. Application of these Principles to the Instant Action

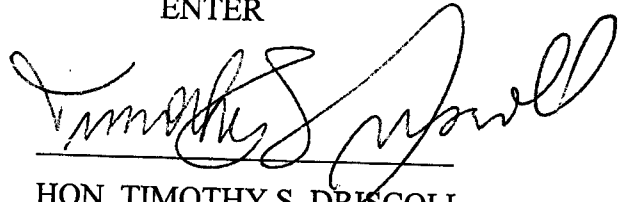
Even assuming, *arguendo*, that Defendant's submissions are in admissible form, the Court concludes that there are numerous disputed issues of fact regarding whether the parties entered into a joint venture and, if so, the nature of that joint venture that make summary judgment inappropriate. The Court also determines that Plaintiff's pursuit of the instant action is not barred by the doctrine of unclean hands and is somewhat struck by Defendant's reliance on that doctrine in light of the Court's conclusion in the Prior Decision that Defendant has been "less than cooperative in responding to [Plaintiff's] document requests" (Prior Decision at p. 9). The Court also holds that Plaintiff's action is not barred by the Statute of Frauds. Accordingly, the Court denies Defendant's motion in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a Compliance Conference on June 17, 2010 at 9:30 a.m.

DATED: Mineola, NY
May 18, 2010

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAY 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE