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

PRESENT: Saliann Scarpulla PART 19

Index Number : 104047/2008
TOTH, JAMES
vs.
SPELLMAN, LISA
SEQUENCE NUMBER : 007
VACATE NOTE OF ISSUE/READINESS

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

decided per the memorandum decision dated 7/7/11
which disposes of motion sequence(s) no. 07 and 08.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/7/11

Saliann Scarpulla
SALIANN SCARPULLA 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

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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JAMES TOTH,

Plaintiff,

Index No.: 104047/08
Submission Date: 4/11/2011

-against-

DECISION AND ORDER

LISA SPELLMAN,

Defendant.

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For Plaintiff:
Law Offices of Joseph J. Mainiero
305 Broadway, Suite 402
New York, NY 10007

For Defendant:
Law Office of Fred L. Seeman
170 Broadway, Suite 201
New York, NY 10038

HON. SALIANN SCARPULLA , J.:

In this action involving unmarried co-habitants involved in a long-term romantic relationship, plaintiff ex-boyfriend James Toth ("Toth") seeks $7.5 million dollars, allegedly representing compensation for services rendered. Defendant ex-girlfriend Lisa Spellman ("Spellman") moves for summary judgment pursuant to CPLR 3212, to dismiss the only remaining cause of action for quantum meruit. Spellman also seeks summary judgment in the amount of $250,000 on her sixth counterclaim which seeks repayment of a loan to Toth (sequence # 008). In a separate motion, Spellman seeks to vacate the Note of Issue and Certificate of Readiness (sequence # 007). Toth opposes the motion. Motion sequence numbers 007 and 008 shall be decided together herein.

The facts of this case were detailed in this Court's (J. Lehner) prior decision, dated December 24,2009, in which the Court summarily dismissed three of the four causes of

action, leaving only the quantum meruit action. As explained in greater detail there, the parties had a boyfriend/girlfriend relationship for approximately twelve (12) years, commencing in 1995 and concluding in December 2007. Spellman owns and operates an art gallery in Manhattan, and Toth owns a sound system rental business. Toth has two daughters from a previous relationship whom he supported throughout the parties' relationship.

In 1995, Spellman purchased a property in Montauk, Long Island where the parties resided (the "Montauk property"). It is undisputed that Toth lived there rent free. In August 1999, Spellman purchased a building at 41 Charlton Street, New York, New York with her own funds (the "Townhouse"), where the parties resided for eight (8) years. The parties agree that Toth did not contribute to the payment of the mortgage or otherwise contribute funds towards the maintenance of the Townhouse (i.e., groceries, insurance, landscaping, pest control, repairs, utilities). Toth had use of Spellman's BMW and Volkswagen during this period.

The parties also agree that from 1999 through 2007, Toth engaged in certain alterations and repairs to the Townhouse, and that all materials and workmen used were paid for by Spellman. In May 2004, Spellman took out a line of credit in the amount of $250,000, earmarked for Toth to renovate his home in Great Barrington, Massachusetts.

In December 2007 the parties ended their relationship and Toth was asked to vacate the Townhouse. Four months later, Toth agreed to leave the Townhouse pursuant to an April 14, 2008 stipulation of settlement entered in Civil Court, Housing Part (*Lisa*

Spellman v. James Toth Index, No 60019/08). Thereafter, Spellman purchased a property in Stockton, New Jersey with her own funds where Toth lived rent free until his eviction on December 1, 2008.

In March 2008, Toth commenced the instant action to enforce an alleged oral agreement between the parties to be "equal economic partners." Toth alleged four causes of action in his pleading: 1) breach of contract; 2) the imposition of a constructive trust over one half of Spellman's real property; 3) an accounting based upon breach of a partnership agreement; 4) quantum meruit for services rendered in the amount of $7.5 million dollars. The first three causes of action were summarily dismissed with prejudice by the Court (J. Lehner), finding that there was never an express agreement for the parties to "equally share in all financial endeavors and as such equally benefit." Spellman asserted eight counterclaims for damages stemming from Toth's allegedly tortious conduct regarding her business and properties and interposed twenty affirmative defenses.

With regard to the quantum meruit cause of action, the Court stated that dismissal was premature absent discovery. This Court stated:

> 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 [Toth's] services rendered is therefore, necessarily unavailable [citation omitted]." (*Moors v Hall*, 143 AD2d 336, 337 [2d Dept 1988]).

The Court further held that "at this early stage in the litigation, when there has been no discovery" it would be premature to bar the equitable relief.

Toth alleges in the complaint that he contributed his labor pursuant to an express oral agreement entered into between the parties in 1995 to be "equal economic partners." According to Toth, the parties agreed in 1995 that "both parties' income and expertise would be utilized to increase their net worth . . . [and that they would] equally share in all financial endeavors and as such equally benefit from their partnership" forever. Toth, who deems himself to be an experienced historical restorer and woodworker with an extensive knowledge of construction and design, maintains that he performed domestic and business services at the request of Spellman throughout the years with the expectation that he would receive full compensation for them, and that Spellman always accepted his services knowing that he expected compensation for them.

Toth further alleges that subsequent to September 11, 2001, he lost a significant amount of business and Spellman allegedly assured Toth to "never worry about money," since he was "an equal partner in anything they did and that they would share equally in any profits." Toth claims that in reliance on Spellman's assurance, he spent the great majority of his time from September 2001 until the summer of 2007 restoring the Townhouse and maximizing its equity potential.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must

then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).[1]

"[I]n order to make out a claim in quantum meruit, a claimant must establish (1) the 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 A.D.2d 479, 484 (1st Dept 1991). *See also Moors v Hall*, 143 AD2d 336 (2d Dept 1988). Ordinarily "a party may not expect compensation for a benefit conferred gratuitously upon another." *Trott v. Dean Witter & Co.*, 438 F. Supp. 842, aff'd 578 F. 2d 1370 (2d Cir. 1978). Quantum meruit recovery represents a narrow exception to this rule, and was stems from a quasi contract theory, when there is no express agreement, in order "to prevent a party's unjust enrichment." *Clark-Fitzpatrick, Inc., v. Long Island R. R. Co.*, 70 N.Y.2d 382, 388 (1987).

In support of her summary judgment motion, Spellman submits affidavits and supporting papers, and argues that it is not reasonable, as a matter of law, to imply a contract from the rendition of Toth's services because the evidence conclusively establishes that the parties enjoyed a twelve (12) year romantic relationship wherein the

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[1] Toth's attempt to have the summary judgment motion denied because the Court has already addressed a summary judgment motion is unavailing. Toth concedes that CPLR 3212 does not restrict multiple summary judgment motions and agreed in a signed, so-ordered stipulation dated December 15, 2010 that "all discovery [is] complete" and that "[s]ummary judgment motions would be made within 60 days thereafter."

parties consistently lived together. Even if such a contract could be implied, Spellman argues, the evidence submitted establishes that Toth had no reasonable expectation of compensation when he assisted in repairs and renovations to the Townhouse, as Spellman paid over $2,000,000 in principal and interest on mortgages and advanced approximately $500,000 for maintenance of her three houses where Toth lived rent free. Rather, she argues, Toth was merely doing his share in contributing to the household.

At his examination before trial, Toth testified that the "[o]nly conversations [he] had with Lisa concerning compensation was the conversations that we had about our wealth which was the conversation where she agreed to share in wealth equally." Spellman argues that Toth did not assign a value for the delineated tasks he performed, nor did he keep a contemporaneous log or record of the hours that he worked. Spellman points out that Toth testified that "there were no invoices, no logs, no records of any kind other than the fact I trusted what she told me and I believed what she told me, which is that we shared our wealth equally." Toth also testified that all materials and workers used for the improvements and repairs were paid for by Spellman.

In his opposition, Toth vehemently denies that the "valuable services" that he "painstakingly" performed throughout the years were based solely upon "love and affection." Toth argues that he has submitted admissible evidence to create the existence of a"credibility issue" regarding "the explicit promise by the defendant that all of the 'wealth' we accumulated belonged to both of us" or that there was an economic partnership between the parties, requiring a trial of the action.

In the alternative, Toth argues that an issue of material fact exists as to whether equity requires that the court imply an agreement for the parties to equally share in all assets and profits as "equal economic partners." Toth argues, at minimum, that his different characterization of the intention with which the work was performed creates a material triable issue of fact as to whether his expectation that he be compensated as an equal partner was reasonable.

In her reply, Spellman argues that Toth's assertions regarding the parties so-called express agreement to be "equal economic partners" have already been dismissed by this Court's earlier summary judgment decision. Spellman correctly states, as was already noted by the Court at the August 25, 2010 discovery conference, that Justice Lehner conclusively determined in his decision that no express agreement to be equal economic partners exists between the parties. Any feigned factual issues concerning whether an express agreement to be "equal economic partners" exists are insufficient on this motion to dismiss the quantum meruit cause of action. *See Grullon v. City of New York*, 297 A.D.2d 261 (1st Dept 2002).

Toth urges the Court to imply an agreement between the parties, and to find that the agreement provided that he should use his skills to design, construct, supervise and manage the renovation, remodeling and construction of the Townhouse and in return, he "would share in everything forever and that my [Toth's] children would inherit everything." Toth asks the court to imply an obligation based upon his "actions" arguing

that "a person would have to be insane to do what I did without expecting to be compensated."

However, the Court of Appeals held in *Morone v. Morone,* 50 N.Y.2d 481 (1980), that in the absence of an explicit and structured understanding of an express contract, it will not imply a contract between unmarried co-habitants under quantum meruit principles from the mere rendition and acceptance of services. *See also Matos v. Gadman*, 173 A.D.2d 442 (2d Dept 1991) (where plaintiff claimed that the parties cohabited as "equal economic partners," the court dismissed the cause of action for quantum meruit against the individual defendant premised upon an implied agreement to be compensated).

The Court in *Morone* explained the difficulty with asking a Court to imply a contract from the mere rendition and acceptance of services between unmarried parties living together.

> Absent an 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 after thought, 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.

Morone, 50 N.Y.2d at 488.

Thus, it is not reasonable for Toth to infer or expect an agreement to receive payment for services rendered in the context of a romantic relationship between people who live together. "As a matter of human experience personal services will frequently be

rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do." *Morone*, at 488. In fact, the Court of Appeals concluded that "the notion of an implied contract between an unmarried couple living together is, thus, contrary to both New York decisional law and the implication arising from our legislature's abolition of common law marriage." *Morone*, at 488.

Toth's reliance upon *Moors v. Hall*, 143 A.D.2d 336 (2d Dept 1988) in support of his argument that an agreement should be implied which would treat Toth as an equal partner is misplaced. In *Moors*, the Second Department specifically declined to apply the *Morone* analysis to the quantum meruit claim because the evidence established that the parties kept separate residences for over twenty years and never lived together. In this case, unlike the parties in *Moors*, the evidence clearly establishes, and Toth does not deny, that the parties cohabited in Spellman's three residences, throughout their twelve year relationship.

Based upon the foregoing, the Court grants Spellman's motion for summary judgment and dismisses the remaining quantum meruit cause of action.

That portion of Spellman's motion which seeks summary judgment on her claim that Toth breached his promise to re-pay the $250,000 line of credit provided to him in 2004 is denied. Spellman has failed to meet her burden of proof in establishing the express terms of re-payment of the alleged loan and the court will not imply an such an agreement. *See Morone*, at 481.

Lastly, Spellman moves to vacate the Note of Issue and Certificate of Readiness, arguing that Toth "erroneously demanded a jury trial and misstated that discovery is still outstanding despite his representation to the Court otherwise on December 15, 2010." Spellman accurately asserts that Toth cannot demand a trial by jury as his complaint asserts both claims in law and equity. *See, e.g., Mirasola v. Gilman*, 104 A.D.2d 932 (2d Dep't 1984) ("By deliberately joining legal and equitable causes of action arising out of the same transaction, plaintiffs waived their right to a trial by jury. The subsequent removal of the equitable claims from the case . . . did not revive that right"). As only Spellman's counterclaims remain in this action, and Spellman asserts both claims in law and equity, Spellman's motion to vacate the note of issue will be granted to the extent of striking the jury demand from the note of issue. *See Edward Joy Company, Inc. v. McGuire & Bennett, Inc.*, 221 A.D.2d 891, 891-2 (3d Dep't 1995).[2]

In accordance with the foregoing, it is

ORDERED that the portion of the motion by plaintiff Lisa Spellman seeking summary judgment dismissing the remaining fourth cause of action is granted and thus, the complaint is dismissed in its entirety; and it is further

ORDERED that plaintiff Lisa Spellman's motion for summary judgment on her sixth counterclaim for repayment of the alleged loan is denied; it is further

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[2] Spellman asserts that Toth misstated in the note of issue that discovery is outstanding, however a review of the note of issue on its face does not show that Toth claims discovery is outstanding.

ORDERED that Lisa Spellman's motion seeking to vacate the Note of Issue is granted to the extent of striking the jury demand from the note of issue; and it is further

ORDERED that the Clerk of the Court is directed to place this action on the appropriate trial calendar for trial of the counterclaims; and it is further

ORDERED that Lisa Spellman serve a copy of this order with notice upon James Toth within 20 days of entry.

Dated: New York, New York
July 7, 2011

ENTER:

Saliann Scarpulla, J.S.C.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE