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

PRESENT: ~~SALIANN SCARPULLA~~ Hon. PART 19

Index Number : 103283/2008
GURAL, JEFFREY
VS.
DRASNER, FRED
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n 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 and cross-motion are decided in accordance with accompanying memorandum decision.

Dated: 1/18/12

Saliann Scarpulla J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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

----------X

JEFFREY GURAL,

Plaintiff,

-against-

FRED DRASNER,

Defendant.

----------X

Index No. 103283/08
Submission Date: 10/12/11

DECISION AND ORDER

For Plaintiff:
Goldberg Weprin Finkel Goldstein LLP
1501 Broadway
New York, NY 10036

For Defendant:
Bracewell & Giuliani LLP
1251 Avenue of the Ameri
New York, NY 10020

HON. SALIANN SCARPULLA, J.:

Defendant Fred Drasner ("Drasner") moves for an order granting summary judgment in his favor and for leave to amend his answer. Plaintiff Jeffrey Gural ("Gural") cross-moves for an order granting him leave to serve and file an amended complaint.

In this action, Gural alleges that, at some unspecified time before 2006, he entered into an oral agreement with Drasner to make certain "improvements" to Drasner's property in Stanfordville, New York. According to Gural, it was agreed that he would construct a pole barn/run-in shed ("barn"), install a road, erect fencing, dig a well, and clear and seed an area of Drasner's property, and that the costs for that construction would be repaid by Drasner, if and when he sold the property. Gural claims that Drasner

also agreed that Gural could let his horses graze on Drasner's property, and that Gural would remove the horses prior to any sale of the property. Gural contends that Drasner initiated the agreement because he was building a hunting lodge on the property, and wanted to have the view of Gural's horses grazing on the property, rather than seeing the existing weeds, scrub and dead trees. In 2006, Drasner sold the property on which the "improvements" were made. Gural contends that Drasner now owes him $181,551.89 for the cost of the "improvements." The complaint asserts causes of action for breach of contract and unjust enrichment.

Drasner moves for summary judgment dismissing the complaint against him. Drasner first argues that, on the basis of the record, Gural cannot establish the existence of an enforceable agreement. Drasner also argues that the alleged oral agreement lacks consideration, the terms are defectively ambiguous, and is barred by the statute of frauds. Drasner also asserts that Gural is not able to make a prima facie showing of unjust enrichment, and that Gural is not the proper party to bring this lawsuit. Finally, Drasner seeks to amend his answer to assert defenses of lack of standing and lack of legal capacity to sue.

Gural cross moves pursuant to to CPLR 3025(b) for leave to serve and file an amended complaint.

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).

Prior to 2006, Drasner owned five tax lots which he sold in two transactions. The portion of his property that contained the "improvements" was ultimately sold by Drasner to Cara Leigh Wilson ("Wilson"). According to Wilson, she paid the asking price of $3,250,000 for the property.

The parties do not dispute that there was an agreement between them permitting Gural to construct the barn, make the other "improvements" on the property, and let his horses graze on Drasner's property. Drasner contends, however, that it was Gural that approached him with the request to build a barn and perform the other work and let his horses graze on Drasner's property, and that there was an express agreement that the work would be done at Gural's expense. In support of that argument, Drasner relies on Gural's deposition testimony that "[h]e asked me, would I be willing to go in and clear the land and fence it and put a barn up at my expense and move some horses there. I said I would." Gural further testified, "I said, if you want me to do it, fine, I could use the extra fields. I'd be happy to do it." Gural also stated: "Fred was my friend. He told me he was going to pay the money he owed me. . . . The man says he's paying me $150,000 and he doesn't. I assume if he's your friend you would assume –."

[* 5]

It is undisputed that in or around 2001, Gural hired a local contractor to clear and seed certain fields located on Drasner's property, that it took approximately two years for the fields to grow sufficient grass for grazing, and that in 2003, Gural hired another contractor to build the barn and install the fencing. Gural then kept six to eight horses on the property until Drasner sold the property. Gural contends that the construction and creation of grazing fields improved Drasner's property and was responsible for the price Drasner was able to get when he sold the property.

Drasner contends that Gural's claim that Drasner approached him to construct the barn and create grazing fields on his property is implausible and lacks an evidentiary basis. Drasner contends that he does not particularly like horses or the smell of horse manure. Drasner further asserts that the horses walked around tearing up grass which made the land unusable for other purposes, he could not see the barn or the horses from the hunting lodge, and he did have a view of the Catskill Mountains, which was the view that he desired.

Drasner relies on the testimony of George Langa ("Langa"), of Millbrook Real Estate, who brokered the sale of the property, and who testified that the purchaser of the property did not indicate that she was looking for any facilities other than a house on the property, but she did indicate that she was looking for open land. Langa further testified that in some circumstances having a fenced pasture would improve the value of the property, and in other circumstances it would not.

In reply Gural contends that Drasner could see the fields and the horses grazing as he drove through his property to the hunting lodge. With respect to the question of the value of the improvements to a potential purchaser, Gural relies on the purchaser's undisputed testimony that what mattered to her and her husband was that the property was suitable for horses, and that had Gural not cleared and cultivated Drasner's property, the value of Drasner's property would have been lower.

Drasner notes that Gural did not actually sue him until 2008, approximately three years after he sold the property. Drasner contends that the only reason Gural claimed that there was an oral agreement was that, as he testified at deposition, he needed the money because his own expenses had gone up markedly, because his wife had spent considerably more to build a house on his own property than he had anticipated. Drasner has, however, submitted Gural's written requests for reimbursement, dated August, September, and October 2006, only one of which mentions the increase of his own expenses.

The parties agree that there was some sort of oral agreement, however, who initiated the agreement and who would ultimately pay for the work done are in dispute. Drasner contends there was no reason for him to agree to reimburse Gural when he did not even like horses and already had a good view of the Catskills. Gural, in turn, contends that both the esthetic and financial value of Drasner's property was enhanced by the alterations and that Drasner sought the improvements.

[* 7]

Drasner argues that the complaint must be dismissed, because there is no evidence of the consideration necessary to support a contract. That argument was rejected by the Court (Justice E. Lehner), in a decision denying Drasner's motion to dismiss on the basis of Gural's allegation that the work done on Drasner's property allegedly increased the value for the purposes of sale. *Gural v. Drasner,* Sup Ct, NY County, Feb. 11, 2009, Lehner, J., at 3. Drasner now relies on Langa's testimony that fencing could be either a positive or negative feature in the sale of property and that the purchaser never mentioned an interest in the barn, and argues that there is no evidence of consideration. In light of the purchaser's testimony that she was looking for open land and that she and her husband keep animals on the property,[1] however, the fact that Gural cleared some of Drasner's land to make grazing possible creates a factual dispute as to whether the work done by Gural on Drasner's property enhanced the value of the property and constitutes consideration necessary for a valid contract.

Drasner also contends that it was Gural, not Drasner, that benefitted from the alleged agreement, arguing that Gural had admitted that he received a benefit from the arrangement, because he could let his horses graze on the property. Gural counters that while he might have received some benefit, the value of having six or eight horses grazing on Drasner's property for approximately two years did not equal the $181,000

[1] At the time of her deposition Wilson had 27 sheep, expected the birth of 60 lambs, and also had miniature and full sized horses on the property.

that he spent to build the barn, and clear and cultivate and fence the field, and dig the well on the property.

Drasner next argues that the alleged oral agreement is barred by the statute of frauds, because an agreement must be in writing if "[b]y its terms is not to be performed within one year from the making thereof." General Obligations Law § 5-701 (a) (1). The statute of frauds argument was also rejected by Judge Lehner, who concluded that the construction could have been completed within one year and the sale of the property was contingent. *Gural v. Drasner, supra*, at 5.

In discovery, however, Gural conceded that it took two years to clear and seed the fields and have the grass grow sufficiently high to use for horses to graze. Therefore, the alleged oral agreement could not have been performed within one year. *Sheehy v. Clifford Chance Rogers & Wells LLP*, 3 N.Y.3d 554, 560 (2004) ("In order to remove an agreement from the application of the statute of frauds, both parties must be able to complete their performance of the contract within one year"). As Judge Lehner concluded, the sale of property was contingent, and to that extent, the statute of frauds did not apply. *Gural v. Drasner, supra, at 4-5; see Nakamura v. Fujii,* 253 A.D.2d 387, 389 (1st Dept 1998); *see also Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 463 (1982) (where employment contract could have been terminated at will or for just cause within one year, it did not come within statute of frauds). Nevertheless, given that an essential, undisputed part of the alleged agreement – that Gural would create grazing fields – could not be accomplished within one year, the statute of frauds applies.

[* 9]

Gural argues that because he did the work he agreed to perform, the doctrine of partial performance takes the agreement outside of the statute of frauds. Partial performance which is "unequivocally referable" to alleged oral agreement will take an agreement outside of the statute of frauds. *Anostario v. Vicinanzo,* 59 N.Y.2d 662, 664 (1983). Certainly, the work that Gural did on Drasner's property constitutes partial performance. However, on the basis of the testimony and affidavits submitted by the parties, the court concludes that Drasner's arguments to the contrary notwithstanding, this is just the sort of "he said - he said" situation that creates triable issues of fact regarding the nature of the underlying agreement and whether the that partial performance is "unequivocally referable" to the alleged oral agreement. *See H.P.P. Ice Rink v. New York Islanders,* 251 A.D.2d 249, 249 (1st Dept 1998). Therefore, Drasner's motion for summary judgment on the ground of statute of frauds is denied.

With respect to Gural's second cause of action for unjust enrichment, Drasner argues that Gural fails to submit any admissible evidence in support of claim. Above, the Court has already concluded that there are triable issues of fact regarding whether the work done by Gural on Drasner's property in fact enhanced the value of the property and resulted in the sale of the property to Wilson.

Citing *Indyk v. Habib Bank Ltd.,* 694 F.2d 54 (2d Cir. 1982), Drasner also argues that Gural is improperly seeking to recover money expended by Allerage Inc. ("Allerage"), the corporation through which Gural operates his horse farm. *Indyk,* however involved an issue of whether a defendant seeking to avoid honoring a check

could obtain a set-off of the amount owed, claiming that a third party had paid a portion of the money owed, and, therefore, the plaintiff would be unjustly enriched if the set-off were not permitted. Here, however, although it is undisputed that the checks for the work done on Drasner's property were issued from an account maintained for Allerage by Newmark and Co. Real Estate Inc., the management company which is the managing agent for Allerage, according to Gural's sworn testimony, it was his money that funded Allerage's account.

Next, Drasner seeks to amend his answer to assert defenses of lack of standing and lack of legal capacity to sue. Citing *Country Pointe at Dix Hills Home Owners Assn., Inc. v. Beechwood Org.,* 80 A.D.3d 643 (2d Dept 2011), Gural opposes Drasner's motion to amend, arguing that by not asserting the affirmative defenses of lack of standing and lack of capacity in his original answer or motion to dismiss, Drasner waived those defenses. *See also Salinas v. City of New York,* 31 Misc 3d 1236(A), 2011 NY Slip Op 51018(U) (Sup Ct. Bronx Co. 2011).

Drasner, in response, cites *Arellano v. HSBC Bank USA,* 67 A.D.3d 554 (1st Dept 2009), in which the Appellate Division reversed the decision of the Supreme Court which had denied defendant's permission to amend its answer, and then ruled that the defendant was entitled to summary judgment based on that defense. *See also Armstrong v. Peat, Marwick, Mitchell & Co.,* 150 A.D.2d 189, 190 (1st Dept 1989). Particularly here, where Drasner learned as a result of discovery that the payments for the work done by Gural were made from an account maintained for Allerage, there is sufficient justification for

permitting the amendment at this stage. Accordingly, Drasner's motion to amend his answer is granted.

Citing *Katz v. Katz,* 55 A.D.3d 680 (2d Dept 2008), Drasner argues that where the funds were spent by Allerage, even if Gural is the sole member of the corporation, he cannot sue for damages in his individual capacity, and, therefore, summary judgment should be granted based upon the defenses of lack standing and lack of capacity to sue. In *Katz v. Katz,* the husband was seeking to recover use and occupancy charges from his wife for her alleged "holdover occupancy" in an apartment that was owned not by him, but a limited liability corporation of which he was the sole member. Here, however, Gural alleges that he entered into the alleged oral agreement with Drasner personally, and in his sworn testimony, Gural states not merely that he is the sole shareholder of Allerage[2], but that he actually supplied the funds to the bank account for Allerage to pay for the work. Assuming that Gural can establish that he paid for that work, he could be considered the real party in interest and would have standing to bring this action. *See Shalam v. KPMG LLP,* 13 Misc 3d 1205(A), *4, 2006 NY Slip Op 51697(U) (Sup Ct, NY County 2006), *affd* 43 AD3d 752 (1st Dept 2007). Gural has raised a material issue of fact as to the source of the funds for the work performed on Drasner's land, and, therefore, this situation is distinguishable from that *in Katz v. Katz*, and summary judgment on Drasner's affirmative defenses of lack of standing and capacity to sue is denied.

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[2] According to Gural's deposition testimony, he believes that he is the sole shareholder, though his wife may also be a shareholder.

Gural cross-moves to amend his complaint to add Allerage as a plaintiff. Drasner opposes Gural's motion, arguing that such an amendment would prejudice him, because he engaged in discovery treating Gural, not Allerage as the plaintiff. Gural's cross motion to amend is in direct response to Drasner's motion to amend his answer. Although the court has denied Drasner's motion for summary judgment based upon his amended answer, ultimately Gural must be able to establish that he indeed paid for the work done on Drasner's property. Should he fail to do so, Allergage may well be the appropriate plaintiff. Having granted Drasner's motion to amend his answer, it is appropriate to grant Gural's motion to amend his complaint as well.

Drasner will, however, be given a limited period of time in which to conduct any necessary discovery as a result of the amendment to the complaint.

In accordance with the foregoing it is

ORDERED that the motion by defendant Fred Drasner for summary judgment is denied; and it is further

ORDERED that the motion by defendant Fred Drasner for leave to amend his answer is granted and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the cross motion by plaintiff Jeffrey Gural to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the

moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties are directed to appear for a status conference in Part 19, Room 279, 80 Centre Street, on March 28, 2012 at 2:15 PM.

Dated: New York, New York
January 11, 2012

ENTER:

Saliann Scarpulla, J.S.C.

FILED
JAN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE