

**Barone v Barone**

2013 NY Slip Op 34095(U)

May 6, 2013

Supreme Court, Queens County

Docket Number: 9162/2012

Judge: Orin R. Kitzes

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Short Form Order

**ORIGINAL**

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES  
Justice

IA Part 17

-----x  
FRANK A. BARONE,

Plaintiff,

-against-

GILMA POSADA BARONE a/k/a MARIA G.  
BARONE, Individually, as Officer and  
Shareholder of J.P. Barone Properties,  
INC., as Officer and Shareholder of  
BARONE PROPERTIES, INC., and as Officer  
and Shareholder of BARONE PROPERTIES II,  
INC., BARONE PROPERTIES, INC., and  
BARONE PROPERTIES II, INC.,

Defendants.  
-----x

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Number 9162/ 2012

Motion  
Date April 18, 2013

Motion Seq. No. 6

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The following papers numbered 1 to 13 read on this motion by plaintiff, pursuant to CPLR 3211(b) to dismiss the first, second, third and fifth affirmative defenses and pursuant to CPLR 3211(a) and (b) to dismiss the counterclaims.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Movant's Supplemental Affirmation - Exhibits.....	8-10
Reply Affidavits.....	11-13

Upon the foregoing papers it is ordered that the motion is granted in part and denied part for the following reasons:

The amended verified complaint asserts causes of action for constructive trust, an accounting, fraud, unjust enrichment and the appointment of a receiver. In the January 23, 2013 order, the constructive trust claim was dismissed as timed barred. It is undisputed that the first, second and third affirmative defenses

are moot as they relate to the constructive trust claim. Thus, the first, second and third affirmative defenses are dismissed.

Initially, in considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. The sole criterion is whether from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]). "The facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Id.* [citations omitted]). Thus, the court must determine whether the facts claimed are even facts at all, or whether significant dispute exists regarding them (*Id.*)

With respect to the fifth affirmative defense, plaintiff seeks dismissal of it pursuant to CPLR 3211(b) on the ground that it has no merit. The fifth affirmative defense states that "[t]he promises alleged in the complaint as having been made by defendant, Maria G. Barone, are subject to the statute of frauds." The amended verified complaint alleges that Maria Barone represented to plaintiff that she and plaintiff were equal partners who will equally share the profits and losses from the parcels of real property.

The Statute of Frauds provides, in pertinent part, that "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing . . . if such agreement, promise or undertaking . . . by its terms is not to be performed within one year from the making thereof" (General Obligations Law § 5-701[a][1]). This provision does not apply to an agreement that "appears by its terms to be capable of performance within the year; nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year" (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 176 [1968]). It applies to "those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]). However, the statute of frauds is generally inapplicable to an agreement to create a joint venture or partnership (*Pugliese v Mondello*, 57 AD3d 637 [2d Dept 2008]). Moreover, where, as here, the joint venture or partnership agreement is one to deal in real property, the statute of frauds does not render it void because the interest in each partner is

deemed personalty (*Plumitallo v Hudson Atlantic Land Co., LLC*, 74 AD3d 1038 [2d Dept 2010]).

Accordingly, the fifth affirmative defense is dismissed.

With respect to dismissal of the first, second and third counterclaims as time-barred, CPLR 3211(e) explicitly provides that an objection or defense based on the statute of limitations is waived unless raised in a responsive pleading or by motion to dismiss. Here, plaintiff waived the statute of limitation defense by failing to either raise the defense in reply to the counterclaim or timely move to dismiss the counterclaim based on such ground. This branch of the motion is denied.

With respect to dismissal of the third; fourth and fifth counterclaims pursuant to CPLR 3211(a)(7), it is well settled that in considering a motion to dismiss for failure to state a cause of action the pleadings must be liberally construed. The sole criterion is whether from the four corners of the complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Lupski v County of Nassau*, 32 AD3d 997 [2d Dept 2006]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], affirmed 66 NY2d 946 [1985]). Where evidence is submitted by the movant in support of the CPLR 3211(a)(7) motion, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (see *Simos v Vic-Armen Realty, LLC*, 92 AD3d 760 [2d Dept 2012]; *Fishberger v Voss*, 51 AD3d 627 [2d Dept 2008]; *Columbo v Chase Manhattan Automotive Fin. Corp.*, 297 AD2d 327 [2002]).

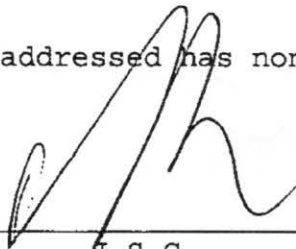
The third, fourth and fifth counterclaims assert a claim for breach of fiduciary duty. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (Restatement [Second] of Torts § 874, Comment a). "Courts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency" (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 160 [1993]). Here, the verified answer does not allege the fiduciary terms of the employment contract or fiduciary relationship (*Id.* at 162). In addition,

defendants do not submit evidence demonstrating the merit of their claims or a sworn statement of fact to remedy the deficiencies in the counterclaims (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2d Dept 2011], citing *Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1049 [2d Dept 2010]). Moreover, the counterclaims are not pleaded with the requisite specificity as required by CPLR 3016(b).

Accordingly, the third, fourth and fifth counterclaims are dismissed. To the extent that said counterclaims assert a claim for fraud, the claims are similarly dismissed as the facts constituting the essential elements of fraud, including an intent to induce reliance and justifiable reliance, have not been alleged (CPLR 3016(b)).

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

Dated: 5/6/13

  
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