SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DAVID E. RETTER,

Index No.: 652106/2010

Plaintiff,

DECISION & ORDER

-against-

NEIL ZYSKIND and PHYLLIS ZYSKIND,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Neil Zyskind (Neil) and Phyllis Zyskind (Phyllis) move, pursuant to CPLR 3212, for summary judgment against plaintiff David E. Retter. Retter opposes and cross-moves for summary judgment. The motion and cross-motion are granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

Unless otherwise noted, the following facts are undisputed.

Retter commenced this action to enforce the rights to his alleged equity in two nursing homes in upstate New York. The main issue is whether the money Retter gave Neil to fund the nursing homes was a loan or an equity investment.

On December 25, 2001, Retter met with Neil and his brother-in law (non-party Emanuel Pollack) to negotiate entering into a joint venture, whereby Retter and Pollack would invest in a nursing home that would be run by Neil. This nursing home is called Mary Agnes Manor

(MAM) and is located in Buffalo. The parties orally agreed that Retter and Pollack[1] would each receive 30% equity in MAM.

On December 26, 2001, Retter, Pollack, and Neil signed a memo, setting forth the terms "that were agreed upon" the previous day (the MAM Agreement). *See* Dkt. 92. The MAM Agreement sets forth the parties' equity (Retter getting 30%) and lays out how MAM is going to be run. Simply put, two LLCs were to be formed: (1) an operating company (Mary Agnes Manor LLC) to run the home; and (2) a real estate company (Mary Agnes Realty LLC) to own the property. Neil was to own 100% of the operating company and the equity in the real estate company was to be split in accordance with the MAM Agreement's equity distribution (i.e., Retter owning 30%). Retter maintains the parties orally agreed that the MAM business was to be treated as one venture, with profits distributed in accordance with the MAM Agreement's equity split, but that Neil was nominally named as the only member of the operating company for reasons that are not entirely clear.[2] Neil, on his own, drafted operating agreements for the MAM operating and real estate companies, and also secretly formed a third LLC called Mary Agnes Manor Management LLC – all of which only named Neil and his wife, Phyllis, as members, and none of which were signed by Retter or Pollack. All of these entities are New York LLCs.

Retter and Pollack each invested $216,000 in MAM. Retter claims these were equity investments and Neil claims they were loans. Pursuant to the MAM Agreement, Retter and

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[1] Pollack is not a party to this action, but he submitted affidavits in support of Retter and takes his side in this litigation.

[2] The record indicates that Retter and Pollack may have had legal troubles that they wanted to conceal so as to not create regulatory problems for the nursing homes.

Pollack are each entitled to a 12% return on their investment, which they did indeed receive from 2002 through 2008.[3] Neil stopped paying Retter in 2009, prompting this lawsuit.

A similar scenario played out with the second nursing home, called Heritage Manor (Heritage), which is located in Ransomville, New York. In 2004, Retter, Pollack, and Neil met to discuss Retter and Pollack collectively purchasing 65% of the equity in Heritage. Neil sent Retter and Pollack a letter dated February 18, 2004 (the Heritage Agreement), stating:

> This letter is to confirm our agreement regarding each of your loans to Heritage in the amount of $168,750.00 for a total of $337,500.00. Promissory notes will be prepared and forwarded to you shortly. In addition to the 12% interest you will be receiving on your loan, I will be providing you with a 65% equity interest in the company owning the real estate or management company, to be agreed upon at a later date.

See Dkt. 95. As with MAM, Neil created an operating company (Hertiage Ransomville Management LLC) and a real estate company (Heritage Ransomville Realty LLC), but did not name Retter and Pollack as members in their operating agreements. Retter claims that, between 2004 and 2008, he received certain payments from Heritage, but has never been repaid his $168,750, which he claims was a capital investment, not a loan.

On February 22, 2009, Retter, Pollack, and Neil met to discuss the possible sale of Heritage. The next day, on February 23, 2009, Neil sent Retter and Pollack an email:

> I am currently in negotiations to lease out Ransomville for $27,500. I am proposing to transfer the realty and pay the realty $15,000 per month rent. The realty would be owned 50% by the two of you and I would own the other 50%. Further, the lessee would pay $500,000 cash to be used to pay down the mortgage. Assuming our mortgage will be around $650,000, I anticipate our monthly int/principal to be around $6,000 per month. This leaves $9,000 to distribute.

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[3] Pollack received more, but explains that this was attributable to other dealings with Neil. Neil does not dispute this.

> If this is unacceptable, I am proposing to buy both of u out for $350,000. If u wish I can get an appraisal and we can go from there.

See Dkt. 96.

The record is unclear about what happened with Heritage. On the one hand, the purported Heritage Agreement, allegedly sent by Neil to Retter and Pollack and never signed, indicates that Retter's $168,750 was a loan, and that a formal equity grant was to occur at some later point. However, no promissory notes were ever created or executed. Then too, no evidence of an equity grant appears to exist. Yet, the February 23, 2009 email indicates that Neil believed he had to buy out Retter and Pollack. There is no evidence in the record that conclusively resolves this question.

Neil, however, points to the LLC's operating agreements – again, which Neil drafted on his own and were never signed by Retter and Pollack – as proof that only Neil and his wife own equity. Neil further argues that the fact that Retter only received 1099s, and not K-1s, from the LLCs, is evidence that Retter was never a member. However, Retter explains that Neil, over the objections of Retter and his accountant, refused to issue K-1s to Retter, and this was a longstanding matter of dispute among the parties. None of these issues are dispositive.

Neil's deposition testimony illustrates the confusion presented by this record:

> Q. Now after you paid off the note to Mr. Retter did you make any further payments to Mr. Retter in connection with Mary Agnes Manor?
>
> A. Yes.
>
> Q. So I want to see if I understand you. It was your understanding that legally Mr. Retter's alleged loan had been paid off from the HUD financing and you did not owe

him another penny, correct?

A. Correct.

Q. But you nonetheless continued to pay him because you hoped that if you might pay him some money he might lend you more money?

A. Yes.

Q. That was it, right?

A. Yes.

Q. Was this reflected in any writing?

A. No.

Q. Did you tell Mr. Retter that?

A. No.

Q. This was just something that you decided?

A. Yes.

See Dkt. 91 at 11, quoting Neil's 11/29/12 Dep. Tr. at 106-07 (*see* Dkt. 100 at 30).

Retter commenced this action on November 24, 2010. The Complaint asserts seven causes of action: (1) "breach of the venture"; (2) breach of the MAM Agreement; (3) breach of the Heritage Agreement; (4) breach of fiduciary duty; (5) unjust enrichment; (6) constructive trust; and (7) an accounting. In essence, Retter wants (1) a declaratory judgment that he has equity in MAM and Heritage; (2) returns on his equity since Neil stopped paying in 2009; and (3) an accounting of the current financial state of the nursing homes.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

With one exception, set forth below, summary judgment is denied. The court cannot determine, with any degree of reasonable certainty, what happened.[4] Questions exist as to

[4] Defendants also proffer erroneous arguments about why Retter's claims are legally defective. The statute of frauds argument fails because there are writings for both nursing homes, and, even if there were no writings, "[t]he statute of frauds does not render void oral joint venture agreements to deal in real property." *Malaty v Malaty*, 95 AD3d 961, 962 (2d Dept 2012). Moreover, in his February 23, 2009 email, Neil seems to acknowledge that Retter owns equity in Heritage. Questions of fact exist that cannot be resolved on a summary judgment motion.

whether Retter has equity in the nursing homes,[5] how much Retter is owed, and what happed with the nursing homes' finances since 2009.[6]

That being said, the unjust enrichment claim is dismissed as duplicative. Retter's claims with respect to both nursing homes are governed by contracts. With respect to MAM, there is a signed, written agreement. With respect to Heritage, the emails evidence an agreement, though the parties dispute whether the agreement was for a loan or an equity grant. In either case, since the parties' rights are govern by contract, an unjust enrichment claim cannot be maintained. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). Accordingly, it is

ORDERED that the parties' motion and cross-motion for summary judgment are denied, except as to Retter's unjust enrichment claim, which is dismissed as duplicative; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on August 14, 2014 at 11:30 in the forenoon.

Dated: August 5, 2014

ENTER:

J.S.C.

[5] The distinction between the real estate and management companies also is unclear. A full factual record is necessary for a trier of fact to understand how such entities controlled the nursing homes (e.g. whether they actually observed corporate formalities or whether each nursing home was one business venture in which Retter might have equity).

[6] For instance, Retter claims that Neil improperly diverted money from the homes to various family members. If this occurred and if Retter proves the existence of a joint venue, such defalcations would constitute a breach of fiduciary duty.