

<b>Kolanu Partners, LLC v Becker</b>
2015 NY Slip Op 30070(U)
January 14, 2015
Supreme Court, New York County
Docket Number: 157274/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
KOLANU PARTNERS, LLC,

Plaintiff,

Index No. 157274/13

-against-

**DECISION/ORDER**

RONNY BECKER,

Defendant.

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Kolanu Partners, LLC (“Kolanu”) commenced the instant action against defendant Ronny Becker seeking to recover monies allegedly owed to it pursuant to certain agreements between them. Kolanu and Daniel Perla, a counterclaim defendant and Kolanu’s managing agent (hereinafter referred to as the “moving parties”), now move for an Order pursuant to CPLR § 3211 dismissing all of the counterclaims asserted against them by Mr. Becker. For the reasons set forth below, the motion is granted in part and denied in part.

The relevant facts are as follows. Kolanu commenced the instant action with the service of a Summons together with a Notice of Motion for Summary Judgment in Lieu of Complaint and supporting affidavit of Mr. Perla against Mr. Becker to recover the principal amount of \$45,754.95, with interest thereon and attorneys’ fees pursuant to certain agreements between the parties. In a decision dated February 7, 2014, this court denied Kolanu’s motion on the ground

that it was “not based upon an instrument for the payment of money only” and directed Kolanu to serve a complaint on Mr. Becker who was to answer the complaint within twenty days of receipt.

On or about February 27, 2014, Kolanu served Mr. Becker with a complaint asserting causes of action for breach of contract, unjust enrichment and alleging an equitable lien. The complaint bases such causes of action on the following allegations. Mr. Becker is the current owner of unit Penthouse D (the “Unit”) in the condominium building located at 191-121 E. 23<sup>rd</sup> Street, New York, New York (the “Condominium” or the “building”). Kolanu was the developer and sponsor of the Condominium. The Condominium is an unincorporated association made up of unit owners, formed pursuant to an offering plan filed with the Attorney General of the State of New York (the “Offering Plan”) on or about January 18, 2005. On or about April 21, 2003, while the Condominium was being constructed, Kolanu, as sponsor, initiated the process of obtaining a partial tax abatement pursuant to § 421-a of New York’s Real Property Tax Law (“RPTL”) for the Condominium. Pursuant to the Offering Plan, Kolanu was to expend its own money to obtain the tax abatement. However, Part I, ¶ 20 of the Offering Plan provided that: “[i]n the event Sponsor’s application for a partial abatement from real estate taxes is granted, all Residential Unit Owners shall be required to reimburse Sponsor for all Sponsor’s costs in obtaining such abatement.” The parties do not dispute that on or about January 7, 2007, the § 421-a partial tax abatement was granted with an effective date of July 1, 2006. The complaint further alleges that defendant, as a Unit Owner, has breached his obligation under the Offering Plan, Condominium’s By-Laws and the Purchase Agreement by failing to pay his pro-rata share to reimburse plaintiff for the costs it incurred in obtaining the partial tax abatement.

Subsequent to the service of the complaint, counsel for Mr. Becker withdrew and new counsel appeared. On or about June 12, 2014, Mr. Becker filed an answer and asserted six

counterclaims, five for breach of contract and one demanding an accounting, against Kolanu and Mr. Perla individually. Mr. Becker bases said counterclaims on the following allegations. Mr. Becker alleges that he located the real estate project on East 23<sup>rd</sup> Street (the "Project") to be developed by Kolanu and that he coordinated the transaction with Mr. Perla and provided additional services in exchange for an agreed-upon fee and an interest in the profits of the Project in addition to a bonus. Specifically, Mr. Becker's answer alleges that he, Kolanu and Mr. Perla entered into an agreement whereby Mr. Becker would receive a flat fee equal to \$3,000,000.00 plus fifty percent of the income, receipts, benefits, distributions and profits attributable to Mr. Perla for Mr. Becker's services on the Project, an accounting to verify Kolanu's income and expenses and Mr. Perla's income, receipts, benefits, distributions and profits and an additional bonus of \$3,000,000.00 for his services. Mr. Becker further alleges that he fully performed all services according to the agreement and that the Project has since been completed. Mr. Becker alleges that prior to receiving any distribution of the income, receipts, benefits, distributions and profits from the Project, Mr. Perla complained to him that another investor in the Project had taken too much money from him and that Mr. Becker should accept a lower amount. Thus, Mr. Becker alleges that there was a modification of the agreement whereby he accepted a reduction of his fees to the flat \$3,000,000.00 fee plus 40% of all of income, receipts, benefits, distributions and profits attributable to Mr. Perla from the Project plus the \$3,000,000.00 bonus. Kolanu and Mr. Perla now move for an Order pursuant to CPLR § 3211 dismissing the counterclaims asserted against them.

As an initial matter, that portion of the moving parties' motion for an Order dismissing the counterclaims against Mr. Perla on the ground that Mr. Becker improperly asserted said counterclaims against him is denied. Specifically, the moving parties assert that the

counterclaims against Mr. Perla are improper because Mr. Becker failed to pay the required fee to the county clerk when filing his summons and answer with counterclaims against Mr. Perla, as he was not a party to the action. Pursuant to CPLR § 3019(a), “[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.” Further, pursuant to CPLR § 3019(d), “[w]here a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim. Such defendant shall serve a reply or answer as if he or she were originally a party.” Here, this court finds that Mr. Becker properly filed his summons and answer containing the counterclaims against Mr. Perla as CPLR § 3019 does not require that a fee be paid to the county clerk along with such filing. The moving parties’ assertion that because CPLR § 3019 is silent as to whether a fee is required, this court should look to the requirements of CPLR § 1007, which addresses the procedure for commencing a third-party action and requires the payment of a fee, is without merit as they have failed to cite any authority for such assertion.

That portion of the moving parties’ motion for an Order dismissing Mr. Becker’s first and fifth counterclaims against them on the ground that they are barred by the statute of limitations is denied. Mr. Becker’s first counterclaim alleges a breach of contract action against Kolanu and Mr. Perla and seeks to collect his \$3,000,000.00 flat fee plus interest and attorney’s fees. Mr. Becker’s fifth counterclaim alleges a breach of contract action against Kolanu and Mr. Perla and seeks to collect his \$3,000,000.00 bonus plus interest and attorney’s fees. “A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the

statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired.” *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dept 2007). A party has six years to commence an action for breach of contract. See CPLR § 213(2). “In New York, a breach of contract cause of action accrues at the time of the breach.” *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). Here, the moving parties have failed to meet their burden of establishing that the time in which to commence an action for breach of contract to collect Mr. Becker’s fee and bonus has expired. The moving parties assert that Mr. Becker’s time to commence a breach of contract action to collect his fee and bonus started to run on or before January 6, 2007, the date of a letter sent by Kolanu to Kolanu’s investors, in which Kolanu reported to the investors the agreement to pay Mr. Becker his fee, a percentage of the profits and an additional amount as a bonus as a result of the services rendered by Mr. Becker. However, the letter does not in any way establish that January 6, 2007 is the date said breach of contract occurred or that the breach occurred before the date of the letter. The letter states, in pertinent part, that

the Company entered into a compensation agreement with Mr. Ron Becker P.E., for his service as the Company’s Owner Representative, and for his successful efforts in obtaining the land lease and the additional development rights that significantly increased the Company’s profit. Mr. Becker’s compensation was based upon the net profit earned by the Company from the complete sellout of the Project. Based upon the projected profit to be derived from the Project, as projected in the Confidential Offering Memorandum, Mr. Becker’s compensation was projected to be \$3,000,000. However, per the compensation agreement, and because of the previously unanticipated high level of profit attained by the Company, Mr. Becker will also be entitled to receive a bonus of \$1,500,000 - \$3,000,000. It is projected that Mr. Becker will receive a bonus of \$2,000,000.

The letter does not specify the date on which Mr. Becker was to be paid. Additionally, it is undisputed that at the time the letter was sent, numerous units in the building had yet to be sold and thus, a “complete sellout of the Project” had not yet occurred. Moreover, it is undisputed that the last unit in the building was not sold until 2010, at which point the Project was completely sold out and the profits from the Project could be ascertainable. The letter makes clear that the Project was still ongoing and that the money due Mr. Becker, demanded in the counterclaims, was still in the “will be paid” and “projected” stage. Thus, as the moving parties have failed to establish that the time in which to commence an action for breach of contract to collect Mr. Becker’s fee and bonus has expired, that portion of their motion to dismiss the first and fifth counterclaims on that ground is denied.

That portion of the moving parties’ motion for an Order dismissing Mr. Becker’s fourth counterclaim against Mr. Perla on the ground that there is another action pending between the parties is denied. CPLR § 3211(a)(4) provides for the dismissal of an action or a cause of action where another action is pending between the same parties for the same cause of action. Mr. Becker’s fourth counterclaim alleges breach of contract and seeks to collect \$800,000.00 plus interest and attorney’s fees. Specifically, the fourth counterclaim alleges that at the conclusion of the Project, Mr. Perla and Kolanu received approximately \$26,842,000.00 in income, receipts, benefits, distributions and profits from the Project and that as a result, Mr. Becker was owed 40% of said amount as and for his part of his fees, in the amount of \$10,736,800.00. The fourth counterclaim further alleges that Mr. Perla unilaterally diverted all but \$800,000.00 of Mr. Becker’s fees to Mr. Perla’s associated entities and loans including, but not limited to, projects known as Green Street, SOHO and SOHO DR, a development in the Dominican Republic. The

fourth counterclaim specifies that “[t]he diversion of all but approximately \$800,000.00 of BECKER’s 40% in fees by PERLA is the subject of another pending action and are not claimed herein.”

Here, the moving parties have failed to establish that the fourth counterclaim must be dismissed against Mr. Perla on the ground that there is another action pending between the same parties for the same cause of action. It is undisputed that in May 2013, Mr. Becker, along with six other plaintiffs, commenced an action in Supreme Court, New York County against Mr. Perla and six other defendants, not including Kolanu, alleging causes of action for an accounting, conversion, breach of fiduciary duty, rescission, fraud and misrepresentation, constructive fraud, negligence, constructive trust, unjust enrichment, money had and received, breach of the covenant of good faith and fair dealing and breach of contract based on a certain real estate investment in the Dominican Republic (the “DR Action”). However, the counterclaims in this action all involve the Project, the work performed for that Project by Mr. Becker and any money allegedly owed to Mr. Becker based on said work and have absolutely no connection to the claims made by Mr. Becker in the DR Action for misappropriation of funds. Indeed, Mr. Becker’s answer specifically states that the DR Action involves the misappropriation of funds *other* than the \$800,000 he is seeking in his fourth counterclaim. It is undisputed that the only similar subject matter between the instant action and the DR Action is that Mr. Perla allegedly used one of the bank accounts used for the Project for some period of time in the collection of the investment funds from the DR Action plaintiffs. Thus, the fact that Mr. Becker has another action pending against Mr. Perla for claims arising out of an unrelated investment project is immaterial and is insufficient as a basis for dismissal of the fourth counterclaim pursuant to

CPLR § 3211(a)(4).

That portion of the moving parties' motion for an Order dismissing Mr. Becker's counterclaims on the ground that they are barred by the Statute of Frauds is also denied. As an initial matter, the moving parties' motion to dismiss Mr. Becker's counterclaims on the ground that they violate General Obligations Law ("GOL") § 5-701(a)(2) is denied. Pursuant to GOL § 5-701(a)(2),

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

2. Is a special promise to answer for the debt, default or miscarriage of another person.

In the instant action, Mr. Becker's answer alleges that he entered into the agreement at issue with both Mr. Perla *and* Kolanu for the relief he seeks and does not allege, as suggested by the moving parties, that liability against either Kolanu or Mr. Perla is premised upon a special promise to answer for the debt, default or miscarriage of Kolanu or Mr. Perla to provide Mr. Becker with the relief he alleges he is owed.

Additionally, the moving parties' motion to dismiss Mr. Becker's counterclaims against Kolanu on the ground that they violate GOL § 5-701(a)(10) is denied. Pursuant to GOL § 5-701(a)(10),

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange,

renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction....

In the instant action, Mr. Becker's counterclaims allege that he entered into the agreement at issue with Mr. Perla and Kolanu in exchange for services, which included "locat[ing] a real estate project on East 23<sup>rd</sup> Street developed by Kolanu...coordinat[ing] the transaction with PERLA and provid[ing] additional services...." Based solely on the allegations in the answer, which is all this court can look to on a motion to dismiss, this court cannot determine that Mr. Becker's counterclaims are barred by GOL § 5-701(a)(10) as it is not clear whether Mr. Becker was being compensated for "negotiating" for the purchase, sale, exchange, renting or leasing of the real estate on which the Condominium was built or for other services, which would not be covered by the GOL.

Further, the moving parties' motion to dismiss Mr. Becker's counterclaims against Mr. Perla on the ground that they violate GOL § 5-701(a)(1) is denied. Pursuant to GOL § 5-701(a)(1),

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof....

"The statute encompasses only those agreements which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year.' It matters not that completion of

performance within one year may be unlikely or improbable.” *Foster v. Kovner*, 44 A.D.3d 23, 26 (1<sup>st</sup> Dept 2007) (citing *D & N Boening v. Kirsch*, 63 N.Y.2d 449 (1984)). Based solely on the allegations in the answer, which is all this court can look to on a motion to dismiss, this court cannot determine that Mr. Becker’s counterclaims are barred by GOL § 5-701(a)(1) as it is not clear whether the terms of the agreement could not have been performed within one year from its making. The counterclaims do not allege when the agreement was entered into and do not allege the date by which Mr. Becker’s services had to be completed or when he had to be paid for his services under said agreement.

To the extent the moving parties seek to dismiss Mr. Becker’s sixth counterclaim for an accounting on the ground that no fiduciary relationship exists between the parties, such request is denied. Here, the existence of a fiduciary relationship between the parties is immaterial as Mr. Becker’s demand for an accounting is not based on said relationship but rather on the agreement between the parties which allegedly entitles Mr. Becker to said accounting.

To the extent the moving parties’ seek to dismiss Mr. Becker’s second, third, fourth and sixth counterclaims on the ground that they are barred by the statute of limitations, such request is denied as they have failed to put forth a basis for such relief and have failed to brief said arguments in their moving papers.

However, that portion of the moving parties’ motion for an Order dismissing Mr. Becker’s counterclaims seeking attorney’s fees is granted. “Under the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by an agreement between the parties, statute or court rule.” *Hooper Associates, LTD. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989). Here, Mr. Becker’s

