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| Goldstein v FIA 192 E56 Holdings, LLC |
| 2016 NY Slip Op 30842(U) |
| April 26, 2016 |
| Supreme Court, Kings County |
| Docket Number: 507824/2015 |
| Judge: Wavny Toussaint |
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of April, 2016.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

SHLOIME GOLDSTEIN,

Plaintiff,

- against -

Index No. 507824/15

FIA 192 E56 HOLDINGS, LLC,

Defendant.

-----X

The following papers numbered 1 to 7 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

_____ 1-5

Opposing Affidavits (Affirmations) _____

_____ 6-7

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, defendant FIA 192 E56 Holdings, LLC, moves for an order: (1) pursuant to CPLR 3212, granting defendant summary judgment dismissing the complaint; (2) pursuant to CPLR 6514 (a) or (b), cancelling the notice of pendency recorded on June 24, 2015 against defendant's property located at 192 East 56th Street, Brooklyn, New York, Block 4703, Lot 11 (the Premises); (3) pursuant to CPLR 6514 (c), directing plaintiff Shloime Goldstein to pay to defendant the cost and and expenses incurred by defendant

occasioned by the filing and cancellation of the notice of pendency, and the costs incurred in defending this action; and (4) pursuant to 22 NYCRR 130.1.1, imposing sanctions on plaintiff's counsel for commencing a frivolous action and improperly filing the notice of pendency.

The portion of defendant's motion for summary judgment is granted and the complaint is dismissed. The portion of the defendant's motion requesting the cancellation of the notice of pendency is granted to the extent that, provided no timely appeal is taken and a stay granted, the clerk is directed to cancel the notice of pendency 30 days from the date a copy of this order is served on plaintiff as shown by a proof of service of this order with notice of entry. Plaintiff's motion is otherwise denied.

In this action, plaintiff seeks the imposition of a constructive trust over the Premises owned by defendant. In the complaint, plaintiff asserts that "a representative of Defendant promised to convey all of defendant's interest in the subject premises to Plaintiff for the sum of \$1,800,000 if Plaintiff would transfer a 'good faith' deposit with respect to the purchase of the subject premises to [defendant's] counsel Robert Rimberg, Esq., Goldberg & Rimberg."¹ According to plaintiff, a confidential relationship was created when plaintiff transferred a deposit of \$291,684.46 to Rimberg's IOLTA trust account and caused an

¹ In plaintiff's opposition papers, plaintiff concedes that the offering price was \$2,500,000, not \$1,800,000. In addition, although in some paragraphs of the complaint plaintiff refers to Rimberg as plaintiff's counsel, other paragraphs of the complaint and plaintiff's opposition papers make clear that Rimberg represented defendant during the course of the negotiations relating to plaintiff's attempted purchase of the premises.

additional \$35,000 to be paid to defendant. Plaintiff further alleges that Rimberg improperly released this \$325,684.46 to David Goldwasser, a member of defendant, on or around June 15, 2015, and thereafter, defendant attempted to return this deposit to plaintiff.

In moving for summary judgment, defendant has submitted an affidavit from David Kornitzer, who asserts that, in August 2014, he entered into an option to purchase the Premises from defendant's predecessor in interest, East Flatbush Associates, LLC (East Flatbush). This option agreement required the payment of \$1,500,000 and the payment of other obligations such as taxes, legal fees and outstanding liens by February 6, 2015. Kornitzer asserts that, in January 2015, he reached an oral agreement with plaintiff under which plaintiff would purchase the Property from him for \$2,500,000, on the condition that plaintiff provide him a \$900,000 non-refundable payment by February 6, 2015, in order to allow Kornitzer to meet his obligations under his option agreement with East Flatbush. When it appeared that plaintiff would be unable to meet the February 6, 2015 option deadline, Kornitzer obtained an extension on the deadline from defendant to March 13, 2015. While Kornitzer concedes that plaintiff, on or around February 19, 2015, wired \$93,000 to Goldberg & Rimberg's trust account and wired another \$198,684 to this trust account on February 27, 2015, plaintiff did not pay the remainder of the \$900,000 to the trust account by March 13, 2015, and Kornitzer advised defendant that he did not have the funds to pay the balance of the funds due under the option agreement. Defendant thereafter advised Kornitzer that his option had expired.

Defendant also submits an affidavit from David Goldwasser, a member of defendant, who repeats Kornitzer's assertions about Kornitzer's option agreement with East Flatbush, and the extension he (Goldwasser) granted to Kornitzer to accommodate the sale agreement between Kornitzer and plaintiff. Goldwasser concedes that on or around February 27, 2015, he received \$291,394.46 from Rimberg, Kornitzer's counsel, as a portion of the payment due under Kornitzer's option agreement. As defendant did not receive the remainder of the \$900,000 due under the option agreement with Kornitzer, on March 15, 2015, defendant notified Kornitzer that the option had expired. At some point after April 17, 2015, Goldwasser learned that plaintiff's counsel had sent a letter to Rimberg demanding return of \$326,884, representing the \$291,384.46 wired to Rimberg's trust account and \$36,000 that was alleged to have been sent by check. In view of this letter, Goldwasser directed his counsel, Jeffrey Karp, to negotiate directly with plaintiff regarding a sale of the premises, but no final agreement was reached. Goldwasser thereafter had defendant return to Rimberg the \$291,684.46 it had received from him with instructions to wire it to plaintiff's counsel. In sum, Goldwasser denies ever reaching an agreement or contract with plaintiff to sell the Premises to plaintiff.

Plaintiff, in his own affidavit submitted in opposition, asserts that on or about February 16, 2015, he met with Kornitzer and a Mr. Koff² and that they agreed "on behalf" of the owner to convey defendant's interest in the Premises to plaintiff for \$2,500,000.

² It appears that Mr. Koff was an organizer/member of East Flatbush, defendant's predecessor in interest.

Plaintiff also essentially repeats the assertions made in the complaint regarding sending the wire transfer of \$291,684.46 and the check in the amount of \$35,000 to Rimberg and the release of those funds to defendant. Of note, however, nothing in the printouts of various e-mails attached as exhibits to the opposition papers, which were to and from Rimberg, plaintiff's counsel, and defendant's current counsel and which are dated from mid-April 2015 to July 2015, suggests that any final agreement was ever reached between the parties regarding the sale of the Premises.

In determining the motion, defendant's papers demonstrate, prima facie, that no agreement, oral or written, was ever reached between defendant and plaintiff regarding the sale and that the only agreement reached by plaintiff was his oral agreement to purchase from Kornitzer, who had the option to purchase the premises. While plaintiff in his opposition affidavit, asserts that Kornitzer and Koff were acting on defendant's behalf, plaintiff provides no evidentiary basis for this conclusory assertion. Indeed, plaintiff has pointed to no facts suggesting that Kornitzer and Koff were employees or agents of defendant or that defendant created an agency by estoppel by cloaking Kornitzer and Koff with apparent authority to act on its behalf in negotiating with plaintiff (*see 1911 Richmond Ave. Assoc., LLC v G.L.G. Capitol, LLC*, 90 AD3d 627, 627 [2d Dept 2011]; *ER Holdings, LLC v 122 W.P.R. Corp.*, 65 AD3d 1275, 1277 [2d Dept 2009]).

Even assuming that plaintiff's papers are sufficient to demonstrate a factual issue as whether he reached an oral agreement with defendant relating to the sale, defendant is still

entitled to the dismissal of the action. The court notes that plaintiff has evidently pled his action as one for the imposition of a constructive trust rather than as one for breach of contract because he never entered into a written contract with defendant, and without a writing, the statute of frauds bars enforcement of any agreement that may have been made relating to the conveyance of defendant's property to plaintiff (*see* General Obligation Law § 5-703 [1]; *Town of Oyster Bay v Doremus*, 94 AD3d 867, 868-869 [2d Dept 2012]; *Pinkava v Yurkiw*, 64 AD3d 690, 692 [2d Dept 2009]). Moreover, plaintiff cannot establish the partial performance exception to the statute of frauds (General Obligations Law § 5-703 [4]). In this regard, defendant's temporary holding or acceptance of the deposit money plaintiff transferred to Rimberg to be held as a deposit, standing alone, does not show partial performance in the absence of other acts, such as possession or possession and improvements (*see* *Bordeau v Oakley*, 185 AD2d 417, 419 [3d Dept 1992]; *Tikvah Realty, LLC v Schwartz*, 43 AD3d 909, 909 [2d Dept 2007]; *Carlton Ctr., LLC v Carlton Nursing Home*, 303 AD2d 706, 707 [2d Dept 2003]; *Papakostas v Harkins*, 168 AD2d 547, 548 [2d Dept 1990]; *Francesconi v Nutter*, 125 AD2d 363, 363-364 [2d Dept 1986]; *but see* *Clark Constr. Corp. v BLF Realty Holding Corp.*, 300 AD2d 49, 49 [1st Dept 2002]).

While the statute of frauds is not a defense to the constructive trust causes of action pled in the complaint (*see* *McGrath v Hilding*, 41 NY2d 625, 628-629 [1977]; *MacKenzie v Croce*, 54 AD3d 825, 827 [2d Dept 2008]), defendant has shown, *prima facie*, that plaintiff is not entitled to the imposition of a constructive trust. The requirements of a constructive

trust cause of action are: “(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment” (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

Here, defendant’s factual allegations establish, prima facie, that there was no fiduciary or confidential relationship between plaintiff and defendant. Namely, no such relationship generally arises in the context of an arms-length business relationship involving the sale and purchase of real property (see *Kain Dev., LLC v Kraus Props., LLC*, 130 AD3d 1229, 1234 [3d Dept 2015]; *Bennett v John*, 151 AD2d 711, 711 [2d Dept 1989]; see also *Chi Lo Liu v Radmin*, 106 AD3d 1042, 1043 [2d Dept 2013]). Plaintiff, in opposition, has failed to submit any facts suggesting that the relationship between plaintiff and defendant involved the high degree of trust and confidence that would give rise to a fiduciary or confidential relationship (see *Kain Dev., LLC*, 130 AD3d at 1234-1235; *Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1286 [3d Dept 2007]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]; *Johnston v DeHaan*, 37 AD2d 1028, 1029 [3d Dept 1971]).

Plaintiff attempts to overcome this failure by asserting that defendant, once it received plaintiff’s deposit funds that had been held by Rimberg, assumed a fiduciary obligation to plaintiff with respect to the entire deal. Plaintiff, however, has not, in other than conclusory terms, alleged facts suggesting that Rimberg agreed to hold the funds in escrow (*Ehrlich v Froelich*, 72 AD3d 1010, 1012 [2d Dept 2010]; *Sienna Capital Group, Inc. v Rosen*, 44 AD3d 742, 743 [2d Dept 2007]). To the extent that Rimberg may be found to have agreed

to hold the funds in escrow, and to the extent that the release of the funds by Rimberg may be found to have been unauthorized, the release of the funds involved a breach of Rimberg's contractual and fiduciary obligations as escrow agent (*see Baquerizo v Monasterio*, 90 AD3d 587, 587 [2d Dept 2011]; *Takayama v Schaefer*, 240 AD2d 21, 25 [2d Dept 1998]), and did not impose a fiduciary duty on defendant (*D'Ambrosio v Engel*, 292 AD2d 564, 565 [2d Dept 2002]; *cf. Rosenberg v Canetti & Troodler*, 309 AD2d 914, 914 [2d Dept 2003]; *Shapiro v Snow Becker Krauss, PC*, 208 AD2d 461, 461 [1st Dept 1994]).

Nor can plaintiff overcome these defects by asserting that, in effect, that the corporate veil of defendant must be pierced to attribute Rimberg's acts to defendant given plaintiff's assertion that Rimberg shares office space with defendant. The conclusory allegations regarding the sharing of office space do not raise a factual issue with respect to the piercing of the corporate veil (*see Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 587-588 [1st Dept 2011]; *see also TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009], *affd* 16 NY3d 775 [2011]). As such, plaintiff has failed to demonstrate the existence of a factual issue with respect to the confidential or fiduciary relationship requirement of a constructive trust cause of action (*see Kain Dev., LLC*, 130 AD3d at 1234; *Evans v Rosen*, 111 AD3d 459, 460 [1st Dept 2013]; *Bonteco v Goldman*, 103 AD2d 732, 733 [2d Dept 1984]).

Defendant is entitled to dismissal of the complaint as the only specific relief requested is the imposition of a constructive trust in plaintiff's favor over the Premises owned by defendant. To the extent that a cause of action for unjust enrichment with respect to the deposit funds must be found to have been pleaded since such a claim is a necessary element of the constructive trust cause of action (*see Kain Dev., LLC*, 130 AD3d at 1235), defendant has shown that it is still entitled to dismissal of the action.

In this regard, as conceded by plaintiff's counsel, defendant returned \$291,686.46, first to Rimberg, who then wired the \$291,686.46 to plaintiff. Plaintiff, through his counsel, refused to accept the return of this \$291,686.46, and plaintiff's counsel thereafter sent a check in that amount back to Rimberg along with a request that the money be held in Rimberg's IOLTA account pending a closing on this matter. In his affirmation in opposition, plaintiff's counsel concedes that this check was returned to him by Rimberg. As such, the only other issue relates to the additional \$35,000 check plaintiff alleges was transferred to defendant.

With respect to this check, Goldwasser only conceded that defendant received the \$291,686.46 from Rimberg, and specifically denied that FIA received any additional funds from plaintiff, Rimberg or Kornitzer. As such, Goldwasser has effectively denied that defendants had received the check or the funds from the check. The e-mails provided by plaintiff relating to the check include one dated February 25, 2015 from Kornitzer to plaintiff suggesting that the check at issue was to be made out to Rimberg and given to Kornitzer to

deliver to Rimberg (Plaintiff's Exhibit 12). The copy of the cashed check that is attached to a copy of a April 27, 2015 e-mail from plaintiff's counsel to Rimberg, however, shows that it was not made out to Rimberg and was not made out to defendant (Plaintiff's Exhibit 18).³ While Rimberg states in an e-mail, dated April 24, 2015, from him to plaintiff's counsel and others, that credit would be given for the check (Plaintiff's Exhibit 16), nothing in this agreement to give credit suggests that defendant had actually received the funds relating to the check. Accordingly, plaintiff's papers fail to show a factual issue as to whether defendant improperly retained the \$35,000 from the check at issue (*cf. Kain Dev., LLC*, 130 AD3d at 1235; *3801 Review Realty LLC v Review Realty Co. LLC*, 111 AD3d 509, 510 [1st Dept 2013]).

Since the plaintiff has not offered anything beyond mere hope and speculation that further discovery might lead to relevant evidence sufficient to defeat the motion for summary judgment, the court rejects plaintiff's argument that the motions for summary judgment are premature (*see Leak v. Hybrid Cars. Ltd.*, 132 AD3d 958, 959 [2d Dept 2015]; *Williams v. Spencer-Hall*, 113 AD3d 759, 760–761 [2d Dept 2014]).

Given the complaint has been dismissed, barring a timely appeal and the grant of a stay, defendant is entitled to cancellation of the notice of pendency 30 days after service of this order on plaintiff with notice of entry (CPLR 6514 [a] [a court must order cancellation when the time to appeal from a final judgment is filed]; *Jonestown Place Corp. v 153 West*

³ While the name of the payee on the check is not entirely decipherable, it is clearly not Rimberg or defendant.

33rd St. Corp., 74 AD2d 525, 526 [1st Dept 1980]; 184 Joralemon LLC v Brooklyn Law School, 31 Misc 3d 1201 [A], 2011 NY Slip Op 50464 *4-5 [Sup Ct, Kings County 2011]). As the court does not find that plaintiff's claims were made with bad faith for purposes of CPLR 6514 (c), defendant is not entitled to the immediate cancellation of the notice of pendency, or the recovery of costs and expenses under that section (see Town of Oyster Bay v Doremus, 94 AD3d 867, 870 [2d Dept 2012]; Jonestown Place Corp., 74 AD2d at 526; 184 Joralemon LLC, 2011 NY Slip Op 50464 * 5). For essentially same reasons, this court finds that plaintiff is not entitled to the recovery of sanctions and/or costs pursuant to 22 NYCRR 130-1.1 (c) (see Global Events LLC v Manhattan Ctr. Studios, Inc., 123 AD3d 449, 450 [1st Dept 2014]; Stone Mtn. Holdings, LLC v Spitzer, 119 AD3d 548, 550-551 [2d Dept 2014]).

Accordingly, the motion of defendant for summary judgment is granted and the Kings County Clerk is directed to cancel the notice of pendency thirty days from the date a copy of the order is served upon plaintiff.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

Hon. Wavny Toussaint
J.S.C.

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

2016 MAY -6 AM 10:05
KINGS COUNTY CLERK
FILED