

REP 35 Engel, LLC, v Holber Assoc., L.P.

2016 NY Slip Op 32684(U)

March 8, 2016

Supreme Court, Nassau County

Docket Number: 017604/11

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

REP 35 ENGEL, LLC,

Plaintiff,

-against-

HOLBER ASSOCIATES, L.P. and WELLS
FARGO BANK MINNESOTA, N.A., As
Trustee for the Registered Holders of
SALOMON BROTHERS MORTGAGE
SECURITIES VII, INC., COMMERCIAL
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2002-KEY2,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 017604/11

MOTION DATE: Feb. 8, 2016
Motion Sequence # 004

The following papers read on this motion:

Order to Show Cause..... X
Affidavit in Support..... X
Affirmation in Opposition..... X
Memorandum of Law..... X

Motion by defendant Holber Associates, LP to strike plaintiff's jury demand is **granted**. Motion by defendant to preclude plaintiff from offering evidence of part performance is **denied**.

This is an action for breach of an oral joint venture agreement. Defendant Holber Associates, LP is the owner of commercial property located at 35 Engel Street in Hicksville. On December 1, 1997, Holber entered into a net ground lease with Reckson Operating Partnership, LP for a 20 year term. The lease is a triple net lease, requiring the tenant to pay all expenses, including real estate taxes, insurance, repair, and maintenance. On November 12, 2003, Reckson assigned the ground lease to plaintiff REP 35 Engel LLC.

Plaintiff alleges that in January 2011 it entered into an oral joint venture agreement with Holber Associates. On January 13, 2011, plaintiff sent Holber Associates a letter of intent setting forth the terms of the joint venture agreement. The letter states that Holber and REP 35 shall each own a 50 % interest in the property, REP shall be responsible for the redevelopment and operation of the property, Holber shall be entitled to the net proceeds of all refinancing up to \$3.5 million, and net operating income shall be shared on a 50-50 basis. The letter of intent states that it is not a "binding agreement" and that the agreement of the parties shall be "incorporated into a mutually acceptable joint venture agreement."

A formal joint venture agreement was never executed. However, plaintiff alleges that the parties operated pursuant to the terms of the joint venture agreement for almost all of 2011. In December 2011, Holber notified REP 35 that it expected the tenant to pay the real estate taxes and mortgage payments in accordance with the terms of the ground lease. REP 35 objected to having to pay these items on the ground that the joint venture agreement provided that expenses would be shared equally by the parties. On December 8, 2011, Holber sent REP 35 a notice of default stating the rent outstanding was \$283,392.98, accrued since October 1, 2010, and the tenant had ten days to cure its default.

Plaintiff commenced this action on December 16, 2011. In the first cause of action in the amended complaint, plaintiff seeks an injunction restraining defendants from declaring the tenant in default under the ground lease. In the second cause of action, plaintiff seeks specific performance of the joint venture agreement, including an order directing Holber to pay its share of real estate taxes and mortgage payments. The third cause of action is for damages for breach of the joint venture agreement. The fourth cause of action is for unjust enrichment based upon plaintiff's services in managing and marketing the property. The fifth cause of action sounds in promissory estoppel, based upon defendant's failure to pay real estate taxes and mortgage payments. On January 23, 2012, plaintiff discontinued the action without prejudice as to defendant Wells Fargo Bank Minnesota, NA.

By order dated April 16, 2012, the court granted defendant Holber Associates' motion to dismiss the first cause of action for an injunction enjoining defendants from declaring

plaintiff in default under the lease and the second cause of action for specific enforcement of the joint venture agreement based on the statute of frauds. The statute of frauds does not render void oral joint venture agreements to deal in real property because the interest of each partner in a partnership is deemed personalty (*Plumitallo v Hudson Atlantic Land Co.*, 74 AD3d 1038 [2d Dept 2010]). Nevertheless, a plaintiff suing for damages on an oral joint venture agreement cannot acquire an interest in real property (Id). Since the joint venture agreement was never reduced to writing, plaintiff could not acquire any interest in the property or prevent defendant from evicting plaintiff for non-payment of rent or other charges.

By order dated December 17, 2014, the court denied defendant Holbert's motion for summary judgment dismissing the balance of plaintiff's claims.

The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e. a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*Hamlet at Willow Creek Dev. Co. v Northeast Land Dev. Corp.*, 64 AD3d 85, 103 [2d Dept 2009]).

The provision in the January 2011 agreement that the parties shall each own a 50 % interest in the property manifests an intent to be associated as joint venturers and joint control over the enterprise. Holber would contribute property to the joint venture and REP would contribute effort and skill to develop and operate the property. The provision as to the distribution of net proceeds of refinancing, and the sharing of net operating income, provided for the sharing of profits. Thus, defendant had not established prima facie that there was no joint venture agreement.

Meanwhile, on August 27, 2014, plaintiff filed a note of issue demanding a jury trial.

By order to show cause dated January 28, 2016, defendant Holber moves to strike plaintiff's jury demand. Additionally, defendant moves to preclude plaintiff from offering any evidence of part performance.

The joinder by plaintiff of legal and equitable claims arising from the same transaction results in a waiver of the right to trial by jury with respect to the legal claims (*Horizon Asset Management v Duffy*, 106 AD3d 594 [1st Dept 2013]). Plaintiff's causes of action for an injunction, specific performance, and unjust enrichment are all equitable claims. By joining

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those equitable claims with its legal claim, plaintiff waived its right to a jury trial. Defendant's motion to strike plaintiff's jury demand is **granted**.

An oral joint venture agreements to deal in real property is not within the statute of frauds because the interest of each partner in a partnership is deemed personalty (*Plumitallo v Hudson Atlantic Land Co.*, 74 AD3d 1038 [2d Dept 2010]). Nevertheless, plaintiff may offer evidence of "part performance" to show that the parties reached the stage of a joint venture agreement, that defendant has been unjustly enriched, and that plaintiff relied on defendant's promise of a joint venture to plaintiff's detriment.

The line of cases upon which defendant relies are inapplicable because they deal with contracts to convey an interest in real property, rather than with a joint venture agreement (*Sparks Assoc. v North Hills Holding Co.*, 94 AD3d 864 [2d Dept 2012]). Defendant's motion to preclude plaintiff from offering evidence of part performance is **denied**.

So ordered.

Dated MAR 08 2016


J.S.C.

ENTERED

MAR 10 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE