

Slabakis v Schik

2017 NY Slip Op 31869(U)

August 30, 2017

Supreme Court, New York County

Docket Number: 651986/2015

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

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ANGELO SLABAKIS,

Index No.: 651986/2015

Plaintiff,

DECISION & ORDER

-against-

WALTER SCHIK, 890 PARK REALTY CORPORATION,
890 PARK LLC, JOSEPH SCHIK, LAKE REALTY
MANAGEMENT LLC, XYZ ENTITIES 1 through 10,
JOHN DOES 1 through 10, and JANE ROES 1 through 10,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with its decision on defendants’ motion to dismiss plaintiff’s original complaint, which is set forth in an order dated August 19, 2016. *See* Dkt. 108 (the Prior Decision).¹ The Prior Decision explains that while plaintiff might be capable of pleading a claim for breach of an alleged joint venture agreement, plaintiff was required to file an amended pleading due to myriad gaps in his contentions (some of which suggest illegal conduct pertinent to defendants’ unclear hands defense).

Plaintiff filed his amended complaint (the AC) on September 29, 2016. *See* Dkt. 119. It asserts seven causes of action: (1) breach of contract (i.e., the alleged oral agreement), asserted against Walter;² (2) breach of fiduciary duty, asserted against Walter; (3) fraud, asserted against

¹ References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. All capitalized terms not defined herein have the same meaning as in the Prior Decision.

² While the “wherefore” clause following this cause of action indicates that relief also is sought from the corporate and John Doe defendants, the alleged oral agreement was only between plaintiff and Walter. The AC only alleges that Walter, and not any of the other defendants, breached the alleged joint venture agreement. Indeed, the AC does not assert a veil-piercing claim. Likewise, certain of the other causes of action suffer from this problem (e.g., the second cause of action for breach of fiduciary duty). In the above recitation of the defendants against

Walter; (4) tortious interference with contract, asserted against Joseph; (5) specific performance, asserted against Walter; (6) constructive trust as to the Building and all sale proceeds; and (7) promissory estoppel, asserted against Walter.

On November 23, 2016, defendants filed the instant motion to dismiss the AC. The court reserved on the motion after oral argument. *See* Dkt. 159 (8/3/17 Tr.). For the reasons that follow, defendants' motion is granted in part and denied in part.

The basic facts pleaded in the AC mirror those alleged in the original complaint. They are discussed in the Prior Decision and, therefore, are not repeated here. However, the terms of the alleged joint venture agreement differ from those alleged in the original complaint.³ In the AC, plaintiff alleges that it was agreed that:

[Walter] would advance \$1,500,000 in order to acquire the UBS note and mortgage in full, conclude the foreclosure and acquire title to the [Building]; [Walter] would be repaid the \$1,500,000 with interest at a 12% annual rate either by Plaintiff paying him within two years, or receiving payment from the proceeds of sale, if the [Building] were sold within the first two years from the date of the advance by [Walter], or at [Walter's] option, upon the expiration of two years without sale or repayment, [Walter] would rely only on the sale of the [Building] for repayment from his share of the proceeds realized from the development and sale of the [Building].

whom the various causes of action are asserted, the court lists only those defendants against whom such claims are logically asserted. Plaintiff is admonished for this sloppy pleading, especially given the Prior Decision. *See, e.g., id.* at 3 n.4 (admonishing plaintiff for misleading conflation of the individuals and their companies); *see also id.* at 4 n.6 (noting fraud plaintiff committed on the tenants he claimed to have moved to other buildings). In that regard, the court further admonishes plaintiff for baselessly naming as defendants all parties other than Walter and Joseph, as such defendants are not alleged to have engaged in any substantive wrongdoing. That said, defendants also are admonished for ignoring the court's explicit holding in the Prior Decision that Walter's detailed factual affirmation cannot be considered on a motion to dismiss. *See id.* at 1 n.2. Yet, Walter submitted a detailed **30-page** affirmation (Dkt. 153), which the court does not consider. *See id.*, citing *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 (1st Dept 2014).

³ Contrary to the defendants' arguments, this is not an absolute bar to plaintiff's claim, but merely creates an issue of credibility for trial. That said, it is troubling that plaintiff's allegations about the alleged material terms of the parties' agreement have changed.

AC ¶ 20. Additionally, “Plaintiff and [Walter] further agreed that profits and losses of their venture would be shared equally upon sale and final accounting.” ¶ 21. Moreover, “[Walter] agreed to contribute title to the [Building] to the venture, and agreed to pay maintenance and taxes and related carrying costs of the venture, including assisting with vacating tenants.” ¶ 22. “Plaintiff also contributed time, effort and expense to vacate the [Building], which would be necessary in order to fully develop the [Building] and realize the goals of the joint venture.” ¶ 24. While the AC sets forth other terms of the parties’ alleged agreement [*see, e.g.*, ¶ 26 (“the proceeds of sale would be used to satisfy expenses of each party for vacating and relocating tenants”)], discussion of such detail is not necessary for the purposes of this motion.

The court is now convinced that plaintiff has stated a claim for breach of an alleged joint venture agreement. “The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses.” *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 (1st Dept 2003).⁴ “The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit” *Hamlet at Willow Creek Dev. Co. v N.E. Land Dev. Corp.*, 64 AD3d 85, 104 (2d Dept 2009), quoting *Steinbeck v Gerosa*, 4 NY2d 302, 317 (1958). If a joint venture exists,

⁴ As discussed in the Prior Decision, “an oral joint venture agreement regarding real estate is not barred by the statute of frauds.” *See id.* at 7 (collecting cases).

“plaintiff’s status as an alleged partner in a joint venture gives rise to a fiduciary relationship which allows the imposition of a constructive trust.” *Plumitallo v Hudson Atl. Land Co.*, 74 AD3d 1038, 1039 (2d Dept 2010).⁵

Regardless of whether the alleged agreement amounts to a joint venture, it is indisputable that plaintiff has pleaded the existence of an oral agreement with Walter regarding the Building. There is no reasonable interpretation of the Prior Decision that permits defendants to conclude otherwise. The court declines to address arguments raised and rejected on the prior motion, such as whether plaintiff sufficiently pleaded the terms of the alleged agreement with reasonable certainty. Simply put, plaintiff alleges an oral agreement with Walter, which Walter cannot defeat with conclusory denials on a motion to dismiss (nor, as noted earlier, can he procure dismissal based on averments in an affirmation). Reading the AC liberally and affording plaintiff every favorable inference – which the court must on this motion to dismiss [*see Chanko v Am. Broad. Cos.*, 27 NY3d 46, 56 (2016)] – it is impossible to conclude that the parties had no oral agreement. Even the limited evidence submitted on this motion shows that plaintiff was involved with the Building for years– a fact that suggests there was some agreement between the parties. The terms of that agreement shall be probed in discovery.

That said, defendants contend that the AC suffers from two omissions that supposedly are fatal to stating a claim for breach of a joint venture.

⁵ The issues of whether plaintiff has viable claims for breach of fiduciary duty, constructive trust, and an accounting rise and fall with the question of whether he has stated a claim for breach of the alleged joint venture agreement. Since the existence of the alleged joint venture is a question of fact that is not resolved on this motion, dismissal of these other three causes of action is not warranted at this juncture. It also is premature to decide whether specific performance is warranted, as a determination of the terms of the alleged agreement may dictate whether ordering specific performance is appropriate.

First, defendants contend that plaintiff has not pleaded an agreement to share losses. “An **indispensable essential** of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses.” *Steinbeck*, 4 NY2d at 317 (emphasis added). Moreover, “[a]n agreement to distribute the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks.” *Id.*

In the Prior Decision, the court held that “while Slabakis claims to have performed services for the parties’ joint venture, he does not explain how he satisfies an essential element – the sharing of losses.” *See id.* at 10, citing *Lerch v Ark Restoration & Design Ltd.*, 137 AD3d 637, 638 (1st Dept 2016) (“the agreement, as described by plaintiffs ... had no provision for the sharing of losses, and therefore was not one for a joint venture”). Plaintiff has now done so. In the AC, plaintiff alleges that he agreed to bear the risk of numerous types of losses. For instance, plaintiff alleges that he agreed to bear the cost of removing tenants, which, if unsuccessful, would result in plaintiff incurring direct out-of-pocket losses.⁶ Plaintiff also was loaned money by Walter, meaning that he incurred substantial financial liabilities in connection with his involvement with the Building. It is simply not the case that plaintiff stood to lose nothing if the alleged venture failed.

It should be noted that some First Department cases suggest that alleging an agreement to share losses is not always essential to pleading the existence of a joint venture if other facts

⁶ The truth and extent of such efforts is a factual matter that cannot be challenged on this motion to dismiss. Yet, it appears undisputed that plaintiff helped move tenants, albeit in a way that involved illegality. That plaintiff may have acted unlawfully does not, however, mean that he did not perform services for the alleged joint venture. By complaining about how plaintiff moved tenants, defendants implicitly concede that he did so. But for having some interest in the Building, plaintiff would lack the scienter to defraud.

strongly indicate the intent to enter into a joint venture and where “there was no reasonable expectation of losses.” *Don v Singer*, 92 AD3d 576, 577 (1st Dept 2012), citing *Cobblah v Katende*, 275 AD2d 637, 639 (1st Dept 2000).⁷ These cases appear at odds with the Court of Appeals’ statement in *Steinbeck* that an agreement to share losses is “indispensable” and “essential”. See *Williams v Forbes*, 175 AD2d 125, 126 (1st Dept 1991) (“Indispensable to the creation of a joint venture is a sharing in the profits and losses of the business.”). This court need not resolve this tension since, as discussed above, plaintiff has pleaded an agreement to share losses.

Indeed, at the pleading stage, if an alleged joint venture is otherwise alleged, courts have held that a loss sharing agreement may be implied. *P. F. G. Indus., Inc. v Tel-Glass, Inc.*, 49 AD2d 112, 114 (1st Dept 1975) (“The mere failure of plaintiffs to allege an agreement to share losses as well as profits is not fatal, if other elements essential to a joint venture are present.”), citing *Forman v Lumm*, 214 AD 579, 586 (1st Dept 1925) (“These parties were engaged in a joint business venture and the principles of the law of partnership apply. The profits were to be shared equally, and the losses must be shared on the same basis.”) (internal citation omitted); see *Penato v George*, 52 AD2d 939, 942 (1st Dept 1976) (“The law will imply an agreement to share losses.”); see also *Richbell*, 309 AD2d at 298 (“the intent of the parties, as one of the factors in determining whether a joint venture exists, may be express or *implied*. Giving plaintiffs the

⁷ While the investment in the Building turned out to be profitable, that was not something that could have been predicted with certainty at the time of the parties’ original alleged agreement. As the financial crisis of 2008 demonstrated, it is perilous to assume the value of real estate will perpetually increase. Moreover, given the need to induce all of the Building’s rent controlled tenants to vacate – a process that took more than a decade and could have taken much longer – the investment clearly entailed risk. Hence, the “no reasonable expectation of losses” exception does not apply.

benefit of every favorable inference, such intent may be implied from the totality of the conduct alleged here.”) (emphasis in original).

The court further rejects defendants’ argument that the alleged terms of the joint venture are “inherently incredible.” *See Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 (1st Dept 2016) (“[I]n considering a motion to dismiss ... the court must presume the facts pleaded to be true and must accord them every favorable inference. **However, factual allegations ... that consist of bare legal conclusions, or that are inherently incredible ..., are not entitled to such consideration.**” (emphasis added; internal citations and quotation marks omitted). While the court’s skepticism of certain of plaintiff’s allegations is manifest in the Prior Decision, the court does not believe plaintiff’s joint venture claim to be so outlandish to warrant pre-discovery dismissal. Although there are irregularities with how the parties came to acquire the Building from UBS, those facts deserve to see the light of day and shall be probed in discovery. Moreover, while the parties’ credibility may be a hurdle to proving the truth of their alleged oral agreement, as noted in the Prior Decision, credibility is an issue for the finder of fact and is inappropriate to consider on a motion to dismiss.

To the extent defendants seek dismissal of plaintiff’s claims based on the doctrine of unclean hands, the facts giving rise to that defense (e.g., fraud on UBS and the junior lenders) requires discovery to resolve. In any event, unclean hands would only defeat plaintiff’s equitable claims. *See The Color Wheel, Inc. v Interstate Printing Co.*, 281 AD2d 161, 162 (1st Dept 2001), citing *518 E. 80th St. Co. v Smith*, 251 AD2d 215, 216 (1st Dept 1998). His legal claims, such as the core breach of contract claim, would survive. *See E. Hills Metro, Inc. v Jeffrey M. Brown Assocs., Inc.*, 74 AD3d 730, 732 (2d Dept 2010).

The balance of plaintiff's claims, however, are without merit. The tortious interference with contract claims asserted against Walter's son Joseph is based on Joseph supposedly convincing his father to renovate the Building and rent apartments – a plan plaintiff disagreed with due to his desire to sell the Building. “Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996). Joseph's actions are not alleged to have caused Walter to breach the alleged oral agreement, nor are any damages alleged. The only reasonable inference that may be gleaned from the AC is that plaintiff and Walter had a disagreement about whether to rent apartments that had been vacated or to leave them unoccupied and to develop and sell the Building. In the end, plaintiff apparently convinced Walter to abandon Joseph's plan.

This was a business judgment dispute. Plaintiff has not pleaded an express agreement not to rent apartments. In fact, in opposing defendants' definiteness argument, plaintiff relies on the Prior Decision's rejection of “defendants' contention that the parties' failure to reach a final decision about whether to sell or further develop the Building renders the [alleged oral] agreement unenforceable.” *See id.* at 9. “On the contrary, according to Slabakis, that was a decision the parties deferred for later determination.” *Id.* The court noted that “[t]his makes sense” because “[i]t would be odd to reach a definitive decision on what to do with a property in the future, especially given the well-known risk of real estate market fluctuations.” *Id.* Hence, “[t]hat the parties left themselves the flexibility with respect to their handling of the Building does not defeat the enforceability of the alleged agreement.” *Id.*

Plaintiff cannot have it both ways. He cannot insist that deferring a decision on what to do with the Building does not defeat the existence of an enforceable agreement while also contending that renting apartments in the Building breached an agreement to definitively sell the Building. The AC concedes that no specific agreement was reached. *See* AC ¶ 38 (“**There were at least two plans:** One for the rehabilitation of the [Building] as a smaller number of luxury units to sell, and the other for the construction of a new, larger building at the site to accommodate approximately twice the number of units to be sold.”) (emphasis added).

To the extent plaintiff complains about Walter giving the renovation and building management job to his son, plaintiff has not cured the pleading deficiencies in his original complaint, which did not allege that the amount paid to Joseph for his work was unreasonable, “what a reasonable fee would be, or even that [Joseph was] paid more than the prior building manager.” *See* Prior Decision at 12. This claim should not be repleaded until after document discovery, which is necessary to allege wrongdoing based on Joseph’s involvement. The bare allegation that Joseph aided his father’s “scheme” does not amount to a well pleaded claim for tortious interference with contract.

Plaintiff’s fraud claim also is dismissed. “The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Pursuant to CPLR 213(8), a fraud claim is time-barred either six years after the alleged misrepresentation or “two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.” *Sargiss v Magarelli*, 12 NY3d 527, 532 (2009).

There is no need to address the substantive deficiencies in plaintiff's fraud claim because it is time-barred.⁸ Plaintiff alleges that, in the 1990s, two decades before this action was commenced, Walter misrepresented his intention to be partners in a joint venture with plaintiff. By plaintiff's own admission, at various points between 2002 and 2009, Walter stonewalled him. See AC ¶¶ 39-51. These allegations – along with the alleged incident with Joseph where Walter was told that “‘You don't belong here; ‘You have no right to be here’; and ‘This is not your property’” [see AC ¶ 58] – are “circumstances [that] suggest to a person of ordinary intelligence the probability that he has been defrauded.” See *Aozora Bank, Ltd. v Deutsche Bank Secs. Inc.*, 137 AD3d 685, 689 (1st Dept 2016). Simply put, since far more than six years has elapsed since the alleged fraudulent inducement, and more than two elapsed since plaintiff had reason to believe that Walter did not view plaintiff as an equal partner in the alleged joint venture, the fraud claim is time-barred.

Plaintiff's promissory estoppel claim is time-barred for the same reason. To the extent the seventh cause of action also purports to be a claim for equitable estoppel, it is dismissed. See *Perella Weinberg Partners LLC v Kramer*, 2016 WL 3906073, at *11 (Sup Ct, NY County 2016). (“Equitable estoppel is not an independent, affirmative cause of action; it is a defense to a breach of contract claim based on detrimental reliance.”) (collecting cases).

⁸ It is unclear how plaintiff was damaged by the alleged fraudulent inducement. He put up none of his own money and did not even own the Building (Park Associates did). Indeed, if there is no joint venture agreement, then Walter cannot collect the \$1.5 million purportedly loaned to plaintiff because any such claim would be time-barred under CPLR 213(2)'s six-year statute of limitations for breach of contract. Hence, plaintiff has no “out-of-pocket” loss to recover. See *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142-43 (2017). That said, it should be noted that Walter allegedly telling plaintiff that he owes him the \$1.5 million is further evidence of the alleged oral agreement.

Finally, there is no basis for plaintiff to seek punitive damages or attorneys' fees.

Plaintiff does not allege any wrongful conduct "directed at the public generally" [see *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994)], nor does he allege any applicable "statute, agreement or court rule" providing for attorneys' fees. See *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 NY3d 592, 597 (2004). Accordingly, it is

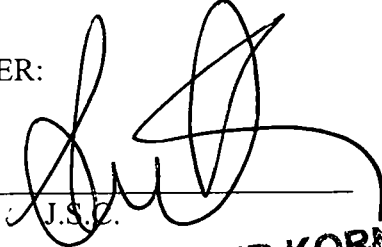
ORDERED that defendants' motion to dismiss the amended complaint is granted only to the extent that the third (fraud), fourth (tortious interference with contract), and seventh (promissory estoppel) causes of action are dismissed; and it is further

ORDERED that this action shall now bear the following caption:

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 ANGELO SLABAKIS, Index No.: 651986/2015
 Plaintiff,
 -against-
 WALTER SCHIK,
 Defendant.
 -----X

Dated: August 30, 2017

ENTER:



 J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.