Ostad v Nehmadi
2017 NY Slip Op 32050(U)
September 28, 2017
Supreme Court, New York County
Docket Number: 650460/2010
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

DAVID H. OSTAD,
Plaintiff,
-against-

Index No. 650460/2010

BEHZAD NEHMADI
and BENITA HOLDINGS, LLC,
Defendants.

DECISION/ORDER

Plaintiff David H. Ostad (Ostad) brings this action for the imposition of a constructive trust in connection with a real estate venture to which he allegedly contributed $400,000 in cash. Defendants Behzad Nehmadi (Nehmadi) and Benita Holdings, LLC (Benita Holdings) move for summary judgment dismissing the Amended Complaint (complaint), pursuant to CPLR 3212, on the grounds that plaintiff's claims are barred by the statute of limitations and statute of frauds. Although this is a post-discovery motion, defendants' motion also purports to seek dismissal of the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Defendants' motion also seeks sanctions pursuant to NYCRR § 130-1.1 (22 NYCRR).

BACKGROUND

Some of the background facts relevant to this motion were set forth in a prior Decision and Order of this court dated April 8, 2011 (Ostad v Nehmadi, 2011 WL 1420879 [Sup Ct, NY Co 2011] [Fried, J] [vacating notice of pendency]) (the Prior Order), familiarity with which is presumed. The following facts are undisputed unless otherwise indicated.

The complaint alleges that early in 2003, Nehmadi proposed an "enterprise" with Ostad (the Enterprise) to purchase a building located at 227 East 45th Street in Manhattan (the Premises), and that Nehmadi formed Benita Holdings for the purpose of acquiring the Premises on behalf of the Enterprise and for the joint benefit of Ostad and Nehmadi. (Compl., ¶¶ 6, 7.)

According to Ostad, based on a relationship of trust and confidence with Nehmadi, Ostad gave $400,000 in cash to Nehmadi for this purchase, in exchange for Nehmadi's agreement to give Ostad a 10 percent interest in the Premises. (Id., ¶¶ 5-6.) The complaint pleads five causes of action. The first, for breach of contract, seeks an injunction compelling Nehmadi to issue shares of Benita Holdings to Ostad. (Id., ¶¶ 30-36.) The second seeks an accounting. (Id., ¶¶ 37-39.) The third seeks imposition of a constructive trust upon the Premises. (Id., ¶¶ 40-43.) The fourth seeks damages for breach of fiduciary duty. (Id., ¶¶ 44-45.) The fifth seeks damages for unjust enrichment. (Id., ¶¶ 46-47.)

According to Ostad, he and Nehmadi became close friends after they first met in the 1990s. (Ostad Aff. 7/7/2016 [Dkt. 208], ¶ 6 [Ostad Aff.].) In 2000, Ostad started a plastic surgery practice in New York. As Nehmadi was a real estate developer, Ostad sought his expertise and assistance in opening medical offices. (Id., ¶¶ 8-9.) In late 2000, Ostad began facing legal problems due to a medical malpractice claim. Nehmadi encouraged him to become more active in real estate ventures. (Id., ¶ 10.) In 2000 and 2001, Nehmadi and Ostad considered or completed a number of real estate transactions together. (Id., ¶¶ 11-14.)

In February 2003, Nehmadi formed Benita Holdings to purchase the Premises which is the subject of this dispute. (Nehmadi Aff. 6/17/2016 [Dkt. 177], ¶ 9 [Nehmadi Aff.]; Benita Holdings Operating Agreement [Ex. A to Nehmadi Aff.].) According to Ostad, Nehmadi first asked other friends, including Sharam Kohan (Kohan), to invest in the Premises. Ostad claims that Nehmadi urgently needed funds and offered Kohan an interest in the property in exchange for a $200,000 cash payment, which Kohan declined because he lacked the money. (Ostad Aff., ¶ 16; Kohan Aff. 7/6/2016 [Dkt. 210], ¶ 5 [Kohan Aff.].) Ostad claims that Nehmadi ultimately offered him a 10% interest in the $22 million property, in exchange for a $400,000 contribution toward the $4 million down payment. (Ostad Aff., ¶¶ 18-19; Kohan Aff., ¶ 6.) He testified that

Nehmadi insisted that the funds be in cash, and that he removed that sum from a safe deposit box at Bank Leumi and brought it to his home in Old Westbury in a duffle bag, where Nehmadi picked it up. (Ostad Dep. [Ex. H to Nehmadi Aff.] at 261-265, 431-434, 438.) Ostad's wife Mojgan has submitted an affidavit asserting that the two men counted the money on the kitchen table while Nehmadi explained the terms of the agreement. (Mojgan Aff. 7/7/2016 [Dkt. 209], ¶¶ 3-5, 7.) Ostad did not get a receipt for the cash or confirm the payment by email or other means. (Ostad Dep. at 442-443.) However, he contends that Nehmadi, in Ostad's presence, shortly thereafter informed a number of other individuals about the payment and/or the agreement. They included Nehmadi's wife Bita (Bita), Ostad's brother and sister, Kohan, Robin Eshaghpour and Vic Lotan. (Ostad Dep. at 267-269.) Eshaghpour testified at his deposition that he overheard Nehmadi and Ostad discussing that Ostad was going to invest cash in a midtown Manhattan building (Eshaghpour Dep. [Ex. L to Nehmadi Aff.] [Dkt. 194] at 15-18.) Kohan has submitted an affidavit stating that he was present at Eshaghpour's apartment when Nehmadi solicited Ostad's participation and pressed him to contribute $400,000 on an expedited basis. (Kohan Aff., ¶¶ 6-8.)

However, Ostad is not mentioned in any of the transactional documents relating to the purchase of the Premises. Rather, the operating agreement identifies three members – Nehmadi, Bita, and United Equities Inc. (United). (Benita Holdings Operating Agreement, p. 1.) The operating agreement reflects that Nehmadi held an 89% interest, Bita a 10% interest, and United a 1% interest. (Id., ¶ 2.3.) The members' combined capital contribution was listed as $1,000, and the net income was to be distributed quarterly in a manner consistent with their respective ownership interests. (Id., Schedule A.)

The closing of the sale of the Premises occurred on February 24-25, 2003. The closing statement indicated a purchase price of $22,650,325 and identified various loans and mortgages,

including an $18,000,000 purchase money mortgage to Benita Holdings. (Closing Statement at 1-2 [Ex. M to Nehmadi Aff.].) Neither Ostad's name nor his alleged $400,000 contribution is mentioned in the document. However, Ostad claims he appeared at the closing from time to time whenever he was able to take breaks from his medical practice. He states that he spoke to one of the attorneys at the closing, Andrew Albstein, and that afterwards he and Nehmadi went out drinking to celebrate the deal. (Ostad Aff., ¶¶ 27-28.)

Ostad never received copies of the closing or other transactional documents. (Ostad Dep. at 443.) He did not receive or seek a K-1 reflecting the profits he was supposed to receive from the Premises, or report them on his taxes. (Id. at 455-457.) Ostad alleges that over the next few years, he inquired about the status of his investment and Nehmadi reported that the Premises was profitable. (Id. at 448-451.) Nehmadi allegedly told Ostad that he was depositing the profits in a Bank Leumi account in Israel, and that the money would be distributed once the Premises was refinanced. (Id. at 451-452.) Ostad did not ask to see copies of the bank statements. (Id. at 452-454.) Nehmadi denies having opened an account for this purpose, and no record of an account used to hold plaintiff's profits has been identified through discovery. (Nehmadi Aff., ¶¶ 46-51.) Despite the alleged profitability of the Premises, Ostad claims that Nehmadi called upon him to make additional contributions to a "reserve fund" and for lobby renovations, and asserts that he ultimately gave Nehmadi an additional $290,000, with $100,000 on each of two occasions and $90,000 by wire transfer. (Ostad Dep. at 551-564.)

Ostad further claims that, after the closing for the Premises, he and Nehmadi continued to engage in further real estate transactions. He asserts that subsequent to his purchase of a property in Florida, he learned that Nehmadi was "behind [a] loan" that he took at the closing, and that Nehmadi was unwilling to lower a high rate of interest. (Ostad Aff., ¶¶ 31-33.) Upon this discovery of Nehmadi's betrayal of their relationship, Ostad lost trust in Nehmadi and, in

March 2008, "demanded [his]10% interest" in the transaction that is the subject of this action. (Id., ¶ 34; Compl., ¶¶ 22-23.) Nehmadi denied that Ostad had any interest. (Id.) Ostad later discovered that the Premises had been refinanced for $55 million (Compl., ¶ 25), and commenced this action on May 14, 2010.

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

Statute of Frauds/Statute of Limitations

First, defendants contend that the statute of frauds and statute of limitations bar the pleaded causes of action. A claim for breach of an oral contract for the sale of stock of a company whose sole asset is real estate is subject to the statute of frauds. (See Yenom Corp. v 155 Wooster St. Inc., 33 AD3d 67, 70–71 [1st Dept 2006]; Pritsker v Kazan, 132 AD2d 507, 507

[1st Dept 1987].) There is, however, substantial authority that the statute of frauds does not bar enforcement of an oral joint venture or partnership agreement to deal in real property, because the parties' interest is in the assets and income of the enterprise and is deemed to be personalty. (See Mattikow v Sudarsky, 248 NY 404, 406–07 [1928]; Retter v Zyskind, 138 AD3d 496, 496 [1st Dept 2016]; Livathinos v Vaughan, 121 AD3d 485, 486 [1st Dept 2014]; Prior Order, 2011 WL 1420879, *4 n 2.) As discussed in the Prior Order, Ostad claims that he and Nehmadi "acted as partners and joint venturers" and "alleges the existence of a partnership or quasi-partnership arrangement" in the Enterprise. (Prior Order, 2011 WL 1420879, * 4; Compl., ¶¶ 5-12.)

Moreover, "a constructive trust over real property can be imposed even where an underlying agreement is not in writing." (Thomas v Thomas, 70 AD3d 588, 591 [1st Dept 2010]; see Foreman v Foreman, 251 NY 237, 240 [1929] ["The rule is now settled by repeated judgments of this court that the statute [of frauds] does not obstruct the recognition of a constructive trust affecting an interest in land where a confidential relation would be abused if there were repudiation, without redress, of a trust orally declared"].) The standard for identifying relationships that may form the basis of a trust is not "rigid." (Thomas, 70 AD3d at 591.) That standard has been met here, as defendants do not deny that Nehmadi had an ongoing friendship with Ostad upon which Ostad could have based his trust. They also do not persuasively dispute that Nehmadi's expertise in real estate was superior to Ostad's.

In upholding the denial of summary judgment in a similar action brought against Nehmadi by Kohan, the First Department held:

> "Both plaintiff and defendant Behzad Nehmadi acknowledged that they were friends, and plaintiff claims that defendants promised him an interest in certain real property, that he had made payments and expended monies in reliance of [sic] that promise, that defendants were unjustly enriched at plaintiff's expense, given that certain conveyances transferred less property to him than what he claims he was promised. Given the close friendship between plaintiff and Behzad Nehmadi and defendants' alleged superior expertise and knowledge of real estate, the court properly concluded that if these factual claims were proved, they could form the

basis for the imposition of a constructive trust."

(Kohan v Nehmadi, 130 AD3d 429, 430 [1st Dept 2015].)

On this motion, as discussed below, defendants do not submit evidence sufficient to demonstrate that the parties did not enter into a partnership or joint venture. Rather, defendants rely on affidavits which raise credibility issues that are not properly determined on a motion for summary judgment. Defendants accordingly fail to demonstrate as a matter of law that the breach of contract cause of action should be dismissed based on the statute of frauds.

The statute of limitations is also not a bar to this action. The six year limitations period for a constructive trust and an accounting accrue, respectively, when the property is wrongfully withheld and when the fiduciary "openly repudiate[s]" the obligations imposed by the parties' agreement. (Kohan, 130 AD3d at 429-430; Knobel v Shaw, 90 AD3d 493, 496 [1st Dept 2011] [constructive trust claim "commences to run upon occurrence of the wrongful act giving rise to a duty of restitution"]; see also Robinson v Day, 103 AD3d 584, 586 [1st Dept 2013] [accounting].) Ostad claims that the wrongful withholding of the property alleged to have been held in trust, and the repudiation of the fiduciary relationship, occurred in March 2008 when he demanded his interest in the subject transaction. Nehmadi does not deny that he rejected Ostad's demand at that time. The court accordingly holds that these causes of action are timely, as they were brought within approximately two years of the filing of the complaint.

The claim for breach of fiduciary duty is also timely, as plaintiff alleges, and Nehmadi does not deny, that Nehmadi first denied the existence of a partnership in March 2008.[1]

As to the breach of contract cause of action, defendants correctly argue that the cause of action accrues at the time of the contractual breach, even if no damage occurs until later. (See

[1] As the claim accrued less than three years prior to the filing of the complaint, the court need not determine whether the three year limitations applies for a breach of fiduciary duty that seeks primarily monetary relief (see IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139–40 [2009], rearg denied 12 NY 889), or whether this is a case where the six year limitations period applies.

generally Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993].) The complaint pleads the constructive trust cause of action based on an alleged breach of the agreement to give plaintiff an interest in the Premises. Defendants contend that the cause of action accrued at the time of closing, when plaintiff was excluded from any documented ownership interest in the property. (Transcript of Oral Argument [Tr.] at 7-8.) However, Ostad does not allege that defendants breached their agreement by failing to include him as a member of the LLC at the time it acquired the Premises. Rather, Ostad contends that both parties intended that the property would be held in Nehmadi's name. Ostad alleges that Nehmadi agreed to "hold [Ostad's] interest in the Property in trust" for him during a period in which he was "going through a very hard time with medical malpractice lawsuits and issues relating to [his] medical license."[2] (Ostad Aff., ¶¶ 20, 22; see also Tr. at 11-12, 15.) Defendants fail to submit authority that the breach for purposes of accrual of the contract cause of action occurred at a different time than the wrongful act for purposes of the accrual of the constructive trust cause of action.

Constructive Trust

Defendants' remaining arguments are directed primarily at plaintiff's claim for a constructive trust, which they assert lacks sufficient evidentiary support to avoid dismissal at the

[2] At oral argument, defendants asserted that plaintiff should be barred from proceeding with his equitable claims by the unclean hands doctrine, given that Ostad has implied that his purpose in keeping his name off the operating agreement was to shield assets from potential creditors bringing malpractice claims against him. (Tr. at 20.) The court is concerned about the appropriateness of granting equitable relief under these circumstances. However, defendants have not moved, nor provided authority in support of dismissal, on the basis of the unclean hands doctrine. The parties should be prepared to address at trial the requirements, under a substantial body of law, for application of the doctrine if it is found that a transfer was intended to frustrate creditors. (See e.g. Dolny v Borck, 61 AD3d 817, 818 [2d Dept 2009] [stating that "the question of whether [defendants] knew of the fraudulent purpose of the transaction is irrelevant" to the application of the unclean hands doctrine], lv denied 13 NY3d 702; Jossel v Meyers, 212 AD2d 55, 57-58 [1st Dept 1995] [holding that the "clean hands maxim" is available to deny relief to a litigant who transferred assets to avoid claims of creditors, even where the party invoking doctrine was not injured by the wrongful conduct]; Holland v Ryan, 307 AD2d 723, 725 [4th Dept 2003] [raising the doctrine sua sponte where both parties agreed to a side payment to avoid higher tax liability for the plaintiff because the "basis of the action is immoral and one to which equity will not lend its aid"]; but see Tai v Broche, 115 AD3d 577, 578 [1st Dept 2014] [holding that the unclean hands defense is not applicable where defendants are "willing wrongdoers"]; Malaty v Malaty, 95 AD3d 961, 962 [2d Dept 2012] [reversing the trial court's application of the unclean hands doctrine where the plaintiff's purported immoral conduct was not directed at, and did not cause injury to, the defendant].)

summary judgment stage. A constructive trust may be established by proof of "(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]; accord Leidel v Annicelli, 114 AD3d 536, 537–38 [1st Dept 2014].) The "constructive trust doctrine is not rigidly limited" and may be imposed "even in the absence of a confidential or fiduciary relation." (Simonds v Simonds, 45 NY2d 233, 241 [1978].) It is appropriately invoked whenever "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." (Sharper v Harlem Teams for Self-Help, Inc., 257 AD2d 329, 332 [1st Dept 1999].)

In challenging the element of a transfer, Nehmadi does not unequivocally deny Ostad's unequivocal assertion that Ostad gave Nehmadi $400,000 in cash in a duffel bag at his Old Westbury home on a night in early February 2003. Nehmadi merely asserts that he "can state without hesitation that the claim Plaintiff gave [him] money in exchange for an interest in the Company is a bold-faced lie." (Nehmadi Aff., ¶ 6.) This vague statement leaves it unclear whether Nehmadi is denying that he ever received the cash, or just denying that the cash, when accepted, was in exchange for an interest in the Premises.

Rather than clarifying the ambiguity in his own testimony, Nehmadi focuses upon the alleged lack of evidence corroborating his receipt of $400,000 in cash. For example, he notes that Ostad has no receipt for the cash; that only Mojgan has come forth as an actual eyewitness to the tender of the cash; and that Mojgan's testimony is suspect both because of her status as plaintiff's wife and because of arguably contradictory deposition testimony about the frequency of her work in plaintiff's medical office. (Nehmadi Reply Aff. [Dkt. 227], ¶¶ 6-7, 19.) Nehmadi also questions Ostad's credibility, noting that in connection with his former plastic surgery practice, Ostad was adjudged to have been "involved in the delivery of fraudulent and deceptive medical services" (People ex rel. Spitzer v Park Ave. Plastic Surgery, P.C., 48 AD3d 367, 367

[1st Dept 2008]), and that an internet arbitration panel determined that Ostad acted in "bad faith" in registering the domain "Botox.net." (Nehmadi Aff., ¶¶ 17-22.) Furthermore, he argues that the witnesses who testified that Ostad had an interest in the property cannot be credited. He points out that Kohan's trial testimony in his own action against Nehmadi was found "not credible" by the judge (Nehmadi Reply Aff., ¶¶ 13-15); that Eshaghpour's deposition testimony did not fully corroborate the alleged agreement; and that Eshaghpour invoked his right against self-incrimination when questioned about whether he was under the influence of illegal drugs when he overheard the parties' discussions. (Nehmadi Aff., ¶¶ 36-39.)

At best, these contentions do not eliminate triable issues of fact but merely raise factual questions that would require the court to resolve matters of credibility, an undertaking that is impermissible on a summary judgment motion. Given Nehmadi's failure to offer an express, unambiguous denial that he received $400,000 in cash from Ostad, or that he discussed Ostad's investment in the Premises with the multiple witnesses identified, the court does not find the claim of an agreement to be incredible as a matter of law. This conclusion is further bolstered by Nehmadi's failure to address the claim that Ostad contributed an additional $290,000 to the Premises, and his admission that on other occasions he may have received tens of thousands of dollars in cash from Ostad. (Nehmadi Dep. at 50-51 [Ex. B to Ostad Aff.].)

Finally, Nehmadi argues that even if there is some facial merit to Ostad's allegations, the action must be dismissed because, without documentary evidence or credible witnesses, Ostad cannot establish his claim for a constructive trust by the clear and convincing evidence standard applicable at trial.[3] Relying on United States Supreme Court precedent in libel cases brought by a public figure, Nehmadi argues that "a ruling on a motion for summary judgment or for a

[3] In fact, on reply, Nehmadi's sole argument pertains to the standard of proof, with his arguments regarding the statute of frauds and statute of limitation relegated to footnotes.

directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." (Anderson v. Liberty Lobby, Inc., 477 US 242, 252 [1986].)

New York courts have applied the clear and convincing evidence standard to the assessment of a libel defendant's motion for summary judgment. (See Kipper v NYP Holdings Co., 12 NY3d 348, 353–54 [2009].) Defendants have not, however, cited any case in which the clear and convincing evidence standard of proof has been applied to summary judgment motions in other contexts, notwithstanding that a party would have the burden of proof at trial under the heightened standard. (See e.g. Morley Maples, Inc. v Dryden Mut. Ins. Co., 130 AD3d 1413 [3d Dept 2015] [denying summary judgment based on factual disputes requiring credibility assessments, and reasoning that "[a]lthough defendant's ultimate burden of proving the affirmative defense at trial would be by the standard of clear and convincing evidence, this strict standard is not applied at this juncture" [internal citation omitted]; Platinum Equity Advisors, LLC v SDI, Inc., 2016 WL 3221580, *3 [Sup Ct, NY Co June 7, 2016] [Bransten, J.] [holding that at the summary judgment juncture, "the Court cannot apply a burden of proof, such as clear and convincing evidence, in order to resolve factual disputes raised by the parties; the Court can only identify if such disputes exist for trial"].) Moreover, defendants have cited no authority for the proposition that witness testimony is insufficient to meet the clear and convincing standard or that a witness's alleged past history of untrustworthiness can be the basis for dispensing with a trial.[4] The court accordingly rejects defendants' contention that a trial in this action is rendered futile by questions as to the credibility of the witnesses Ostad relies on to corroborate the agreement.

The court has considered defendants' remaining contentions and finds them to be without

[4] Indeed, even a criminal conviction does not affect a witness's competency to testify, but merely provides grounds, where relevant, for impeachment on cross-examination. (See CPLR 4513; Pope v New York City Transit Auth., 244 AD2d 263, 264 [1st Dept 1997].)

merit.

Accordingly, it is hereby ORDERED that the motion of defendants Behzad Nehmadi and Benita Holdings, LLC for summary judgment dismissing the complaint and for sanctions is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 28, 2017

MARCY FRIEDMAN, J.S.C.