SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JIM BENJAMIN,

Plaintiff, Decision and order

- against - Index No. 517545/17

270 MALCOLM X DEVELOPMENT, INC., ESTATE OF IRENE OSTAD & FRED OSTAD, a/k/a FARHAD OSTAD, Individually, and as an EXECUTOR OF THE ESTATE OF IRENE OSTAD, VALLEY NATIONAL BANK,

Defendants, April 24, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint filed by the plaintiff on the grounds it fails to state a cause of action and is barred by the Statute of Frauds and the Statute of Limitations. The plaintiff have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The complaint alleges that in 2003 the plaintiff and Ahron Ostad the father of defendant Fred Ostad entered into an oral agreement whereby they would purchase, remodel and then resell real estate. Specifically, Mr. Ostad would provide all the finances and the plaintiff would provide all the development and management of the property. Indeed, a home was purchased in Long Island, remodeled and then sold for a profit, each party receiving half the profits pursuant to their oral agreement. Following that successful venture the parties again purchased property, located at 270 Malcolm X Boulevard in Kings County. The property was actually

purchased by Malcolm X Development Inc., a corporation wholly owned by Ahron Ostad for $650,000 on December 2, 2004. The property was then remodeled and completed during November 2007. The complaint alleges that due to a real estate meltdown the parties agreed to rent out the units which they did from 2008 through 2014. Mr. Ostad passed away in 2009 and his son, defendant Fred Ostad, succeeded his father. In 2014 Fred informed the plaintiff that he was no longer welcome on the property and that he was not entitled to half of the profits since there was no written agreement indicating as such. This lawsuit followed. The plaintiff has asserted various causes of action including a constructive trust against the corporation, Fred Ostad and the estate of Irene Ostad, Fred's mother, breach of contract and unjust enrichment. The defendants have filed the instant motion seeking to dismiss all the causes of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807

NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good

conscience retain the beneficial interest, equity converts him into a trustee."

Concerning the first element, it is well settled that an alleged partner of a joint venture gives rise to a fiduciary relationship and if the all the remaining elements have been satisfied can create a constructive trust (see, Plumitallo v. Hudson Atlantic Land Company LLC, 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). Thus, while such a relationship might have existed the remaining elements of a constructive trust cannot be satisfied. The remaining elements require a promise made, a transfer of an asset in reliance upon the promise and unjust enrichment flowing from the breach of the promise (Mei Yun Chen v. Mei Wan Kao, 97 AD3d 730, 948 NYS2d 426 [2d Dept., 2012]). Thus, the plaintiff must demonstrate that it transferred property to the defendants in reliance on a promise and that such property is being held whereby a trust should be imposed (Kalmon Dolgin Affiliates Inc., v. Tonacchio, 110 AD3d 848, 973 NYS2d 304 [2d Dept., 2013]). Therefore, even if it can be established the defendants made a promise to the plaintiff, there is no evidence at all the plaintiff transferred to the defendants any asset as a result of such promise (Swartz v. Swartz, 145 AD3d 818, 44 NYS3d 452 [2d Dept., 2016]). Indeed, the complaint merely asserts the plaintiff is entitled to fifty percent of the profits from Malcolm X Corporation by virtue of the promise made to him by Ahron and then reiterated by Fred.

However, if true, that is not a constructive trust because there is no "asset" that was given by the plaintiff to the defendants. The plaintiff asserts in a footnote that he dedicated time and talent to develop the property on behalf of the corporation and he should justly be compensated for those efforts (see, Affirmation in opposition, Footnote 3). While that might present claims for breach of contract as will be discussed, that is not an asset that was transferred in reliance upon a promise. Furthermore, the plaintiff cannot argue the asset consists of the property since he did not contribute any assets to purchase that property. Therefore, the plaintiff cannot establish a constructive trust and consequently the motion seeking to dismiss the first four causes of action is granted.

The next three causes of action allege breach of contract. It is well settled that to state a claim for breach of contract one must allege the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and lastly resulting damages (Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 921 NYS2d 260 [2d Dept., 2011]). There is no dispute the contract in this case was oral thus the plaintiff asserts a joint venture was created, which need not be in writing, and is consequently enforceable.

It is well settled that a partnership or joint venture need not be in writing to be enforceable (see, Blank v. Nadler, 143

AD2d 966, 533 NYS2d 891 [2d Dept., 1988]). Moreover, the existence of an oral agreement is generally a question of fact which cannot be summarily determined on a motion to dismiss (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]).

The defendants argues the plaintiff has failed to demonstrate the existence of a joint venture for two distinct reasons. First, defendant argues the parties never agreed upon the terms of the joint venture, and moreover, they never agreed to share profits and losses. The complaint does allege that "as a result of the Corporation's failure and refusal to perform, Jim has been damaged with losses of profits from the rental income and 50% of the Corporation's profits" (see, Complaint, ¶ 39), there is no indication the parties agreed to share profits and losses, a necessary condition to the establishment of a joint venture. As the court noted in Maware v. Landau, 130 AD3d 986, 15 NYS3d 120 [2d Dept., 2015], a joint venture cannot be created without a "mutual promise or undertaking to share the burden of the losses of the alleged enterprise" (id). The complaint does not detail the obligation upon the plaintiff to share in any of the losses of the venture. The complaint states that for six years "Jim completely dedicated to rent, manage, operate and maintain all of the rental units" and that he "collected all of the rents and deposited them into the Corporation's bank account

which was then used for its expenses including its mortgage, insurance and taxes" (see, Complaint ¶ 20), however, there is no mention of any agreement whereby losses would be borne by both parties (see, Latture v. Smith, 1 AD3d 408, 766 NYS2d 906 [2d Dept., 2003], Davella v. Nielsen, 208 AD2d 494, 616 NYS2d 800 [2d Dept., 1994]). Therefore, no such joint venture existed and consequently the motion seeking to dismiss counts five, six and seven is granted.

The next three causes of action concern unjust enrichment. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The unjust enrichment claims are duplicative of the breach of contract claims. Indeed, the complaint alleges essentially the same claims, namely entitlement to half the proceeds of any sale of the property, for the unjust enrichment causes of action as the breach of contract causes of action. Consequently, the claims of unjust enrichment are improper and thus the motion seeing to dismiss those causes of action is granted.

The remaining claims are dismissed as well. The plaintiff has no cause of action against Valley National Bank or a cause of

action for partition since the plaintiff has no standing to pursue these claims.

The plaintiff might, perhaps, maintain causes of action against the defendants for work performed, if proven and if not adequately compensated, however, the causes of action presented in the complaint are improper. Therefore, the motion seeking to dismiss all the causes of action of the complaint is granted.

of action for breach of contract is granted.

So ordered.

ENTER:

DATED: April 24, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC