

Benjamin v 270 Malcolm X Dev., Inc.
2019 NY Slip Op 30151(U)
January 9, 2019
Supreme Court, Kings County
Docket Number: 517545/17
Judge: Leon Ruchelsman
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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,

MS # 4

Defendants,

January 9, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue a decision and order dated April 24, 2018 which dismissed the complaint. The defendants 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.

As recorded in the prior order the complaint alleged 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. The parties, by an entity called Malcolm X Development Inc., wholly owned by Ahron Ostad, purchased property, located at 270 Malcolm X Boulevard in Kings County 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 court dismissed the complaint finding there was no constructive trust, no contract and that the plaintiff could not maintain an action for unjust enrichment. The plaintiff has now moved seeking reargument.

Conclusions of Law

A motion to reargue which is not based upon new proof or evidence may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (Delcrete Corp. v. Kling, 67 AD2d 1099, 415 NYS2d 148 [4th Dept., 1979]). Thus, the party must demonstrate that the judge must have overlooked some point of law or fact and consequently made a decision in error. Its purpose is designed to afford an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law. Thus, where a party fails to demonstrate that the Court misapprehended any of the relevant facts or misapplied any controlling principle of law, a motion to reargue must be denied Matter of Mattie M. v. Administration for Children's Services, 48 AD3d 392, 851 NYS2d 236 [2d Dept., 2008], McNamara v. Rockland County Patrolmen's Benevolent Association, Inc., 302 AD2d

435, 754 NYS2d 900 [2d Dept., 2003]).

The plaintiff argues the court did not allow every favorable inference concerning the existence of a constructive trust. Specifically, the plaintiff asserts the court erroneously concluded there was no transfer of an asset in reliance on a promise. The plaintiff argues no such transfer of an asset is required and that time and effort, ie., work performed by the plaintiff can satisfy this element to establish a constructive trust. The plaintiff cites to Spodek v. Riskin, 150 AD2d 358, 540 NYS2d 879 [2d Dept., 1989] for the proposition that time and effort can satisfy a transfer in reliance on a promise to create a constructive trust. However, in that case the plaintiff paid \$50,000 toward the apartment building in which the plaintiff sought an ownership interest. Thus, there is no support for the argument that other intangibles can satisfy the transfer necessary for the imposition of a constructive trust. Further, extending the narrow exception establishing constructive trusts in marital cases where an asset has not been transferred to all such cases would effectively change the elements of a constructive trust, an untenable argument. The plaintiff argues the court must afford leeway and discovery to discern whether the plaintiff's claims may properly be pursued. That is true, however, if as a matter of law the complaint fails to state a cause of action then no allegation exists. As noted, without a valid transfer of an asset the plaintiff cannot establish

a constructive trust. Thus, the motion seeking to reargue the dismissal of the first four causes of action is denied.

Turning to the motion to reargue the dismissal of the breach of contract claims the plaintiff argues the court erred by holding no joint venture was created since the agreement did not mention profits or losses. The plaintiff argues that pursuant to Penato v. George, 52 AD2d 959, 383 NYS2d 900 [2d Dept., 1976] such definitiveness need not be present and a joint venture can exist even without an agreement concerning losses. However, that decision has been disfavored by more recent cases (see, Turner v. Temptu Inc., 586 Fed. Appx. 718 [2d Cir. 2014], Maware v. Landau, 130 AD3d 986, 15 NYS3d 120 [2d Dept., 2015]). Consequently, there is no basis upon which to reargue the dismissal of the next three causes of action and such motion is denied.

Lastly, concerning the three causes of action regarding unjust enrichment, the plaintiff argues the court should not have dismissed those claims. However, the plaintiff does not present any argument not already presented. Thus, the plaintiff is merely rearguing a prior determination without any basis. Consequently, the motion seeking to reargue the dismissal of the unjust enrichment claims is denied.

The plaintiff seeks to amend the complaint. The defendants object on the grounds the basis for such relief and the reason such relief was not requested sooner has not been presented. Thus, the

plaintiff may make a motion seeking to amend the complaint. The defendants may oppose such motion and the arguments will be scrutinized and a decision rendered.


So ordered.

ENTER:



DATED: January 9, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC


KINGS COUNTY CLERK
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