

**Kamel v Aghelian**

2019 NY Slip Op 31425(U)

May 15, 2019

Supreme Court, Kings County

Docket Number: 517828/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

**AARON KAMEL,**

**Plaintiff,**

**-against-**

**JOSEPH AGHELIAN and 1233 DEAN STREET, LLC,**

**Defendants.**

**DECISION / ORDER**

**Index No. 517828/2017  
Motion Seq. No. 2, 3  
Date Submitted: 3/7/19  
Cal No. 29, 65**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment and plaintiff's cross motion to extend his time to file the Note of Issue.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation, Affidavit and Exhibits Annexed.....	<u>19-25</u>
Notice of Cross Motion, Affirmation, Affidavit and Exhibits Annexed...	<u>29-38</u>
Reply Affirmation.....	<u>39</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is an action commenced in September 2017 for specific performance of an oral joint venture agreement or for damages for breach of an oral agreement between plaintiff Aaron Kamel and defendant Joseph Aghelian. Plaintiff avers that the parties agreed to purchase the real property located at 1233 Dean Street, Brooklyn, New York, from a non-party owner as "equal partners" through a limited liability company to be formed for that purpose, to be known as 1233 Dean Street, LLC. The complaint alleges that defendant Aghelian agreed to purchase the property (a four-family house) with plaintiff Kamel, with each party to own a 50% interest in an LLC to be formed

specifically for the purpose of owning and managing the subject premises. Further, the complaint alleges that Aghelian breached the parties' oral agreement by purchasing the property solely in his own name (on June 23, 2016) and he then transferred it to defendant 1233 Dean Street, LLC.<sup>1</sup>

Defendants move for summary judgment dismissing the complaint as barred by the Statute of Frauds, which was pleaded as an affirmative defense in their answer [GOL § 5-703] inasmuch as there is no writing signed by defendant Aghelian reflecting the terms of the purported agreement "concerning an interest in real property."<sup>2</sup>

Defendants support their motion with the pleadings, an affirmation from counsel, an affidavit from defendant Aghelian and about 30 pages of text messages which are not in admissible form and could not be considered. Defendants do not provide a copy of the contract of sale with Ms. Washington, the seller.

Plaintiff opposes the motion with an affirmation of counsel, an affidavit of plaintiff, the pleadings and copies of text messages that plaintiff certifies in his affidavit (§ 11) are "true and accurate." He does not provide a copy of the contract of sale either. The text messages plaintiff printed out do not specify which are plaintiff's and which are defendant's. However, on March 24, 2018, one of the parties said "let's sign [contract of sale with Washington] tomorrow." Plaintiff claims he alone located the property and made the offer to Ms. Washington, which she accepted. Plaintiff contends that the Statute of Frauds is inapplicable because he is not seeking to enforce an agreement

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<sup>1</sup>This LLC was formed on April 4, 2016, according to the New York State Department of State website.

<sup>2</sup>Defendant Aghelian, in an affidavit, denies entering into any agreement with plaintiff concerning 1233 Dean Street and denies that plaintiff supplied any money toward the purchase or maintenance of the subject premises. In addition, Aghelian maintains that plaintiff has no interest in 1233 Dean Street LLC and did not participate in its formation.

concerning “an interest in real property” but to enforce the agreement that he receive a one-half interest in the entity that was to purchase the property.<sup>3</sup> Further, plaintiff cross-moves to extend his time to file the Note of Issue, as he claims he inadvertently attempted to file the Note of Issue one day late, due to a calendar error, and it was rejected by the clerk. However, his cross motion is now moot, as the FDP (Final Disposition) Part issued an order on March 7, 2019 on both parties’ default, apparently while they were waiting to argue these motions before the undersigned, which gives plaintiff until July 25, 2019 to file the Note of Issue and schedules a conference in the FCP (Final Pre-Note Conference) Part on June 11, 2019.

#### Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is well established that the Statute of Frauds does not render void an oral partnership or joint venture agreement to deal in real property because the interest of each partner in a partnership is deemed to be personal property. (see *C & B Enters. USA, LLC v Koegel*, 136 AD3d 957, 959 [2d Dept. 2016]; *Livathinos v Vaughan*, 121 AD3d 485, 486 [2d Dept. 2014]; *Malaty v Malaty*, 95 AD3d 961 [2d Dept. 2012];

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<sup>3</sup>Plaintiff, in his affidavit, claims that the parties agreed to purchase the premises in the name of an entity they would each own equally and that any out of pocket expenses or capital provided would be reimbursed to that party out of profits, rents or proceeds resulting from a sale or refinance, with the balance being split evenly.

*Plumitallo v Hudson Atl. Land Co., LLC*, 74 AD3d 1038, 1039 [2d Dept 2010]; *Barash v Estate of Sperlin*, 271 AD2d 558, 559 [2d Dept 2000]; *Walsh v Rechler*, 151 AD2d 473, 542 [2d Dept 1989]). Thus, if the plaintiff is asserting an alleged interest in joint venture assets, not an interest in real property, the Statute of Frauds does not apply (*Plumitallo v Hudson*, 74 AD 3d at 1039).

The court finds that the defendants have failed to make out a prima facie case for summary judgment. This is not a motion to dismiss, but a motion for summary judgment. While it is true that the plaintiff's complaint is rather sparse with regard to his allegations regarding the formation of a joint venture, defendants did not move to dismiss on the grounds that plaintiff did not adequately plead the existence of an oral joint venture agreement. As the court explains in *Mawere v Landau* (130 AD3d 986, 986 [2d Dept 2015]), those elements are: an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers 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.

Here, defendants have not provided a copy of the contract of sale, or any agreement with a real estate broker, leaving the court to wonder if plaintiff's name is on the contract, as either a co-buyer and/or a signatory. Defendants have not provided any evidence of who paid the down payment with the contract, who negotiated with the seller's broker, who formed the limited liability company, or who hired or paid the attorney who represented the buyers in the purchase. Thus, as plaintiff claims he alone located the property and negotiated the contract, that the parties had an agreement to

take title to the property in the name of an LLC, and to each have a one-half interest in the LLC, while defendant Aghelian claims there was no agreement between the parties, this motion cannot be granted. The court may not determine issues of credibility in a motion for summary judgment.

To be clear, an oral agreement for a joint venture can be subject to the Statute of Frauds if the conveyance of realty is to be "from one venturer to another," but that is not the case here (*Spodek v Riskin*, 150 AD2d 358 [2d Dept 1989]). Additionally, the party seeking to enforce the oral agreement must have made some contribution to the venture, of either time, skill or funds, to take it out of the Statute of Frauds. Here, plaintiff claims that he has done so, asserting that he has had other joint ventures with this defendant, that he located the property and negotiated the contract with the seller (Barbara Washington), and that (ascertained from the admissible text messages) the parties intended to both sign the contract of sale. As the Court of Appeals states in *Levy v Brush* (45 NY 589, 596-97 [1871]), where the plaintiff claimed the defendant had orally agreed to purchase the property in his own name and the plaintiff was to pay the defendant one half of the price and title was to be taken in both of their names, the court held that no action would lie to compel the enforcement of the alleged oral agreement, as

"no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient, to take the case out of the statute, would repeal it. Care must be taken that this is not done, under an idea that as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party,

in no legal sense, commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right both at law and in equity to refuse performance. But where the party seeking performance has partly performed, or has, as in the case of *Ryan v Dox*, [34 NY 307] parted with valuable property upon the faith of the contract, the case is different. In such cases, equity will not permit a party to retain property obtained on the faith of a verbal contract, to consummate a fraud by retaining the property and refusing to perform the contract.”

The reason an oral agreement, coupled with part performance, is taken out of the Statute of Frauds is that a claim of an oral agreement “to form a ‘partnership’ or a ‘joint venture’ to deal in real property . . . is not subject to the requirement of the Statute of Frauds that it be evidenced by a writing (see, General Obligations Law § 5-703) because the interest of each partner or joint venturer is deemed ‘personalty’” (*Barash v Estate of Sperlin*, 271 AD2d 558, 559 [2d Dept 2000], citing *Mattikow v Sudarsky*, 248 NY 404; *Walsh v Rechler*, 151 AD2d 473; *Elias v Serota*, 103 AD2d 410, 413; *Pace v Perk*, 81 AD2d 444, 458). Similarly, an oral agreement to deal in real property is not subject to the Statute of Frauds because the interest of each partner in the partnership is “personalty.” (See *Walsh v Rechler*, 151 AD2d 473 [2d Dept 1989]; *Liffiton v DiBlasi*, 170 AD2d 994 [4<sup>th</sup> Dept 1991]). In *Walsh v Rechler*, the court concludes, on similar facts, “the Statute of Frauds cannot be considered a bar to the plaintiff’s claim, which must ultimately be tested at trial.” In *Plumitallo v Hudson Atlantic Land Co. LLC*, 74 AD3d 1038, 1039 [2d Dept 2010], the Second Department reversed Supreme Court’s dismissal of a claim similar to plaintiff’s, also finding that “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. The plaintiff is not seeking to acquire an interest in real property, but rather, is asserting an alleged interest in joint

venture assets [internal citations omitted].” Supreme Court had erroneously concluded that “inasmuch as the transaction at issue involved the issuance of stock in a corporation whose sole asset was real property, the Statute of Frauds is applicable.”<sup>4</sup> (See also *Malaty v Malaty*, 95 AD3d 961 [2d Dept 2012]. [“The plaintiff is not seeking to acquire an interest in real property (but) rather . . . asserting an interest in joint venture income and assets”]; *Liffiton v DiBlasi*, 170 AD2d 994, 994 [4<sup>th</sup> Dept 1991] [complaint alleging that defendant entered into a partnership agreement to purchase a piece of property with legal title held in the name of defendant with plaintiff retaining a 25% equitable interest sought enforcement of an oral partnership agreement and did not seek to acquire an interest in real property subject to the statute of frauds]).

Accordingly, it is

**ORDERED** that the defendants’ motion for summary judgment is denied, and it is further

**ORDERED** that the cross motion is denied as moot, as discussed above.

This constitutes the decision and order of the court.

Dated: May 15, 2019

**ENTER :**

  
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Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court

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<sup>4</sup>From decision and order dated January 16, 2009 in Index No. 8539/08 at page 8.