

Schroeder v Mercurio
2020 NY Slip Op 30597(U)
January 23, 2020
Supreme Court, Queens County
Docket Number: 710088/2015
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33

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Alfred Schroeder, as a member of
Mercury Development LLC,
Plaintiff,

Index No:710088/2015

-- against --

Motion Date:10/29/19

Guy Mercurio

Seq. No:6

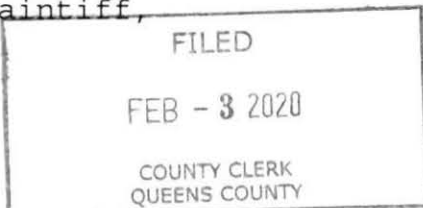
Defendant

-----X
Guy Mercurio

Defendant/Counterclaim Plaintiff,

-- against -

Alfred Schroeder, as a member of
Mercury Development LLC,
Plaintiff/Counterclaim Defendant



-----X
The following papers numbered 1 to 9 read on this motion by the Defendant for an order pursuant to CPLR §3212 granting summary judgment dismissing Plaintiff's three causes of action against defendant.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 4
Answering Affirmations, Affidavits and Exhibits.....	5 - 7
Reply Affirmations, Affidavits and Exhibits.....	8 - 9
Other.....	

Upon the foregoing papers, the motion is granted in part and denied in part.

The individual plaintiff, Schroeder, was an owner of 782 Prospect Place Partners, which acquired 782 Prospect Place, Brooklyn, New York (hereinafter "782 Prospect Place") on September 10, 1986. Defendant/counterclaim plaintiff is, along

with the plaintiff, the co-owner of Mercury Development LLC and supplied the capitol investment funds. It is undisputed by the parties that 782 Prospect needed to be renovated, rehabilitated and was in an unlivable condition. The building remained that way for many years prior to Mercurio's involvement. Schroeder and Mercurio formed Mercury Development LLC in February 2003, with each party owning 50% of the shares. The roles of the parties were for Mercurio to supply capital for the company and fund the renovations and rehabilitation and for Schroeder to oversee the construction and rehabilitation of 782 Prospect Place. The parties formed a limited liability company named Mercury Development LLC on February 4, 2003. They signed an operating agreement on February 5, 2003. The operating agreement stated that Schroeder was to act as a project manager overseeing the rehabilitation of 782 Prospect Place. Schroeder was to be paid \$500.00 per week in consideration for overseeing the project and its timely completion. The operating agreement also stated that once the building was renovated and either sold or rented, that prior to the split of any profits, Mercurio would receive his investment money back, which included the money he paid to Schroeder to transfer the building and all of the rehabilitation costs. He would also earn eight percent (8%) interest on his funds from the date of investment. Schroeder, through his company 782 Prospect Place Partners, sold 782 Prospect Place to Mercury Development LLC for \$380,000.00 on July 1, 2004. 782 Prospect Place is still owned by Mercury Development LLC.

The complaint alleges that, on May 11, 2010 Mercurio changed the locks to the building denying Schroeder access to the premises. Mercurio subsequently rented the premises and has refused to share the profits and has frozen Schroeder out from management of the LLC.

This action was commenced on December 24, 2014 by the plaintiff, alleging causes of action for a declaratory judgment, breach of fiduciary duty, and imposition of a constructive trust.

Pursuant to an agreement dated July 9, 2015, non-party Ronald Dalton agreed to finance the within litigation. The agreement also purports to transfer 95% of Schroeder's interest in the LLC to Dalton.

Defendant moves for summary judgment. Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact

(*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

Defendant's first argument is that plaintiff lacks standing because he transferred his interest in Mercury to Dalton. However, by the terms of the agreement, Schroeder transferred only his beneficial interest and retained his position as a 50% member of Mercury. Accordingly this branch of the motion is denied.

Defendant's second argument is that the declaratory judgment action is barred by the statute of limitations. In this cause of action, Schroeder seeks a judgment from this court declaring that he continues to maintain his fifty percent interest in Mercury.

The statute of limitations period for a declaratory judgment action cannot begin to run any earlier than "when there is a bona fide justiciable controversy between the parties" (*Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]). "[I]n most cases in which declaratory judgment is sought there has been no injury which gave rise to a claim for coercive relief; rather, the parties are in disagreement about their respective legal rights" (*Charney v North Jersey Trading Corp.*, 172 AD2d 390, 390-391 [1st Dept 1991][internal quotation marks omitted]). "To hold that the existence of disagreement triggers the statute of limitations would be unwise because it would

encourage litigation which could prove unnecessary with the passage of time (*Id.* at 391).

In the instant case, defendant has not identified a date when Schroeder's ownership interest was contested in a manner which would cause the statute of limitations to begin to run. Accordingly, this branch of the motion is denied.

Defendant's third argument is that the cause of action for breach of fiduciary action is barred by the statute of limitations. The statute of limitations for a cause of action sounding in breach of fiduciary duty is dependent on the relief sought. The Court of Appeals ruled in *IDT Corp. v Morgan Stanley Dean Witter & Co.* (12 NY3d 132): "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214 (4), which has a three year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies."

Plaintiff alleges that Mercurio breached his fiduciary duty to Schroeder by converting all of the rents of the building and taking all of the capital depreciation of the building on his own account. Thus, the complaint alleges monetary and equitable claims. Accordingly, the claims are not barred to the extent that they allege conduct within the limitations period. Accordingly, the branch of the motion to dismiss the breach of fiduciary cause of action is denied.

Finally, defendant moves to dismiss the constructive trust claim. In order to obtain the remedy of a constructive trust, a plaintiff generally is required to demonstrate four factors: (1) a fiduciary or confidential relationship between the parties, (2) a promise, (3) a transfer of some asset in reliance upon the promise, and (4) unjust enrichment flowing from the breach of the promise (*Paragon v. Paragon*, 164 AD 3d 1460 [2nd Dept. 2018]).

In the instant case, plaintiff argues that a constructive trust should be established with regard to all of the assets improperly diverted by Mercurio. The complaint fails to allege a promise or that the assets were transferred in reliance of the promise. Accordingly, the motion for summary judgment on the


constructive trust claim is granted and it is,

Ordered, that the third cause of action for a constructive trust is dismissed.

Any other or further relief not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: January 23, 2020


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Leonard Livote, A.J.S.C.

FILED
FEB - 3 2020
COUNTY CLERK
QUEENS COUNTY