Toobian-Sani Enters., Inc. v Bronfman Fisher Real Estate Holdings, LLC
2020 NY Slip Op 30928(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 651847/2012
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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TOOBIAN-SANI ENTERPRISES, INC.,INDIVIDUALLY AND ON ITS OWN BEHALF AND DERIVATIVELY ON BEHALF OF 210 WEST 91ST STREET OWNER, LLC,

Plaintiff,

- v -

BRONFMAN FISHER REAL ESTATE HOLDNGS, LLC,210 W 91 ACQUISITION LLC AND, AVI DAN, AS DEFENDANTS, AND 210 WEST 91ST STREET OWNER, LLC AS NOMINAL DEFENDANT

Defendant.

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INDEX NO. 651847/2012

MOTION DATE N/A, N/A

MOTION SEQ. NO. 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 600, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 699, 700, 704, 712, 713

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 599, 601, 602, 603, 604, 605, 606, 607, 608, 610, 611, 612, 698, 705

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action alleging, *inter alia*, breach of an oral joint-venture agreement, defendants Bronfman Fisher Real Estate Holdings LLC ("Bronfman"), 210 W Acquisition LLC ("Acquisition") and Avi Dan ("Dan") (together "Defendants") move for summary judgment dismissing the complaint (motion sequence no. 009) and plaintiff Toobian-Sani Enterprises, Inc. ("Plaintiff") moves for leave to amend the complaint (motion sequence no. 010).

According to the allegations of the complaint, in 2007, Plaintiff discovered "an opportunity to purchase certain air rights over a shared community property and synagogue located at 210 West 91st Street in New York." Plaintiff's president, Pouya Toobian ("Toobian") allegedly developed a business relationship with Bronfman and they discussed creating a partnership to purchase the air rights and develop a residential condominium.

On February 6, 2008, the parties allegedly executed a confidentiality and non-circumvention agreement ("confidentiality agreement"), which stated that "[i]n no event shall Bronfman use any Confidential Information in competition with or to the detriment of TSE [Toobian Sani] nor shall Bronfman disclose the Opportunity or any other Confidential Information to any person or entity except in strict conformity with the terms of this Agreement."

According to the complaint, "[i]n or about February 2008, Bronfman Fisher executed the [confidentiality agreement]. Toobian Sani and Bronfman Fisher subsequently agreed to partner on the Air Rights Purchase and Project and formed a joint venture concerning same." They allegedly agreed that the joint venture would "create a newly formed LLC that would purchase the air rights and enter into certain necessary contracts with the synagogue in order to develop the project."

The entity 210 West 91st Street Owner, LLC was allegedly formed to complete the purchase of the air rights on behalf of the joint venture. The complaint identified Joseph Kranzler ("Kranzler") as an employee and agent of Bronfman, authorized to act on its

behalf, and explained that Kranzler performed certain due diligence in connection with the project.

On May 14, 2008, the LLC entered into a Purchase and Sale Agreement for the air rights, which Toobian signed on its behalf. According to Plaintiff, it was involved in the budget, architecture, financing and design of the project, and contributed, among other things, its skill and knowledge in acquiring the air rights and developing the project. The negotiations for the air rights purchase agreement were allegedly complete in June 2009.

Plaintiff alleged that also in June 2009, Dan acquired the ability to purchase the air rights because Bronfman transferred its interests in the LLC to Dan without Plaintiff's knowledge or consent. On June 26, 2009, Dan signed a contract for the purchase of the air rights. According to the complaint "the June 2009 air rights contract and memorandum contract, which Dan signed as a member of [the LLC], identified [the LLC] as the air rights contract vendee." Plaintiff was still a member of the LLC at that time, and Dan was aware of that. Dan ultimately transferred the contract vendee rights from the LLC to a new LLC entity 210 West 91st Street II and closed on the purchase of the air rights through that entity on October 31, 2010.

Plaintiff commenced this action and alleged causes of action sounding in breach of contract, breach of a joint venture agreement, breach of fiduciary duty, quantum meruit, breach of the implied covenant of good faith and fair dealing, tortious interference with contract and prospective economic advantage, constructive trust, accounting, and for a declaratory judgment.

During the course of discovery, Plaintiff moved to compel disclosure of certain documents that Defendants withheld on the basis of attorney-client privilege. In an order dated March 7, 2017, I directed a Special Referee to conduct a hearing on the issues of whether (1) Kranzler was an agent for Bronfman in connection with the air rights project for the time period prior to January 1, 2008; and (2) whether Kranzler was an agent for Dan in connection with the air rights project for the time period May 1, 2008 to July 31, 2008. After a hearing, the Special Referee determined that Kranzler ceased being Bronfman's agent in connection with the air rights project as of January 1, 2008, and that Kranzler was Dan's agent in connection with the air rights project for the time period May 1, 2008 to July 31, 2008. In an order dated September 11, 2018, I confirmed the Referee's report.

Motion to Amend

Plaintiff now moves to amend the complaint, arguing that it does not wish to add any new causes of action in the complaint, rather, it only seeks to amplify and clarify certain of the factual allegations. Of note, the proposed amended complaint would clarify the timing of the joint venture agreement between Plaintiff and Bronfman. Plaintiff maintains that it is seeking to make the amendments now because Toobian's "recollection was refreshed by emails that were produced in 2016, after [his] deposition" and the amendments would not prejudice or surprise Defendants in any way.

Specifically, Toobian claims that after his examination before trial, he reviewed certain emails produced in 2016 that refreshed his recollection that the joint venture was actually entered into in 2007. However, when asked about many of the details of the

transaction, including the timing and the parties involved, Toobian testified that he did not remember.

In opposition, Defendants first argue that Plaintiff's new facts contradict the original theory of the case. The original complaint alleges that the oral joint venture agreement was entered into between Toobian on behalf of Plaintiff, and Kranzler on behalf of Bronfman in the period after February 2008 and before April 2008. Now, several years after the action was commenced via a complaint that was verified as true by Toobian, Plaintiff is seeking to recast the allegations to assert that the oral joint venture agreement between it and Bronfman was actually entered into at a meeting at Bronfman's office in 2007 by Toobian and Bronfman's principal Shulem Fisher ("Fisher"). According to Defendants, the motion to amend is merely a "last ditch attempt to avoid the consequences of this Court's confirmation of the Referee's Decision that Kranzler's agency relationship with [Bronfman] concerning the air rights project terminated on January 1, 2008."

Defendants next argue that Plaintiff's delay in seeking this amendment is unreasonable and prejudicial. Even if Plaintiff's explanation that the amendment is being requested now because Toobian's memory was refreshed by emails produced in 2016 after his deposition, that does not explain why it waited two years after Toobian's recollection was refreshed before seeking to amend. In addition, Defendants would face severe prejudice by having to re-open discovery for these new factual allegations.

In reply, Plaintiff alleges that many of the proposed amendments were not addressed in Defendants' opposition, and therefore should be permitted. The amendment

that clarified that the joint venture was formed in late 2007, to which Defendants are objecting, should be granted as well because Defendants misinterpreted the original complaint. The original complaint did not state that Kranzler entered into the joint venture on behalf of Bronfman, rather it states that Toobian and Bronfman decided to enter into a joint venture agreement after the execution of the confidentiality agreement. The proposed amendment merely seeks to clarify that the joint venture was formed before the execution of the confidentiality agreement, not after.

At his deposition, Toobian testified that he first met Fisher at the end of 2007 or beginning of 2008 at a meeting with Kranzler and other parties about the proposed development. In an affidavit, Toobian states that at his deposition, he testified about a meeting he attended with Fisher, Kranzler, Dweck and others at Bronfman's office. At that meeting, the discussed a project involving the air rights. At that meeting, it was Fisher who confirmed that Bronfman wanted to move forward with the project with Toobian. After reviewing emails, he realized that the meeting was not in 2008, rather the meeting was in the fall of 2007, and it was then that the parties entered into the joint venture agreement.

Plaintiff further notes that the Referee's determination as to the issue of Kranzler's agency was only related to the limited discovery issue of Defendants' assertion of the attorney-client privilege. The Referee's decision had no impact on the issue of the timing of the alleged joint venture agreement. Finally, Plaintiff contends defendant suffered no prejudice and there was no unreasonable delay here.

While Plaintiff accurately notes that the original complaint does not name Kranzler as the individual who entered into the joint venture agreement on behalf of Bronfman, nevertheless, the circumstances and timing of the alleged oral joint venture is a material issue in this action. There is simply no reasonable explanation for Toobian's failure timely to review documents and determine that the original allegations of the complaint were incorrect or incomplete as to the circumstances surrounding the creation of the oral joint venture agreement, and then to wait two years before seeking to amend the complaint.

Given the long history of this action, the fact that the alleged joint venture is oral and highly dependent on conversations and actions that have already been recounted through depositions, and the fact that discovery is closed and the action is ready for trial, amendment of the verified complaint is neither necessary nor appropriate. No new theories of liability may be pled and Plaintiff claims that it is simply clarifying and amplifying certain facts. If necessary, once evidence is adduced at trial, the pleadings can be amended to conform to the evidence then. If Plaintiff wants to advance its theory of apparent authority at trial, it can use facts discovered to support that theory.

As Plaintiff has not adequately set forth a reason to amend the complaint at this time, the motion to amend is denied.

Motion for Summary Judgment

Defendants move for summary judgment dismissing the complaint. They first argue that the evidence does not support a finding that a joint venture agreement existed. When asked at his examination before trial about the specific terms of the agreement,

Toobian merely testified that Plaintiff was "50-50 partners" with Bronfman but could not recall any further details or specific terms, *e.g.,* what services each was to provide to the joint venture or the duration of the joint venture.

Defendants also argue that the documentary evidence shows that there was no joint venture agreement. There were drafts of documents containing different parties and conflicting terms between 2007 and 2009, which demonstrates that there was never any mutual intent to be bound to any agreement. Defendants note that Plaintiff did not contribute any funds to purchase the air rights or to the joint venture.

In opposition, Plaintiff argues that whether it and Bronfman manifested the intent to be joint venturers is an issue of fact. According to Plaintiff, Toobian specifically testified that the purpose of the meeting in the fall of 2007 was to determine whether Bronfman wanted to partner with Plaintiff to develop the air rights into a residential condominium. He testified that the joint venture was formed between him and Fisher at that meeting at Bronfman's office.

Plaintiff next maintains that there is sufficient evidence of specific terms of the joint venture agreement. Plaintiff argues that the evidence shows that the terms were: that (1) Plaintiff and Bronfman agreed to be equal, 50/50 partners; (2) that Bronfman would contribute the majority of the capital and construction financing for the joint venture; (3) that Plaintiff would contribute its unique ability to negotiate the purchase of the Community House from the Synagogue - which Bronfman acknowledged was essential to developing the Air Rights - its skill and effort in negotiations with third parties concerning the project's architecture and design, and certain expenses; (4) a new

entity would be created to enter into contracts for the joint venture; and (5) Plaintiff and Bronfman would jointly control the joint venture as equal partners and later as co-managing members after the formation of the new entity. Specifying the duration was not necessary, because it was understood that the duration would be until the project was complete. Further, stating that Plaintiff and Bronfman would be 50/50 partners meant that they would share in the profits and losses equally.

Plaintiff also contends that an issue of fact exists as to whether it financially contributed to the joint venture. Even if it made no capital contributions to the joint venture per se, it contributed capital by paying certain attorneys' fees and renewal building permits. Further, even if it did not contribute financially, it contributed its "skill, knowledge and relationship with the Synagogue to the Joint Venture, which [Bronfman] acknowledged were necessary to in order to purchase the Community Property and develop the Air Rights."

A joint venture is "a special combination of two or more persons where in some specific venture a profit is jointly sought." *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 565 (1988). The essential elements of a joint venture are (1) an agreement manifesting the intent of the parties to be associated as joint venturers, (2) a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), (3) some degree of joint proprietorship and control over the enterprise; and (4) a provision for the sharing of profits and losses." *Richbell Info. Servs.. Inc. v. Juniter Ptrs.. L.P.,* 309 A.D.2d 288, 298 (1st Dept 2003). Under the

totality of the circumstances, issues of fact exist as to whether the parties entered into a binding oral joint venture agreement, and if so, whether such agreement was breached. *See Blank v. Nadler*, 143 A.D.2d 966 (2nd Dept. 1988). The credibility issues and conflicting inferences taken from the evidence must be resolved at trial. *See Timberline R & G Bldg. Co. v. Sigurjonsson*, 161 A.D.2d 947 (3rd Dept. 1990).

Defendants next argue that the cause of action for breach of confidentiality agreement must be dismissed because (1) the confidentiality agreement is too vague to be enforceable because it does not define "opportunity" or "confidential information"; and (2) in any event, there is no evidence that the agreement was breached. Further, it is not clear whose signature appears on the document on behalf of Bronfman. Even if it was Kranzler's signature, the Referee held that as of January 1, 2008, Kranzler was not an agent of Bronfman, and therefore, did not have authority to sign that agreement. The Referee determined that Kranzler was not an agent based on, *inter alia*, the lack of any "testimony that any [Bronfman] employee gave any indication to Plaintiff or anyone else that Kranzler continued to act as [Bronfman's] agent in connection with the air rights project."

In opposition, Plaintiff argues that the parties intended the "opportunity" to mean the opportunity to develop a condominium tower over 210 West 91st Street and the "confidential information" referred to Plaintiff's unique plan to purchase the synagogue's community property to use as a staging ground for the development.

Plaintiffs also claim that an issue of fact exists as to whether Kranzler executed the confidentiality agreement. Even though Kranzler did not confirm that the signature on the agreement was his, he testified at his examination before trial that he entered into the confidentiality agreement on Bronfman's behalf. Plaintiff argues that, even if he was not Bronfman's agent at the time the agreement was signed, Kranzler acted with apparent authority.

Based on the documentary evidence presented and the relevant examination testimony reviewed, an issue of fact exists as to whether the parties entered into a binding confidentiality agreement and if so, whether the agreement was breached. An issue of fact also exists as to whether it was Kranzler who signed the agreement, and if so, on whose behalf he was signing.

With regard to the remaining causes of action, Defendants argue that because Plaintiff is essentially seeking compensation for negotiating or consummating a transaction for the purchase or sale of the air rights and related agreements with the synagogue, the causes of action are barred by the Statute of Frauds which applies to a "contract to pay compensation for services rendered…in negotiating the purchase, sale, exchange…or any real estate[,] business opportunity, [or] an interest therein…including the creating of a partnership interest." However, according to Plaintiff, based on the evidence presented, it is not seeking compensation for those types of services, rather, it is seeking to recover for the reasonable value of the services it provided, including consulting with architects and facilitating the installation of a minipile. Thus, an issue of fact exists as to whether the Statute of Frauds would apply to bar these causes of action.

As to the claim for tortious interference with contract, "[a] claim of tortious interference with contract requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dept. 2000). Because issues of fact exist as to whether the joint venture agreement or confidentiality agreements exist and/or are enforceable, I cannot determine on this motion for summary judgment whether this cause of action is sustainable.

Plaintiff also pleads a claim for tortious interference with prospective business relationships. "A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dept. 2009). This cause of action is dismissed as there is no evidence to suggest that Dan acted with the sole purpose of harming Toobian or by using unlawful means.

In its causes of action alleging breaches of fiduciary duties (third, fourth, ninth and tenth causes of action), Plaintiff alleges individually and derivatively that Bronfman and Dan owed fiduciary duties to Plaintiff and the LLC and breached those duties by depriving Plaintiff and the LLC of ownership of the air rights and the opportunities associated with the project. Plaintiff further alleges that Dan engaged in self-dealing by

misappropriating the assets of the LLC and then transferring the contract vendee rights in the air rights contract to his new LLC.

Defendants argue that because there was no joint venture, there were no fiduciary duties owed that could be breached, or self-dealing that could occur. They further argue that the causes of action for constructive trust and accounting must also fail because there was no confidential or fiduciary relationship that existed to support such claims.

Again, because there are issues of fact with regard to the relationships between the parties, including whether the parties were joint venturers, and whether Toobian was a member of the LLC, and therefore whether any fiduciary duties were owed, issues of fact exist which preclude summary dismissal of the breach of fiduciary duty, accounting and constructive trust causes of action.

Defendants next maintain that the declaratory judgment cause of action must be dismissed because there was no joint venture agreement, and in any event, a declaratory judgment is not appropriate where a plaintiff has an adequate remedy based on another cause of action. Plaintiff argues that the declaratory judgment cause of action cannot be dismissed because money damages are not a sufficient remedy, it would need a judicial declaration as well so that it can recover its interests in the air rights. A cause of action for a declaratory judgment is unnecessary and inappropriate where a plaintiff has an adequate, alternative remedy in another cause of action, such as breach of contract. *Apple Records, Inc. v. Capitol Records, Inc.,* 137 A.D.2d 50 (1st Dept. 1988). The determination of the breach of contract cause of action will give guidance to the parties as

to their contractual relationship and performance under the contract and would obviate the need for any declaratory relief. *See 204 Columbia Hgts., LLC v Manheim*, 148 A.D.3d 59 (1st Dept. 2017). Here, Plaintiff has an adequate alternative remedy, thus the declaratory judgment cause of action is dismissed.

Finally, Defendants argue, *inter alia*, that the quantum meruit and breach of the covenant of good faith and fair dealing causes of action must be dismissed as duplicative of the breach of contract causes of action. Plaintiff argues that the cause of action alleging breach of the covenant of good faith and fair dealing is not duplicative of the breach of contract cause of action because it is based on Bronfman's failure to disclose that it transferred its interests in the joint venture to Kranzler and/or Dan, and Dan's refusal to recognize Plaintiff's interest in the project and transfer of the air rights from the LLC to Dan's new LLC. Plaintiff notes that the causes of action cannot be dismissed as duplicative of the breach of contract causes of action because there is a dispute as to the existence of the contracts.

To establish a claim in quantum meruit, a claimant must establish "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services." *Curtis Props. Corp. v. Greif Cos.,* 236 A.D.2d 237, 239 (1st Dept. 1997). A party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a dispute as to the existence of a contract. *Id*.

A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties. *Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.,* 77 A.D.3d 474 (1st Dept. 2010). The covenant requires that neither party shall do anything that would have the effect of destroying or injuring the right of the other party to receive the benefits of the contract. *See generally Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236 (1st Dept. 2000).

Given that there are issues of fact as to whether a contract existed between the parties, these causes of action will not be dismissed.

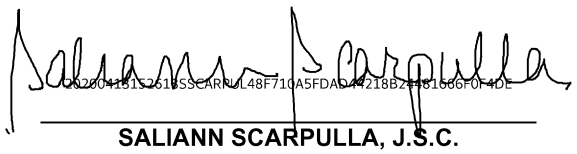
In accordance with the foregoing, it is hereby

ORDERED that defendants Bronfman Fisher Real Estate Holdings LLC, 210 W Acquisition LLC, and Avi Dan's motion for summary judgment dismissing the complaint (motion sequence no. 009) is granted only to the extent that the causes of action for a declaratory judgment and for tortious interference with prospective business advantage are dismissed and the remaining causes of action are severed and shall continue; and it is further

ORDERED that plaintiff Toobian-Sani Enterprises, Inc.'s motion for leave to amend the complaint (motion sequence no. 010) is denied; and it is further

ORDERED that the parties are directed to appear for a conference on June 24, 2020 at 2:15 p.m. unless the conference is further adjourned by the Court.

This constitutes the decision and order of the court.



4/13/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE