

Kamel v Ahgelian

2020 NY Slip Op 31208(U)

May 1, 2020

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.

At an IAS Term, Part 9, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of May, 2020.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

AARON KAMEL,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 517828/2017

JOSEPH AHGELIAN AND 1233 DEAN STREET, LLC,

Defendants,

----- X

The following e-filed papers read herein:

NYSEF Doc. Nos.:

Notice of Motion and	
Affidavits (Affirmations) Annexed	_____
Opposing Affidavits (Affirmations)	_____
Reply Affidavits (Affirmations)	_____

	<u>51-67, 80</u>
	<u>70-79</u>
	<u>81</u>

Upon the foregoing papers in this action for specific performance of an alleged oral agreement, defendants move in motion sequence (mot. seq.) five for an order, pursuant to CPLR 2221 and 3212, renewing defendants’ prior motion for summary judgment and, upon renewal, granting the motion and dismissing the complaint.

Background

Plaintiff Aaron Kamel (Kamel) commenced the underlying action for specific performance of an alleged oral joint venture agreement between himself and defendant

Joseph Aghelian (Aghelian) and/or for damages from the breach thereof. Kamel's claim, in essence, is that he and Aghelian agreed to purchase 1233 Dean Street as equal partners, with title to be taken by an LLC to be formed for that purpose, that he worked to bring the acquisition to fruition, and that Aghelian undercut him by purchasing the property without him, in his name, and that he then transferred it to an LLC (co-defendant 1233 Dean Street, LLC) which is solely owned and operated by defendant Aghelian.

In late 2018, defendants moved for summary judgment dismissing the complaint on the ground that the suit was barred by the Statute of Frauds (NY General Obligations Law § 5-703), as there was no written agreement between the parties. This court denied the motion and cited numerous precedents that hold that the Statute of Frauds does not apply to render void oral partnership or joint venture agreements to deal in real property. The court further noted that, although the complaint provides only limited information about the formation of the alleged venture, defendants had not argued in their motion that the existence of an oral agreement had not been adequately pled. Additionally, the existence of several factual disputes between the parties and the absence of any supporting documentation (such as the sales contract, broker agreement, down payment checks, etc.) was noted. The court thus found that the defendants had not made a prima facie case for summary judgment and therefore the motion could not be granted.

Following depositions of Kamel and Aghelian, held after the prior motion, defendants now move for renewal¹ of their prior motion for summary judgment, and seek

¹ Defendants filed a corrected notice of motion on January 6, 2020, to correct the prayer for relief to specify that defendants were requesting renewal of the prior motion, which was left out of the original notice of motion, which merely asks for summary judgment.

an order dismissing the plaintiff's complaint. Defendants argue that, based upon evidence that was unavailable prior to the completion of discovery, it should be clear to the court that there was no oral agreement between the parties. Defendants also reiterate their previous (and alternative) legal argument that the Statute of Frauds bars plaintiff's claims because the oral agreement plaintiff alleges they made is unenforceable.

Plaintiff opposes the motion, and argues that this is an impermissible successive motion for summary judgment on a different theory, that renewal is inappropriate in the absence of a reasonable justification for failing to provide the new theory (that there was no oral agreement) and the "new" facts in the previous motion, and that an enforceable agreement between Kamel and Aghelian was made.

Discussion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e] [2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]).

Defendants argue that the plaintiff's deposition testimony, among other things, demonstrates that an agreement (meeting of the minds) had not been reached by the parties, and that, as the deposition was not held until after the original motion for summary judgment was denied, it constitutes new evidence that should lead to a different result.

After considering the arguments, the court grants defendants leave to renew, and agrees to consider the evidence available from the parties' deposition transcripts. However, upon review, the court adheres to its prior determination and denies the defendants' motion for summary judgment dismissing the complaint.

As an initial matter, the court notes that no new evidence has been proffered, nor any change in the law presented, that would affect the court's previous determination that the Statute of Frauds is not applicable to the parties' alleged agreement. "[L]aw of the case is a rule of practice, an articulation of sound policy, that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Abbas v Cole*, 44 AD3d 31, 37 [2d Dept 2007]; quoting *Thomas v Dietrick*, 284 AD2d 325 [2d Dept 2001]; quoting *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). The court's prior determination on this issue constitutes the law of the case, requires no further analysis, and shall remain undisturbed.

It is well settled that "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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also, *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden

shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], *quoting Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

At their respective depositions, Kamel and presented rather different versions of the relevant events. Though plaintiff’s testimony was in places unclear, it appears that he claims to have originated the deal, as he claims he found the property and contacted the seller through a cold call [Kamel Dep., 51:11-52:6]), that he negotiated the purchase price [Kamel Dep., 64:17-67:11, 85:11-17], and that he brought Aghelian into the deal which he had already made, expecting that they would partner 50/50 in the acquiring entity, whether it would be a partnership, corporation or LLC (the “usual” terms) [Kamel Dep., 52:20-55:22, 68:18-69:22]. He testified that before the closing, he marketed the property to an investor (“Anton”) to see what it was worth and to explore the possibility of the parties’ flipping the property [Kamel Dep., 97:18-105:22]. At some point, plaintiff testified, Aghelian tried to renegotiate their agreement, and Kamel was open to such discussions (and seems to have later been willing to accept a buyout) [Kamel Dep., 52:20-55:22, 78:9-

15, 93:25-101:23], but Aghelian purchased the property “out from under him” [Kamel Dep., 82:2-83:22].

Aghelian, on the other hand, claims that the transaction originated with a lead about the property being available for sale, which he and not plaintiff had found [Aghelian Dep., 40:4-41:11] and that he allowed plaintiff to be involved in the negotiations under his supervision, since Kamel wanted to learn the business [Aghelian Dep., 42:21-45:24]. Aghelian admitted that he did offer plaintiff a 50% stake in the venture, but only if Kamel provided half of the funds to purchase the property [Aghelian Dep., 68:23-71:20] and he also admitted that he closed the deal without actually affording plaintiff the opportunity to proffer his share of the money [Aghelian Dep., 74:9-16].

Notwithstanding defendants’ arguments to the contrary, the purported “new” deposition evidence creates more factual issues than it resolves. The issues of credibility as to the parties’ respective versions of the events preclude a grant of summary judgment (*see Forrest*, 3 NY3d at 315). The parties’ conflicting testimony, it should be noted, has no bearing on the defendants’ prior motion, which asserted that the action is barred by the Statute of Frauds. Now, urging the court to determine, as a matter of law, that there was no oral agreement so the complaint must be dismissed on that grounds, is unavailing and really is a request for a subsequent summary judgment motion. Further, this is not relief that is possible on these facts. Such a conclusion might be possible if the claim was that the plaintiff sued the wrong person, who coincidentally has the same name as the person he intended to sue. Not here. These parties, who are cousins, have submitted a large number

of text messages between them about this transaction, most of which the court found were inadmissible in the prior decision. But there were certainly discussions between them, and text messages, and whether they are sufficient to constitute a meeting of the minds sufficient to constitute an enforceable oral agreement is not a question for the court. Consequently, the defendants' motion is denied without regard to the sufficiency of plaintiff's opposing papers (*Alvarez*, 68 NY2d at 324; *Smalls*, 10 NY3d at 735).

Conclusion

Accordingly, it is

ORDERED that the branch of defendants' mot. seq. five, seeking leave to renew its prior motion for summary judgment is granted, and it is further

ORDERED that, upon renewal, the branch defendants' mot. seq. five seeking summary judgment is denied in all respects.

The court, having considered the defendants' remaining contentions finds them to be unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER:



Debra Silber, JSC