

Lembo v Rosania
2020 NY Slip Op 32377(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 655076/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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MATTHEW LEMBO	INDEX NO.	<u>655076/2016</u>
Plaintiff,	MOTION DATE	<u>03/23/2020</u>
- v -	MOTION SEQ. NO.	<u>002</u>
ROBERT ROSANIA,		
Defendant.	DECISION + ORDER ON	MOTION

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 41, 43, 44, 45, 46, 48, 49

were read on this motion to/for MODIFY.

Upon the foregoing documents, it is

In this employment-related action, Plaintiff Matthew Lembo (“Lembo”) moves to amend the complaint pursuant to CPLR 3025(b) to add a cause of action for a constructive trust and to impose *pendente lite* a constructive trust on Defendant Robert Rosania’s (“Rosania”) assets equal to 5.83% of the proceeds of the most recent restructuring of the property, the Villas at Parkmerced (“Property”), pending the outcome of this litigation. Rosania opposes the motion and cross-moves to dismiss the proposed amended complaint.

For the purposes of this motion, familiarity with the facts of the underlying dispute are assumed, and the factual background will only be repeated to the extent necessary.

Background

Lembo allegedly worked as an employee of Stellar Management (“Stellar”) beginning in 2008. During this time, Rosania was Stellar’s chief executive officer. Lembo was hired to work with and under the direction of Rosania to financially restructure Stellar’s real estate, which include Parkmerced, Larkspur Shores (“Larkspur”), Madera Vista, Alexandria Park, The Georgian, The Enclave, and The Archstone Portfolio (collectively referred to as the “Stellar Properties”).

During Lembo’s employment, he allegedly entered into an oral employment agreement with Rosania, whereby Rosania promised Lembo that, for each restructuring deal he successfully completed, Lembo would be granted a 2.5% equity interest in the entity which owned the property or properties involved; this interest would increase to 5.83% if certain conditions, which were specified in each property's operating agreement, were met (the Agreement”).

Lembo allegedly restructured Larkspur in 2012, and pursuant to the Agreement, allegedly became a member in Marin Resi LLC, which indirectly controlled the property. Rosania left Stellar in 2013; after this time, he denied entering into the Agreement with Lembo and refused to compensate Lembo for his work in restructuring the Property and Larkspur.

Lembo filed the initial complaint in January 2018, alleging causes of action for breach of contract, declaratory judgment, and unjust enrichment based upon, *inter alia*, Rosania's failure to pay Lembo as agreed for services allegedly rendered in connection with the successful financial restructuring of the Property and Larkspur.

Rosania moved to dismiss the originally filed complaint, which I denied by decision and order dated July 9, 2019 (“2019 Decision”). In the 2019 Decision, I found that Lembo sufficiently plead a breach of contract claim by alleging that “Rosania expressly offered and Lembo agreed that, in exchange for Lembo’s successful completion of a restructuring deal of the Property, Rosania would grant Lembo a 2.5% equity interest in Parkmerced LLC [and that Lembo] successfully completed his performance of the Agreement but Rosania refused to perform, in breach of the Agreement.” I also found that the complaint stated a cause of action for unjust enrichment because it alleged that “Rosania was enriched at Lembo’s expense because Lembo successfully restructured the Property’s financing without being compensated, and as a result of Lembo’s efforts, the value of the Property increased significantly.”

Lembo now seeks to amend the complaint to add a cause of action for a constructive trust and to impose *pendente lite* a constructive trust on Rosania’s assets equal to 5.83% of the proceeds of the most recent restructuring of the Property. Rosania opposes the motion and cross-moves to dismiss the proposed amended complaint.

In the proposed amended complaint, Lembo alleges that “Rosania and Lembo were in a confidential relationship stemming from Lembo’s work on the restructuring of the [Stellar] Properties.”

Lembo also alleges that Rosania is the managing member of Marin Resi LLC – the indirect owner of Larkspur – and therefore owes a fiduciary duty to Lembo, who allegedly became a partner in the Marin Resi LLC after restructuring Larkspur. Rosania allegedly

made distributions to other member in 2016 but did not make any distributions to Lembo. Lembo also alleges, upon information and belief, that Larkspur was sold to Deutsche Bank at Rosania's direction in 2018, however, Rosania failed to remit to Lembo his share of the proceeds from this sale.

Lembo alleges that, after he filed his complaint in January 2018, Rosania settled a series of lawsuits between Rosania and Laurence Gluck ("Gluck"), and upon information and belief, Rosania received "a substantial sum from Gluck in connection with the settlement." In December 2019, Rosania's entity recapitalized Parkmerced again, with a calculation of approximately \$1.8 billion.

Discussion

A motion seeking leave to amend a pleading pursuant to CPLR 3025(b) is generally "freely granted absent prejudice or surprise resulting from the delay." *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 (1st Dept 2006). The party seeking leave to amend is required to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010) (internal citations omitted).

Lembo seeks leave to amend his complaint to add a cause of action for a constructive trust. To state a cause of action for a constructive trust, the complaint must allege: "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." *Bankers Sec. Life Ins. Soc. v Shakerdge*, 49 NY2d 939, 940 (1980) (citations omitted).

Rosania argues that the claim is legally insufficient because Lembo failed to allege a confidential or fiduciary relationship between Rosania, the alleged constructive trustee, and Lembo, the alleged beneficiary of the constructive trust.

The proposed amended complaint alleges that Lembo and Rosania “were in a confidential and fiduciary relationship stemming from Lembo’s work on the restructuring of the Distressed Properties.” Lembo alleges that, by virtue of the work that he completed when employed at Stellar, he is member of the Marin Resi LLC. Although Lembo alleges that he holds membership interest in Marin Resi LLC, this relationship is not the basis for the breach of contract or unjust enrichment causes of action. Rather, as discussed in the 2019 Decision, the basis for the underlying claims is that Lembo was employed by Stellar and was completing work pursuant to an alleged oral employment Agreement, and the dispute arises out of Rosania’s failure to compensate Lembo pursuant to this Agreement.

The work done by Lembo was completed in an employee-employer context, not within the context of a special relationship, and is therefore insufficient to support a constructive trust cause of action. *See Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 835-36 (1st Dept 1983).

Even if Lembo properly alleged a fiduciary relationship, Lembo failed to allege facts to allege any transfer of interest in reliance of a promise. Allegations that Lembo worked to successfully restructure the properties, without more, is insufficient to allege any transfer of interest by Lembo in reliance of a promise. *Cf. Gaddi v Gaddi*, 108 AD3d

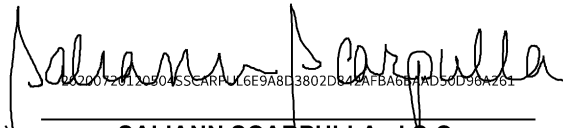
430, 431 (1st Dept 2013) (“in reliance on defendant's promise, plaintiffs satisfied the mortgage and paid the property taxes and common charges for several years”); *Pinkava v Yurkiw*, 64 AD3d 690, 693 (2d Dept 2009) (“plaintiffs’ allegations of payments to the Yurkiws of \$51,000 and their contribution of time managing the property was sufficient to establish the transfer in reliance . . .”); *Rafferty Sand & Gravel, LLC v Kalvaitis*, 116 AD3d 1290, 1292 (3d Dept 2014) (“plaintiff contributed more than \$200,000 toward the business as well as all of the knowledge, labor, equipment and other resources necessary for its development, that a substantial amount of processed material that it had paid to create remained on the property when plaintiff was locked out in 2011 . . .”).

Because the proposed amendment to the complaint to add a cause of action for constructive trust is clearly devoid of merit, Lembo’s motion to amend the complaint and to impose *pendente lite* a constructive trust on Rosania’s assets is denied. Rosania’s cross-motion to dismiss the proposed amended complaint is denied as moot.

In accordance with the foregoing, it is hereby

ORDERED that Plaintiff Matthew Lembo's motion to amend the complaint is denied, and Defendant Robert Rosania's cross-motion to dismiss the proposed amended complaint is denied as moot.

This constitutes the decision and order of the Court.

<u>7/20/2020</u> DATE	 SALIANN SCARPULLA, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED ☐ GRANTED ☒ DENIED ☐ SETTLE ORDER ☐ INCLUDES TRANSFER/REASSIGN	☒ NON-FINAL DISPOSITION ☐ GRANTED IN PART ☐ OTHER ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE