

Elkerson v Lee

2021 NY Slip Op 33069(U)

December 14, 2021

Supreme Court, Bronx County

Docket Number: Index No. 34914/2020E

Judge: Kenneth L. Thompson, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

ALBERT ELKERSON, AL EL CONSTRUCTION,
LLC PIER 132 LLC, BX SAMMICH LLC, JOVIAL
HOLISTIC LC, SOUTH-SOUTH BRONX, LLC and
BRONX BLACK HOUSE, LLC

Index No: 34914/2020E

DECISION AND ORDER

Plaintiff,

Present:

HON. KENNETH L. THOMPSON, JR.

-against-

MARK C. LEE, SENGDARA LLC, SAMUEL
CHUANG, ESQ., SANDY SUN, LLC GLOBAL
ESTATE, LLC HAN DYNASTY BRONX, LLC,
THREE SUNS HOLDING LLC a/k/a” Three Sun
Holdings LLC”,

Defendants

_____ X

The following papers numbered 1 to read on this motion to dismiss

No	On Calendar of July 30, 2021	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		motion sequence #5 NYSCEF
Answering Affidavit and Exhibits-----		motion sequence #5 NYSCEF
Replying Affidavit and Exhibits-----		motion sequence #5 NYSCEF
Memorandum of Law-----		motion sequence #5 NYSCEF

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, Mark C. Lee, Sengdara, LLC and Global Estate, LLC move pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint. Plaintiff alleges that he entered into an oral agreement to form a joint venture partnership with defendants for the development of a commercial property owned by defendants. Plaintiff was to contribute “sweat equity” and would receive four commercial condominium spaces, would be a minority partner though he would have no decision-making authority, receive a share of the profits from the commercial property and would receive a share of the rents that were paid in excess of one dollar per square foot.

Plaintiffs argue that defendants’ motion is procedurally defective because



defendants are limited to a single motion to dismiss. Defendants prior motion to dismiss was denied as moot as plaintiff was granted leave to amend the complaint. “Nor does the motion violate the single motion rule (*see* CPLR 3211 [e]), since the prior motion was not decided on the merits.” (*Rivera v. Bd. of Educ. of City of New York*, 82 A.D.3d 614 [1st Dept 2011]). Therefore, defendants’ motion does not violate the single motion rule since the merits of the underlying motion to dismiss were not decided.

“On a motion to dismiss, the court is not called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander’s, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Rather, the complaint should be liberally construed in favor of the plaintiff (*see, Foley v. D’Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).” (*Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421-422 [1st Dept 2001]).

JOINT VENTURE

The causes of action that allege defendants’ breach of a joint venture agreement are numbered 1st, 7th, 8th, 9th, 14th, 17th and 18th. With respect to whether a joint venture was formed by oral agreement, the alleged provision that would transfer to plaintiffs, four commercial properties runs afoul of the statute of

frauds, since no writing of the agreement has been alleged. The amended complaint alleges that the alleged oral agreement for plaintiffs to obtain four commercial units “was to be memorialized into a writing by the lawyers.”¹ There is no allegation that the memorialization occurred.

A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

GOL § 5-703(2)

Plaintiffs’ argument that the agreement is not subject to the statute of frauds because the agreement concerns a joint venture is inapposite. (*Walsh v. Rechler*, 151 A.D.2d 473 [2nd Dept 1989]). In *Walsh*, the plaintiff sought an “accounting and a sum of money equal to 20% of the value of new acquisitions of real property.” *Id.* In contrast, plaintiffs herein are seeking, in part, a direct interest in four commercial spaces owned by defendants, that plaintiff alleges was part of an oral contract between plaintiffs and defendants.

With respect to any remuneration for bringing in commercial tenants as alleged by plaintiffs’ such activity also runs afoul of the statute of Frauds. “it is undisputed that no written agreement existed, and any oral agreement that BRA would serve as leasing agent for the property is unenforceable under the statute of frauds (General Obligations Law § 5–701[a][10]).” (*Hersh v. Weg*, 105 A.D.3d

¹ Amended complaint, paragraph 40.

539 (1st Dept 2013]). GOL 701(a)(10) provides as follows:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

...

10. Is a contract to pay compensation for services rendered in... negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

There is no allegation that plaintiff is an auctioneer, attorney at law, a licensed real estate broker or real agent salesman.

Plaintiffs failed to allege that they would share in losses of the joint venture agreement in the 1st, 7th, 9th 14th causes of action,² while alleging that they would share in profits. "There is no indication of mutual control over the management and operation of the properties, nor is there an agreement to share the burden of losses." (*Magnum Real Est. Servs., Inc. v. 133-134-135 Assocs., LLC*, 59 A.D.3d 362, 363 [1st Dept 2009]). See also, (*MacKay v. Paesano*, 185 A.D.3d 915, 915–16, 128 N.Y.S.3d 645 (2020)). It is noted that plaintiffs alleged losses as well as

² Amended complaint, paragraphs 91, 172, 178, 190

profits in the 17th and 18th causes of action.³ Therefore, plaintiffs' failure to allege a sharing of losses in some paragraphs of the amended complaint is ameliorated in the 17th and 18th causes of action. The issue of pleading sharing of losses as well as profits is not dispositive to this motion.

Accordingly, the 1st, 7th, 8th, 9th, 14th, 17th and 18th causes of action are hereby dismissed on grounds of violation of the statute of frauds.

FRAUDULENT INDUCEMENT CLAIMS

The causes of action that allege defendants' fraudulent inducement to enter an oral joint venture agreement are numbered as follows: 2nd, 3rd, 4th and 5th. Plaintiffs' allegation regarding fraudulent inducement relates to the breach of contract regarding the formation of a joint venture.

We find that since the only fraud charged in the second cause of action relates to an alleged breach of contract (*see, Lane v McCallion*, 166 AD2d 688, 691; *Mastropieri v Solmar Constr. Co.*, 159 AD2d 698), the Supreme Court should have dismissed that cause of action. Moreover, the plaintiff cannot avoid the bar of the Statute of Frauds by labelling the cause of action as one to recover damages for fraud where, as here, proof of a contract, void under the Statute of Frauds, is essential to maintain the action (*see, Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 408).

(*Bernbach v. Camp Wah-nee in the Berkshires*, 176 A.D.2d 304, 305 [2nd Dept 1991]).

Accordingly, the 2nd, 3rd, 4th and 5th causes of action are dismissed.

³ Amended complaint, paragraphs 275 and 290.

CIVIL CONSPIRACY

The cause of action that alleges civil conspiracy is numbered 6th.

The allegations of the first cause of action are not sufficient. It purports to allege a conspiracy but, as we long ago held, "a mere conspiracy to commit a [tort] is never of itself a cause of action" (*Brackett v Griswold*, 112 NY 454, 467; accord, *Green v Davies*, 182 NY 499; *Manning v Beck*, 129 NY 1, 11; *Manning v Turtel*, 115 AD2d 712).

(*Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969

[1986]).

Accordingly, the 6th cause of action is dismissed.

QUANTUM MERUIT

The cause of action for quantum meruit is numbered 10th. In *Snyder v. Bronfman*, 13 N.Y.3d 504 [2009], "Plaintiff "developed for the Joint Venture a series of business relationships with key figures in the corporate and investment banking communities.'" *Id.* The Court of Appeals held that the joint venture agreement that plaintiff alleges is void under the statute of frauds and quantum meruit damages are unobtainable.

"The issue before us is whether this statute bars plaintiff's claims for unjust enrichment and quantum meruit... The answer to this question is yes. The essence of plaintiff's claim is that he devoted years of work to finding a business to acquire and causing an acquisition to take place—efforts that ultimately led to defendant's acquisition of his interest in Warner Music. In seeking reasonable compensation for his services, plaintiff obviously seeks to be compensated for finding and

negotiating the Warner Music transaction. His claim is of precisely the kind the statute of frauds describes.”

(*Snyder v. Bronfman*, 13 N.Y.3d 504, 508-509 [2009]).

Accordingly, the 10th cause of action for quantum meruit is dismissed.

ESTOPPEL

The estoppel cause of action is the 11th cause of action.

[W]e agree with the Supreme Court's determination to dismiss the causes of action alleging fraudulent misrepresentation and promissory estoppel insofar as asserted against the defendant. Those causes of action are duplicative of the unenforceable breach of contract cause of action and, thus, constitute an impermissible attempt to circumvent the statute of frauds (*see Martin Greenfield Clothiers, Ltd. v Brooks Bros. Group, Inc.*, 175 AD3d 636 [2019]; *Gorman v Fowkes*, 97 AD3d 726 [2012]).

(*MacKay v. Paesano*, 185 A.D.3d 915, 916 [2nd Dept 2020]).

As decided above, the allegations alleging a breach of the joint venture agreement are dismissed and therefore, the estoppel cause of action is dismissed.

Accordingly, the 11th cause of action is dismissed.

ABUSE OF PROCESS

The 12th cause of action alleges abuse of process.

Moreover, plaintiffs have not alleged the “ ‘gist of the action for abuse of process’ ”, which is “ ‘the improper use of process after it is issued’ ” (*Williams v. Williams, supra*, at p. 596, 298 N.Y.S.2d 473, 246 N.E.2d 333; *Dean v. Kochendorfer*, 237 N.Y. 384, 390, 143 N.E. 229; *Miller v. Stern*, 262 App.Div. 5, 8, 27 N.Y.S.2d 374). They do not contend that the summons issued by defendants was improperly used after it was issued but only that defendants acted maliciously in bringing the action. A malicious motive alone, however, does not give rise to a cause of action for abuse of process (*Hauser v. Bartow*, 273

N.Y. 370, 374, 7 N.E.2d 268).

(*Curiano v. Suozzi*, 63 N.Y.2d 113, 117 [1984]).

Plaintiffs' abuse of process claim is not supported by factual allegations beyond alleged malicious motivations.

Accordingly, the 12th cause of action for abuse of process is dismissed.

BREACH OF FIDUCIARY DUTIES

The 13th cause of action alleges breach of fiduciary duties. "In light of these findings, [no joint venture found], plaintiff's causes of action for breach of fiduciary duty and for the imposition of a constructive trust fail as well." (*Langer v. Dadabhoy*, 44 A.D.3d 425, 426 [1ST Dept 2007]). Similarly, the causes of action predicated upon breach of a joint venture have been dismissed in this action and therefore, the breach of fiduciary duties must be dismissed as well.

Accordingly, the 13th cause of action for breach of fiduciary duties is Dismissed.

ACCOUNTING

The 16th cause of action alleges entitlement to an accounting of joint venture income, expenses, profits and losses. "The claim for an accounting should have been dismissed in the absence of a fiduciary relationship arising out of the contract between the parties (*see Elghanian v Elghanian*, 277 AD2d 162 [1st Dept 2000], *lv denied* 96 NY2d 712 [2001]; *Waldman v Englishtown Sportswear*, 92 AD2d 833, 835-836 [1st Dept 1983])." (*Maor v. Blu Sand Int'l Inc.*, 143 A.D.3d 579 [1st Dept

2016]). The causes of action alleging the breach of a joint venture have been dismissed and therefore, the cause of action for an accounting must be dismissed.

Accordingly, the 16th cause of action for an accounting is dismissed.

TORTIOUS INTERFERENCE WITH CONTRACT

The 15th cause of action is for tortious interference with contract.

The elements of a claim of tortious interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). “[T]he degree of protection available to a plaintiff for a [defendant's] tortious interference with contract is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior” (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476 [2009], quoting *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]).

(*Pac. Carlton Dev. Corp. v. 752 Pac., LLC*, 62 A.D.3d 677, 679 [2nd Dept 2009]).

Defendants argue that “[p]laintiffs never claim that any of the contracts that Defendants allegedly interfered with were ever breached.”⁴ The third element of a tortious interference with contract claim requires either a “breach or otherwise

⁴ Defendants reply, page 9.

render performance impossible.” *Id.* (*emphasis added*) It is abundantly clear that plaintiff alleged that defendants’ failure to execute “the documents necessary for the change of use and certificate of occupancy,”⁵ made it impossible for plaintiffs to operate a restaurant, which was the underlying purpose of those alleged contracts of “food, alcohol and restaurant supplies with third-parties.”⁶

Accordingly, defendants’ motion is denied to the extent that defendants seek to dismiss the fifteenth cause of action for tortious interference with contract.

CONCLUSION

Accordingly, defendants’ motion to dismiss the amended complaint is denied to the extent of the 15th cause of action for tortious interference with contract. Otherwise, defendants’ motion to dismiss the amended complaint is granted except for the 15th cause of action for tortious interference with contract.

The foregoing constitutes the decision and order of the Court.

Dated: 12/14/2021


KENNETH L. THOMPSON JR., J.S.C.

⁵ Amended complaint paragraph 258.

⁶ Amended complaint, paragraph 256.