

Gaitan v Borradori

2022 NY Slip Op 33820(U)

November 9, 2022

Supreme Court, New York County

Docket Number: Index No. 157069/2019

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

GUSTAVO GAITAN

Plaintiff,

- v -

GIOVANNA BORRADORI,

Defendant.

-----X

INDEX NO. 157069/2019

MOTION DATE 05/02/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140

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

Defendant moves for summary judgment in this action asserting breach of contract, fraud, misrepresentation, harassment, quantum meruit, and quasi-contract, among others. Plaintiff opposes.

As an initial procedural matter, the motion is untimely. CPLR § 3212(a) provides that “the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after filing of the note of issue”. The preliminary conference order directed all counsel to file dispositive motions within 60 days (NYSCEF Doc. No. 46 at ¶ 10). Following the transfer of this matter to Part IV, the Court, by further conference order, again directed all dispositive motions to be filed within 60 days of filing the

note of issue (NYSCEF Doc. No. 69 “All dispositive motions must be filed within 60 days of the note of issue”). Where a party seeks to file an untimely summary judgment motion, good cause must be shown (CPLR § 3212). The “good cause” for untimely summary judgment motions requires “a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill v. City of New York*, 2 NY3d 648 [2004]). Good cause must be addressed in the initial moving papers (*O’Neil v. Env. Prods. Corp.*, 187 AD3d 771 [2d Dept 2020]).

Here, the note of issue was filed on January 10, 2022, following the Court’s demand for resumption of prosecution (NYSCEF Doc. No. 98); the instant summary judgment motion was filed on May 2, 2022, nearly two months after the deadline had passed. Furthermore, defendant has provided no explanation for the late filing, nor has good cause been demonstrated to accept the untimely filings. Accordingly, the motion is denied as untimely.

Were the Court to reach the merits of the motion, assuming, *arguendo*, that the instant motion was timely, it would find issues of fact preclude granting summary judgment.

As relevant to this motion, plaintiff and defendant were romantically involved, although the extent and details of this relationship are disputed by the parties. During this relationship, plaintiff contends that plaintiff and defendant, via an oral agreement, created a joint venture to renovate a townhouse, purchased by defendant, whereby defendant would provide renovation capital and plaintiff would provide renovation labor. Plaintiff does not dispute that his renovation work was generally otherwise unpaid, but plaintiff contends that upon completion of the renovations, plaintiff would effectively take a one-half ownership interest in the subject townhouse with defendant – plaintiff would enjoy one-half of the profits from a vacation rental business at the property and receive one-half of the proceeds of any sale of the property.

The Court of Appeals decision in *Morone v. Morone*, is instructive here, although not for the reasons discussed by counsel, as the Court of Appeals cautioned, regarding implied contracts for personal services between unmarried persons living together:

As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the

intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error. Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid.”

(*Morone v. Morone*, 50 NY2d 481 [1980] [internal citations omitted]).

The instant matter raises claims which may be classified as personal services; however, regardless of classification, there exists great risk of emotion-laden afterthought, fraud, and error in attempting to wade through the parties’ private personal relationship – without the benefit of an express contract – on this summary judgment motion to determine whether the renovation services here were gratuitous or by agreement. Furthermore, the parties have submitted conflicting evidence on this issue and, as the issue of whether the renovation services were gratuitous or compensated goes to the heart of the claims in this matter, denial of the summary judgment motion is required.

[continued on following page]

Accordingly, it is

ORDERED that defendant's summary motion is denied as untimely; and it is further

ORDERED that, as an alternative holding on the merits, issues of fact preclude summary judgment.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/9/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

J.S.C.
 OTHER

REFERENCE



HON. FRANK P. NERVO