

Polacco v Fried

2022 NY Slip Op 34048(U)

November 18, 2022

Supreme Court, New York County

Docket Number: Index No. 656887/2019

Judge: Verna L. Saunders

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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MICHAEL POLACCO, Plaintiff, INDEX NO. 656887/2019
MOTION SEQ. NO. 002

- v -

PAUL FRIED, Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this action by summons and complaint against defendant to recover damages based on, *inter alia*, a breach of the parties' partnership agreement. (NYSCEF Doc. No. 1, *summons and complaint*). The relevant facts of this action, as alleged in the complaint, are as follows. Since 2002, the parties were 50/50 partners in a business in which they purchased, managed, and sold properties for profit, including the properties at issue here, located at 518 North MaGee Street in Southampton, New York 11968 ("North MaGee property") and 401 Petersburg Road, Williamstown, MA 01267 ("Williamstown property") (collectively "the subject properties"), which the partners purchased in 2003. Pursuant to the terms of the partnership, (a) plaintiff completely financed the purchase of the properties and defendant provided the "sweat equity;" (b) plaintiff was to be paid five (5%) percent interest on the monies loaned to the partnership to acquire and develop the properties; and (c) after a property was sold and all expenses related to the property were paid, including reimbursement of the funds loaned by plaintiff to acquire and develop the property with interest, only then would the partners split any profits or losses on a 50/50 basis.

In 2010, after defendant began experiencing financial and health related issues, plaintiff agreed to take over all of defendant's "sweat equity" duties with respect to the two properties. However, by 2015, the parties' relationship had broken down after plaintiff learned that defendant had rented out the Williamstown property without sharing the rental income and was under-reporting the rental income; that defendant did not repay loans plaintiff made to him or shared in any partnership profits from a different property of the partnership ("Lincoln Street property"); and that, after years of not paying the mortgage, defendant obtained a mortgage discharge on the Lincoln Street property but failed to inform plaintiff. Plaintiff also claims defendant unilaterally took out a loan in the middle of an attachment hearing, on the Lincoln Street property, and used all of the loan money.

In 2015, plaintiff commenced an action against defendant in Supreme Court, New York County, captioned *Polacco v Fried*, Index No. 654241/2015, which was later discontinued pursuant to a stipulation agreeing to, among other things, arbitrate before a mutually selected arbitrator (NYSCEF Doc. No. 40, *stipulation of discontinuance*, in *Polacco v Fried*, Sup Ct, NY County, Index No. 654241/2015). Although the 2015 matter was initiated concerning primarily two other properties, defendant sought relief in that case relating to the North MaGee property and Williamstown property. In the final arbitration award, the arbitrator found that, although these properties were “not a focus of the arbitration,” he did not consider the relief defendant sought to be beyond the scope of the arbitration. Accordingly, the final arbitration stated, among other things, that:

“...consistent with their prior arrangement, Polacco is entitled to recover principal and 5% interest on the sums that he has invested in or expended on these properties in the same manner as he has been reimbursed with respect to other properties. In addition, Fried is entitled to half of the net rental income (i.e., the sum remaining after Polacco’s investment and expenses and entitlements to interest are taken into account,) even though he is no longer managing the properties. Exactly what this will require when the properties are sold is, however, beyond the scope of this arbitration.

When the Williamstown and North MaGee properties are sold, Fried shall be entitled to half of any proceeds remaining after accounting for Polacco’s investment and expenses and interest thereon at the rate of 5% per annum. In addition, Fried shall be entitled to half of any net rental income remaining after Polacco is compensated for his investment and expenses and interest thereon at the rate of 5% per annum.”

(NYSCEF Doc. No. 28, *Final Arbitration Award*, in *Polacco v Fried*, Sup Ct, NY County, Index No. 654241/2015).

Thereafter, defendant filed a petition to confirm the award and plaintiff cross-moved to vacate the same. In 2018, this court (Borrok, J.) granted defendant’s motion seeking to confirm the award and denied the cross-motion. (NYSCEF Doc. No. 36, *decision and order*, Index No. 655888/2018). The court’s decision was affirmed on appeal. (See *Matter of Fried v Polacco*, 190 AD3d 414 [1st Dept 2021].)

The subject properties were sold in December 2018 and plaintiff now asserts that defendant has failed to pay him for investment payments he made towards the North MaGee property and Williamstown property. Plaintiff asserts causes of action against defendant for breach of fiduciary duty (first cause of action), breach of contract (second cause of action), breach of the covenant of good faith and fair dealing (third cause of action), unjust enrichment (fourth cause of action), conversion (fifth cause of action), and for a declaratory judgment that the accounting leading to the damages sought, i.e., \$597,085.45 — corresponding to half of \$1,194,170.80, is accurate (sixth cause of action). (NYSCEF Doc. No. 1, *summons and complaint*).

Defendant interposed an answer setting forth various affirmative defenses and counterclaims for conversion (first counterclaim), breach of fiduciary duty (second

counterclaim), unjust enrichment (third counterclaim), and accounting (fourth counterclaim) (NYSCEF Doc. No. 6, *verified answer*).

Plaintiff now moves the court for summary judgment “for breach of contract” pursuant to CPLR 3212(b), arguing that there are no material issues of fact with respect to the existence of the parties’ 50/50 partnership agreement, nor the amount owed to plaintiff by defendant. (NYSCEF Doc. No. 20, *notice of motion*; NYSCEF Doc. No. 22, *memorandum of law*). According to plaintiff, the arbitration award clearly establishes that plaintiff and defendant were 50/50 partners; that plaintiff was entitled to five (5%) percent interest on money loaned; and that the parties were to split the profit/losses of the subject properties upon sale of the same. Plaintiff maintains that defendant did not challenge at his deposition (in the instant proceeding) an accounting report prepared by the partnership accountant on or about August 20, 2019, reflecting a loss of \$1,194,170.80 for the two properties sold. Thus, plaintiff argues he is entitled to summary judgment in the amount of \$597,085.45 as there are no material issues of fact that the sale of the two properties resulted in said loss and that defendant is responsible for half of the loss (NYSCEF Doc. No. 22, *memorandum of law*).

Defendant opposes the motion for summary judgment. He argues, among other things, that it was plaintiff who breached their agreement when properties were sold over defendant’s verbal and written objection at such a huge loss, and that such breach of the partnership agreement on the part of plaintiff should lead to a finding that the partnership ceased and that, as such, he had no reason to, nor would he spend money to, review said accounting (NYSCEF Doc. No. 46, *affirmation in opposition*). Defendant appears to contend then, that he should not be held liable for fifty (50%) percent of the loss. In support of his opposition, defendant cites to relevant portions of plaintiff’s deposition testimony where he admitted to not seeking or obtaining defendant’s consent in selling the subject properties and acknowledged that defendant had objected to the sales. Defendant further cites to plaintiff’s deposition testimony where the latter admitted that no agreement existed giving one partner the final say on whether or when to sell a partnership property should the other not agree to the terms. (NYSCEF Doc. Nos. 45, 46, *affidavit and affirmation, respectively*).

Indeed, defendant submits that the court should grant summary judgment to defendant instead. (NYSCEF Doc. No. 46, *affirmation*). Defendant first argues that the court should grant it summary judgment as to the Williamstown property based on “Plaintiff’s admissions that he unilaterally, and in breach of the parties’ agreement, entered into the contract of sale for the Williamstown property.” (*Id.*, at ¶ 45.) Defendant further seeks summary judgment as to the North MaGee property, or contends that, at least, defendant has shown triable issues of fact exist as to this property sufficient to deny plaintiff’s motion for summary judgment. (*Id.*, at ¶ 46.)

In reply, plaintiff reiterates that there are no material issues of fact precluding summary judgment in his favor. (NYSCEF Doc. No. 58, *memorandum of law in reply*). Plaintiff states that defendant’s sole raised issue was that plaintiff sold the subject properties without defendant’s consent, incurring a loss that was higher than what it should have been. However, plaintiff argues that review of his good faith actions in selling the subject properties is precluded by the business judgment doctrine (NYSCEF Doc. No. 58, *memorandum of law in reply*).

“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 eliminate any material issues of fact from the case.” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Where a movant fails to meet its *prima facie* burden, it is unnecessary to consider the opponent’s motion. (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Frees v Frank & Walter Eberhart L.P. No. 1*, 71 AD3d 491 [2010].) Only if a movant meets his or her *prima facie* burden does the burden shift to the movant’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].)

As to plaintiff’s summary judgment motion, the court first briefly addresses defendant’s preliminary contention that said motion should be denied because it was unsupported by an affidavit showing personal knowledge regarding the underlying events. The fact that plaintiff’s supporting proof was placed before the court by way of an attorney’s affidavit annexing deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat its right to summary judgment. (see *Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985].) This court disregards plaintiff’s failure to attach a statement of material facts; it is a technical defect that does not affect the parties’ substantive rights and has been cured. (see CPLR 2001; *Remora Capital S.A. v Dukan*, 72 Misc 3d 1203[A] [Sup Ct, NY County 2021].)

Nevertheless, plaintiff has failed make a *prima facie* showing of entitlement to judgment as a matter of law where none of its supporting exhibits were signed, notarized or supported by any affidavit. While some records may be business records, nothing in plaintiff’s counsel’s affirmation indicates the records to be as such. In particular, plaintiff offers as proof of the claimed contract breach amount two accounting reports for the subject properties. (NYSCEF Doc. Nos. 33, 34, *Williamstown Accounting Report, North MaGee Accounting Report*). In at least one, the “History of Williamstown Property” portion appears to be a summary of the property from 2006 through 2018, a record which does not appear to be a part of a routine business record. (NYSCEF Doc. No. 33, *Williamstown Accounting Report, p. 11*). Similarly, to the extent plaintiff argues that his sale of the subject properties should not be subject to judicial review pursuant to the business judgment rule (NYSCEF Doc. No. 22, *memorandum of law, 7*), he submits reports by real estate brokers that are similarly unsworn and unsupported by affidavits and thus, fail to constitute evidentiary proof in admissible form to warrant summary judgment. (NYSCEF Doc. Nos. O, P, *Gintare Everett Report, Carolyn Umlauf Report*, respectively).

Accordingly, plaintiff’s motion for summary judgment is denied. (see *Frees*, 71 AD3d at 492 [lower court erred in considering an expert report that “was unsworn, was not made in the regular course of business, and was thus inadmissible and could not be considered in support of the motion”]; *Rue v Stokes*, 191 AD2d 245, 247-48 [1st Dep’t 1993] [citation omitted] [“[u]nsworn reports, letters, transcripts and other documents do not constitute evidentiary proof in admissible form...”]; see also *In re Kasziner*, 298 AD2d 109 [1st Dep’t 2002] [“the burden never shifted to petitioners to submit evidence in opposition” where “the accountant’s cash flow analysis and affidavit on which appellant relied in support of the motion do not specify the documentation underlying the accountant’s opinion, and for the most are hearsay”].) This court

also notes that, while plaintiff sold the subject properties over defendant's objection, there is also an issue of fact regarding the parties' respective rights to unilaterally dispose of property, warranting denial of plaintiff's motion.

In addition to the reasons set forth above, to the extent defendant argues in his opposition papers that summary judgment should be granted to him, said request is denied as improper insofar as plaintiff fails to file a notice of cross-motion (see CPLR 2214 [a]; 2215; *Abizadeh v Abizadeh*, 159 AD3d 856, 856-857 [2d Dept 2018]). All remaining arguments have been considered and are either without merit or need not be addressed given the findings above.

ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's purported cross-motion for summary judgment is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

November 18, 2022


HON. VERNAL L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: