SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Index Number : 652984/2011
LOBEL, MICHAEL
vs
HAKAMI, URI
Sequence Number : 003
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION AND CROSS-MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

12/6/13
Dated: _____

_____, J.S.C.
ELLEN M. COIN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

----------X

MICHAEL LOBEL,

Plaintiff, Index No. 652984/11

- against -

URI HAKAMI, RYDER MADISON, LLC, NGUYEN XUAN NGUYEN, and John Does 1 through 10, defendants being unknown parties, corporations, or entities, having or claiming an interest in Ryder Madison, LLC,

Defendants.

----------X

ELLEN M. COIN, J.:

Plaintiff Michael Lobel (Lobel) commenced this action alleging that defendants deprived him of the opportunity to own real property in Manhattan. Defendants Uri Hakami (Hakami) and Ryder Madison LLC (Ryder LLC) move jointly for summary judgment dismissing the complaint. Lobel cross-moves for summary judgment against Hakami and Ryder LLC.

The crux of Lobel's complaint is that he and Hakami were partners and that Hakami breached the partnership agreement. Lobel and Hakami were "family friends" (complaint, ¶ 9). Lobel, an experienced real estate investor in Israel and London, was looking for New York City investments. Hakami told Lobel that Hakami had an opportunity to take part in buying a building. The prospective buyer, nonparty Lofts 21 LLC (Lofts 21) did not have enough money to close and needed investors. Hakami told Lobel that he knew some Vietnamese investors also interested in purchasing. Defendant Nguyen Xuan Nguyen (Nguyen) is a Vietnamese investor who became a purchaser.

Lobel told nonparty David Mitchell (Mitchell), a friend of his for 25 years and a real estate developer, about the deal. Lobel, Mitchell, Hakami, and Lofts 21 began negotiating how they would purchase the building. Lobel claims that he conducted due diligence and was the chief negotiator with Lofts 21. For much of the time during the negotiations Hakami was in Israel where he lives. Lobel conveyed information about the transaction to Hakami.

Lobel, Hakami, and Mitchell decided to form Ryder LLC by which they would purchase part of the property. The remainder would be purchased by Classic Realty (Classic), a Lofts 21 subsidiary. The building would be renovated to suit both residential and commercial uses. Proposals passed back and forth and, on September 10, 2010, Classic emailed Lobel and Mitchell a letter of intent, which provided that the "first phase" would cost $18.8 million, that equity from $5.5 to $6 million was needed, that Hakami, Lobel, Mitchell and Classic were the four partners, that each would invest 25% of the monies needed for purchase and renovation, that Classic would take 8% profit off the top, and that all four partners would split the remaining 92% profit. Each partner would occupy one floor of the building. At the closing, the other investors would give Classic $300,000 towards its equity requirement. Mitchell and Classic would be co-developers and decision makers, and share development and management fees. Some details were changed later, but for the most part the terms of the transaction remained as set out in the letter of intent.

On September 10, 2010, Classic emailed Mitchell, Lobel, and Hakami, suggesting that they wire $600,000 to the property's seller so that the closing date could be extended. If this was not done quickly, Classic stated, it would be forced to go with different investors. On September 13, 2010, Mitchell sent Lobel "the finalized term sheet," which provided the following (Lobel

affidavit, ¶ 33). Classic, Lobel, Hakami, and Mitchell would be the members of a limited liability company, which would buy the property. Each member would own a 25% membership interest in the company. Each member would contribute $1.25 million as its initial capital contribution to the company. The other three members would each lend Classic $300,000 towards its initial capital contribution.

It was subsequently agreed that Mitchell would receive a management fee of $250,000 from the profits generated by the building. Lobel and Mitchell agreed that Lobel would receive half of that for his work in putting the deal together. Lobel maintains that, from the beginning of their discussions, he and Hakami settled that they would be 50/50 partners in the purchase, renovation, and ownership of the property. Around the second week of September 2010, in New York City, Hakami introduced Lobel to some Vietnamese investors, including Nguyen. Lobel states that, at this gathering, he and Hakami represented themselves as partners in the deal.

"At this time," Lobel was expecting funds from investments in Israel (Lobel affidavit, ¶ 38). Around the middle of September 2010, while Hakami was in New York City, Lobel told him that Lobel was not sure whether the Israeli transactions would close in time for him to obtain the capital to pay his part in the purchase. Lobel alleges that Hakami said that he, too, was not sure if he had the capital, and that he needed capital from the Vietnamese investors. Hakami said that he could arrange for some of the Vietnamese investors to buy Lobel's share in the deal. Lobel agreed "to sell his part if he was to receive $200,000 from the Vietnamese investors immediately 'within days' (time being of the essence)" (complaint, ¶ 65). Lobel alleges that he and Hakami agreed to split this sum, in accordance with their agreement to do everything 50/50. Lobel and Hakami further agreed to split Lobel's half of Mitchell's management fee.

Hakami alleges this. "Notably, at some point early on during our discussions with Classic, Lobel advised me and Mitchell that [sic] could not obtain the funds necessary to make his required contributions to join in the Proposed Investment" (Hakami affidavit, ¶ 38). "Given Lobel's inability to move forward, it was agreed that Nguyen and I would make the additional capital contribution in place of Lobel and, thus, Nguyen and I would then acquire a 50% interest in Lofts 21" (*id.*, ¶ 40). At Mitchell's deposition, he testified that it was his understanding that Lobel did not proceed with the investment due to lack of money.

Hakami was concerned that Mitchell would not want to go forward without Lobel, but that turned out not to be the case. On September 15, 2010, Lofts 21 emailed Mitchell instructions on how to transfer money to Lofts 21, and asked, "Do you want to send this [sic] Lobel?" (cross motion exhibit 15). Mitchell emailed a copy to Lobel. On September 16, 2010, three things happened. Mitchell incorporated defendant Ryder LLC and assigned his membership interest therein to Hakami and Nguyen. Hakami and Nguyen entered into Ryder LLC's operating agreement as its only members. Lofts 21 sent Mitchell an amended and restated operating agreement, which provided that Mitchell, Ryder LLC, and a third party were members of Lofts 21, that Mitchell and Ryder LLC would make capital contributions to Lofts 21 of $300,000 and $600,000, respectively, and that Mitchell and the third party each owned 25% of Lofts 21, and that Ryder LLC owned 50%.

Hakami advanced $300,000 to Lofts 21, and Mitchell advanced $600,000, half of which was on his own behalf and half of which was on Ryder LLC's behalf. On September 21, 2010, Mitchell emailed Hakami and Lobel seeking repayment of $300,000, asking "Is it fair to say that if I do not get back by Thursday I should assume that I need to find a partner for it myself"

(Hakami motion exhibit P). Nguyen paid Mitchell $300,000.

Concerning the $200,000 that the Vietnamese investors were to pay Lobel, on September 28, 2010, Hakami emailed Lobel, "They just reconfirmed that they are in" and that $100,000 was "OK" (cross motion exhibit 11). Lobel emailed back, "Ok, you mean $200k right?" (*id.*). Hakami replied, "No. Nguyen . . . was with me and [Mitchell] at a meeting where [Mitchell] pledged 100k for that cause. Now we should have 200K. Let's put aside in a joint acc.till [sic] we'll decide what and how to use it. I'm sure this deal will have many more turns and surprises" (*id.*). Lobel responded that he did not want to take money from Mitchell or Hakami and that the Vietnamese investors must pay the $200,000. "If not I'll get the funding for my part" (*id.*). Lobel and Hakami agreed to talk later. They did not agree on who should pay the $200,000, and Hakami never gave Lobel the $100,000 "agreed upon to transfer my 25% share to [Hakami]" or half of whatever Hakami received by selling Lobel's share (Lobel affidavit, ¶ 59).

In an October 7, 2010 email to Nguyen, Hakami wrote that Lobel "really wants to come back to the deal. Which I said NO to" (cross motion exhibit 12). Referring to this email, Lobel alleges that "as early as October 7, 2010 . . . Hakami and Nguyen colluded not to let me contribute to the deal" (Lobel affidavit, ¶ 61). Lobel alleges that he was ready, willing, and able to fulfill his contribution on October 7.

In October 2010, Lofts 21 was required to pay $600,000 to the seller to extend the closing date. Ryder LLC paid Lofts 21 $400,000 on October 14, 2010 and Mitchell paid it $200,000 on October 18, 2010. Mitchell later made a payment of $55,000, in connection with the closing date being extended again, and Hakami reimbursed him the same day. As of December 16, 2010, Hakami alleges, Hakami and Nguyen had made a total capital contribution of $1,117,028 on

behalf of Ryder LLC.

As evidence that he was ready to pay his share, Lobel points to his October 23, 2010 email to Hakami. In the email, Lobel stated that he was surprised that Hakami did not call him and that they needed closure on their arrangement. Lobel wrote, "BTW - I can arrange financing for 70% of the $13.5 million at 7-8%p.a for 2-3 yrs" (cross motion exhibit 13). From late October until late November 2010, "with the closing on the deal approaching," Lobel urged Hakami to put their agreement about "transferring [Lobel's] 25% interest to Hakami in writing" (Lobel affidavit, ¶ 52). Lobel wanted to clarify that "in the event that I did not receive the $100,000 from Hakami, I would participate in the deal with a 25% interest, since my interest was never transferred to Hakami" (*id.*, ¶ 54). Lobel alleges that Hakami said that he did not want to put things in writing, because his word was good. Lobel informed Hakami that he, Lobel, would retain his original interest in the deal. Hakami said that this was impossible because he had already made a commitment to other parties. Lobel contends that he was entitled to make his capital contribution and participate in the deal on a 50/50 basis with Hakami.

On February 11, 2011, the sale of the building to Lofts 21 closed. Title to the property was conveyed to an entity with Lofts 21 as its sole member. Hakami and Nguyen were the only members of Ryder LLC, which was a member of Lofts 21. Mitchell was also a member of Lofts 21. By that time, Lofts 21 had acquired more members. Thus Mitchell, Ryder LLC, and the other members of Lofts 21 (the "John Does" named as defendants) own the building. At the time that this action commenced, the property was being renovated.

Hakami alleges that Lobel withdrew from the project, that he had no involvement with the project after September 16, 2010, that he never made any payments (which Lobel does not

dispute), that he had no money to participate in the project, and that no partnership was ever contemplated. Hakami has a different version of the agreement concerning $200,000 from the Vietnamese investors. Hakami claims that a Vietnamese company named Sovico was to pay the $200,000 that he was to split with Lobel. Any payment that Lobel was to receive was conditioned on Sovico becoming an investor, which did not happen. Hakami alleges that he, Lobel, and Mitchell discussed the possibility that Lobel could receive "certain monies," even though Lobel would not hold any interest in the property, and "the most that was ever discussed as a potential payment to Lobel was $37,500" (Hakami affidavit, ¶ 51).

The first, second, and third causes of action sound in breach of contract, specific performance, and breach of fiduciary duty, respectively, as against Hakami. The fourth cause of action, as against all defendants, seeks a declaratory judgment that Lobel owns 50% of Ryder LLC. The fifth and sixth causes of action, as against all defendants, sound in unjust enrichment, and constructive trust, respectively.

The proponent of a summary judgment motion must provide evidence demonstrating the absence of material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers (*id.*). Where the moving party succeeds in making the required showing, the burden of proof shifts to the opposing party to produce evidence demonstrating the existence of material factual issues that can only be resolved at trial (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The court does not assess the credibility of the parties (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), and views all competent evidence in a light most favorable to the party opposing summary judgment (*Jimenez v Cummings*, 226 AD2d 112, 113 [1st Dept

1996]; *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

"A partnership is an association of two or more persons to carry on as co-owners a business for profit . . ." (Partnership Law § 10 [1]). Factors indicating that parties are in a partnership include sharing of profits and losses, recognized as an essential element of a partnership (*Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012]); owning partnership assets together; joint management and control; joint liability to creditors; receiving compensation; and making capital contributions to the partnership (*M.I.F. Sec. Co. v Stamm & Co.*, 94 AD2d 211, 214 [1st Dept], *affd* 60 NY2d 936 [1983]; *D'Amour v Ohrenstein & Brown, LLP*, 17 Misc 3d 1130[A], *5, 2007 NY Slip Op 52207[U] [Sup Ct, NY County 2007]). When the parties have not made a written agreement, the determination whether they are in a partnership rests upon an examination of their intentions, relationship, and conduct (*Brodsky v Stadlen*, 138 AD2d 662, 663 [2d Dept 1988]). No one factor is determinative in showing the existence of a partnership; it is necessary to examine the parties' relationship as a whole (*Martin v Peyton*, 246 NY 213, 218-219 [1927]). Calling an organization a partnership or holding oneself out as a partner does not necessarily mean that a partnership exists (*id.*).

Lobel claims that he and Hakami agreed that they were in a partnership and that they agreed to buy the building as partners. However, the parties did not engage in the conduct that manifests a partnership, such as sharing profits and losses. Moreover, the writings setting forth the terms of the deal show that the intention was for Lobel, Hakami, Mitchell, and Classic to buy and to each own 25% of the building. Lobel and Hakami are referred to in the same manner as the other investors, with no distinction made regarding their relationship.

Contrary to Hakami's argument, partners can form a limited liability company as a

vehicle to purchase and hold property (*see Rinaldi v Casale,* 13 AD3d 603, 605 [2d Dept 2004]). In *Rinaldi,* the parties entered into an oral agreement to purchase and develop real estate together. The plaintiff located property, which the defendant purchased. The plaintiff retained an engineer to develop the property and, jointly with defendant, filed a subdivision plan. The plaintiff and the defendant formed a corporation with the intent of transferring the property to it. Before this could happen, the defendant died and his executrix took ownership of the property. The court denied the motion to dismiss the complaint because the plaintiff had adequately alleged the existence of a partnership or joint venture to buy the property and the parties' intent that their corporation should hold the property. Here, however, Lobel and Hakami did not take steps, such as filing a plan or creating a corporation, that would enable a jury to find that they were in a partnership and that Lobel was entitled to own part of the property. Although Lobel conducted due diligence and negotiated with the other parties who wanted to buy the building, that is not enough evidence to raise a triable issue as to whether there was a partnership.

In *Sherpaco, LLC v Kossi* (2010 WL 231618, 2010 NY Misc LEXIS 1322, 2010 NY Slip Op 30072[U] [Sup Ct, NY County 2007]), the court considered whether a man and a woman were in a partnership before the limited liability company, which the man owned, acquired two condominium units. Within days of the limited liability company acquiring the units, the woman was given unrestricted powers on behalf of the company, including the ability to sign checks, borrow money, open bank accounts, and withdraw funds. She also deposited $190,000 into the company's account, which, according to a letter written by the other party, constituted her capital contribution. The property had been designed to her liking and she had lived in it. Based on these factors, the court determined that whether the parties had entered into a partnership

agreement before the corporation bought the units was an issue of fact. If they were in a pre-existing partnership, that would mean that the woman was part owner of the units. Lobel and Hakami's situation is different, as the record is devoid of any of the indicia that they entered into a partnership. Whether a partnership exists is generally a question of fact (*Olson v Smithtown Med. Specialists*, 197 AD2d 564, 565 [2d Dept 1993]), but on occasion, as in this case, it can become a matter for summary determination (*Moses,* 96 AD3d at 469; *Cleland v Thirion,* 268 AD2d 842, 843-844 [3d Dept 2000]).

Even assuming, *arguendo,* that there were a partnership, Lobel has not shown that he could afford to buy the property. The party wronged by a breach of contract must show that the breach caused his loss. To do this, it must show that it intended to and was able to perform when its performance was due (*Reddy v Ratnam,* 95 AD3d 982, 984 [2d Dept 2012]; *1861 Capital Master Fund, LP v Wachovia Capital Mkts., LLC*, 95 AD3d 620, 621 [1st Dept 2012]; *see also Record Club of Am., Inc. v United Artists Records, Inc.*, 890 F2d 1264, 1275 [2d Cir 1989]). If the wronged party could not have performed regardless of the breach, then any loss occasioned by nonperformance of the contract cannot be blamed on the breaching party.

After the agreement about the $200,000 payment from the Vietnamese investors fell through, Lobel allegedly was ready to come back to the deal. However, Lobel fails to show that he was able to perform before Ryder LLC was formed or before the closing, and that he did not perform only because of Hakami. Neither Lobel's allegation that he was ready on October 7, 2010 to fulfill his contribution (Lobel affidavit, ¶ 62), nor his October 23, 2010 email to Hakami (cross motion exhibit 13), shows that he was ready. Those statements are conclusory and do not raise a triable issue as to whether Lobel had the funds to invest in the acquisition of the building.

Nor does Lobel claim that he did not offer the money because he knew that it would be futile. The wronged party is not required to engage in "[a]cts made futile by the breaching party" in order to seek recovery against the party who breached the contract (*Scholle v Cuban-Venezuelan Oil Voting Trust*, 285 F2d 318, 320 [2d Cir 1960]; *see also Special Situations Fund III v Versus Tech.*, 227 AD2d 321, 321 [1st Dept 1996]). Lobel does not claim that he knew that Hakami or the other investors would refuse to take his payment, or that information was hidden from him.

To the extent that Lobel argues that there was an enforceable agreement concerning the $200,000, the court does not agree. According to Lobel, he and Hakami agreed that Lobel would take $200,000 from the Vietnamese investors in exchange for Lobel's part in the deal. Lobel states that this agreement was conditional; that is, it meant that if the Vietnamese investors did not pay him $200,000, he would stay in the deal. "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). In this case, mutual assent did not exist. Lobel does not state that he told Hakami that he would only accept payment from the Vietnamese investors. He does not make it clear that he told Hakami that he planned to stay in the deal if he did not get the payment from those persons. Thus, assuming that there were a partnership, Lobel does not show that he and Hakami made an agreement that Lobel would give up his place in the partnership for $200,000 from the Vietnamese investors.

The next question is whether the parties agreed that Lobel would not stay in the deal and that he would sell his part in the deal to the Vietnamese investors. The answer is no, because Lobel and Hakami did not know if those investors would agree to pay Lobel $200,000. Thus, the

element of "definiteness or certainty" was lacking (*Korff v Corbett,* 18 AD3d 248, 250 [1st Dept 2005]). In addition, in order for an acceptance of an offer to lead to the creation of a contract, the acceptance must comply with the terms of the offer and be clear and unequivocal (*Kowalchuk v Stroup,* 61 AD3d 118, 122 [1st Dept 2009]). An acceptance conditioned on the offeror's assent to different terms is a counteroffer which constitutes a rejection of the offer (*Homayouni v Banque Paribas,* 241 AD2d 375, 376 [1st Dept 1997]). Hakami came back to Lobel with a counteroffer that the Vietnamese investors would pay half of Lobel's payment and that Mitchell would pay the other half. Thus, no agreement was made, because Hakami and the Vietnamese investors rejected Lobel's offer to sell his interest in the deal for $200,000.

Since the parties did not form a partnership and Lobel has no interest in the building, there can be no claim for breach of contract, breach of fiduciary duty, specific performance, constructive trust, or a declaration that Lobel is a part owner of Ryder LLC. The fifth cause of action for unjust enrichment, which may also be seen as a quantum meruit claim, is not dismissed to the extent it is based on Lobel's contributions to the project. He is entitled to payment for those services (*see Moses*, 96 AD3d at 470-471).

To conclude, it is

ORDERED that the motion for summary judgment by defendants Uri Hakami and Ryder Madison LLC is granted to the extent that the First, Second, Third and Sixth Causes of Action are dismissed; and it is further

ORDERED AND DECLARED that plaintiff Michael Lobel is not a part owner of Ryder Madison LLC; and it is further

ORDERED that the cross-motion for summary judgment by plaintiff Michael Lobel is

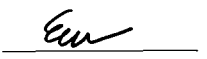
denied; and it is further

ORDERED that the remainder of the action shall continue.

No costs.

Dated: December 6, 2013

ENTER:



Ellen M. Coin, A.J.S.C.