SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 43

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Cathy Daniels, Ltd., Daniel Chesler, Steven M. Chesler, individually and as a personal representative of the Estate of Herbert Chesler and as a personal representative of the Estate of Rita Chesler,

Plaintiffs,

Index Number:

-against-

114942/2009

Robin S. Weingast, Robin S. Weingast & Associates, Inc., John Hancock Life Insurance Company of New York and Designs For Finance, Inc.,

Defendants.

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ROBERT R. REED, J.:

Defendants Robin S. Weingast (Weingast) and Robin S. Weingast & Associates, Inc. (Weingast Associates, together the Weingast Defendants), move for summary judgment, pursuant to CPLR 3212, to dismiss the breach of contract cause of action against them.

Underlying Allegations and Procedural Background

The underlying allegations are set forth in detail on pages 2 through 4 in the order of Hon. Richard Lowe, dated September 9, 2010 (the Order) and need not be repeated. Plaintiffs and the decedents (Plaintiffs) claimed that, in September 2005, defendants had sold them an employee benefit plan (the Plan)

that would benefit plaintiffs, that the premiums for the Plan would be deductible, but that, ultimately in October 2007, the I.R.S. issued a ruling that the premiums were not deductible. Plaintiffs had each signed a one-page acknowledgment and disclosure form on June 15, 2005 (the Waiver), which waived potential claims against the Plan's sponsor and its agents and precluded any oral modifications of the Plan. On November 13, 2006, there was a meeting (the Meeting) between several of the individual plaintiffs and Weingast. Plaintiffs contend that, at the Meeting, Weingast made an oral promise that the Weingast Defendants and John Hancock Life Insurance Company of New York (John Hancock) would indemnify and reimburse Plaintiffs if the I.R.S. disallowed tax deductions for The Plan.

In October 2009, Plaintiffs commenced this action against the Weingast Defendants, John Hancock and Designs For Finance Inc. (DFF), alleging fraud, breach of fiduciary duty, breach of contract, deceptive trade practice in violation of General Business Law § 349, negligence and vicarious liability against John Hancock. In the Order, Plaintiffs' claims were dismissed in their entirety. The Appellate Division, First Department, affirmed the dismissal of all of Plaintiffs' claims, except for the breach of contract cause of action against the Weingast Defendants (*Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431, 433-434 [1st Dept 2012]). It held that the Order "improperly concluded

that the contract claim was barred by the statute of frauds" (*id.* at 434). It also held that "the alleged oral promise was made [at the Meeting] more than a year after [P]laintiffs entered into the transaction [and, therefore,] [n]either the parol evidence rule nor the merger clause preclude a breach of contract claim based on a subsequent additional agreement" (*id.*).

On November 3, 2016, this court so-ordered a stipulation that withdrew the claims of Cathy Miller, substituted the Estate of Rita Chesler in place of Rita Chesler, substituted the Estate of Herbert Chesler in place of Herbert Chesler, named Steven M. Chesler as representative of these estates, and amended the caption of this action accordingly.

In this motion, the Weingast Defendants contend that the Plaintiffs' breach of contract claim is barred by the Waiver, by the statute of frauds since there is no writing and that any indemnification would be illegal under Insurance Law § 4224 (c) and, therefore, unenforceable.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden,

then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Contract Claim

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms" (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

Oral Modifications

Generally, "where a contract contains a 'no oral modification' clause, that clause will be enforceable" (*Israel v Chabra*, 12 NY3d 158, 163 [2009]; *see also Nassau Beekman LLC v Ann/Nassau Realty LLC*, 105 AD3d 33, 39 [1st Dept 2013]). However, "[n]either the parol evidence rule nor the merger clause of the underlying contract prohibits proof of a subsequent additional agreement or of a subsequent modification of the original agreement" (*Getty Ref. & Mktg. v Linden Maintenance Corp.*, 168 AD2d 480, 481 [2d Dept 1990]; *see also Cathy Daniels*, 91 AD3d at 434).

Discussion

Initially, the court notes that, as the movants, the burden is on the Weingast Defendants to establish their entitlement to judgment as a matter of law. The Weingast Defendants contend that the Waiver mandates dismissal of the Plaintiffs' contract claim. This conflates the underlying contract, Plaintiffs' purchase of the Plan, with the oral promise that Plaintiffs contend that the Weingast Defendants made at the Meeting. The Appellate Division rejected this claim, holding that "the alleged oral promise was made [at the Meeting] more than a year after [P]laintiffs entered into the transactions" (*id.*). There are conflicting versions of the Meeting and what the parties agreed to in it, but, for the purpose of deciding this motion, the court

must accept the Plaintiffs' version of contested facts, since they are the non-moving parties (*see Vega*, 18 NY3d at 503; *Branham*, 8 NY3d at 932). Plaintiffs have asserted that there was an agreement on the substantive terms, and that the conduct of the parties thereafter reflected this agreement (Steven Chesler affidavit, ¶¶ 5, 17-23).

Plaintiffs also assert that, at the Meeting, the Weingast Defendants agreed to compensate Plaintiffs in the event of an unfavorable tax ruling by the I.R.S. The Weingast Defendants have not shown that this agreement constitutes the "answer[ing] for the debt . . . of another" such that a writing is required under the statute of frauds. Similarly, while "[i]llegal contracts are . . . unenforceable [,] . . . [this] rule does not always apply [since] the statute does not provide expressly that its violation will deprive the parties [of a contract claim] and the denial of relief is wholly out of proportion to the requirements of public policy" (*Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992] [internal quotation marks and citation omitted]). In sum, the Weingast Defendants have not shown their entitlement to judgment as a matter of law and, at best, there are factual disputes concerning the parties' agreement and their conduct at and after the Meeting. These are "issues as to witness credibility [and they] are not appropriately resolved on a motion for summary judgment" (*Santos*,

295 AD2d at 218-219). Consequently, the motion for summary judgment must be denied.

Order

It is, therefore,

ORDERED that the motion of Robin S. Weingast and Robin S. Weingast & Associates, Inc. for summary judgment dismissing plaintiffs' breach of contract cause of action is denied.

Dated: March 13, 2017

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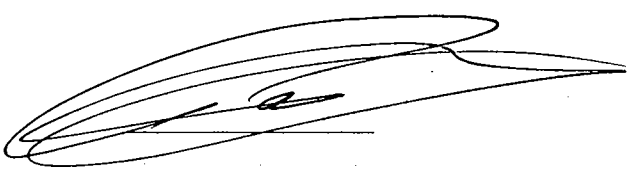

J.S.C.