Langer v Dadabhoy
2006 NY Slip Op 30715(U)
November 9, 2006
Supreme Court, New York County
Docket Number: 105198/2006
Judge: Helen E. Freedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 39

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LARRY LANGER,

Plaintiff, Index No. 105198/2006

-against-

SIRAJ DADABHOY and EMERALD HOLDINGS (USA), LLC,

Defendants.

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Helen E. Freedman, J.S.C.:

In this action, Larry Langer ("Langer") sues Siraj Dadabhoy ("Dadabhoy") and Emerald Holdings (USA), LLC, claiming that Dadabhoy breached an oral agreement to include Langer in a joint venture to purchase and "commercially exploit" units in The Trump International Hotel and Tower Condominium, located at One Central Park West (the "Trump Properties"). He sues Dadabhoy and Emerald Holdings (USA), LLC, the entity Dadabhoy formed without Langer to purchase the Trump Properties, for breach of contract, breach of joint venture, breach of fiduciary duty, and he seeks an accounting and an imposition of a constructive trust. The defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7) because the parties never executed a final written contract to purchase real property, the terms of the alleged oral agreement are too indefinite to be enforceable, and Langer does not allege all of the elements of a joint venture. Alternatively, defendants contend that the action should be dismissed against Emerald Holdings (USA), LLC because the Complaint states no claim against the company. Defendants and Langer move and cross move for sanctions, contending that the Complaint and motion to dismiss, respectively, are frivolous.

For the reasons stated below, the motion to dismiss is granted, and the motion and cross

motion for sanctions are denied.

Allegations and Contentions:

Langer alleges that in February 2005, he and Dadabhoy orally agreed to form a joint venture and create a company called "Emerald Properties, LLC," whereby Dadabhoy was to act as manager and Langer would remain a minority member and hold a fifteen percent interest, and that a February 15, 2005 e-mail from Dadabhoy to Langer confirmed this agreement. Members of the joint venture allegedly agreed to raise and "make available" one million dollars. Langer alleges that he "set aside and pledged to Dadabhoy well over $150,000 to invest in the joint venture," with the $150,000 representing fifteen percent of the one million dollars in start-up capital. The joint venture members allegedly expected to gain a profit of $3.5 million. Despite the agreement to include Langer in the deal, Dadabhoy formed Emerald Holdings (USA), LLC to purchase the Trump Properties without Langer.

The e-mail referenced in the Complaint allegedly confirming Langer's fifteen percent ownership states in full:

> Larry:
> By way of this e-mail, I am confirming a 15% interest for you in Emerald Properties, LLC.
> Please see the attached sales plan. We are already upto [sic] $8.75 Million!
> We have sometime [sic] before we will finalize the partnership and the funding plan.
> Safe travels.
> Best,
> Siraj.

Defendants contend that the February 15, 2006 e-mail demonstrates that the parties held negotiations and contemplated memorializing their discussions in a final, written contract.

Additionally, defendants argue that subsequent e-mails[1] among the parties and other potential investors demonstrate that Langer's fifteen percent ownership was not definite, and that the parties did not intend to be bound until execution of a final, written contract, which never ultimately surfaced. Defendants contend that the lack of a written contract defeats Langer's claim because the underlying agreement was for the purchase of real property, and thus the Statute of Frauds applies. Although an oral agreement to form a joint venture concerning real property may in certain circumstances be enforceable, defendants argue that Langer does not allege all of the elements of a joint venture or any definite terms that would render an oral agreement enforceable. Defendants maintain that merely "setting aside" some money is insufficient consideration to bind the parties to a contract. Finally, defendants argue that Emerald Holdings (USA), LLC was improperly named as a defendant because all of the causes of action in the Complaint are stated against Dadabhoy.

Langer opposes the motion to dismiss arguing that the Complaint alleges all of the elements of a joint venture. He argues that because the parties agreed that he would hold a fifteen percent interest, it is implied that he would collect fifteen percent of profits and share the same percentage in losses. Langer avers that setting aside a sum of money and promising to pay it is sufficient consideration to support an oral contract. He argues in his motion papers that Emerald Holdings (USA), LLC is a properly named defendant because the company received assets that he was

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[1]On February 23, 2005, a non-party Jason Bitsky sent Dadabhoy an e-mail referencing an oral conversation with Langer and the need to complete paperwork for the proposed deal. On February 24, 2005, Dadabhoy sent Langer an e-mail stating he needed to speak with Langer about changes to the deal structure. Dadabhoy sent Langer e-mails dated March 7 and March 8, asking Langer to call him and again referencing the need to complete some paperwork. On March 15, Langer sent an e-mail to another non-party about the Trump deal summarizing a conversation with Shabir, another potential investor, and stated that "He said he would protect me so that I got the same percentage that he got. He couldn't remember exactly but he thought that it was 15%, might end up being 10% to 15% but he doesn't want to get diluted more than that. He spoke to Siraj [Dadabhoy] right before Siraj went to Karachi about my issues and told Siraj to do the right thing and give me the same percentage as Shabir." Dadabhoy and Langer exchanged e-mails in May 2005, discussing pending legal action involving the Trump Properties' seller.

supposed to receive pursuant to the alleged joint venture.

Discussion:

A breach of contract action must allege definite material terms, and a "mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher,* 52 N.Y.2d 105, 109 (1981). While the Statute of Frauds applies to agreements to purchase real property (GOL 5-703), oral agreements containing sufficiently definite terms to form a joint venture concerning real property may be enforceable because the interest of each venturer is considered "personalty." *Barash v. Estate of Sperlin,* 271 A.D.2d 558, 559 (2nd Dept. 2000). Thus, the issue is whether Langer alleges sufficient facts to support his claim that the parties orally agreed to form a joint venture.

In order to demonstrate that the parties agreed to form a joint venture, plaintiff must allege "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses." *Natuzzi v. Rabady,* 177 A.D.2d 620 (2nd Dept. 1991). An agreement to distribute the proceeds of an enterprise on a percentage basis does not, on its own, establish a joint venture. *See Maalin Bakodesh Society, Inc. v. Lasher,* 301 A.D.2d 634 (2nd Dept. 2003); *Gold Mechanical Contractors v. Lloyds Bank P.L.C.,* 197 A.D.2d 384 (1st Dept. 1993).

The February 15 e-mail that Langer references in the Complaint stating that the parties still had time before they would finalize the partnership and funding plan suggests that the parties contemplated further negotiation before they intended to be bound by contract. Additionally, the Complaint does not allege that Langer agreed to share in losses of the venture, that he promised to

hold any control over the enterprise, or that he contributed anything of value. Langer argues that there was no reasonable expectation of losses, *see Cobblah v. Katende,* 275 A.D.2d 637 (1st Dept. 2000), and that his role as partial financier and agent of the venture is sufficient because joint venturers need not share equal management control, citing *Richbell v. Jupiter Partners,* 309 A.D.2d 288 at 299 (1st Dept. 2003). However, bare legal conclusions related to shared control over a joint venture is insufficient to survive a motion to dismiss. *Gold Mechanical Contractors v. Lloyds Bank P.L.C.,* 197 A.D.2d 384 (1st Dept. 1993). Although joint venturers need not share equal amounts of management control, "the inquiry as to the existence of this factor is limited to whether a member of the venture had *any* measure of control." *Richbell v. Jupiter Partners,* 309 A.D.2d 288 at 299 (1st Dept. 2003). Here, the Complaint alleges that Dadabhoy alone would manage the enterprise, and thus Langer fails to allege that he agreed to maintain *any* measure of control.

Additionally, Langer does not allege that he actually contributed skills, knowledge or capital to the venture. He alleges he merely "set aside" $150,000 to contribute to the joint venture. However, he does not allege how the "setting aside" of funds obligated him to perform in any way. He does not allege he actually contributed anything of value to the enterprise, and "there must still be something -- property, cash, even services -- which has been given over and employed by another before that other can be liable as a fiduciary. A promise is not enough." *Chipman v. Steinberg,* 106 A.D.2d 343 (1st Dept. 1984). Because Langer made no actual contribution and does not allege he would share in any control over the enterprise, the allegations are insufficient to state a claim for a joint venture. *See Mendelson v. Feinman,* 143 A.D.2d 76 (2nd Dept. 1988).

Thus, the claims for breach of joint venture and breach of contract to form a joint venture are dismissed. Absent a joint venture, there is no fiduciary relationship between the individual parties

and no claim stated for breach of fiduciary duty. *See Golub Associates Inc. v. Lincolnshire Management, Inc.*, 1 A.D.3d 237, 767 N.Y.S.2d 571 (1st Dept. 2003); *Charles Hyman, Inc. v. Olsen Industries, Inc.*, 227 A.D.2d 270, 277 (1st Dept. 1996). Because the fourth cause of action seeking imposition of a constructive trust is based on a fiduciary relationship, that cause of action is also dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss the Complaint is granted, and the Complaint is dismissed, and it is further

ORDERED that the motion and cross motion for sanctions are denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: November 9, 2006 ENTER:

Helen E. Freedman, J.S.C.