

**Jemrock Enter. LLC v Konig**

2013 NY Slip Op 32884(U)

October 24, 2013

Sup Ct, Queens County

Docket Number: 703280/2013

Judge: Orin R. Kitzes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY  
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES  
Justice

IA Part 17

-----x Index  
JEMROCK ENTERPRISES LLC and SSJ Number 703280/ 2013  
DEVELOPMENT, LLC,

Plaintiffs,

Motion  
Date September 30, 2013

-against-

MICHAEL KONIG, URI KIRSCHNER and  
WATERSHORE VIEWS, LLC,

Motion Seq. No. 1

Defendants.  
-----x

The following papers numbered E8 to E21 read on this motion by defendants to cancel the notice of pendency, to award costs to defendants pursuant to CPLR 6514(c), to dismiss the amended complaint pursuant to CPLR 3211(a)(5) and (7) and the fraud claims pursuant to CPLR 3016(b).

	Papers <u>Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	E8-E16
Memorandum of Law in Support.....	E14
Answering Affidavits - Exhibits.....	E18-E21
Memorandum of Law in Opposition.....	E20

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for money damages and to impress a constructive trust upon real properties owned by defendants. By their amended verified complaint, plaintiffs allege that pursuant to an oral agreement between plaintiffs and the individual defendants, plaintiffs disclosed corporate opportunities, provided proprietary information and used their contacts and connections to secure business deals that would not otherwise be available to individual defendants. In return individual defendants agreed to make plaintiffs 50/50 partners with Michael Konig providing the

FILED & RECORDED

OCT 30 2013  
COUNTY CLERK  
QUEENS COUNTY

financial capital and plaintiffs providing the work and receipt of \$1,000,000 annual salary. Individual defendants also agreed to negotiate settlements or buy out plaintiffs' creditors. When individual defendants did not perform their part of the oral agreement, this action ensued. Plaintiffs asserts causes of action for breach of contract, fraud, breach of fiduciary duty, unjust enrichment, conversion and constructive trust.

Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7) and (a)(5) for failure to state a cause of action and as barred by the Statute of Frauds.

Initially, in considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. The sole criterion is whether from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]). "The facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Id.* [citations omitted]). Thus, the court must determine whether the facts claimed are even facts at all, or whether significant dispute exists regarding them (*Id.*) In addition, affidavits submitted by a plaintiff may be considered by the court to remedy any defect in the complaint, not to provide evidentiary support for the complaint (see *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *Leon v Martinez*, *supra*; *Rovello v Orofino Realty Co.*, *supra*).

At this time, the court rejects defendants argument that the complaint should be dismissed as against Uri Kirschner on the ground that he acted solely as an agent of Michael Konig and thus cannot be held personally liable for his conduct as an agent. This record presents issues of fact, including the scope of the principal-agent relationship between Uri Kirschner and Michael Konig if one existed and if the relationship existed, whether the relationship was disclosed to plaintiffs.

Defendants contention that the complaint should be dismissed for violating the statute of frauds lacks merit. The Statute of Frauds does not apply to an agreement that "appears by its terms to be capable of performance within the year; nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year" (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 176 [1968]; General Obligations Law § 5-701[a][1]). It applies to "those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year" (*D & N Boening v Kirsch*

*Beverages*, 63 NY2d 449, 454 [1984]). However, the statute of frauds is generally inapplicable to an agreement to create a joint venture or partnership (*Pugliese v Mondello*, 57 AD3d 637 [2d Dept 2008]). Moreover, where, as here, the joint venture or partnership agreement is one to deal in real property, the statute of frauds does not render it void because the interest in each partner is deemed personalty (*Plumitallo v Hudson Atlantic Land Co., LLC*, 74 AD3d 1038 [2d Dept 2010]).

That branch of the motion to dismiss the first cause of action is denied. The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage. (*McCormick v Favreau*, 82 AD3d 1537; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052.) The first cause of action is adequately stated.

That branch of the motion to dismiss the second cause of action is denied. Plaintiffs adequately plead all elements of a cause of action for fraud, including (1) that defendants made material representations that were false or concealed a material existing fact, (2) that defendants knew the representations were false and made them with the intent to deceive plaintiffs, (3) that plaintiffs were deceived, (4) that plaintiffs justifiably relied on defendants' representations, and (5) that plaintiffs were injured as a result of defendants' representations. (CPLR 3016[b]; see *Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Watson v Pascal*, 27 AD3d 459 [2d dept 2006]; *Cerabono v Price*, 7 AD3d 479 [2d Dept 2004]; *American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616 [1st Dept 2000]; *Swersky v Dreyer & Traub*, 219 AD2d 321 [1st Dept 1996].)

That branch of the motion to dismiss the fourth cause of action is denied. Plaintiffs sufficiently alleged "that [they] conferred a benefit upon the defendant[s], and that the defendant[s] will obtain such benefit without adequately compensating plaintiff[s] therefor." (*Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]; see *MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751 [2d Dept 2008]; *Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598 [2d Dept 2002].)

The branch of the motion to dismiss the fifth cause of action for conversion is granted. A claim for conversion which merely restates a claim for breach of contract, without alleging a separate taking, is legally insufficient (*East End Labs., Inc. v*

*Sawaya*, 79 AD3d 1095, 1095 [2d Dept 2010]; *Tornheim v Blue & White Food Prods. Corp*, 56 AD3d 761 [2d Dept 2008]).

The branch of the motion to dismiss the third cause of action for breach of fiduciary duty is granted. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (Restatement [Second] of Torts § 874, Comment a). "Courts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency" (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 160 [1993]). Here, the verified complaint does not allege the terms of the fiduciary relationship (*Id.* at 162). In addition, the affidavit of Stephen Jemal does not demonstrate the merit of their claims or remedy the deficiencies in the complaint (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2d Dept 2011], citing *Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1049 [2d Dept 2010]).

The branch of the motion to dismiss the claim for the imposition of a constructive trust is similarly granted. The elements of a cause of action to impose a constructive trust include "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Nastasi v Nastasi*, 26 AD3d 32 [2d Dept 2005].) Again, plaintiffs have not plead a confidential or fiduciary relation with defendants. (see *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6 [2d Dept 2008].)

The branch of the motion to cancel the notice of pendency is granted (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302 [1961]). It is well settled law that a notice of pendency is to be filed by a party to protect some right, title or interest claimed in or to the real property against which it is filed which might be lost in the event of a transfer of the subject property to a purchaser for value (*Id.* at 304-305).

While this action sought imposition of a constructive trust, said claim has been dismissed. Thus, the remaining causes of action seek monetary damages. Accordingly, since "a judgment for the plaintiff[s] would not affect 'the title to, or the use, possession, or enjoyment of, real property'", the notice of pendency must be canceled (*Shkolnik v Krutoy*, 32 AD3d 536, 537 [2d Dept 2006]).

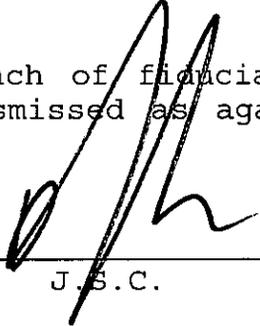
Thus, the County Clerk of Queens County is directed, upon the payment of any fees which may be due and owing, to cancel the notice of pendency filed in this action against the property

located in Queens, New York, and indexed under Block 4019 and Lots 100 and 120. The Clerk shall enter upon the margin of the record a notice of cancellation referring to this order.

The branch of the motion for costs incurred in connection with this motion pursuant to CPLR 6514(c) is denied. While the notice of pendency was canceled, an award of costs would be inappropriate under the circumstances of this case (see *Shkolnik v Krutoy*, 65 AD3d 1214, 1216 [2d Dept 2009]).

Thus, the causes of action for breach of fiduciary duty, conversion and constructive trust are dismissed as against all defendants.

Dated: October 24, 2013



---

J.S.C.