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SHORT FORM ORDER

INDEX NO.: 26922-11

# SUPREME COURT - STATE OF NEW YORK
## COMMERCIAL DIVISION
## TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-25-14
SUBMITTED: 2-27-14
MOTION NO.: 001-MD

x

GASPARE BUSCAGLIA,

Plaintiff,

-against-

THOMAS SCHRECK,

Defendant.

x

KRESSEL, ROTHLEIN, WALSH & ROTH, LLC
Attorneys for Plaintiff
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Massapequa, New York 11758

THOMAS SCHRECK
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Huntington Station, New York 11746

Upon the following papers numbered 1-13 read on this motion to dismiss ; Notice of Motion and supporting papers 1-5 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 6-11 ; Replying Affidavits and supporting papers 13-16 ; Other defendants memorandum of law 12-13 ; it is,

***ORDERED*** that the defendant's motion (001)for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (5), and (7), and for summary judgment pursuant to CPLR 3212 is denied; and it is further

***ORDERED*** that the parties are directed to appear at a conference with clients on Wednesday, August 13, 2014 at 10:30 a.m. in Part 44.

In this action, the plaintiff seeks monetary damages for the defendant's alleged failure to pay a proportionate share of partnership expenses. The complaint alleges that the parties formed a partnership in or about 2006 for the purpose of purchasing real property ("the premises") in Vermont. The attorney, Mr. Nitka, who represented the parties at the closing, failed to disclose that he was a friend of a neighbor whose building encroached upon the subject premises. Litigation was commenced against the parties by the neighbor, and the parties commenced an action against Mr. Nitka for legal malpractice. The parties settled the action against Mr. Nitka

for the sum of $250,000, $60,000 of which was paid to their attorney, Mr. Barr, leaving the sum of $190,000 to be divided between the parties. On April 26, 2011, the parties executed a General Release, which discharged and released Mr. Nitka from future claims or damages, and a Settlement Agreement and General Release discharging each other and Mr. Barr from damages or any claims related to the litigation against Mr. Nitka. On June 6, 2011, the parties agreed to an equal division of the settlement proceeds after settling with the sellers of the premises in a foreclosure action.

The complaint alleges in the first cause of action that the plaintiff paid approximately $197,000 to Mr. Barr during the course of the litigation, while the defendant only paid Mr. Barr $20,000. The complaint also alleges that the parties were unable to pay the mortgage on the premises due to the necessity of paying attorney fees in the legal malpractice action, thereby causing the premises to go into foreclosure. The first cause of action seeks reimbursement of one-half of the expenses paid by the plaintiff. The complaint alleges in the second cause of action that, the during the pendency of the litigation, the plaintiff paid property insurance and expert witness fees and seeks reimbursement of one-half of those expenses. The complaint alleges in the third cause of action that the defendant wrongfully took various assets of the partnership, including heating oil, from the premises and cashed insurance checks payable to both parties. The complaint further alleges that the plaintiff also paid an attorney to represent the parties to resolve the foreclosure action on the premises and seeks reimbursement of one-half the expenses and assets taken by the defendant. The defendant interposed an answer and asserted a general denial, several affirmative defenses and a counter claim seeking "in excess of $50,000," for the plaintiff's refusal to lease the premises during the litigation.

The defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7) on the grounds that a defense is founded upon documentary evidence, that the cause of action violates the Statute of Frauds, and that the complaint fails to state a cause of action. The defendant also moves for summary judgment pursuant to CPLR 3212.

The defendant submits his personal affidavit, a copy of a Settlement Agreement and General Release executed by the parties, Mr. Barr, and Robert Reis, Esq., as attorney for Mr. Nitka and escrow agent for the settlement funds, dated April 26, 2011; a copy of a letter dated June 6, 2011, from the parties to the escrow agent; a copy of a letter dated July 26, 2011, from the parties and the sellers of the premises to the escrow agent; and the pleadings. The letter dated June 6, 2011, reflects that the parties sought an equal division of the settlement proceeds in the amounts of $95,000 each. The letter dated July 26, 2011, provided that the remaining $190,000 would be divided as follows: $20,000 would be paid in settlement of the foreclosure action to the sellers' attorney and $85,000 each would be paid to the plaintiff and the defendant. The defendant avers in his personal affidavit that the Settlement Agreement and General Release sets forth the parties' agreement to end all disputes regarding any claims, demands, causes of action, set offs, defenses, costs or attorney fees. Defendant further states that the plaintiff has no basis upon which to now sue the defendant on the ground that he released the defendant by signing the General Release and Settlement Agreement. The defendant also states that when he and the

plaintiff agreed to the equal split of the remaining malpractice award at $85,000 each, it signified the end of their relationship and their rights and obligations against each other.

In opposition, the plaintiff submits his personal affidavit, wherein he states that he entered into a partnership agreement with the defendant in New York State to purchase real estate in the State of Vermont. The agreement between the parties was to develop the property as a restaurant and to share the expenses equally. They acquired the property together and later learned about the title issues and encroachment by the neighbor's building. The plaintiff's account of the legal malpractice suit supports the defendant's affidavit. The plaintiff, however, states that he paid Mr. Barr $197,000 in legal fees to represent the parties in the legal malpractice suit as well as for litigation surrounding the encroachment issue. The plaintiff states that the defendant only paid Mr. Barr $20,000. At the end of the malpractice suit, Mr. Barr was still owed $60,000, which was paid from the proceeds of the settlement. The remainder of the settlement proceeds were held in escrow in order for the parties to determine how to divide them. The plaintiff states that the Settlement Agreement and General Release was not intended nor did it release claims that the plaintiff had against the defendant, or for that matter, any claim the defendant might have had against the plaintiff. The plaintiff states that the Settlement Agreement was executed for the benefit of Mr. Nitka's insurance carrier, who wanted to pay the settlement and end the dispute against Mr. Nitka.

Subsequently, the mortgage on the premises went into foreclosure. The parties received a letter dated May 13, 2011, from the foreclosure attorney seeking payment, and the disbursal of the settlement proceeds was stayed by a Vermont court. Eventually, with the assistance of an attorney retained by the plaintiff, the foreclosure matter was settled for $20,000 out of the original proceeds on or about July 26, 2011, and the parties were able to reconvey the premises to the sellers. The plaintiff states that on the date the parties executed the Settlement Agreement and General Release, the plaintiff sought to obtain reimbursement for the legal fees, as well as other costs of maintaining the premises, but was pressured by the defendant to sign. The parties finally divided the remaining proceeds on June 6, 2011. As stated earlier, the plaintiff commenced the instant action to recover other fees.

With regard to defendant's first contention that the complaint must be dismissed pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (**Trade Source, Inc. v Westchester Wood Works, Inc.**, 290 AD2d 437; **Berger v Temple Beth-El of Great Neck**, 303 AD2d 346). The defendant contends that the Settlement Agreement and General Release dated April 26, 2011, represents that the parties released all claims that they had against each other. The defendant relies upon Paragraph 4 of the Settlement Agreement and General Release, which states: the plaintiff, the defendant, and Mr. Barr "hereby mutually release each other *** from any and all claims *** and liabilities of any kind whatsoever ***."

"In construing a general release it is appropriate to look to the controversy being settled and the purpose for which the release was executed[,] . . . [and] a release may not be read to cover matter which the parties did not desire or intend to dispose of" (**Bugel v WPS Niagara Properties, Inc.**, 19 AD3d 1081, 1082; *see also* **Wechsler v Diamond Sugar Co.**, 29 AD3d 681, 682). It is also well settled that "releases are contracts that, unless their language is ambiguous, must be interpreted to give effect to the intent of the parties as indicated by the language employed" (**Rubycz-Boyar v Mondragon**, 15 AD3d 811, 812).

Initially, the court notes that the defendant has waived the ground of documentary evidence set forth in CPLR 3211 (a) (1) inasmuch as he has already served an answer and failed to preserve this ground in the answer or in a pre-answer motion. In any event, the defendant has failed to demonstrate that the documentary evidence resolves all factual issues and disposes of the plaintiff's claim. The court cannot determine from Paragraph 4 of the Settlement Agreement and General Release whether the parties intended to release each other from all disputes that were related to the partnership or whether the subject document relates only to the claims in the litigation against Mr. Nitka. Therefore, the branch of the motion seeking dismissal on the ground of documentary evidence is denied.

The defendant has also failed to establish that the complaint should be dismissed pursuant to the grounds set forth in CPLR (a) (5). Although the defendant has properly asserted and preserved the defenses of estoppel, payment, and violation of the Statute of Frauds in the answer, the moving papers fail to provide any substantive basis for dismissal on any of those grounds. Therefore, under these circumstances, the branch of the motion seeking to dismiss the complaint pursuant to CPLR (a) (5) is denied.

The defendant has also failed to establish that the complaint fails to state a cause of action pursuant to CPLR 3211 (a) (7). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action (**Guggenheimer v Ginzburg**, 43 NY2d 268). In examining the sufficiency of the pleading, the court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (**Board of Education v State Education Dep't**, 116 AD2d 939). Here, in light of the foregoing and upon a review of the complaint, plaintiff has alleged three legally sufficient causes of action seeking monetary damages related to the parties' purported shares of the partnership assets and expenses. Accordingly, the branch of the motion to dismiss on the ground that the complaint fails to state a cause of action is denied.

The court now turns to the branch of the defendant's motion seeking summary judgment. A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851; **Zuckerman v New York**, 49 NY2d 557). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**Stewart Title Ins. Co. v Equitable Land Servs.**, 207 AD2d 880), but once a prima facie showing has been made, the burden shifts to the

party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320). Here, the court finds that the defendant has failed to submit sufficient evidence to demonstrate his entitlement to judgment as a matter of law. In addition, there are issues of fact surrounding the parties' intent when they executed the Settlement Agreement and General Release. Therefore, the branch of the motion seeking summary judgment is denied.

Accordingly, the defendant's motion is denied in its entirety. The parties are directed to appear for a conference on Wednesday, August 13, 2014 in Part 44 at 10:30 a.m.

**Dated: June 10, 2014**

HON. ELIZABETH HAZLITT EMERSON

**J.S.C.**