Benten Equity Mgt., LLC v Hart
2015 NY Slip Op 31543(U)
August 14, 2015
Supreme Court, New York County
Docket Number: 653680/2012
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

BENTEN EQUITY MANAGEMENT, LLC and MATTHEW WILLIAMS

Plaintiffs,

– against –

KENNETH HART, 35th HARCO LLC, and HARCO CONSTRUCTION LLC,

Defendants.

Index No.: 653680/2012

DECISION/ORDER

This action is brought by plaintiffs Benten Equity Management, LLC (Benten) and its principal, Matthew Williams, against defendants 35th HARCO LLC, HARCO Construction LLC, and their principal, Kenneth Hart. Plaintiffs seek damages for breaches of two letter agreements concerning the financing and development of a hotel in Manhattan. Defendants now move pursuant to CPLR 3212 for summary judgment dismissing all of plaintiffs' claims.

The terms of the parties' agreements are discussed at length in this court's April 1, 2013 Decision and Order on defendants' motion to dismiss, and will not be repeated here. (April 1, 2013 Decision [NYSCEF Doc. 62] at 3-4.) It is undisputed that the agreements were initially drafted by Williams without the benefit of counsel, and that Williams and Hart negotiated and made changes to the agreements, also without the benefit of counsel, before the final versions were signed on April 7, 2011. As they did on the prior motion (id. at 4), defendants contend that plaintiffs are not entitled to the consideration specified in the agreements – a percentage of a financing fee and equity interests in the HARCO entities – because the agreements were terminated before plaintiffs performed the acts that they were required to perform as a condition of entitlement to such compensation. Defendants claim that the agreements were agency

agreements that were terminable at will. Plaintiffs claim that the agreements were partnership agreements for a specified duration.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.) "Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Blvd. Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974].)

For the reasons stated in its prior decision, the court holds that the letter agreements are ambiguous on the issues of plaintiffs' partnership status and the duration of the agreements. (April 1, 2013 Decision at 6-7.) Thus, the court again rejects defendants' contention that the letter agreements by their terms establish a terminable-at-will agency. The court further holds that even "[i]n the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent." (Haines v City of New York, 41 NY2d 769, 772 [1977]; Better Living Now, Inc. v Image Too, Inc., 67 AD3d 940, 942 [2d Dept 2009] ["a definite term of duration need not be relayed in express terms, and may be implied"].)

On this summary judgment motion, defendants do not present evidence sufficient to clarify the ambiguities identified by the court, or to eliminate triable issues of fact concerning either the existence of a partnership or the duration of the contracts.

Contrary to defendants' contention, the drafts of the agreements, which contain similarly conflicting provisions regarding the nature and duration of the parties' relationship, do not resolve these issues. (See, e.g. Drafts [Defs.' Ex. R at P06889, P06891, P06893] [each referring to Hart and Williams as "50%/50% partners"].)

The deposition testimony on which defendants rely also fails to establish that plaintiffs did not have a partnership interest or that the agreements were terminable at will. Defendants contend, for example, that Williams was not able to offer adequate explanations for the inclusion of certain terms in the agreements (e.g., the sole agent provision or the termination clause). (See Defs.' Memo. In Supp. at 4-5; Reply at 5-6.) While the trier of fact may ultimately reject Williams's explanations, the law is clear that "[a] defendant cannot satisfy its burden [on a summary judgment motion] merely by pointing out gaps in the plaintiff's case . . . ." (Sabalza v Salgado, 85 AD3d 436, 437-38 [1st Dept 2011]; Yaziciyan v Blancato, 267 AD2d 152, 152 [1st Dept 1999] [arguably inconsistent testimony within deposition "merely presents a credibility issue properly left for the trier of fact"].)

Defendants also rely on Hart's affidavit in which he denies that the parties agreed to form a partnership or to share profits and losses. (Hart Reply Aff. ¶ 8.) This affidavit is not properly considered, as it was submitted for the first time on the reply. (See Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992].) To the extent, however, that the affidavit is deemed responsive to Williams's affidavit, it raises credibility issues which cannot be decided on this motion. (See

S.J. Capelin Assoc., Inc., 34 NY2d at 341.)

Finally, the documentary evidence in the record is conflicting. Defendants correctly note that plaintiffs have not alleged or submitted any evidence that the parties ever drafted or filed a certificate of doing business as partners, or that any partnership tax returns were ever filed. (Defs.' Reply at 7.) Plaintiffs, however, point to post-agreement documents created by or for distribution to outside parties in which Benten is identified as defendants' partner. (Pls.' Exs. 5, 7, 11.) Contrary to defendants' assertion, this is therefore not a case in which there is "not a scintilla of evidence supporting plaintiff's claim of the existence of a partnership." (Cleland v Thirion, 268 AD2d 842, 844 [3d Dept 2000].)

As all of plaintiffs' causes of action are dependent on plaintiffs' status as a partner or on the duration of the agreements, the motion will be denied in its entirety. (See April 1, 2013 Decision at 7-8 [based on triable issues as to the existence of a partnership, denying the branches of defendants' motion to dismiss the non-contract causes of action and to dismiss claims against Hart in his individual capacity].) The branch of the motion to dismiss claims against HARCO Construction LLC, a request for relief not addressed by the prior decision, is also denied. HARCO Construction LLC is included as a party in the first sentence and signature lines of both letter agreements. Moreover, the agreements provide for Benten to hold a 5% interest in the "affiliated construction management entity for the subject project," which Hart has testified is HARCO Construction LLC. (Hart Transcript [Defs.' Ex. P] at 174.)

The court has considered defendants' remaining contentions and considers them without merit.

Accordingly, it is hereby ORDERED that defendants' motion for summary judgment is

denied in its entirety, with prejudice; and it is further

ORDERED that this action is set down for a pre-trial conference on October 29, 2015 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
August 14, 2015

MARCY FRIEDMAN, J.S.C.