SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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RAYMOND CHAN,

Plaintiff,

-against-

VIVIAN KWOK, HELEN S. CHAN and KITTY S. CHAN,

Defendants.

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DECISION AND ORDER

Index No. 653093/2013

HON. ANIL C. SINGH, J.:

This is an action sounding in breach of contract or, alternatively, unjust enrichment. Plaintiff Raymond Chan alleges that he performed services in connection with the acquisition, rehabilitation, management and maintenance of premises located at 416-418 West 49th Street in Manhattan. Title to the property was held by Clinton 49 Corporation ("Clinton 49"). He sues his sisters Vivian Kwok, Helen S. Chan and Kitty S. Chan (collectively, "defendants") for failing to pay him a development and management fee of 6% from profits realized by the sale of shares which reflected defendants' ownership interest in Clinton 49.

Defendants deny liability and have counterclaimed for their shares of monies that Mr. Chan is alleged to have wrongfully taken from Clinton 49's bank account. In addition, defendants have interposed counterclaims for conversion,

breach of fiduciary duty and unjust enrichment.

A bench trial was held before this court on March 31, 2016, and April 1, 2016. Raymond Chan testified that he has been a registered architect since 1983. He specializes in the development of residential and commercial property (Trial Transcript, March 31, 2016 at p.17). In 1983, Mr. Chan borrowed money from his sister Betty Wong and purchased a cooperative apartment, which he sold a year later at a profit. He paid back his sister with interest (Id., at p. 18). Mr. Chan developed another property in Queens. Later, with monies received from his father, Mr. Chan along with some of the defendants purchased a property in Manhattan at 43 East Third Street. The property was developed and sold for a substantial profit (Id., at p. 19). The monies were distributed to family members who had invested in the development.

Mr. Chan located the West 49th Street property and, after a financial analysis, he decided to purchase the property (Id., at p. 24). At a family gathering with some of the defendants present, he presented a document entitled "Probable Financial Return Estimates" (Exhibit 6). The document sets forth Mr. Chan's estimates of development costs, expenses and potential rents that could be realized upon development. Salient to this dispute is the notation at the end of the document which states as follows: "A '10%' development & management fee is to

be deducted from net profit or increase in property value above base value." Mr. Chan explained that he drafted this provision to protect himself in the event the project was sold immediately after it was developed, he would be compensated for his efforts based on the increased value of the property (Id., at p. 28). In other instances when the property was retained for a longer period of time, he would "reduce the fee from10 to 8 to 6 [percent] ... to ... make everybody feel better" (Id., at p. 29, lines 9-11).

Clinton 49 purchased the property in 1995. The family members discussed developing the property, but according to Mr. Chan, if the circumstances had been right, they would have flipped it for resale (Id., at p. 30). The interest of the family members was reflected in a shareholder ledger (Exhibit 7). The shares were allocated based on the amount the various family members (and one non-family member) contributed.

The building was not habitable when purchased and required substantial rehabilitation. After receiving regulatory approval from various New York City agencies, the property was rehabilitated (Id., at p. 32). The construction cost $800,000. Mr. Chan's architect fee of $12,000 was well below the standard fee of 10% to 12% of construction cost. Generally, developers receive 15% to 20% percent of the profit, and the management fee is 10%. Mr Chan testified that, in

contrast, his fee was a 10% development and management fee (Id., at p. 34-35).

At the end of 1998, after the completion of construction and receipt of a permanent Certificate of Occupancy, the building was rented to tenants. Additionally, the existing mortgage was refinanced with Mr. Chan personally guarantying the loan (Id., at p. 36). Monies received from the refinancing were distributed to the shareholders (Id., at p. 37 and Exhibit 11).

In February 2003, the property was refinanced again (Id., at p. 38). One million dollars was taken out of the property and distributed to all shareholders (Id., at p. 40). A writing was prepared by Mr. Chan's employee on Clinton 49 letterhead stating the amount of the pro rata distribution to each shareholder (Exhibit 13). The writing contains the following notation at the bottom: "A 6% management & development fee will be charged." Mr. Chan explained that the fee represented the increased value of the building, the work that had been put into the project and for guarantying the refinanced mortgage.

The management and development fee was based on the monies distributed to the shareholders, including rental income (Id., at p. 42). Plaintiff introduced into evidence distribution statements between August 12, 1998, and December 24, 2012, which reflect the pro rata distribution to the shareholders (Exhibit 14). Each statement contains the notation that a management and development fee has been

billed. At first, a 10% fee was assessed to the shareholders. Subsequently, the figure was reduced to 8% and, finally, to 6%.

The management and development fee was based on the net distributions or profit to the shareholders (Id., at p. 46). Mr. Chan testified that there was no objection to the fee by any of the shareholders, including the defendants (Id., at p. 44). The witness explained that he and his employees did all the work required by the lender to keep the mortgage in good standing, as well as managing the rentals and making repairs to the building (Id., at p. 47- 50). The employees were paid by Raymond Chan Architect PC. Clinton 49 did not pay for their services (Id., at p. 51).

On cross-examination, Mr. Chan testified that there where no writings signed by the family members agreeing to the management and development fee (Id., at p. 64 -65). He was asked about his understanding of the statement on Exhibit 6 that "[a] 10% development & management fee is to be deducted from net profit or increase in property value above base value." He explained that the fee was based on two alternatives. The fee would be deducted from net profits from Clinton 49 or, alternatively, assessed on an increase in property value above base value. In this instance, Mr. Chan was seeking to exercise the latter option by seeking a fee on the monies realized by his sisters based on the increase in

property value over base value from the sale of their shares in Clinton 49 (Id., at p. 58-59). He testified that he had the right to exercise both options – net profits received over the years, and the increase in the value of the shares (Id., at p. 59). Mr. Chan maintained that the asset increased substantially because of his efforts, and he is entitled to recoup the value from the sale of his sisters' shares (Id., at p. 82).

The next and final witness called by plaintiff was defendant Vivian Kwok. Ms. Kwok prepared the ledger which showed how much each shareholder invested in Clinton 49 (Exhibit 7). There were no writings signed by the family members agreeing to the management and development fee (Id., at p. 95). One hundred shares were issued and distributed on a pro rata basis (Id., at p. 96).

Ms. Kwok understood that Raymond was going to charge a management and development fee as he was not working for "free" (Id., at p. 100). It was agreed that he would be paid for his work (Id., at p. 100). Ms. Kwok never objected to the 6% assessment made by Mr. Chan upon the mortgage proceeds as he had done the work (Id., at p. 100). Nor were there any objections to the management fee taken by Mr. Chan in accordance with distribution statements

(Exhibit 14).[1] The witness understood the management fee to be the sum her brother charged for managing the property (Id., at p. 107).

Ms. Kwok testified that the minority shareholders consisted of Helen Chan, Kitty Chan, Adrian Chan and herself (Id., at p. 111). Collectively, the four had a 41% interest in Clinton 49. Their interest was sold for $2.6 million. The fifteen shares (subsequently increased to 16.667%) that she purchased in 1995 for $150,000 at $10,000 per share had increased in value at the time of the sale to $62,409 (Id., at p. 112-113). As a result of the March 2013 sale of her shares, Ms. Kwok received $891,852 (Id., at p. 115-116). She acknowledged that the increase in value was because of Raymond's efforts; however, he "collected the management and development fee for doing this." (Id., at p. 113, lines 9-10). Clinton 49 distributed a total $2,612,209.00 to the shareholders as of August 10, 2012. Ms. Kwok's share of the distributions totaled approximately $400,000. (Id., at p. 116). In total, she received approximately $1.3 million as a result of her investment (Id., at p. 117).

The direct examination of Ms. Kwok by her counsel established that she never objected to Raymond getting a fee from the distributions for the work he

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[1]The parties stipulated that the defendants received and cashed the checks referenced on the distribution statements (except for a $3,000 payment due to Kitty Chan) that contained the legend of a management fee and that there was no objection (Id., at p. 104).

performed (Id., at p. 119-120). However, the fee he was seeking on the sale of the shares was different. Mr. Chan was insistent on selling the property in 2010 after their mother died. The defendants did not wish to sell because the "market was low" (Id., at p. 120). The defendants attempted to prevent the sale by filing a lis pendens against the property (Id.).

Nonetheless, Mr. Chan found a buyer for the majority share in the company (Id., at p. 120). The minority members felt compelled to sell their interest as well, as they were concerned about the investment (Id., at p. 121). Raymond was not involved in the sale of the minority interest.

Ms. Kwok testified that only defendants' distributions were reduced by the attorneys' fees incurred by their attempts to prevent the sale. They did not agree to being assessed legal fees (Id., at p. 125). On re-cross-examination, Ms. Kwok stated that Raymond Chan contested the action brought by her and the other defendants. The case was discontinued (Id., at p. 125-126).

The parties stipulated that two remaining defendants, Helen and Kitty Chan, would give similar testimony with respect to their dealings with Mr. Chan, except that Ms. Kitty Chan disputed receiving a $3,000 dividend check.

At the close of the case, the parties entered into the following stipulation on April 1, 2016:

> "1) The issue before the Court is whether the plaintiff is entitled to a fee based on defendants' sale of their shares at a profit in a corporation that owned real property based on a contract or quasi-contract.
>
> 2) In the event the Court finds the plaintiff recovers based on contract or quasi-contract, the amount due to plaintiff will be $68,867.74 plus interest from March 2013.
>
> 3) In the event the Court finds that the plaintiff does not recover on contract or quasi-contract, the amount due the defendants will be $59,559.00 plus interest from March 2013; plus the defendants shall be entitled to present proof regarding a $3,000 check payable to Kitty Chan."

Based on the stipulation to damages, defendants' counterclaims of conversion, breach of fiduciary duty and unjust enrichment are dismissed.

I. Whether the parties entered into a contract

The principles of contract formation are well settled: 1) capacity of two or more parties to enter into a contract; 2) mutual assent or meeting of the minds to the essential terms of the contract; and 3) consideration (Restatement, Second Contracts, Sections 9, 12, 23; Express Industries and Terminal Corp. v. New York Dept. of Transportation, 93 NY2d 584 (1993)). Intent is determined objectively "gathered by their expressed words and deeds" (Brown Bros. Elec. Contrs. v. Beam Const. Corp., 41 NY2d 397, 399 (1977)). Accordingly, "an unsigned contract may be enforceable, provided there is objective evidence establishing that

the parties intended to be bound by it." (Flores v. Lower East Side Service Center, Inc., 4 NY3d 363, 368 (2005); see also God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP, 6 NY3d 371 (2006)). The parties' course of conduct may be looked at "to determine whether there was a meeting of the minds sufficient to give rise to an enforceable contract" (Flores v. Lower E. Side Serv. Str. Inc., 4 NY3d 363, 370 (2005)).

Here, although defendants did not sign a writing expressly assenting to the management and development fee, the surrounding circumstances establish that the parties intended to be bound by the payment term. Mr. Chan developed the 43 East Third Street project successfully. Family members, including some of the defendants, had invested in the project. The developed property was sold for a substantial profit. Clearly, the family had confidence in Mr. Chan's expertise in developing property at a profit.

Mr. Chan proposed the West 49th Street project to family members, including the defendants. The proposal explicitly stated that: "A '10%' development & management fee is to be deducted from net profit or increase in property value above base value." The defendants along with other family members agreed to be bound by the fee term by making monetary investments in the project. They received shares in consideration for the investment allocated

upon the amount the various family members (and one non-family member) contributed.

49 Clinton purchased property in December 1995. Between 1998 and 2012, Mr. Chan on behalf of the corporation made distributions to the family shareholders in the sum of $2,672,209 from net profits, including rents collected and money received by the corporation from refinancing of the mortgages. The disbursement statements expressly provided that a "management and development fee will be charged." The defendants never objected to the management and development fee assessed by Mr. Chan from the distributions. In fact, defendants admit that Mr. Chan was entitled to charge a management and development fee for the work he performed on behalf of 49 Clinton. In short, the surrounding circumstances and course of conduct establish that the parties intended to be bound by the term granting a management and development fee to plaintiff.

II. Whether plaintiff is entitled to a share of profits realized upon defendants' sale of their shares in 49 Clinton

To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing (Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1 [1st Dept 2012]; Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s, 243 AD2d 1, 6 [1st Dept

1998]). A clear, complete document will be enforced according to its terms (Ashwood Capital, 99 AD3d at 7). The court should give "a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (Brown Bros. Elec. Contrs., supra, at p. 400 citing 1 Corbin, Contracts, Section 1).

When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide (Id.). Whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources" (Kass v Kass, 91 NY2d 554, 566 [1998]). A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning (White v Continental Cas. Co., 9 NY3d 264, 267 [2007]; Greenfield v Philles Records, 98 NY2d 562, 569 [2002]). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning (Chimart Assoc. v Paul, 66 NY2d 570, 573 [1986]). Inquiry into the course of the parties' conduct is "appropriate in the instance of an ambiguity or where the contract has doubtful meaning" (Slatt v. Slatt, 64 NY2d 966, 967 (1985) (internal citation omitted)). An ambiguous term is construed against the drafter (Guardian Life Ins. Co. of America v. Schaefer, 70 NY 2d 888 (1987)).

Here, plaintiff is entitled to "[a] '10%' development & management fee [that] is to be deducted from net profit or increase in property value above base value." Plaintiff maintains that the term necessarily includes net profits the defendants realized from the sale of their shares in 49 Clinton. Defendants counter that the monies received from the sale of their shares are not net profits of Clinton 49.

The term "net profit" is not defined, rendering the provision ambiguous as it relates to sale of shares. The parties' course of conduct established that between 1998 and 2012, Mr. Chan made distributions to the shareholders from net profits earned by the corporation, 49 Clinton. This course of dealing is the best evidence that the parties intended to deduct net profit from corporate distributions made by 49 Clinton. This interpretations is practical and consistent with the definition of a distribution, which is defined as "[a] corporation's direct or indirect transfer of money or other property, or incurring indebtedness to or for the benefit of its shareholders, such as a dividend payment out of current or past earnings." (Distribution, Blacks Law Dictionary (10th ed. 2014)).

Next, plaintiff maintains that he had the right to exercise both alternatives, assessing a fee on the net profits 49 Clinton earned over the years and the increase in value of the shares owned by the defendants. He contends that election of one

alternative does not preclude the other. Defendants counter that this construction fails to give meaning to the word "or" used between the two clauses. "Or" is a disjunctive phrase (Sasson v. TLG Acquisition LLC, 127 AD3d 480 (1st Dept. 2015)). Defendants argue that since plaintiff exercised his right to a fee on net profits from distributions, plaintiff may not double dip and receive a fee based on the increase in property value above base value.

Whether "or" is a disjunctive or conjunctive term depends on what the parties intended (Decker v. Carr, 11 AD 432 (3rd Dept. 1896), aff'd 154 NY 764 (1897)). Extrinsic evidence may be utilized to aid in the interpretation of the contract to effectuate the intent of the parties (Id., at pp. 433-434); see also Major Oldsmobile, Inc. v. General Motors, Inc., 115 WL 326475 (S.D.N.Y. 1995) ("It is well established that the word 'or' is frequently construed to mean 'and' and vice versa to carry out the intent of the parties (other citations omitted)."

Here, the court construes the term "or" in the disjunctive as reflecting the intent of the parties. Mr. Chan drafted the provision. He explained that he developed each property differently. A property may be retained for a longer period if it was generating adequate profit. In these instances, he would take a management and development fee after expenses reducing his fee over time. However, other projects may increase in value once developed and sold in a short

time period. In this scenario, in order to be compensated properly, Mr. Chan's fee would be based on the increase in value of the developed property.

Accordingly, the parties intended that plaintiff would either be paid a development and management fee over the long term from net profits generated by the company's distributions, or if market conditions had dictated an immediate sale of the property shortly after it was developed, his fee was based on the increase in property value. The 49th Street property was retained long term. Mr. Chan received a development and management fee on net profit from distributions. The provision does not give Mr. Chan the right to a double recovery on the profits the defendants realized by selling their personal shares in Clinton 49.

Plaintiff's alternative request to impose a management and development fee based on unjust enrichment is denied. Here, since the parties intended to be bound by the written term setting forth the terms under which Mr. Chan was entitled to a management and development fee, the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388-89 [1987]).

Based on the parties' stipulation on damages dated April 1, 2016,

defendants are due the sum of $59,559, plus interest from March 15, 2013.[2] Accordingly, it is

ORDERED that the complaint is dismissed with prejudice; and it is further

ORDERED that the defendants are granted a judgment on their counterclaim that plaintiff took monies from Clinton 49's bank account belonging to defendants; and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of defendants Vivian Kwok, Helen S. Chan, and Kitty S. Chan and against plaintiff in the sum of $59,559, plus statutory interest from March 15, 2013, together with costs and disbursements as taxed by the Clerk of the Court.

Date: July 27, 2016
New York, New York

Anil C. Singh

[2]In addition, the parties had stipulated that defendants are entitled to present proof regarding a $3,000 check payable to Kitty Chan. Proof of this sum shall be submitted to the court within 30 days.