

Zahradnikova v Buhl
2017 NY Slip Op 31585(U)
July 27, 2017
Supreme Court, New York County
Docket Number: 152586/2016
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----- X

DANIELA ZAHRADNIKOVA,

Plaintiff,

Index No. 152586/2016

- against-

HENRY BUHL,

DECISION AND ORDER

Defendant.

----- X

DEBRA JAMES, J.S.C.:

In this action for an accounting and damages under an alleged oral partnership agreement (the Partnership Agreement), defendant Henry Buhl moves to dismiss this action on the ground of a defense founded upon documentary evidence, and for failure to state a cause of action pursuant to CPLR 3211 (a) (1), and 3211 (a) (7), respectively.

CONCLUSION

The motion of defendant Henry Buhl to dismiss the complaint based on a defense founded upon documentary evidence pursuant to CPLR 3211 (a) (1), and for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), shall be granted to the extent that the third cause of action must be dismissed.

The Complaint

Plaintiff Daniela Zahradnikova alleges in the complaint that, in 2005, she moved into defendant's home at 114 Greene St., in Manhattan, "and began cohabitating [sic] with defendant continuously from that time until the present". The complaint

alleges further that, in 2005, plaintiff and defendant

"entered into a partnership agreement whereby it was explicitly agreed and understood, by and between the parties that Plaintiff would fulfill all wifely duties of a domestic nature on her part as required and requested by the Defendant, and that Defendant would support, maintain and provide for Plaintiff in accordance with his earning capacity for the rest of her life".

The complaint further alleges the following: that the parties agreed that the net profits from the partnership would "be used for and applied to the equal benefit of plaintiff and defendant"; that plaintiff left her employment in reliance upon defendant's alleged "representations . . . to support, provide and maintain her in a certain lifestyle;" and that plaintiff thereafter began to reside with defendant, and devoted all her resources, time and effort to defendant's endeavors.

The complaint further alleges that defendant operated at least two retail stores, and had an undefined business relation with an organization described in the complaint as the Association of Community Employment Programs for the Homeless (ACE), from which, along with his retail outlets, he "collected large sums of money". In 2007, plaintiff allegedly received \$75,000 from defendant to invest in stocks for their mutual benefit.

Plaintiff alleges that the services she rendered over a 10-year period, which defendant accepted, have a reasonable value of \$1.5 million.

In February 2016, defendant allegedly refused to continue to perform under the Partnership Agreement, and demanded that she vacate the premises. Plaintiff demanded that defendant continue to pay plaintiff pursuant to the terms of the Partnership Agreement, but defendant refused, and has failed to render an accounting.

The complaint contains three causes of action: the first seeking an accounting; the second seeking \$1.5 million in damages under the Partnership Agreement; and the third seeking monthly support for the remainder of plaintiff's life, "in accordance with his earning capacity".

In support of this pre-joinder motion, defendant submits a 2013 IRS Form 1099, a 2014 Form W-2, and a 2015 Form W-2, all listing plaintiff's address as 45 Huddy Avenue, Highlands, New Jersey, rather than the Greene Street address in which she allegedly had lived continuously with plaintiff.

Plaintiff submits a 2016 holdover petition, by which defendant had sought to evict plaintiff from the Greene Street premises.

DISCUSSION

The following standard applies to this motion:

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only

whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one "

(Leon v Martinez, 84 NY2d 83, 87 [1994][internal quotation marks and citations omitted]).

A complaint will not be dismissed for failure to state a cause of action (CPLR 3211 [a] [7]) if it contains sufficient allegations to state all of the necessary elements of a cognizable cause of action (see Kempf v Magida, 37 AD3d 763, 765 [2d Dept 2007]).

In 1980, the Court of Appeals allowed a cause of action to enforce an alleged oral partnership cause of action involving an unmarried couple living together, in which the plaintiff alleged that she

"performed domestic duties and business services at the request of defendant with the expectation that she would receive full compensation for them, and that defendant has always accepted her services knowing that she expected compensation for them[,] . . . that they have filed joint tax returns[,] . . . [that] she and the defendant entered into a partnership agreement by which they orally agreed that she would furnish domestic services and defendant was to have full charge of business transactions, that defendant would support, maintain and provide

for plaintiff in accordance with his earning capacity and that defendant further agreed on his part to take care of the plaintiff and do right by her, and that the net profits from the partnership were to be used for and applied to the equal benefit of plaintiff and defendant”

(Morone v Morone, 50 NY2d 481, 484-485 [1980][internal quotation marks and footnote omitted]).

The Court of Appeals in Marone upheld the claim of an express oral partnership agreement, but disallowed the first cause of action, alleging essentially the same facts, based on a contract implied in law, finding that it did not assert an express agreement. The dissent in Marone, argued that the terms of the alleged oral agreement are too vague, nebulous, and uncertain to be enforceable, stating, as pertinent:

“A reference of more substance is required than simply one to the provider's earning capacity to describe what it is to which the parties are agreeing. What is notably lacking is any statement of the standard of support and maintenance to be provided or of what relationship is to furnish the measure of the allegedly agreed-on life-style. . . . By its terms the promise is indefinite and uncertain and it runs afoul of the basic premise of contract law--viz., [i]t is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to give it an exact meaning”

(50 NY2d at 490 [internal citations and quotation marks omitted]).

It must be noted that Morone did not require an allegation

that the parties agreed to share losses as well as profits, an essential element of a partnership (see Moses v Savedoff, 96 AD3d 466, 470 [1st Dept 2012], citing Chanler v Roberts, 200 AD2d 489, 491 [1st Dept 1994]).

In the wake of Morone, Justice Greenfield held that "the allegations of an express contract that the woman would furnish domestic services and the man was to have full charge of business transactions and that the net profits from the partnership were to be shared equally, set forth an enforceable cause of action" (Trimmer v Van Bomel, 107 Misc 2d 201, 205 [Sup Ct, NY County 1980][internal quotation marks omitted]).

The complaint in this action contains the essential elements required by Morone, and sufficiently pleads a cause of action for breach of an oral non-marital partnership. Therefore, defendant has failed to demonstrate that the complaint fails to state a cause of action.

Similarly, the documentary evidence does not conclusively demonstrate a defense as a matter of law (Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]). The fact that the three tax forms showed another address for plaintiff does not conclusively demonstrate the falsity of any of the required allegations for the cause of action, or establish a defense as a matter of law. The fact that defendant brought a holdover proceeding against plaintiff to evict her from the Greene Street premises diminishes

any weight to be given to defendant's documentary evidence. On this motion, plaintiff is entitled to "the benefit of every possible favorable inference" (Leon v Martinez, 84 NY2d at 87), and from other facts revealed in discovery, it may be deduced that the documentary evidence ultimately supports her claim. Given the eviction proceeding, defendant's documentary evidence is certainly insufficient to establish a defense as a matter of law. Moreover,

"New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together"

(Morone v Morone, 50 NY2d at 486).

However, the third cause of action in which plaintiff claims that under the Partnership Agreement, defendant promised to pay her monthly support for the rest of his life is barred by the statute of frauds (see General Obligations Law § 5-701(a)(1); Sheehy v Clifford Change Rogers & Wells, LLP, 3 NY3d 554 [2004]).

ORDER

Accordingly, it is

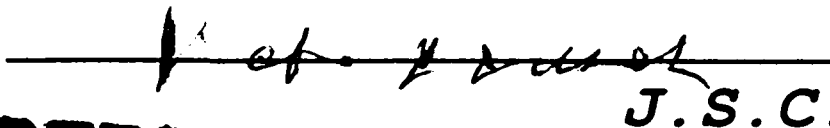
ORDERED that the motion of defendant Henry Buhl, to dismiss the complaint based on a defense founded upon documentary evidence, pursuant to CPLR 3211 (a) (1), and for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), is granted only to the extent that the third cause of action of the complaint is dismissed; and it is further

ORDERED that the defendant is directed to serve his answer to the complaint within 20 days of service after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, on September 12, 2017, at 9:30 AM.

Dated: July 27, 2017

E N T E R:


J.S.C.
DEBRA A. JAMES