

Ernest v Hryck

2017 NY Slip Op 31814(U)

August 25, 2017

Supreme Court, New York County

Docket Number: 159179/2012

Judge: Kelly A. O'Neill Levy

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

-----X

JAMISON ERNEST,
Plaintiff,

INDEX NO. 159179/2012

MOTION DATE _____

- v -

MOTION SEQ. NO. 004

DAVID HRYCK, AS TRUSTEE FOR CPVS TRUST, CHAMBERS
SKY LLC, CHAMBERS SKY II LLC, PH CHAMBERS 398357R

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126, 127

were read on this application to/for _____

Upon the foregoing documents, it is

Defendants David Hryck, as trustee for CPVS Trust, Chambers Sky LLC, Chambers Sky II LLC, and PH Chambers 398357R, LLC (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint filed against them by plaintiff Jamison Ernest. Plaintiff opposes.

BACKGROUND

Plaintiff alleges five causes of action, all of which are based on Plaintiff's claim that he was involved a joint venture with a now deceased individual, Carlo Salvi. Plaintiff claims that he entered into an oral agreement of a joint venture with Mr. Salvi, in which it was agreed that Plaintiff

would receive twenty percent of the net profits from the sale of real property located at 200 Chambers Street in Manhattan¹.

Specifically, Plaintiff alleges that pursuant to the joint venture Plaintiff would (1) introduce Mr. Salvi to Scott Resnick, CEO of Jack Resnick & Sons, developer of the subject properties located at 200 Chambers Street; (2) secure Mr. Salvi's first entry to choose the units Mr. Salvi would purchase at opening price; (3) arrange for Plaintiff's company to be hired as a consultant for Mr. Salvi; (4) convince Mr. Salvi that downtown Tribeca was a prime area to acquire lots and property; (5) arrange multiple meetings and advise Mr. Salvi on which units to purchase and on the purchase of multiple storage units; and (6) be entitled to twenty percent of the net profits in connection with the eventual sale of all units purchased by Mr. Salvi.

On February 22, 2013, Defendants filed a motion to dismiss and for summary judgment. On September 25, 2013, Justice Anil Singh heard oral argument and denied the motion except as to the fifth cause of action for a constructive trust and further found that summary judgment was premature. Nevertheless, Justice Singh noted to Plaintiff's counsel that "everyone you point to has submitted affidavits saying we never heard anything about this, this alleged agreement," and further asked, "[y]ou believe you'll be able to get the witnesses to state, in fact, that there was this agreement?" (Exhibit E, Sept. 25, 2013 Motion to Dismiss Tr. at 10-11). Plaintiff's counsel responded, "Yes, I believe I would" (*Id.* at 11).

Defendants' motion for summary judgment is now ripe before this court, and Plaintiff still has not provided any witnesses to state that there was, in fact, an oral agreement of a joint venture between Plaintiff and Mr. Salvi.

¹ Plaintiff alleges that the properties include units: 21C, 21D, PHC, PHD, PHE, 22C, 6D, 6J, and sixteen storage units.

DISCUSSION

Standard

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

A joint venture is a "special combination of two or more persons where in some specific venture a profit is jointly sought." *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 565 (1988) (internal quotation marks omitted). An oral agreement may be sufficient to create a joint venture relationship. *Cobblah v. Katende*, 275 A.D.2d 637, 639 (1st Dep't 2000). The existence of a joint venture may be predicated on the "contribution of property, skills, etc., control over the venture or a sharing of possible financial losses." *Langer v. Dadabhoy*, 44 A.D.3d 425, 426 (1st Dep't 2007) (citing *Matter of Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317 [1958]). Put another way, "[t]he indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses." *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 298 (1st Dep't 2003); see also *Ackerman v. Landes*, 112 A.D.2d

1081, 1082 (2d Dep't 1985) ("The essential elements [of a joint venture] are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking"—"i.e., a combination of property, financial resources, effort, skill or knowledge"—"some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses").

Furthermore, CPLR 4519, New York's Dead Man's Statute, provides in pertinent part:

"[A] party or a person interested in the event ... shall not be examined as a witness in his own behalf or interest ... concerning a personal transaction or communication between the witness and the deceased person...."

The New York Court of Appeals explained that "[t]he statute prevents any person 'interested in the event' from testifying to a 'personal transaction' with the deceased unless the representative of the deceased has waived the protection of the statute by testifying himself or introducing the testimony of the decedent into evidence at trial." *Matter of Wood's Estate*, 52 N.Y.2d 139, 144 (1981). The high court further explained that "[o]ne of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court." *Id.*

Analysis

Here, Defendants have proffered sufficient evidence to meet their prima facie burden. The deposition testimony and affidavits of Ronald Harris, the former business and asset manager for the United States holdings of Mr. Salvi, and the affidavits of Piero Dal Maso, the former financial and investment manager for holdings of Mr. Salvi, support Defendants' contention that no joint venture existed between Plaintiff and Mr. Salvi.

In his affidavit dated January 25, 2013, Mr. Harris stated that "[w]hile [he] was present during some meetings or informal gatherings with Decedent where Plaintiff was also present, to the best of [his] recollection, [he] never heard Plaintiff and Decedent discuss any agreement whereby

Plaintiff would receive any monetary or other benefit upon the sale of any of the [subject] [p]roperties” (Exhibit G, Harris Aff. 1 at ¶ 4). In his affidavit dated March 27, 2013, Mr. Harris reiterated that he had no recollection of any agreement between Plaintiff and Mr. Salvi regarding the subject properties but added that he had suffered from two strokes and so did not have total recall of his memory (Exhibit H, Harris Aff. 2 at ¶ 3). Contrary to Plaintiff’s contention, the above affidavits are not in contradiction and reach the same conclusions. Further, at his examination before trial on July 14, 2016, Mr. Harris testified that he had no firsthand or direct knowledge of any agreement or handshake deal between Mr. Salvi and Plaintiff regarding the subject properties nor did he have any knowledge of the terms and conditions of or any evidence of any such agreement (Exhibit I, Harris Tr. at 46-48).

Defendants also provided two 2013 affidavits from Mr. Dal Maso and a supplemental affidavit dated February 3, 2017. Per his affidavits, Mr. Dal Maso never acknowledged the existence of a joint venture relationship between Plaintiff and Mr. Salvi. In his affidavit dated April 3, 2013, Mr. Dal Maso, like Mr. Harris, stated that “[w]hile [he] was present during some meetings or informal gatherings with Decedent where Plaintiff was also present, to the best of [his] recollection, [he] never heard Plaintiff and Decedent discuss any agreement whereby Plaintiff would receive any monetary or other benefit upon the sale of any of the [subject] [p]roperties” (Exhibit N, Dal Maso Aff. 2 at ¶ 3). More recently, in his affidavit dated February 3, 2017, Mr. Dal Maso stated that he has “no personal knowledge of any joint venture, business arrangement, or alleged agreement whereby Plaintiff would receive any monetary or other benefit upon the sale of any of the [subject] [p]roperties and” is “unaware of the existence of any evidence or documentation which could prove such an agreement existed” (Exhibit O, Dal Maso Aff. 3 at ¶ 5).

In further support, Defendants provided the deposition testimony of Plaintiff, in which he testified that Plaintiff received payment from Mr. Resnick for “marketing for the [200 Chambers

Street] property,” although Plaintiff testified that “bringing Mr. Salvi into the building” was not part of his marketing services (Exhibit H, Ernest Tr. at 241-244). Plaintiff also testified that he made no financial contribution, never expected to share in any potential losses, never invested in the joint venture, and did not know whether he could exercise any control over the joint venture (*Id.* at 111-114).

The above evidence is sufficient to establish a prima facie case that Plaintiff and Mr. Salvi did not agree to a joint venture. *See Lerch v. Ark Restoration & Design Ltd.*, 137 A.D.3d 637, 638 (1st Dep’t 2016) (reasoning that “the agreement, as described by plaintiffs in their interrogatory responses, had no provision for the sharing of losses, and therefore was not one for a joint venture”); *Magnum Real Estate Servs., Inc. v. 133-134-135 Assocs., LLC*, 59 A.D.3d 362, 363 (1st Dep’t 2009) (finding there was no evidence of the existence of a joint venture where “[t]here is no indication of mutual control over the management and operation of the properties, nor is there an agreement to share the burden of losses”); *see also Am. Bus. Training Inc. v. Am. Mgmt. Ass’n*, 50 A.D.3d 219, 225 (1st Dep’t 2008) (Claimed conversation in which parties allegedly agreed that if certain materials were used for a program, the parties would act jointly, was “insufficient [to establish a joint venture, where parties did not discuss] necessary details, such as how profits, losses, and expenses would be shared or what the contributions of the parties would be, and [there was] no evidence of an agreement as to how the partnership would be managed”); *Baytree Assocs., Inc. v. Forster*, 240 A.D.2d 305, 306 (1st Dep’t 1997) (finding that an “alleged oral agreement did not create a partnership or joint venture, since certain key terms of such an agreement—the sharing of profits and losses, joint control and management of the company, and contribution of capital—were not established”).

Plaintiff has not produced any witness outside of himself, which testimony would be precluded at trial pursuant to CPLR 4519, to raise an issue of fact as to whether Plaintiff and Mr.

Salvi were in a joint venture. Rather, Plaintiff introduces a written agreement between Plaintiff and Mr. Salvi relating to the sale of a storage unit at 200 Chambers Street worth thousands of dollars. As Defendants correctly argue, said written agreement only serves to further buttress Defendants' position as it supports the claim that Plaintiff and Mr. Salvi would have reduced a multimillion dollar joint venture to writing. Thus, Plaintiff has failed to raise a genuine issue of fact in opposition.

CONCLUSION AND ORDER

There is insufficient evidence as a matter of law for a fact finder to determine that Plaintiff was involved in a joint venture with Mr. Salvi. For the foregoing reasons, it is hereby

ORDERED that Defendants David Hryck, as trustee for CPVS Trust, Chambers Sky LLC, Chambers Sky II LLC, and PH Chambers 398357R, LLC's motion for summary judgment dismissing plaintiff Jamison Ernest's complaint is granted.

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8/25/2017

DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: