

**Meza v Cascio**

2020 NY Slip Op 31602(U)

May 27, 2020

Supreme Court, New York County

Docket Number: 158431/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

DEOGENE MEZA,

Plaintiff,

- v -

NICHOLAS CASCIO and ERIC ROSENTHAL,

Defendants.

-----X

INDEX NO. 158431/2017  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57-70, 78 were read on this motion to \_\_\_\_\_ dismiss \_\_\_\_\_.

By notice of motion, submitted on default, defendants move pursuant to CPLR 3211 and/or 3212 for an order summarily dismissing the complaint.

Following service of the motion, plaintiff's counsel filed an order to show cause seeking to withdraw as counsel, which was granted on December 11, 2019. In the decision and order granting the motion to withdraw, withdrawing counsel was ordered to serve plaintiff, together with a copy of the decision and order with notice of entry on him, a notice directing him to appoint a substitute attorney within 30 days of the date of mailing of the notice. (NYSCEF 77). As the notice was mailed to plaintiff on February 25, 2020 (NYSCEF 90, 91), he had until March 26, 2020 to hire new counsel. In a supplemental decision and order dated February 10, 2020, the instant motion to dismiss was adjourned to April 1, 2020, and plaintiff was directed to file opposition thereto on or before March 20, 2020. (NYSCEF 85).

To date, no opposition has been filed, no attorney has filed a notice of appearance on behalf of plaintiff, and no request for an extension has been sought in any form. Thus, given the

92 days elapsing since plaintiff was advised to appoint a substitute attorney, including the 51 days following the February 10 adjournment, an intentional default is reasonably inferred.

In his complaint, plaintiff alleges that he and defendants are equal partners (partnership) in the ownership of two parcels of property, a condominium at 555 West 23<sup>rd</sup> Street in Manhattan (condominium property) and real property at 219 East 120<sup>th</sup> Street in Manhattan (real property). He contends that the partnership purchased the condominium property in 2008 and that they each paid 50 percent of the purchase price and obtained a mortgage for the property, but that the deed recorded in 2008 only bears Cascio's name. He claims that the intent was to rent out the property and that Cascio did not pay him his share of the profits or any distribution therefrom. (NYSCEF 1).

Plaintiff also alleges that the real property was purchased by the partnership in 2013, that he paid more than his one-third share toward the down payment, and that a mortgage was obtained but the recorded deed lists only defendant Rosenthal. Despite agreeing to rent out that property and divide profits equally, plaintiff asserts that defendants have paid him nothing. (NYSCEF 1).

Based on the foregoing, plaintiff advances causes of action for a declaratory judgment related to the ownership of the two properties, an equitable accounting and constructive trust as to each property, breach of defendants' fiduciary duties to him, and unjust enrichment. (NYSCEF 1).

Defendants move to dismiss on the ground that plaintiff has and had no ownership interest in either property. They recount how in 2008 they began working with plaintiff at a recruiting company, and that in or around 2016 they discovered that he had been misappropriating company funds. In January 2017, defendants approached plaintiff and

demanded repayment of the funds. Although plaintiff initially agreed to repay them, he stopped communicating with them, at which point they advised him that they intended to sue him. Plaintiff then filed the instant action, which defendants describe as an attempt by plaintiff to gain leverage against them in their lawsuit or to strong arm them into withdrawing their lawsuit. (NYSCEF 58, 59, 69).

Defendants deny the existence of evidence that plaintiff ever had an ownership or partnership interest in the properties and observe that even though the parties have exchanged discovery, plaintiff has provided no documentation to support his claims. (NYSCEF 69). They submit the following in support of their allegations:

- (1) an affidavit from each defendant, based on personal knowledge, denying plaintiff's claims (NYSCEF 58, 59);
- (2) the contract of sale, the bargain and sale deed, and the closing documents, including bank checks and other checks, for the purchase of the condominium property, all of which reflects that the only purchaser was Cascio (NYSCEF 60-63);
- (3) the contract of sale, the bargain and sale deed, and the closing documents for the purchase of the real property, all of which bears Rosenthal's name only (NYSCEF 65, 67-68); and
- (4) defendants' summons and complaint filed against plaintiff (NYSCEF 64).

Absent a written agreement related to the purchase of the properties, defendants argue that plaintiff's claims are barred by the statute of frauds, which requires that an agreement related to an interest in real property be in writing. They observe that not only is there no evidence of a written agreement between the parties related to the two properties, but plaintiff does not even allege the existence of one in the complaint. Rather, he asserts an equitable interest in the properties, which is also barred by the statute of frauds. Defendants also deny having had a partnership or fiduciary relationship with plaintiff. (NYSCEF 69).

Given defendants' denial of the existence of a written agreement, and plaintiff's failure to allege or prove the existence of such an agreement or agreements, defendants establish that plaintiff's causes of action for a declaratory judgment, essentially premised on a breach of contract claim, and unjust enrichment have no merit. (*See Aziz v Anna Dev. LLC*, 165 AD3d 580 [1st Dept 2018] [declaratory judgment claim related to ownership of property dismissed as barred by statute of frauds as there was no written agreement related to plaintiff's alleged ownership]; *Massey v Byrne*, 112 AD3d 532 [1st Dept 2013] [breach of contract claim barred by statute of frauds absent written agreement conveying interest in condominium to plaintiff]; *Komolov v Segal*, 117 AD3d 557 [1st Dept 2014] [unjust enrichment claim dismissed as it sought same relief barred by statute of frauds]).

Even if the statute of frauds does not apply to partnerships (*Massey*, 112 AD3d at 533), defendants demonstrate that no partnership was formed or existed among the parties. And, in any event, as defendants establish that plaintiff had and/or has no interest in the properties, plaintiff's causes of action for a declaratory judgment, an equitable accounting, and a constructive trust related to the properties have no factual or legal basis. Moreover, absent proof of a fiduciary relationship with plaintiff, his causes of action for breach of fiduciary duty, an accounting, and a constructive trust fail. (*See e.g., Sharp v Kosmalski*, 40 NY2d 119 [1976] [requisite element of claim for constructive trust is existence of confidential or fiduciary relationship]; *Gorunkati v Baker Sanders, LLC*, 179 AD3d 904 [2d Dept 2020] [right to accounting depends on confidential or fiduciary relationship between parties]).

For all of these reasons, it is hereby

ORDERED, that defendants' motion to dismiss is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

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5/27/2020

DATE

**BARBARA JAFFE, J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE