SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

ANGELO GATZONIS and TED NICHOLOUDIS,
individually and on behalf of PROTO INDUSTRIES, INC.,
A New York corporation,
and CRYSTAL BALL GROUP, INC.,
A New York corporation,

Plaintiff(s),

-against-

DIMITRIOS KALOIDIS,

Defendant(s).

INDEX No. 15171/00

MOTION DATE: 9/12/02

MOTION SEQ. No. 3

The following papers read on this motion:
Notice of Motion/Affidavit/Affirmation/Exhibits A-P
Memorandum of Law
Affidavit in Opposition/Exhibits
Reply Affirmation/Memorandum of Law/Exhibit Q

Defendant DIMITRIOS KALOIDIS seeks an Order dismissing the Complaint pursuant to CPLR § 3211(a), 1, 5 and 7 on the grounds that each of plaintiffs' causes of action is barred by documentary evidence, release and/or the statute of frauds and fails to state a cause of action. In the alternative, he seeks summary judgment pursuant to CPLR § 3212. Plaintiffs oppose. That motion is Granted, on all claims, except that for breach of contract for services performed with respect to the renovation of the Georgia diner.

Gatzonis v. Kaloidis

Plaintiffs TED NICHOLOUDIS and ANGELO GATZONIS have been business partners for approximately ten years. NICHOLOUDIS is related to defendant KALOIDIS, and introduced him to partner GATZONIS so that he provide financing for certain business and development projects. According to plaintiffs, the three embarked upon a joint venture or series of joint ventures involving development of business properties, some of which involved other investors.

In their Complaint, plaintiffs four causes of action, breach of oral contract, breach of fiduciary duty, fraud, and conversion of corporate and partnership opportunities. These claims involve the parties' alleged involvement with five projects, which include: (1) a diner renovation; (2) a major theater or retail development on real property on Queens Boulevard, Queens County; (3) a housing development; (4) a project to provide summer dancing in Central Park's Wollman ice skating rink; and (5) a restaurant-catering project at Terrace on the Park. Further details concerning the projects are provided below as they are addressed individually.

Defendant contends that plaintiffs' breach of contract action must be dismissed on the grounds that the alleged oral agreements "either (a) contemplate that the plaintiffs were merely finders or business brokers, (b) contemplate transactions which cannot by their terms be completed in one year, (c) contemplate the long-term leasing of real property, (d) contemplate transactions which are illegal and unenforceable, and (e) in each instance, all of the alleged contracts contemplate transactions with corporations of which the defendant is merely a shareholder and has no personal liability". He also alleges that he owed no fiduciary duty to plaintiffs and that the fraud cause of action fails for a lack of particularity.

Defendant KALOIDIS also seeks dismissal on the grounds that the alleged obligations sued upon are corporate obligations for which he is not personally liable. The Court finds this argument unpersuasive, as there is sufficient evidence in the record to raise an issue of fact whether KALOIDIS disregarded the corporate form of those corporations in which he is the sole shareholder and operated them as his alter egos. This evidence includes, but is not limited to, his disposition of very large amounts of cash to plaintiff GATZONIS, allegedly as loans, with no formal record keeping, notes, or demand for repayment. *Wm. Passalacqua Builders v. Resnick Developers South*, 933 F.2d 131, 139 (2nd Cir.).

As to defendant's agreement that the second cause of action alleging a breach of fiduciary duty, should be dismissed, the Court agrees. Although plaintiffs allege a broad reaching "joint venture" agreement is allegedly applicable to the five projects covered by this action, as matter of law, such claim for a joint venture is unenforceable based upon the doctrine of indefiniteness. Notwithstanding plaintiffs' allegation that the parties were to share profits and losses equally, the obligations of the parties are not delineated and are incapable of being discerned or enforced.

"The doctrine of definiteness serves two related purposes. *First*, unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy . . . . *Second*, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement" *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 NY2d 475, 482, (1989) *cert denied* 498 U.S. 816 (1990); *Charles Hyman, Inc. v. Olsen Indus.*, 227 AD2d 270, 275.

For all but the simplest of transactions, the burden of establishing the terms of such a verbal contract presents a formidable obstacle to its enforcement. Before a court will impose contractual obligation, it must ascertain that a contract was made and that its terms are definite. The nature of the defendant's obligations under the purported joint venture are not capable of determination. The power of the law cannot be invoked to enforce a promise unless it is sufficiently certain and specific so that what was promised can be ascertained. *Joseph Martin, Jr., Delicatessen v. Schumacher*, 52 NY2d 105, 109 (1981).

In the absence of a joint venture, there is no basis for an alleged breach of fiduciary duty, and the second cause of action is Dismissed.

Before addressing the individual breach of contract claims, the court also will briefly address the third cause of action claiming for fraudulent inducement, which is not subject to a Statute of Frauds defense. Plaintiffs' cause of action for fraudulent inducement, alleging that defendants made promises they never intended to keep, lacks sufficient detail to convert what are essentially contract claims into a fraud claim. *Satra Ltd. v. Coca-Cola Co.*, 247 AD2d 248, 250 (1st Dept. 1998).

Accordingly, the alleged third cause of action is also Dismissed.

TERRACE ON THE PARK PROJECT

The Court will first address the particular claim most susceptible of summary disposition. With regard to Terrace on the Park, plaintiffs make several conflicting allegations as to the nature of the alleged agreement. They assert that as consideration for their services in bringing together the investors, use of their expertise in making application to the City of New York for the contract award, and incorporating Crystal Ball Group, Inc., they were promised equity shares in Crystal, which is the corporation formed to operate the enterprise, Terrace on the Park. They alternatively allege that the consideration for a 10% ownership interest was $100,000.

Notwithstanding the lack of clarity with respect to the terms of the alleged joint venture, specific critical and determinative facts are established by the deposition testimony. GATZONIS was never intended to take title to any stock and his long term business partner, NICHOLOUDIS, was to hold stock on his behalf. The nondisclosure of GATZONIS' ownership was intended to conceal from the City of New York and the State Liquor Authority that he was a principal in the venture, as he had been involved in a criminal proceeding, had been charged with bribing a City agency and had been debarred from any awards of city contracts. GATZONIS himself, during one of his many unrestrained and unsolicited monologues at deposition, admitted the need to hide his ownership because any revelation of his ownership interest would prevent an award of the contract.

It is undisputed NICHOLOUDIS agreed to hold GATZONIS' stock, and that, as between them, they would share ownership. It matters not whether defendant KALOIDIS was a party to the deceit, or whether the parties are all in pari delecto. A secret owner cannot seek "to vindicate his assertion of beneficial title" to shares held by another to perpetrate a fraud upon the statute which regulates and controls traffic in alcoholic beverages. *Flegenheimer v. Brogan*, 259 App Div 347, 349-350, *affd* 284 NY 268 (1940).

As noted, the plaintiffs' agreement not only results in a fraud upon the City of New York, but also the State Liquor Authority which requires disclosure concerning principals. Alcoholic Beverage Control Law, § 110, and the court will not aid or lend its authority to the illegality. As stated in *Flegenheimer, supra.*

> "It is well settled law that parties to a fraudulent or illegal transaction who are in pari delicto may not invoke judicial aid to undo the consequences of their illegal acts. *The law leaves them where it finds them.* If such a contract be executory, it will refuse to enforce the contract; if executed, it will refuse to disturb the result . . . 'Where both parties are equally offenders . . . potior est conditio defendantis; not because the defendant is more favored where both are equally criminal, but because the plaintiff is not permitted to approach the altar of justice with unclean hands.' "

Flegenheimer v. Brogan, 259 App Div 347, 349-350, *affd* 284 NY 268 (1940). (emphasis supplied). Were the court to aid GATZONIS and/or NICHOLOUDIS the judgment of the Court would itself "command illegal conduct" *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 NY2d 124, 129 (1992).

So long as NICHOLOUDIS intentionally participated in the deceit and agreed to share with the undisclosed principal, his rights are irreparably intertwined in the illegality, and the court will not come to his aid. Thus, all claims arising out of this project, are dismissed.

THE HOUSING PROJECT

Defendant has produced a document dated February 12, 1999, signed by GATZONIS, entitled "cancellation agreement" with regard to the Housing Project. In it plaintiff PROTO INDUSTRIES INC., the corporate manager for the project owned by plaintiffs GATZONIS and NICHOLOUDIS, released the owner from any and all claims for any monies that might be due manager under the project management agreement, in exchange for payment of $200,000.00.

In response plaintiffs present only a conclusory assertion that GATZONIS' signature was the product of duress. No evidentiary support is provided. Conclusory allegations submitted in support of assertions of economic duress which are not supported by evidentiary facts are not sufficient to present a triable issue regarding the validity of a release. *Moskowitz v. General Accident Ins. Co.*, 179 AD2d 722 (2nd Dept. 1992). Moreover, one who would repudiate a contract procured by duress, must act promptly, or he will be deemed to have elected to affirm it. *Bethlehem Steel Corp. v. Solow*, 63 AD2d 611, 612, *app dsmd* 45 NY2d 837 (1978).

Plaintiffs, having waited a number of years to raise a claim of duress are deemed to have ratified the release and have waived any alleged right to repudiate. *Edison Stone Corp. v. 42nd St. Devel. Corp.*, 145 AD2d 249, 253 (1st Dept. 1989).

Based on the proof presented, the claims arising out of this project, are dismissed.

THE CENTRAL PARK PROJECT

There was no signed written agreement concerning this project to provide dancing in the summer at Central Park's Wollman Rink, and it is undisputed that the project was to continue for a period of four years. It is therefore subject to the Statute of Frauds as a contract not to be performed within a year. General Obligations Law Section § 5-701[a][1].

The records show that the 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. *Baytree Assocs., v. Forster, supra*. GATZONIS testified during deposition that plaintiffs did not agree to share losses, and did not share in the first year's $300,000.00 loss. *Steinbeck v. Gerosa*, 4 NY2d 302, 317, *app dsmd* 358 US 39 (1958). An indispensable essential of a joint venture is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses. Plaintiffs actions in promoting the project or in introducing Wollman Rink lease or license holders Tom and George Maakos to defendant KALOIDIS are insufficient to establish part performance. Such actions are not unequivocally referable to the alleged agreement to remove it from the Statute of Frauds.

An additional factor supports dismissal of the claim with regard to this project. It is undisputed that the Maakos brothers maintained exclusive control over the Wollman Rink pursuant to their lease or license with the City of New York. (Gatzonis, EBT, p.259). They possessed the rights to possession and control, and they refused to continue the project after the first year's loss of over $300,000.00 (Gatzonis, EBT, pp. 257-258). Even were the contract enforceable, there is no evidence to indicate that KALOIDIS was obligated to continue with a losing project, or could exert any influence over the Maakos

brothers to alter their decision to abandon the project, which decision was controlling in light of their possession and control.

Thus, the claims arising out of this project are dismissed.

THE DINER PARKING LOT PROJECT

There is absolutely no evidence of breach of contract with regard to this project.

Plaintiff GATZONIS testified that KALOIDIS refused to sign a letter of understanding regarding development of this site. (Gatzonis EBT p. 269). He asserts that the parties nevertheless agreed, testifying "we had agreed we'll look at it, we'll examine it and go on . . . ." (Gatzonis, EBT, p. 270) He testified that plaintiffs did all the negotiating with potential tenant American Multi-Cinema, Inc. (AMC) to the point where a letter of intent was signed, and that thereafter we were kept out of it. He acknowledged that the movie theater was never built on the site and that it was an opportunity destroyed by KALOIDIS" through mishandling. He testified that according to AMC lawyers the deal "never consumated" as it was completely mishandled by KALOIDIS and his attorney. (Gatzonis, EBT pp. 278-279). Nevertheless plaintiffs brought Forest City Ratner, another tenant, to the table. GATZONIS testified that they negotiated all the terms and conditions with Forest City Ratner and again KALOIDIS stepped into that deal, stole the second deal away from us, and negotiated direct with Forest City Ratner. He also claimed that the deal also was destroyed by the actions of KALOIDIS. (Gatzonis, EBT, p.281) Thus, due to the alleged mishandling, plaintiffs did not receive their alleged promised consideration, a land lease in the new deal.

Notwithstanding the mishandling and alleged theft of opportunity, GATZONIS testified that plaintiffs exerted efforts to persuade KALOIDIS to continue the development search. He testified, efforts were made to convince KALOIDIS to go ahead with the project and not to kill the opportunity that PROTO INDUSTRIES created of two and a half years of efforts and time and money spent into the property of KALOIDIS". (Gatzonis, EBT, p. 285)

The sole place plaintiffs set forth the terms of the alleged agreement regarding the development project is in their answer to interrogatories, as follows, "A one-third share for Ted, Angelo and

KALOIDIS. Ted and Angelo oversee the entire development and will bring in tenants and construction. PROTO INDUSTRIES was to receive from KALOIDIS a long-term ground lease agreement and then PROTO would lease the property immediately. Everything over 500,000 will be shared equally by the individual parties."

Giving plaintiffs the benefit of every favorable intendment, the facts show that they labored for two years to find a tenant for real property owned by KALOIDIS or his 100% owned corporation 86-55 Queens Blvd. Corp., and they were promised a ground lease in return for those efforts, plus construction. None of the tenants they introduced entered into an agreement with KALOIDIS or 86-55 Queens Blvd. Corp. There is no allegation that they were entitled to compensation for merely finding a potential tenant.

Such agreement, were one asserted, would not be enforceable as subject to the Statute of Frauds. General Obligations Law § 5-701, subd. a, par. 10. In apparent recognition that they were not entitled to compensation for their efforts to procure a business opportunity which did not come to fruition, GATZONIS attempted to persuade KALOIDIS to continue the development search, so that their efforts could be rewarded.

KALOIDIS had no obligation to continue his relationship with plaintiffs for the purposes of developing his property, even were it a joint venture, for a joint venture is terminable at will. A joint venture is subject to the same rules as a partnership. Dissolution of a partnership is caused, without violation of the agreement, by the express will of any partner when no definite term or particular undertaking is specified. *Hooker Chemicals & Plastics Corp. v. International Minerals & Chemical Corp.*, 90 AD2d 991 (4th Dept. 1982).

The alleged goal here, nonspecific commercial development of real property owned by the Thirty-six Corporation, cannot be deemed a "particular" or "specific" undertaking. Several different potential undertakings were identified, and the object of the alleged joint venture was not a specified result, or the completion of a specified work. It cannot be presumed that the parties intended the relationship to continue until the accomplishment of a particular undertaking. *Rutecki v. S.H. Gow & Co.*, 289 AD2d 1066, 1067 (4th Dept. 2001). Indeed, GATZONIS testified that the parties did not enter into a written

agreement because they didn't know specific what they were "gonna do . . . you're entering into a writing agreement where you know specific what you're doing." (Gatzonis, EBT p. 268)

Based on the proof presented, the claims arising out of the parking lot project are also dismissed.

THE GEORGIA DINER RENOVATION

Defendant seeks dismissal of plaintiffs' claim for compensation with respect to the renovations admittedly performed by plaintiff GATZONIS based upon the Statute of Frauds. While plaintiffs claim that the diner project was capable of performance within a year, they divorce the construction phase of the project from the remainder. In determining whether an agreement can be fully performed within a year, courts must consider the duration of the entire agreement and not merely a single phase. *RTC Properties, Inc. v. Bio Resources, Ltd.*, 295 AD2d 285 (1st Dept. 2002). Nevertheless, notwithstanding the applicability of the Statute of Frauds to this project, GATZONIS avers that he performed under the agreement acting as the managing contractor. The doctrine of part performance operates to take an agreement outside the Statute of Frauds if the acts are unequivocally referable to an alleged oral agreement and are not subject to alternative explanations. *Baytree Assocs., v. Forster*, 240 AD2d 305, 307, *lv app denied* 90 NY2d 810 (1997).

The Court finds that defendant KALOIDIS' deposition testimony that GATZONIS agreed to renovate his diner without compensation is not dispositive. (Kaloidis, EBT p. 53). Therefore the motion to dismiss the breach of contract claim arising out of this project, is Denied.

Accordingly, for the foregoing reasons, defendant's motion for summary judgment is granted in all respects except insofar as plaintiffs contend they were not fully compensated for their work on the Georgia Diner renovation.

It is, SO ORDERED.

Dated: Nov 18

ENTERED
NOV 20 2002
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. GEOFFREY J. O'CONNELL, J.S.C.