SHORT FORM ORDER **Index Number: 5917-2008**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 11-23-2009
Motion Submit Date: 12-09-2010
Motion Sequence No's.: 005 MOTD
006 MOTD

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LARRY KIMELSTEIN,

Plaintiff,

-against-

JEFFREY KIMELSTEIN &L & J REALTY, LTD.

Defendants.
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Attorney for Plaintiff
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In this ongoing dispute between two brothers, Defendants move, by Notice of Motion (motion sequence number 005) for an Order dismissing the Plaintiff's First Amended Complaint, pursuant to **CPLR §§ 3211 (a) (1), (5) and (7)** and **General Obligations Law ("GOL") §§ 5-701 and 5-703.** The gravamen of the Defendants' motion is that Plaintiff has failed to state a claim under any theory of law, even under the liberal rules afforded to pleadings in this jurisdiction. Thus, Defendants aver that Plaintiff's claim for breach of an oral agreement cannot withstand the motion, since its terms are indefinite and contradictory, depending which statement or pleading of Plaintiff is read. Plaintiff has at times asserted that he is a 50% shareholder in Defendant corporation and otherwise claims he is a co-owner of the real property that is owned by such corporate entity. Moreover, according to Defendants, Plaintiff has described his oral agreement as one that was contingent upon the Defendants being able to refinance the real property involved. In addition, Defendants assert that the alleged agreement must fail, even if its terms were definite, as it runs afoul of the Statute of Frauds, both because it involves real

property and because, by its terms, it was not necessarily performable within a one year period.

With regard to Plaintiff's claim for specific performance, Defendants assert that such cannot withstand dismissal as barred by the Statute of Frauds, since the so-called payment of several checks by a non party (separate corporation) to the Plaintiff is certainly not clearly referable to the so-called oral agreement . In addition, Defendants claim that the doctrine of part performance as argued by the Plaintiff is misplaced because such only applies where it is the aggrieved party, not the breaching party, who has allegedly performed.

Finally, Defendants assert that Plaintiff does not state a cause of action for imposition of a constructive trust, since he can demonstrate no evidence of any transfer by Plaintiff in reliance on a promise by either of the named Defendants.

Plaintiff opposes the motion to dismiss his First Amended Complaint and cross-moves, by Notice of Cross-Motion (motion sequence number 006) for permission to file a Second Amended Complaint. With regard to the breach of contract claim, Plaintiff urges that he and the individual Defendant, as brothers who had worked together as co-owners of two corporations, L&J Realty Ltd ("L&J") and Van Depot, Inc ("Van Depot") for seven years, entered into an oral agreement in 2007, under which, Plaintiff would forgo his interest in the non-party corporation and sell his interest in the Defendant corporation as well as the real property it owned for the sum of $350,000. According to Plaintiff, the agreement called for weekly payments in the amount of $850, until such time as Defendants were able to refinance the real property, after which the balance was due. According to Plaintiff, 13 of such payments were made by the non party corporation to the Plaintiff and the one payment produced to the Court states that it constitutes payment toward the buy out of the non party corporation. Thus Plaintiff asserts that there is a writing or a series of writings and that taken together, they satisfy the Statute of Frauds. In addition, Plaintiff asserts that the agreement could have been accomplished in a one year period. With regard to specific performance, Plaintiff argues that the 13 weekly payments by the individual Defendant satisfy the requirements for stating that cause of action, as they constitute part performance.

With regard to the imposition of a constructive trust, Plaintiff asserts he has set forth the elements of a fiduciary relationship, a promise by his brother, a transfer of his interest in the corporations in reliance on such promise and unjust enrichment as a result of Defendants' failure to perform. In addition, Plaintiff now seeks to add the second corporation, which he states he owned as co shareholder with the individual Defendant, as a necessary Defendant in this case.

Plaintiff also seeks to add several new causes of action, including one for unjust enrichment, for fraud and breach of fiduciary duty against the individual Defendant, Jeffrey Kimelstein , for dissolution of the corporations, an accounting and for waste of corporate assets.

Defendants oppose Plaintiff's cross motion , essentially threatening that should the Court grant leave to amend, they will move, yet again, to dismiss any new causes of action under CPLR 3211. Thus, Defendants claim that Plaintiff's unjust enrichment claim is merely an attempt to avoid, without merit, the Statute of Frauds; that there can be no breach of fiduciary duty since Plaintiff was not a co-shareholder of either of the now named Defendant corporations - L&J and Van Depot; and the fraud claim is a mere improper repetition of the breach of contract claim. With regard to the claim of corporate waste and dissolution, with an accounting, Defendant again asserts that the documentary evidence demonstrates that Jeffrey Kimelstein alone is a shareholder of the subject corporations and that, in any case, Plaintiff has failed to set forth the necessary allegations to come within the ambit of BCL § 1104-a governing corporate dissolution arising from oppressive conduct.

A motion to dismiss pursuant to CPLR § 3211 will generally fail where, taking all the facts set forth as true and according them every possible inference to plaintiff, the pleading states in some recognizable form, a cause of action recognizable known to our law. **Palo v Cronin & Byczek, LLP**, 43 AD 3d 1127, 843 NYS 2d 149 (2d Dep't 2007); **Shaya B Pac, LLC v Wilson, Elser, Moscowitz, Edelman & Dicker**, 38 AD 3d 34, 827 NYS 2d 231 (2d Dep't 2006). On a motion to dismiss under CPLR § 3211, the standard to be applied by the Court is not, therefore, whether the complaint states a cause of action; but whether the pleader has a cause of action. **Morales v Copy Right, Inc**, 28 AD 3d 440, 813 NYS 2d 731 (2d Dep't 2006).

In the absence of prejudice or surprise to the opposing party, leave to amend a complaint should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. **RCLA, LLC v 50-09 Realty, LLC**, 48 AD 3d 538, 852 NYS 2d 211 (2d Dep't 2008).

While the Court, applying the above principles, does not believe it appropriate to dismiss the Plaintiff's contract claim based upon contradictory allegations at this early stage of the litigation, the so-called oral agreement must, in the Court's view, fail, as a matter of law, due to the Statute of Frauds. Land contracts are subject to the Statute of Frauds, **GOL §§ 5-703 (1) and (2).** This statute apples to either of the Plaintiff's versions of the agreement; i.e., the payment for the real property in question or the sale of stock by a corporation (L&J) where the sale asset is an interest in real property. **Yenom Corp v 155 Wooster Street, Inc**, 33 AD 3d 67, 818 NYS 2d 210 (Dep't 200); **Bergman v Krausz**, 19 AD 3d 186, 796 NYS 2d 360 (1st Dep't 2006). A copy of a check with the writing concerning the purchase of Van Depot, which owns no real property does not satisfy the statute.

The Court agrees that the doctrine of part performance may be invoked to preclude a Statute of

Frauds defense in an action for specific performance of a contract. However, the performance must be unequivocally referable to the so-called oral promise. **Luft v Luft**, 52 AD 3d 479, 859 NYS 2d 694 (2d Dep't 2008). Moreover, as stated by Defendants' counsel, in determining whether the doctrine of part performance precludes the Statute of Frauds defense, the court evaluates only the part performance of the party insisting on specific performance, not that of the party insisting on the Statute of Frauds **Clark Const Corp v BLF Realty Holding Co**, 28 AD 3d 367, 814 NYS 2d 63 (1stDep't 2006).

Plaintiff does, however, have a cause of action, based on his allegations, in equity. As set forth in this Court's prior order, Plaintiff's allegations that he was a family member, that Defendant promised him $350,000 to forego his interest in the property owned by L&J as well as the corporation , that Plaintiff spent time and money over seven years investing in L&J, are sufficient to withstand a motion to dismiss. For the same reasons, the Court permits the Plaintiff to amend to assert an equitable claim of unjust enrichment. Whether stated as Defendants would prefer or not, Plaintiff has alleged that Defendants received valuable benefits, including his contributions over the years to the corporate entities and toward the purchase of the real property; that he has given up any claim to ownership of stock in at least one of the corporations and that it would be inequitable for the individual Defendant to hold title to both without affording plaintiff some sort of compensation. **See, State v International Recovery Corp**, 56 AD 3d 849, 866 NYS 2d 823 (3d Dep't 2008). Accordingly, Plaintiff will be afforded the opportunity to amend his Complaint to assert a cause of action for unjust enrichment. For similar reasons, the motion to dismiss Plaintiff's cause of action to impose a constructive trust is denied.

With regard to the corporate causes of action, the Court finds that they neither prejudice the Defendants, since discovery is still ongoing and that they can hardly be the subject of surprise as they were the subject of several court conferences as the appropriate remedy to resolve what might indeed a corporate dispute. While Defendants assert that Plaintiff is not a shareholder of L&J or Van Depot, Plaintiff claims the opposite, as well as answering that he has proof of substantial contributions to such entities over the course of a lengthy period. In addition, although the Court does not believe the "Corporate Waste" allegations constitute a separate cause of action, they do give rise to a basis for dissolution , if proven, under BCL § 1104-a as well as the concomitant cause of action for an accounting. At this early stage, it is impossible to know, without discovery, whether the Plaintiff is or is not a 50% shareholder of such corporations and, if so, whether the Defendants' actions have caused a basis for dissolution and an accounting.

The Court is also compelled, at this stage, to grant the Plaintiff leave to amend his Complaint to assert a cause of action against the individual Defendant for breach of fiduciary duty. If, as Plaintiff

asserts, the individuals were co shareholders of these entities and Defendant engaged in misconduct by attempting to sell the asset of one of the corporations without providing compensation to the Plaintiff, such a claim falls within the ambit of s breach of fiduciary duty. **See, Kurtzman v Bergstol,** 40 AD 3d 588, 835 NYS 2d 644 (2d Dep't 2007). With regard to the proposed cause of action for fraud, the Court finds the allegations insufficient, since they merely parrot those that were alleged as a breach of the so called oral agreement. As such, they simply do not amount to fraud under our law. **See, Sokol v Addison,** 293 AD 2d 600, 742 NYS 2d 311 (2d Dep't 2002).

Both counsel accuse the other of delaying this litigation and prejudicing the other. Plaintiff accuses the Defendant of failing to allow disclosure to go forward, stating that the individual Defendant is determined to bankrupt his brother by stringing out this litigation through numerous motions; Defendant accuses the Plaintiff of prolonging the litigation by bringing frivolous claims and continuous motions to amend his complaint, in an attempt to cost his brother absurd amounts in legal fees. With all due respect to counsel for both sides, there appears to be some validity to both sides' allegations. This is the Plaintiff's Second Amended Complaint and Defendants' counsel has essentially threatened the Court with yet another string of motions following this decision, should the Court allow the Plaintiff to amend for the second time.

It is time for the parties and counsel complete discovery. Thereafter, the Court will entertain any remaining motions for Summary Judgment, based upon what is learned. However, in accordance with the Rules governing Commercial cases , the Court directs that no further motions be made without a pre motion conference, during which the good faith bases for such will be discussed.

For the foregoing reasons, the Court grants the Defendants' motion to dismiss the Plaintiff's causes of action for breach of contract and specific performance. The Court denies the Defendants' motion to dismiss to Plaintiff's cause of action to impose a constructive trust. The Court grants the plaintiff's cross-motion to amend its complaint to set forth causes of action for unjust enrichment, breach of fiduciary duty, dissolution and an accounting. The so-called cause of action for "corporate waste" will not be accepted a separate cause of action but rather as the Plaintiff's basis for the dissolution claim. The Court denies the cross-motion to amend the Complaint to set forth a cause of action for fraud.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

This matter is set down for a status conference on February 24, 2010 at 9:30 a.m.

Dated: February 5, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.