

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

WILLIAM VILKELIS,  
Plaintiff,

-against-

Index No. 603860/09

SBQ.#002

CATHERINE HOLMES, THOMAS HOLMES,  
JEFF GOODMAN and THE HOLMES TEAM,  
Defendants.

The following papers were read on this motion by defendants to dismiss the complaint.

Notice of Motion — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

**FILED**

Cross-Motion:  Yes  No

FEB 14 2011

For convenience, the following motions shall be consolidated.

In Motion Sequence No. 002, defendants move to dismiss the second ~~NEW YORK~~  
complaint. In Motion Sequence No. 003, plaintiff seeks leave to serve a third amended  
complaint. COUNTY CLERK'S OFFICE

This action involves plaintiff, a real estate agent, and individual defendants, who are also  
real estate agents, who allegedly decided to form a partnership in 2008. Upon the alleged  
dissolution of the partnership in 2009, plaintiff brought this action to recover payments for  
services he had rendered in his capacity as a partner.

The amended complaint contains causes of action sounding in breach of fiduciary duty,  
conversion, fraud, unjust enrichment, breach of contract, and tortious interference with business  
relations and/or slander. Plaintiff seeks injunctive relief and an accounting, as well as

damages, including punitive damages.

Defendants move to dismiss this complaint on various grounds. They claim that there is no evidence that a partnership ever existed between plaintiff and the individual defendants. They state that nowhere in the complaint is there a reference to a written partnership agreement, any allegation that plaintiff made a capital contribution or agreed to share in any potential losses, or any description of the terms and conditions of the partnership. Alternatively, even if the court were to acknowledge the existence of a partnership, defendants contend that such a partnership would be orally conceived and therefore, of an indefinite duration, and terminable at will. Such an entity allegedly could be dissolved by any partner at any time without causing a breach. Moreover, defendants argue that plaintiff, as a partner, would not be entitled to compensation following the dissolution of the partnership.

The other grounds for dismissal raised by defendants are: (1) plaintiff's claims of fraud are simply inflated breach of contract claims; (2) any benefits bestowed by plaintiffs upon the alleged partnership benefitted each partner, not just plaintiff, and plaintiff is not entitled to compensation; (3) upon dissolution of a partnership, plaintiff's co-partners no longer owe a fiduciary duty to plaintiff; (4) plaintiff failed to show unlawful or improper means on defendants' part with respect to interference with business relations; and (5) plaintiff has failed to particularize the elements of slander. Defendants also seek dismissal of the claim for punitive damages because of plaintiff's alleged failure to specify egregious conduct warranting such a remedy.

In opposition to this motion, plaintiff argues that a partnership had existed, even though it was not based on a written agreement. Plaintiff provides documents which he claims indicate that the parties intended to form a partnership for the purpose of purchasing and selling real estate, and that the parties intended to hold themselves out publically as partners. Plaintiff also argues that he is entitled to compensation for his share of the partnership assets, even during

dissolution. Plaintiff contends that the individual defendants have unjustly enriched themselves at his expense.

The first issue to resolve is whether or not there is or was a partnership as asserted by plaintiff. Whether a partnership status is enjoyed turns on various factors, including sharing in profits and losses, exercising joint control over the business and making a capital investment and possessing an ownership interest in the partnership. *M.I.F. Securities Co. v R.C. Stamm & Co.*, 94 AD2d 211, 214 (1<sup>st</sup> Dept 1983). A partnership agreement may be oral. *Missan v Schoenfeld*, 95 AD2d 198, 208 (1<sup>st</sup> Dept 1983). A party claiming the existence of an oral partnership bears the burden of proving the indica of such a relationship. *F & K Supply, Inc. v Willowbrook Development Co.*, 304 AD2d 918, 920 (3<sup>rd</sup> Dept 2003). An oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the statute of frauds. *Prince v O'Brien*, 234 AD2d 12 (1<sup>st</sup> Dept 1996). Partnerships of will are subject to dissolution at any time by any partner. *Sanley Co. v Louis*, 197 AD2d 412, 413 (1<sup>st</sup> Dept 1993).

The evidence provided by plaintiff includes an affidavit from plaintiff, some documents describing business plans on the part of defendant Holmes Team, the alleged partnership, some financial records, and a letter from the individual defendants to plaintiff, indicating the dissolution of the Holmes Team and plaintiff's termination. The letter refers to the Holmes Team as a partnership.

This court concludes that the Holmes Team was intended by the parties to be a partnership to handle real properties. The partnership was based upon an oral agreement and was not for an definite period, which therefore makes it a partnership at will. Like any partnership at will, any partner could choose to dissolve it without violating the terms of the agreement. Here, plaintiff as a partner cannot sue his co-partners for breach of contract or breach of fiduciary duty upon their decision to dissolve.

A partnership is not terminated upon dissolution, but rather continues for the purpose of winding up until such affairs are completed. *Lai v Cartlan*, 46 AD3d 237, 245 (1<sup>st</sup> Dept 2007). As a general rule, "partners cannot sue each other at law unless there is an accounting, prior settlement or an adjustment of the partnership affairs." *Non-Linear Trading v Braddis*, 243 AD2d 107, 115 (1<sup>st</sup> Dept 1998) (citations omitted ). Here, in his complaint, plaintiff is suing for an accounting in order to receive what he considers money owed to him. The claim for an accounting is reasonable in that there is no evidence that defendants have initiated any accounting to date. Plaintiff's legal claims, asserting claims for damages, including punitive damages, are premature at this time. They should be dismissed without prejudice. The claim for injunctive relief, based in equity, which would restrain defendants from soliciting partnership customers and from receiving money from said customers pending payment to plaintiff, is not devoid of merit and opposition to an injunction has not been expressed in the motion papers. Thus, the claim should not be dismissed.

After this motion was brought by defendants, plaintiff moved for leave to serve a third amended complaint. This proposed complaint is similar to the previous complaint, except that it adds Halstead Property LLC (Halstead) as a defendant. Plaintiff is a former employee of Halstead and he has alleged that Halstead is holding certain funds that are owed him in the form of commissions. The third amended complaint includes a cause of action specifically against Halstead for non-payment of money, in which plaintiff seeks damages.

In opposing this motion, defendants argue that plaintiff is disingenuous in bringing the motion. They state that plaintiff falsely argues that he only learned that Halstead possessed the money after the commencement of this action. Defendants claim that plaintiff has no basis for bringing Halstead into this suit. A sworn affidavit from Halstead's comptroller, who claims to have actual knowledge of the facts, avers that Halstead is not holding any commissions due to plaintiff or any of the individual defendants.

While, in general, a motion for leave to amend a complaint should be freely granted, the court should examine the merits of proposed amended pleadings, so that a palpably insufficient amended pleading is not allowed. *See Ancrum v St. Barnabas Hospital*, 301 AD2d 474 (1<sup>st</sup> Dept 2003).

The court will grant the motion for leave to add Halstead. Plaintiff has alleged a viable cause of action against Halstead with respect to money for past services. The addition of Halstead as a defendant is not prejudicial or lacking in merit. Because it is not a partner, Halstead can be sued for damages at this time.

The granting of leave to amend renders moot the motion to dismiss the second amended complaint, which has been superseded by the new complaint. However, as several claims made in the third amended complaint are not appropriate at this time, that pleading will be edited accordingly. The third amended complaint shall be revised in the following way: In reference to the second cause of action, alleging breach of contract, the cause of action will be dismissed with respect to all defendants except Halstead; in reference to the third cause of action, alleging breach of fiduciary duty, the cause of action will be dismissed; in reference to the fourth cause of action, alleging conversion, the cause of action will be dismissed; in reference to the fifth cause of action, alleging fraud, the cause of action will be dismissed; in reference to the sixth cause of action, alleging breach of contract, the cause of action will be dismissed.; in reference to the seventh cause of action, alleging unjust enrichment, the cause of action will be dismissed; and with respect to the eighth cause of action, alleging tortious interference with business relationship and/or slander, the cause of action will be dismissed.

The third amended complaint includes claims for injunctive relief against defendants but does not seek any accounting, as in the previous complaint. For this reason, plaintiff is confined to suing Halstead for damages. Claims brought against the other defendants shall be dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss the second amended complaint is denied as moot; and it is further

ORDERED that plaintiff's motion for leave to serve his third amended complaint is granted only with respect to the addition of defendant Halstead Property LLC. The legal causes of actions, causes two through eight, brought against the other defendants are dismissed without prejudice pending an accounting of the partnership property; and it is further

ORDERED that the amended complaint in this revised form shall be deemed served on Halstead Property, LLC upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant Halstead Property LLC shall answer the amended complaint or otherwise respond thereto within 20 days from date of said service.

Dated: February 3, 2011

Enter:

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**

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