

SHORT FORM ORDER

INDEX NUMBER: 19515-2009

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

COPY

Present: **HON. EMILY PINES**

J. S. C.

Original Motion Date: 09-22-2011

Motion Submit Date: 11-15-2011

Motion Sequence No.: 002 MG

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_____X
GARY DUFF, individually and on behalf of
Fairlea Court Holdings, Inc.,

Plaintiffs,**-against-****PETER CURTO, JR.,****Defendant.**

_____X

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Attorney for Defendants

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ORDERED that the motion by Defendant (motion sequence # 002) for partial summary judgment dismissing the first, second, third, fourth and sixth causes of action in Plaintiff's Complaint is granted.

FACTUAL AND PROCEDURAL BACKGROUND

This action was commenced by plaintiff Gary Duff ("Duff"), a 50% member of Fairlea Court Holding LLC ("Fairlea"), individually and derivatively on behalf of Fairlea against Fairlea's other 50% member, defendant Peter Curto, Jr. ("Curto").

According to the complaint, Fairlea was formed in 2006 for the sole and exclusive purpose of acquiring land at 19 Fairlea Court, North Haven, New York, to construct a single-family home thereon. Duff claims that at the time Fairlea was formed he made a capital contribution of \$300,000. He further claims that Fairlea's Operating Agreement ("Operating Agreement") required each member to provide 50% of the capital contributions to Fairlea in order to fund the purchase of the vacant land and the construction of the home. Duff alleges that Curto failed to make any capital contribution to Fairlea as required by the Operating Agreement. Duff also alleges that thereafter he made additional capital contributions to Fairlea totaling approximately \$173,000, because of Curto's failure to make his capital contribution. Duff further claims that the proceeds from the sale of the property in 2009 were insufficient to cover the mortgage, construction loan and expenses, resulting in a shortfall of \$50,000, which he paid as an additional capital contribution to Fairlea. In the complaint, Duff asserts causes of action for breach of contract, negligent/intentional misrepresentation, unjust enrichment, conversion, and fraudulent inducement.

By order dated January 20, 2010, this Court denied Curto's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (4), (5) and (7), stating, in relevant part:

The defendant provided the Court with the Operating Agreement of Fairlea and argues that the defendant was under no obligation to make an initial capital contribution to Fairlea since there was no amount set forth opposite Curto's name on Schedule A. However, after reading the documents provided, the Court notes that there is a percentage of 50% listed next to each parties name in Schedule A without a figure for the initial cash contribution. The Court finds that the documentary evidence provided raises an issue of the parties intent in placing the 50% figure in the Agreement and does not definitively dispose of the plaintiff's claim (citation omitted).

Curto now moves for summary judgment dismissing all causes of action, except the fifth cause of action for conversion. In an affidavit in support of the motion, Curto states, among other things, that Duff loaned Fairlea all necessary monies to the extent that the expenses were not funded by State Bank of Long Island. He provides a copy of Fairlea's Operating Agreement and notes that Exhibit A of the Operating Agreement does not list any capital to be contributed by either member. Curto further states that no agreement exists between the parties to make capital contributions in any amount. Curto also provides an excerpt of Duff's deposition testimony wherein he admitted that he reported a recourse loan to Fairlea on Fairlea's 2008 tax

return. Curto argues that the Operating Agreement conclusively refutes Duff's contention that Curto was required to contribute capital to Fairlea. Additionally, Curto argues that the existence of the Operating Agreement, a signed and fully integrated contract, precludes Duff's multiple theories of recovery on account of Curto's alleged failure to perform his obligations thereunder.

In an affidavit in opposition to the motion, Duff states, among other things, that Curto assured him that he would match Duff's initial capital contribution to Fairlea, and that he relied on Curto's representation. Duff further alleges that section 3.1 of Fairlea's Operating Agreement required he and Curto to contribute 50% of Fairlea's capital. Section 3.1 of the Operating Agreement provides, in relevant part:

Initial Contributions. Upon the execution of this Agreement, each Member shall contribute cash and/or property to the Company as set forth opposite their names in Exhibit "A".

Exhibit A to the Operating Agreement has four columns. The first column has the parties names. The second column entitled "Initial Cash Contribution" is blank. The third column entitled "Description of Property Contributed and Adjusted Basis (AB), Liability Subject to (LS) and Agreed Value (AG) of Property" is also blank. The fourth column labeled "Percentages" lists "50%" for each of the Members. Duff contends that this demonstrates that he and Curto were each responsible for an initial 50% cash contribution. Duff states he made an initial capital contribution but that Curto did not. Duff alleges that he made additional capital contributions to Fairlea totaling approximately \$80,000, and that his company, Gary Duff Designs rendered services on the project valued at approximately \$143,000. Thus, Duff contends that he expended approximately \$524,000 on the project, while Curto expended nothing. Notably, Duff's affidavit fails to address his deposition testimony that Fairlea's 2008 tax return listed a recourse loan to it by Duff.

Duff argues that this Court's prior finding, in denying Curto's motion to dismiss, "that the documentary evidence provided raises an issue of the parties intent in placing the 50% figure in the Agreement and does not definitively dispose of the plaintiff's claim," precludes summary judgment. He argues that the Operating Agreement is ambiguous and that a question of fact exists regarding its construction. Thus, Duff contends that Curto has failed to make a prima facie showing of entitlement to summary judgment.

In reply, Curto provides, among other things, copies of Fairlea's 2007 and 2008 tax returns both of which list a loan payable to Duff in the amount of \$308,637 as a liability of Fairlea. Curto argues that the tax returns confirm that the funds advanced by Duff to Fairlea were loans and not capital contributions.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85, 487 NYS2d 316 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself and there is no reasonable basis of difference of opinion (*see Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002]). "A cardinal principle governing the construction of contracts is that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract" (*Metropolitan Life Ins. Co. v Noble Lowndes Intern., Inc.*, 84 NY2d 430, 437 [1994] quoting *Rentways Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 347 [1955]).

Here, as previously determined by the Court in denying Curto's earlier motion to dismiss pursuant to CPLR 3211(a)(1), the Operating Agreement is ambiguous as to whether initial capital contributions were required by both Duff and Curto. The first sentence of section 3.1 of

the Operating Agreement appears, on its face, to mandate initial capital contributions by each Member. However, Exhibit A does not set forth the amount of any such initial contribution. Where an agreement is ambiguous, the Court may consider extrinsic evidence of the parties' intent (*Tierney v Drago*, 38 AD3d 755, 757 [2d Dept 2007]). The evidence submitted by Curto in support of the instant motion made following the completion of discovery, including Curto's affidavit, an excerpt of Duff's deposition testimony wherein he admitted that he reported a recourse loan to Fairlea on Fairlea's 2008 tax return, and copies of Fairlea's 2007 and 2008 tax returns, demonstrates, as a matter of law that Duff loaned the funds to Fairlea. Duff's representations in Fairlea's tax returns constitute an admission that the funds were a loan and not a capital contribution (see *Acme American Repairs, Inc. v Uretsky*, 39 AD3d 675, 677 [2d Dept 2007]). Therefore, that branch of Curto's motion for summary judgment seeking dismissal of the first cause of action for breach of contract is granted.

In the second cause of action, Duff alleges, among other things, that "[o]n numerous occasions, the plaintiff represented that he would make equal capital contributions toward the purchase and construction of the subject premises." However, Duff's affidavit in opposition to the instant motion only mentions that Curto made such an assurance/representation prior to the execution of the Operating Agreement. As Duff has presented no evidence of an oral promise made after the parties entered into the Operating Agreement, the merger clause in the Operating Agreement bars the second cause of action (see *Cathy Daniels, Ltd. v Weingast*, __NYS2d __, 2012 NY Slip Op 00025 [1st Dept 2012]; *Getty Refining and Marketing v Linden Maintenance Corp.*, 168 AD2d 480, 481 [2d Dept 1990]). Therefore, that branch of Curto's motion for summary judgment seeking dismissal of the second cause of action is granted.

That branch of Curto's motion for summary judgment seeking dismissal of the third cause of action for negligent misrepresentation is granted. A breach of contract does not give rise to a separate claim of negligent misrepresentation unless the acts alleged are based upon breaches of legal duties extraneous to and distinct from the contract the third cause of action (*RKB Enterprises Inc. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept 1992]). Here, Duff fails to allege the existence of any legal duty on the part of Curto separate and apart from the Operating Agreement.

Additionally, that branch of Curto's motion seeking summary judgment dismissing the fourth cause of action for unjust enrichment is granted since it is duplicative of the cause of

action to recover damages for breach of contract (*Cooper, Bamundo, Hecht & Longworth v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]). “Recovery for unjust enrichment is barred by a valid and enforceable contract” (*Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 593 [2d Dept 2007]).

Finally, that branch of Curto’s motion for summary judgment seeking dismissal of the sixth cause of action is granted. “A fraud-based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract’” (*Manas v VMS Asscos., LLC*, 53 AD3d 451, 453 [1st Dept 2008] quoting *First Bank of the Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). Here, there is no evidence of any representation collateral or extraneous to the terms of the Operating Agreement. Therefore, the cause of action for fraud must be dismissed as it is, in actuality, a cause of action for breach of contract (*see Ka Foon Lo v Curis*, 29 AD3d 525 [2d Dept 2006]).

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

Dated: January 25, 2012
Riverhead, New York



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