

FILED

JULY 20TH, 2021

HON. ALAN G. LESNEWICH, J.S.C.

Order Prepared by the Court

MOSTAFA MORSY,

Plaintiff,

-against-

204 GRAND STREET, LLC; GAP PROPERTIES,
LLC; and THE ESTATE OF ANN PETROCELLI,

Defendants

SUPERIOR COURT OF NEW JERSEY
UNION COUNTY
LAW DIVISION

DOCKET NO.: UNN-L-4229-18

CIVIL ACTION**ORDER**

THIS MATTER, having been opened to the court by Defendants, 204 GRAND STREET, LLC; GAP PROPERTIES, LLC; and THE ESTATE OF ANN PETROCELLI, by their attorneys, Jones, Wolf & Kapasi, LLC, appearing to move for summary judgment as to liability against Plaintiff, MOSTAFA MORSY, pursuant to Rule 4:46 *et seq.*, and the Court having reviewed the moving papers and opposition thereto, and the court having held Oral Argument via Zoom on the record on May 19, 2021 and for the reasons set forth in the following Statement of Reasons and for good cause having been shown;

IT IS on this 20th day of July, 2021,

ORDERED that Defendants' Motion for Summary Judgment is and be hereby GRANTED; and it is further

ORDERED that the Amended Complaint is hereby DISMISSED WITH PREJUDICE; and it is further

ORDERED that a copy of this Order shall be considered served upon all parties by the uploading of the within Order by this Court to eCourts.

/s/ Alan G. Lesnewich, J.S.C.**Honorable Alan G. Lesnewich, J.S.C.**

Opposed.

Statement of Reasons

Mostafa Morsy v. 204 Grand Street, LLC, *et. al.*
Docket No.: UNN-L-4229-18

Brief Statement of Pertinent Procedural History

On December 12, 2018, Plaintiff, Mostafa Morsy, filed his Complaint alleging a breach of contract committed by Defendants, 204 Grand Street, LLC; GAP Properties, LLC; and the Estate of Ann Petrocelli (“Defendants”). Plaintiff seeks specific performance of an alleged contract. Plaintiff alleges that Ms. Petrocelli made an oral promised that Plaintiff then relied upon. Plaintiff also alleges breach of implied contractual covenants, promissory estoppel, and unjust enrichment.

In lieu of an Answer, Defendants filed a Motion to Dismissal for Failure to State a Claim on January 15, 2019. That Motion was partially granted by this court, and Plaintiff was permitted twenty (20) days to file an Amended Complaint. Plaintiff did so on March 14, 2019. Defendants filed their Answer to this First Amended Complaint on March 27, 2019. The discovery process then followed, as did multiple discovery end date extensions, most required by Covid-related complications.

Defendants then filed a Motion for a Separate Trial (essentially a motion to bifurcate liability and damages) on July 23, 2020 and Plaintiff filed a Cross-Motion for Discovery on August 18, 2020. This court denied the Defendants’ motion without prejudice. and Plaintiff’s Motion was granted to the extent that further discovery was permitted.

On March 24, 2021, Defendants filed their Motion for Summary Judgment. The motion return date was adjourned and Plaintiff filed opposition on May 3, 2021. Defendants filed their reply on May 13, 2021. This court held oral argument via Zoom on May 19, 2021. Following the arguments of counsel, this court permitted leave for the parties to file supplemental submissions.

The court asked Plaintiff's counsel to refine their factual submission and respond to Defendants' "sham affidavit" argument. Defendants were then permitted to respond to Plaintiff's submission.

Plaintiff filed a supplemental letter brief on June 10, 2021. In that letter, Plaintiff submitted an Amended Statement of Material Facts and excerpts from Plaintiff's deposition. Plaintiff's counsel argues that the misstatement of years, whether it was 2001 or 2002, does not convert Plaintiff's opposition into a "sham" document. Plaintiff asserts that the Plaintiff's deposition testimony was consistent, and Defendants are incorrect in contending that the testimony is contradictory.

Plaintiff argues that "independent and separate promises" were made by Anthony Petrocelli that Plaintiff would receive incentive payments in exchange for assisting in business ventures. Plaintiff also alleges John Cairo, Plaintiff's friend that was hired by Mr. Petrocelli to operate Defendant GAP Properties, confirmed the intent to involve Plaintiff in real estate enterprises and compensate Plaintiff. Plaintiff similarly alleges that Ms. Antoinette Petrocelli ratified Anthony Petrocelli's promises in her capacity as her husband's executrix. Plaintiff argues that in the alternative, John Cairo was authorized to bind GAP Properties and that he corroborated the promises.

Defendants replied on June 17, 2021. In their brief, Defendants argue that Plaintiff provided a "sham affidavit" in opposition to the motion. Citing Shelcusky & Garjulio, 175 N.J. 185 (2002), Defendants argue that Plaintiff has failed to address the alleged implication of the "Sham Affidavit" doctrine despite being instructed to do so. Additionally, Defendants contend that Plaintiff's testimony is "patently and sharply" contradictory. Defendants argue that even Plaintiff's most recent submission is contradicted by Plaintiff's deposition testimony. Defendants maintain that there were written agreements in place that were in effect when these alleged affirmations and ratifications allegedly occurred. Defendants also insist that there is no evidence

of such meetings besides Plaintiff's claims that they occurred. Defendant concludes that Plaintiff has failed to establish the existence of any issues of material fact sufficient to avoid summary judgment.

Brief Statement of Facts

This matter arises from an alleged breach of a supposed oral contract between Plaintiff and Antoinette (Ann) Petrocelli. Plaintiff became Anthony Petrocelli's driver in 1990 but later became the manager of a carwash owned by Mr. Petrocelli. Plaintiff became the property manager of the residential real property located at 204 Grand Street, Hoboken, New Jersey. Defendant, GAP Properties LLC ("GAP"), was a single member LLC with Mr. Petrocelli as its sole member. This LLC Defendant was created to purchase and acquire interest in real estate. In or around 2002, GAP began to express interest in the real property located at 204 Grand Street and owned by Defendant, 204 Grand Street, LLC.

The actual role and responsibility of Plaintiff as property manager is in dispute. According to Plaintiff not only did he collect rent, maintained the property, filled vacant apartments, and take care of any violations, but he allegedly also made improvements to increase property values. Plaintiff received a salary as the property manager. He did not financially contribute to the purchase, financing, or improvement of the 204 Grand Street Property, despite being offered to do so. Again, Plaintiff never had a written agreement with Mr. Petrocelli, Ms. Petrocelli, Defendant GAP, Defendant 204 Grand Street, LLC, nor the Defendant Estate of Ann Petrocelli related to the 204 Grand Street Property.

GAP holds a 1% ownership interest in 204 Grand Street, LLC. GAP also held a 1% ownership interest in 106 York Street, LLC. The developer of 106 York Street Property was a company called Millennium. None of the Defendants ever held an ownership interest in Millennium. Plaintiff's work with Millennium involved attending meetings, but Plaintiff did not

keep time sheets reflecting the dates, time spent, and services allegedly performed relating to said property. Again, Plaintiff did not make any financial contribution to the purchase, financing or improvement of the 106 York Street Property, despite being offered to do so. Plaintiff did not have a written agreement with Mr. Petrocelli, Ms. Petrocelli, 106 York Street, LLC, or any defendant related to the 106 York Street Property.

Plaintiff does have a written agreement with Azur Management Company ("Azur"). Azur is company owned and operated by John Cairo, apparently a friend of Plaintiff. On February 23, 2013, Azur and Defendant GAP entered into an Independent Contract Agreement whereby Mr. Cairo and his company would manage a number of different commercial real estate properties for GAP, including the properties at 204 Grand Street and 106 York Street in exchange for \$153,000 per year. The Independent Contract Agreement states, in relevant part, that:

2. Duties. (a) Company hereby retains Contractor to serve as a manager for the Company, perform business planning, leasing, supervise acquisitions, financing and dispositions and otherwise conduct all day to day activities on behalf of the Company as are associated with the operation and management of commercial real estate interest (the "Services") or as may be necessary in order for the Company to fulfill its responsibilities as manager under Management Agreements whereby the Company is now or in the future obligated to manage commercial real estate interest located in New Jersey or Pennsylvania including, but not limited to the following "Projects":

- (i) Pennsbury Professional Center
- (ii) English Creek Corporate Center
- (iii) 5218 Atlantic Avenue Associates
- (iv) Falcon Center Complex
- (v) QIOC/1900 AM Drive
- (vi) R27, R26 and R24 Boardwalk Stores
- (vii) 204 Grand Street
- (viii) Court Street Doylestown
- (ix) 106 York Street a/k/a York@Warren

On November 22, 2013, Defendant GAP and Azur entered into the "Addendum to Independent Contractor Agreement Dated February 25, 2013" which stated the following in relevant part thereby amending the GAP/Cairo Contract:

3. Upon the sale of any of the real property set forth in paragraph 2 of the INDEPENDENT CONTRACTOR AGREEMENT (other than a sale to Contractor, or any Contractor related entity or entity in which Contractor has an interest) Company shall within thirty (30) days of receipt of net sale proceeds distribute such proceeds as in the following order:

- a.) Payment of all outstanding loans and obligations of the selling entity, whether secured or unsecured.
- b.) Payment to the Article 4 Trust under the Last Will and Testament of Anthony J. Petrocelli of any and all outstanding loans or unreturned capital advanced by such Trust.
- c.) If the Property Valuation Reports, as of the date of the sale of the real property and excluding such property, reflects an aggregate negative equity, then to the entities owing such properties with negative equity, proportionately.
- d.) Twenty percent (20%) of the remaining net proceeds, after payment of items previously set forth in this paragraph, to the Company.
- e.) Thirty percent (30%) of the remaining net proceeds, after payment of items previously set forth in this paragraph, to Contractor.
- f.) All remaining net proceeds to Company or its assignee(s)

Plaintiff argues that this agreement does not control and that “separate and independent promises” made to him were not limited by this agreement.

On March 18, 2014, Mr. Cairo and Plaintiff signed a contract dated December 18, 2013, which stated the following, in relevant part, and specifically referencing the 204 Grand Street Property and 106 York Street Property:

By Addendum to Independent Contractor’s Agreement dated February 25, 2013 and executed November 22, 2013 (the “Addendum”) between GAP Properties (the “Company”) and Azur Management Company, LLC (the “Contractor”) effective October 1, 2012, the Contractor is entitled a certain portion of proceeds from the sale of Existing Projects. The purpose of this letter agreement is to confirm the agreement of the Contractor to pay to the Consultant, Mostafa Morsy, fifty percent (50%) of any portion of the proceeds of sale received by the Contractor from the sale of the 204 Grand, Ocean Club properties, and the Warren at York Street property.

By signing below the Consultant accepts the foregoing and agrees that he is entitled to no other portion of the revenues or proceeds received by Contractor or Principal pursuant to the Letter Agreement. In the event of the Consultant’s death, proceeds from the Transamerica Life Insurance Policy (#42540085-0) shall be paid to the Consultant’s beneficiary in full payment for any and all payment obligations under this Letter Agreement.

All capitalized terms used in this letter agreement shall have their meaning as defined in the Independent Contractor Agreement.

Plaintiff again contends that “independent and separate promises” were made to him. Ms. Petrocelli passed away in 2018 and Plaintiff filed this suit later that year

Analysis

Summary judgment must be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46-2(c). The court must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). “[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the benefit of all legitimate inferences which can be deduced therefrom[.]” Id. at 535 (citations omitted).

Although summary judgment should be granted with caution, that hesitancy should not deprive a party of the procedure when the movant is rightfully entitled to it. N.J. Sports and Exposition Auth. v. McCrane, 119 N.J. Super. 457, 469 (Law Div. 1971), aff’d, 61 N.J. 1, 7 (1972). Additionally, summary judgment is not to be denied if other papers pertinent to the motion show palpable the absence of any issue of material fact, although the allegations of the pleadings standing alone may raise such an issue. Summary judgment procedure pierces the allegations of the pleadings to show that the facts are other than alleged. Wade v. Six Park View Corp., 27 N.J. Super. 469 (App. 1953); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). “Assertions that are conclusive and self-serving are insufficient to defeat a summary judgment motion.” Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, (1988) (citing Puder v. Buechel, 183 N.J. 428, 440-41 (2005)).

Significant to the court’s decision here, the Supreme Court of New Jersey adopted the “Sham Affidavit” doctrine in Shelcusky v. Garjulio. This doctrine “...calls for the trial court to

perform an evaluative function that is consistent with our holding in Brill. While not applied mechanistically to reject any and all affidavits that contain a contradiction to earlier deposition testimony, the doctrine requires a court to evaluate whether a true issue of material fact remains in the case notwithstanding an affiant's earlier deposition testimony..." Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002). Furthermore, the Supreme Court set forth the following three circumstances where an affidavit, provided in opposition to summary judgment, will not be deemed a "Sham Affidavit": "Critical to its appropriate use are its limitations. Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement." Shelcusky, 172 N.J. at 201-02.

After a review of the dispositive caselaw and the record, including a thorough examination of Plaintiff's deposition testimony and other sworn submissions, it is this court's opinion that there is no genuine issue of material fact in this case. It is evident, in this court's opinion, that the only issue in this case is created by Plaintiff's contradictory testimony. In fact, as to the Shelcusky parameters, Plaintiff has hit the trifecta. The issues raised by Plaintiff are unsupported by the record. The Plaintiff only entered into one written agreement and it was admittedly not made with any of the Defendants. Despite insisting that there were oral agreements made with both Mr. and Ms. Petrocelli, there is nothing in the record to support these alleged oral promises apart from Plaintiff's self-serving, contradictory, and illogical assertions.

Despite Plaintiff's argument that "[d]efendants exaggerate the importance of the dates Anthony Petrocelli made his oral promises to plaintiff", in this court's opinion, the timeline does matter. It is clear from a review of the record that Plaintiff had a written agreement with Azur and that under the agreement Plaintiff was entitled to specified compensation. However, Plaintiff

has not brought a suit against Azur, nor did Plaintiff sue John Cairo. Plaintiff instead seeks to enforce an alleged oral agreement that, according to this court's understanding of the record, has only been evidenced by his say-so.

The court agrees with Defendants that Plaintiff has not properly refuted the argument that the "Sham Affidavit" doctrine applies. While the court cannot cull the exact intent from the pages of the Morsy Certification, it appears that this certification is the source of any and all issues of fact in this case. Those issues are contrived. Plaintiff has been unable to point to anything in the record that clearly supports his claims. Plaintiff relies solely on his own testimony to advance his case. When asked by the court on multiple occasions to provide more definitive evidence as to the claims, Plaintiff instead provides an amended statement of material facts and repeats "independent and separate promises" as support in opposition to the Defendants' motion. This is not some talismanic language that can ward off summary judgment. In order to provide sufficient opposition to a motion for summary judgment, there must be support in the record. The claims asserted and argued for therein spring solely from the certification, unsupported by the record. The court has found multiple contradictions in the certification and the deposition testimony. Examples include, but are not limited to: indicating that 2001 was the year of the oral contract based on the purchase of 204 Grand Street despite the property not being purchased until November of 2002; whether there is one oral contract or two; the reason the supposed incentive payments were not governed by the written contract Plaintiff was a party to; and when Ms. Petrocelli allegedly ratified the oral contract(s). It is not lost on this court that Defendants have gone to great lengths to highlight the contradictions in their supplemental submission, including a side-by-side chart with page citations and direct quotations.¹ The contradictions appear to the court to be deliberate as there is no indication in

¹ For the sake of judicial expediency, the court adopts and incorporates by reference those identified inherent contradictions.

Plaintiff's submissions that he was confused or lacked clarity during his deposition. To the contrary, he refused to answer simple, on-point questions despite multiple opportunities to do so. Instead, it is clear from the record that he sought to spar with the examiner, a theory which was unsuccessful in the long run.

The court has concluded that ultimately, Plaintiff has failed to adequately respond to Defendants' Statement of Material Facts by citing record facts as required by Court Rule 4:46-2(b).² Plaintiff instead supplied new counterstatements that were absent from his original filing and asks the court to disregard his original filing as the supplement "replaces the earlier version." To summarize, it is the court's opinion that Plaintiff has not properly opposed the Defendant's motion and the Morsy Certification is a "Sham Affidavit".

Plaintiff's attempt to create an oral contract to overcome the fact that a written contract does not exist in this matter falls short of the mark for another reasons. The New Jersey Dead Man's Statute, N.J.S.A. 2A:81-2, applies to transactions with decedents and provides, in pertinent part, as follows: "In a civil action that is...defended...by a personal representative on behalf of a decedent, any other party who asserts a claim...against the...personal representative, that is supported by oral testimony of a promise, statement, or act of the...decedent, shall be required to establish same by clear and convincing proof." N.J.S.A. 2A:81-2. The clear and convincing evidence standard of proof applies 'in all cases where the claim against the

² Court Rule 4:46-2(b) clearly sets forth the following requirements for a non-moving party opposing a summary judgment motion:

Requirements in Opposition to Motion. A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), **all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a)** demonstrating the existence of a genuine issue as to the fact.

Accordingly, in admitting or disputing the moving party's Statement of Material Facts, the non-moving party must, consistent with R. 4:46-2(b), identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on. Plaintiff has failed to comply with the Rule.

decedent's estate depends at least in part upon the truth of oral testimony of the promises or acts of decedent...' (citation omitted)'. This standard should produce a firm belief or conviction as to the truth of the allegations sought to be established. See Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006). Here, Plaintiff's Complaint names the Estate of Ann Petrocelli as a Defendant and is supported by claims made by Plaintiff about an oral promise allegedly made by Ann Petrocelli. As such, Plaintiff is required to establish his claims by clear and convincing proof. However, all the record identifies to support that claim is Plaintiff's self-serving testimony that he received oral promises from both Anthony Petrocelli and Ann Petrocelli about speculative incentive payments that were allegedly promised to him. The court agrees with Defendants that the supported testimony of an interested party, like Plaintiff, does not meet the clear and convincing evidence standard. See DeBlanco v. Dooley, 164 N.J. Super. 155, 158 (App. Div. 1978).

As a result, the motion record makes it clear that Plaintiff has failed to satisfy the Dead Man's Statute. The Statute calls for clear and convincing proof of such communications, but as detailed above, Plaintiff has not provided any documents or any substantial evidence of any kind. Plaintiff has only presented his own account of the alleged events.³

For the sake of completeness, the court is of opinion that there are no material issues of fact that prevent the granting of summary judgment in this case. It is clear from the motion record that Defendants have successfully challenged the assertion that Plaintiff performed any duties outside of a supervisory capacity. The record supports those arguments. Plaintiff continues to argue that additional work was done, but has failed completely to point to any adequately supported fact in the record to support such an assertion. What does exist in the record is the agreement between Plaintiff and Azur that outlines incentive payments. Any and all incentive

³ Even if Plaintiff's credibility and consistency were not in question, which they are not on this motion, mere words alone would be insufficient to satisfy the clear and convincing standard.

payments are governed by that written, executed agreement. For reasons not identified in the record, but about which the court can surmise, Plaintiff did not bring suit against Azur or Mr. Cairo. Plaintiff has failed to demonstrate anywhere in the record that shows Ms. Petrocelli had any impact on his agreement with Azur and Mr. Cairo. Ms. Petrocelli was not in privity with that written contract. The only agreement in this record is the one between Plaintiff and Azur and, without any evidence to the contrary, that contract controls.

In short, each of Plaintiff's claims fail in this case. The claim for specific performance of contract fails because, as the court has described in length above, there is no evidence of the existence of any contract between the Plaintiff and any Defendant. The supposed "promises made by Anthony and Ann over many years" have not been presented in any concrete form and that sounds the death knell to that claims. Plaintiff has failed to satisfy the Dead Man's Statute. Similarly, breach of implied contractual covenants fails because the oral contract's existence has not been evidenced. The claim of promissory estoppel fails because, in this court's opinion, the "clear and definite promises" are not clear nor definite. Those promises do not exist. The unjust enrichment claim fails because Plaintiff's compensation plan was with Azur and John Cairo, not the named Defendants. Based upon the motion record, these Defendants had no obligation to compensate the Plaintiff. That was the responsibility of Azur, as outlined in the Agreement between Plaintiff and Azur. Any claims of any other agreements or promises to the contrary are not supported by record.

Even when all facts correctly before the court are construed in a light most favorable to Plaintiff, the non-moving party, the court has concluded that a rational factfinder could not find a material issue of genuine fact in this case. Therefore, the court will grant Defendants' application for summary judgment.

Conclusion

For the reasons set forth above, the court hereby GRANTS the Defendants' Motion for Summary Judgment. The Amended Complaint will be DISMISSED WITH PREJUDICE.