



## Kolanu Partners, LLC v Becker

2015 NY Slip Op 30070(U) (2015) | Cited 0 times | New York Supreme Court | January 14, 2015

SUPREME COURT OF OF YORK COUNTY OF YORK:

KOLANU

RONNY I I I ;I

I I

CPLR 1 the

Papers

Plaintiff Partners, ("Kolanu") inJtant,

tO !I

"moving parties"), Order

Summons Summary JudgmJnt

th1 I I

2014, 11 I THE STATE NEW NEW Part 55

-----x PARTNERS, LLC,

Plaintiff,

-against-

BECKER,

Defendant. -----x HON. CYNTHIA S. KERN,



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J.S.C. Index No. 157274/13 ii DECISION/ORDER

Recitation, as required by 2219(a), of the papers considered in review of this motion for: :

Notice of Motion and Affidavits Annexed ..... . Answering Affidavits  
..... . 2 Replying Affidavits  
..... . 3 Exhibits ..... .  
4

Kolanu LLC commenced the action against

defendant Ronny Becker seeking to recover monies allegedly owed it pursuant to certain .  
agreements between them. Kolanu and Daniel Perla, a counterclaim defendant and Kolanu's

managing agent (hereinafter referred to as the now!move for an

pursuant to CPLR § 3211 dismissing all of the counterclaims asserted against them by Mr.

Becker. For the reasons set forth below, the motion is granted in partLd denied in part.

The relevant facts are as follows. Kolanu commenced the instLt action with the service

of a together with a Notice of Motion for in Lieu of Complaint

and supporting affidavit of Mr. Perla against Mr. Becker to recover principal amount of

\$45,754.95, with interest thereon and attorneys' fees pursuant to certain agreements between the

P arties. In a decision dated February 7, this court denied Kolanu's motion on the ground [\* 1] " "not  
lnly" • h complaint I On 2014,

I Mr. 'I "Unit")

Street, "Condominium" "building"}

J !I I State "Offering Plan") 2005. On

2003, spohsor,

.I ("RPTL") Plan,



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Part 20 Plan 11 "[i]n Sponsor's I I Unit Sponsor Sponsor's I abatement." 2007,

July: 1 1, 2006. I Unit ·1· 11 h" Plan, 1a1 I

Subsequent BJcker I On 2014, that it was based upon an instrument for the payment of money and directed Kolanu to

serve a on Mr. Becker who was to answer the complaint twenty days of receipt.

or about February 27, Kolanu served Mr. Becker wi,th a complaint asserting

causes of action for breach of contract, unjust enrichment and an equitable lien. The

complaint bases such causes of action on the following allegations. Becker is the current

owner of unit Penthouse D (the in the condominium buildingllocated at 191-121 E. 23rd

New York, New York (the or the Kolanu was the

developer and sponsor of the Condominium. The Condominium is unincorporated association

made up of unit owners, formed pursuant to an offering plan filed with the Attorney General of i ' the of New York (the on or about January 18, or about April 21,

while the Condominium was being constructed, Kolanu, as initiated the process ii of obtaining a partial tax abatement pursuant to§ 421-a of New Yorkjs Real Property Tax Law

for the Condominium. Pursuant to the Offering Kolanu was to expend its own

money to obtain the tax abatement. However, of the provided that:

the event application for a partial abatement from real estate taxes is granted, all

Residential Owners shall be required to reimburse for all costs in

obtaining such The parties do not dispute that on or January 7, the§

421-a partial tax abatement was granted with an effective date of The complaint

further alleges that defendant, as a Owner, has breached his obligation under the Offering . . h b h Condom1mum's By-Laws and t e Purchase Agreement y mg to pay 1s pro-rata s are



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to reimburse plaintiff for the costs it incurred in obtaining the partial tax abatement.

to the service of the complaint, counsel for Mr. withdrew and new

counsel appeared. or about June 12, Mr. Becker filed an and asserted six

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wherebJ 'I \$3,000,000.00 40% I Perla Project \$3,000,000.00 I Perla Order CPLR

Order !I Perla said

Lsert counterclaims, five for breach of contract and one demanding an against Kolanu and

Mr. individually. Mr. Becker bases said counterclaims on the allegations. Mr.

Becker alleges that he located the real estate project on East 23rd Street (the to be

developed by Kolanu and that he coordinated the transaction with and provided

dd . . l . . h a services m exc ange or an agreed-upon fee and an interest in the profits of the

in addition to a bonus. Specifically, Mr. Becker's answer alleges Kolanu and Mr.

entered into an agreement whereby Mr. Becker would receive a flat to

plus fifty percent of the income, receipts, benefits, distributions and attributable to Mr.



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for Mr. Becker's services on the an accounting to Kolanu's income and

expenses and Mr. income, receipts, benefits, distributions and and an additional

bonus of for his services. Mr. Becker further alleges he fully performed all

services according to the agreement and that the has since completed. Mr. Becker , alleges that prior to receiving any distribution of the income, receipts, distributions and ! profits from the Mr. complained to him that another in the had

taken too much money from him and that Mr. Becker should accept a lower amount. Thus, Mr.

Becker alleges that there was a modification of the agreement he accepted a reduction of

his fees to the flat fee plus of all of income, receipts, benefits, distributions

and profits attributable to Mr. from the plus the bonus. Kolanu and

Mr. now move for an pursuant to § 3211 the counterclaims

asserted against them.

As an initial matter, that portion of the moving parties' an dismissing . the counterclaims against Mr. on the ground that Mr. Becker improperly asserted

counterclaims against him is denied. Specifically, the moving parties that the

3 [\* 3] :1

Perla

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"[a] counierclaim I

I I 4nd alleged I liable." "[w]here party alleged I liable filed, I I shall Service shall I Such shall reply party." ihis

filed countellaims Perla ii CPLR 3019 a19ng



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Order

the limitations I alleges I Perla \$3,000,000.00 f

alleges

\$3,000,000.00 plus "A

gJund ii

counterclaims against Mr. are improper because Mr. Becker to pay the required fee to

the county clerk when his summons and answer with counterclaims against Mr. Perla, as he

was not a party to the action. Pursuant to CPLR § 3019(a), may be any cause

of action in favor of one or more defendants or a person whom a defehdant represents against one

or more plaintiffs, a person whom a plaintiff represents or a plaintiff persons to

be Further, pursuant to CPLR § 3019(d), a person a is to be

a summons and answer containing the counterclaim or cross-clJim shall be

whereupon he or she become a defendant. upon such a defendant be by

serving a summons and answer containing the counterclaim or cross-claim. defendant

serve a or answer as if he or she were originally a Here, court finds that Mr.

Becker properly his summons and answer containing the against Mr. as

§ does not require that a fee be paid to the county clerk with such filing. The i moving parties' assertion that because CPLR § is silent as to a fee is required, this

court should to the requirements of CPLR § which the procedure for i commencing a third-party



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action and requires the payment of a fee, is merit as they have failed to cite any authority for such assertion.

That portion of the moving parties' motion for an Mr. Becker's first and fifth counterclaims against them on the ground that they are barred by statute of is denied. Mr. Becker's first counterclaim a breach of contract action against Kolanu and Mr. and seeks to collect his flat fee plus interest d attorney's fees. Mr. Becker's fifth counterclaim a breach of contract action against Kolanu and Mr. Perla and seeks to collect his bonus interest and attorney's defendant who seeks dismissal of a complaint pursuant to CPLR 321 l(a)(5) on the that it is barred by the 4 [\* 4] II

II tlons m1tla · " ,,... · u ll · action expire i P.C., 403, 405 2007). breth CPLR I I "In York, breach."

Co. N.Y.2d 402  
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II . 2007, by 1 Kolanu  
res1It II 11 that1January 2007

I )  
compensat10n wit P.E., Owner lease in'creased Project. Project, Offering \$3,000,00?i. thr \$1,500,000 \$3,000,000. \$2,000,000. I tat t f 1 . "ta. b h ... 1 b d f . . . s u e o 1m1 ears t e ur en o provmg, pnma fac1e that the time in which to . h d B ' commence an as . exerza v. 'AB 1vuclear Radiology, 43 A.D.3d

(2d Dept A party has six years to commence an action for of contract. See



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§ 213(2). New a breach of contract cause of action accrues at the time of the

Ely-Cruikshank v. Bank a/Montreal, 81 399, (1993).! Here, the moving parties

have failed to meet their burden of establishing that the time in to commence an action for

breach of contract to collect Mr. Becker's fee and bonus has expired. The moving parties assert

that Mr. Becker's time to commence a breach of contract action to collect his fee and bonus

started to run on or before January 6, the date of a letter sent to Kolanu's

investors, in which Kolanu reported to the investors the agreement to Mr. Becker his fee, a

percentage of the profits and an additional amount as a bonus as a of the services rendered

by Mr. Becker. However, the letter does not in any way establish 6, is the date

said breach of contract occurred or that the breach occurred before date of the letter. The

letter states, in pertinent part, that

d . . li.hM R the Company entered into a agreement r. on Becker for his service as the Company's Representative, and for his successful efforts in obtaining the land and the additional development rights that significantly the Company's profit. Mr. Becker's compensation was upon the net profit earned by the Company from the complete of the Based upon the projected profit to be from the as projected in the Confidential Memo:randum, Mr. Becker's compensation was projected to be However, per the compensation agreement, and because of previously unanticipated high level of profit attained by the Mr. Becker will also be entitled to receive a bonus of - It is projected that Mr. Becker will a bonus of

5 [\* 5]

Building

"complete Project" MLeover !1 :l 20 0, poirtt Project

Project ascertainable.

Project I "will paid" "projected"





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motion

Order I Perla acti 1 bn

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same

\$800,000.00 I I II Project, Perla \$26,842,000.00

Project 40%

of \$10,736,800.00. I Perla I Perla's II i, Street, SOHO SOHO The letter does not specify the date on which Mr. Becker was to be Additionally, it is

undisputed that at the time the letter was sent, numerous units in the had yet to be sold

and thus, a sellout of the had not yet occurred. it is undisputed ' that the last unit in the building was not sold until I at which the was

completely sold out and the profits from the could be The letter makes

clear that the was still ongoing and that the money due Mr. Becker, demanded in the

counterclaims, was still in the be and stage. Thus, as the moving parties

have failed to establish that the time in which to commence an action breach of contract to

collect Mr. Becker's fee and bonus has expired, that portion of their to dismiss the first

and fifth counterclaims on that ground is denied.

That portion of the moving parties' motion for an Mr. Becker's fourth

counterclaim against Mr. on the ground that there is another pending between the ' parties is denied. § 321 l(a)(4) provides for the dismissal of an action or a cause of action i where another action is pending between the same parties for the cause of action. Mr. i Becker's fourth counterclaim alleges breach of contract and seeks to collect plus

interest and attorney's fees. Specifically, the fourth counterclaim that at the conclusion of



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the Mr. and Kolanu received approximately in income, receipts,

benefits, distributions and profits from the and that as a result, Mr. Becker was owed i of said amount as and for his part of his fees, in the amount The fourth

counterclaim further alleges that Mr. unilaterally diverted all of Mr.

Becker's fees to Mr. associated entities and loans including, bJt not limited to, projects

known as Green and DR, a development in the Dominican Republic. The

6 [\* 6] •i •I II "[t]he \$800,000.00

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" 1: fourth counterclaim specifies that diversion of all but approxiJately of

BECKER's in fees by PERLA is the subject of another pendingJlction and are not claimed

Here, the moving parties have failed to establish that the fourth counterclaim must be

d . . d . M p 1 1sm1sse agamst r. er a on the ground that there 1s another action ,pending between the same



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parties for the same cause of action. It is undisputed that in May 2013, Mr. Becker, along with . h 1 . d  
six ot er p s, commence an action m upreme Court, New York County against Mr. Perla

and six other defendants, not including Kolanu, alleging causes of action for an accounting,  
conversion, breach of fiduciary duty, rescission, fraud and misrepresJtation, constructive fraud,  
negligence, constructive trust, unjust enrichment, money had and received, breach of the  
covenant of good faith and fair dealing and breach of contract based a certain real estate  
investment in the Dominican Republic (the However, counterclaims in this

action all involve the Project, the work performed for that Project by Becker and any money  
allegedly owed to Mr. Becker based on said work and have connection to the . claims made by Mr.  
Becker in the DR Action for misappropriation of funds. Indeed, Mr.

Becker's answer specifically states that the DR Action involves the misappropriation of funds  
other than the he is seeking in his fourth counterclaim. It is !Ldisputed that the only  
similar subject matter between the instant action and the DR Action Mr. Perla allegedly

used one of the bank accounts used for the Project for some period of time in the collection of the ii .  
investment funds from the DR Action plaintiffs. Thus, the fact that Mr. Becker has another  
action pending against Mr. Perla for claims arising out of an unrelated\vestment project is  
immaterial and is insufficient as a basis for dismissal of the fourth colterclaim pursuant to

7 [\* 7]

I I I Obligations ("GOL") 5-701(a)(2) GOL I 5-701(a)(2), ·I

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GOL 5-701(a)(10) denied.! GOL

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1'1 10. I sal,e, CPLR § 321 l(a)(4).

That portion of the moving parties' motion for an Order Mr. Becker's

counterclaims on the ground that they are barred by the Statute of is also denied. As an

initial matter, the moving parties' motion to dismiss Mr. Becker's counterclaims on the ground

that they violate General Law § is denied. Pursuant to §

a. Every agreement, promise or undertaking is void, or some note or memorandum thereof be in writing, and by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

2. Is a special promise to answer for the debt, default of another person.

In the instant action, Mr. Becker's answer alleges that he entered into the agreement at issue with

both Mr. Perla and Kolanu for the relief he seeks and does not allege, 'as suggested by the moving

parties, that liability against either Kolanu or Mr. Perla is premised a special promise to

answer for the debt, default or miscarriage of Kolanu or Mr. Perla to Mr. Becker with the

relief he alleges he is owed.

Additionally, the moving parties' motion to dismiss Mr. Becker's counterclaims against ' Kolanu on the ground that they violate § is Pursuant to § 5-

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful if such agreement, promise or undertaking: '



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Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, exchange,

8 [\* 8]

11 interest "Negotiating" consummation 'I 1 ii 11 · Perla "locat[ing]

Street Transaction PERLA II " I' 11 'I GOL 5-70l(a)(l) II "negotiating" rentiAg 1, II :1 'I

counterclaims

Perla GOL P!suaht GOL " :I !i

subsd 1 ribed :: I'. h" ii its is wit :I ;1 "The 11 completion renting or leasing of any real estate or interest therein, of a business opportunity, business, its good will, inventory, or an interest therein, including a majority of the voting stock in a corporation and including the creating of a interest. includes procuring an introduction to party to the transaction or assisting in the negotiation or of the . transaction....

In the instant action, Mr. Becker's counterclaims allege that he into the agreement at ' issue with Mr. and Kolanu in exchange for services, which a real estate

project on East 23rd developed by Kolanu ... coordinat[ing] the with and

provid[ing] additional services .... Based solely on the allegations in answer, which is all this

court can look to on a motion to dismiss, this court cannot determine that Mr. Becker's

counterclaims are barred by § as it is not clear Mr. Becker was being

compensated for for the purchase, sale, exchange, leasing of the real

estate on which the Condominium was built or for other services, would not be covered by

the GOL.

Further, the moving parties' motion to dismiss Mr. Becker's against Mr.

on the ground that they violate § 5-70l(a)(l) is denied. to § 5-

70l(a)(l),



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a. Every agreement, promise or undertaking is void, it or some note or memorandum thereof be in writing, and by the party to be charged therewith, or by his lawful if such agreement, promise or undertaking: . . b d . fr h 1. By terms not to e per1orme m one om t e ak . h f m mg t ereo . . . .

statute encompasses only those agreements which, by their 'have absolutely no ii . possibility in fact and law of full performance within one year.' It not that of

9 [\* 9] improbable." Fosteft

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!I rule." !I N.Y.2d

10 performance within one year may be unlikely or v. Kovner, 44 A.D.3d 23, ; 26 (1st Dept (citing D & N Boening v. Kirsch, 63 N.Y.2d 449 (1984)). Based solely on the

allegations in the answer, which is all this court can look to on a motion to dismiss, this court

cannot determine that Mr. Becker's counterclaims are barred by § as it is not ,, clear whether the terms of the agreement could not have been within one year from its ii making. The counterclaims do not allege when the agreement was into and do not allege

the date by which Mr. Becker's services had to be completed or he had to be paid for his

services under said agreement. ;

To the extent the moving parties seek to dismiss Mr. sixth counterclaim for an



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accounting on the ground that no fiduciary relationship exists the parties, such request is denied. Here, the existence of a fiduciary relationship between the is immaterial as Mr. Becker's demand for an accounting is not based on said relationship but rather on the agreement between the parties which allegedly entitles Mr. Becker to said

To the extent the moving parties' seek to dismiss Mr. second, third, fourth and sixth counterclaims on the ground that they are barred by the statute limitations, such request is denied as they have failed to put forth a basis for such relief and failed to brief said arguments in their moving papers.

However, that portion of the moving parties' motion for an dismissing Mr.

. ' d l l t t ' Becker's see mg attorneys iees grante . n er genera rue, a omeys

fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by an agreement between the parties, statute court Hooper

Associates, LTD. v. AGS Computers, Inc., 74 487, 491 (1989). Here, Mr. Becker's [\* 10] ;

" atto'.rney'

;

J.S.C.

CYNTHIA II J.S.C. answer does not allege that an award of attorney's fees is authorized by the agreement between

the parties and he does not assert any other basis for the award of s fees. :! Accordingly, the moving parties' motion for an Order dismissing Mr. Becker's i counterclaims asserted against them is granted only to the extent that;those portions of Mr.

Becker's counterclaims seeking attorney's fees are dismissed. This constitutes the decision and



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order of the court.

I I Enter:

s" KERN [\* 11]

