

To be Argued by:
DIRK A. GALBRAITH
(Time Requested: 10 Minutes)

New York Supreme Court
Appellate Division—Third Department

ALAN J. LEONARD,

Plaintiff-Appellant-Respondent,

– against –

STEPHEN CUMMINS,

Defendant-Respondent-Appellant.

Case No.:
531497

BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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QUESTIONS PRESENTED

Point I: Does part performance of the parties' agreement by the Plaintiff take this case out of the Statute of Frauds?

Point II: Does Plaintiff's complaint sufficiently allege partial performance on his part of the parties' agreement to remove the case from the Statute of Frauds.

STATEMENT OF FACTS

In 1994 Plaintiff, Alan Leonard, was a graduate student at Cornell University. Leonard became acquainted with the defendant, Stephen Cummins, who then operated a nursery and farm stand business on property which he owned in the Town of Ithaca, Tompkins County. (14)

Cummins' business was, at the time, in serious trouble. The real estate was encumbered by at least two mortgages by held by The Farm Service Administration which were on the edge of default. The balances owing on the mortgages approximately equaled the then fair market value of the real estate. The farm stand and nursery businesses were unprofitable and Cummins was barely able to cover his payroll and the checks written to suppliers. He was unable to supply many of the trees which his business had contracted to provide. (15)

It was against this background that Cummins approached Leonard in the latter part of 2004 and offered to form a partnership with him for the purpose of owning the real estate and jointly operating the farm stand and

tree businesses. It was contemplated that the partnership would be an equal one and conditioned upon Leonard agreeing to leave his studies at Cornell University and devote his full efforts to the partnership business. Cummins' capital contribution to the partnership was to be the land and farm stand businesses, subject to the mortgage obligations secured by the real estate and existing contractual obligations to customers. The exact amount of Leonard's capital contribution was not immediately determined and Cummins represented to Leonard and that their partnership agreement would be effective immediately and be reduced to writing at a later date. (15-16)

In reliance upon Cummins representations, Leonard accepted the offer of partnership, left his studies at Cornell University and began working on a full-time basis in the partnership business.

Leonard was given access to the business accounts of the tree farm and nursery and paid his living expenses by withdrawals from those accounts. In 2006 Leonard

moved into a cabin on the business premises which had been improved for his use and commenced full-time residence there. (16)

Between 2005 and 2007 although Leonard and Cummins devoted their full energies to their partnership business the financial situation of the business remained precarious. (16) That situation changed by the beginning of 2008 after Leonard made a series of payments into the business accounts of the partnership amounting to a capital contribution of \$55,000. Beginning in 2008 the partnership became profitable and in subsequent years the profits of the partnership business increased. (17)

Over the years that followed Cummins stated to various persons that he and Leonard were business partners and co-owners of the property upon which the businesses were located. However, Cummins resisted Leonard's request that their partnership agreement be reduced to a writing, offering various excuses why it was not necessary to formalize their partnership agreement

despite the fact that they continued to operate the businesses as equal partners.

Commencing in 2014 the business relationship between Leonard and Cummins began to deteriorate and in May, 2017 Cummins announced to Leonard that he did not consider them to have been partners "for a long time". In December, 2018 Cummins demanded that Leonard cease to participate in the partnership business and remove himself from the residence on the partnership real estate, which Leonard did. (17-18)

Following a series of unsuccessful negotiations Leonard commenced the present action in November, 2019 seeking a declaration that he and Cummins had formed a partnership, that the real property and the improvements thereon were partnership property and that the partnership be adjudged dissolved. Leonard's complaint in the action further sought an accounting of the affairs of the partnership, the sale of the assets of the partnership and a division of the proceeds between the parties according to their respective rights. (18-19)

The defendant answered in the action and alleged as affirmative defenses, among other things, the Statute of Frauds and the statute of limitations.(21-22) Defendant subsequently moved to dismiss the plaintiff's complaint pursuant to CPLR Rules 3211(a) (5) and 3211(a) (7).

In a written decision the Supreme Court (Hon. Gerald A. Keene, AJSC) held that the plaintiff's complaint did state a cause of action insofar as it alleged that Leonard and Cummins had formed an equal partnership and dismissed the defense of the statute of limitations. (10-11) However the Court went on to hold that plaintiff's claim to an interest in the real property upon which the businesses were located was barred by the Statute of Frauds. The Court held that plaintiff's contention that his partial performance of the parties' agreement did not, as a matter of law, remove the case from the applicability of the Statute of Frauds since the defendant had owned the real property before the partnership was entered into.(11-12)

It is from the portion of the Order of the Supreme Court which granted defendant's motion to dismiss plaintiff's claim for an interest in the real property that this appeal is taken. (2)

Point I: Part performance of the parties' agreement by the Plaintiff takes this case out of the Statute of Frauds.

In dismissing plaintiff's claim that the real property upon which the partnership business was conducted the Court below held the following:

"Plaintiff's contention that partial performance of the agreement removes the case from the applicability of the statute of frauds is rejected by the Court. The exception does not apply in cases where one of the purported partners is the owner of the property before the partnership was entered into." (7)

Citing the holding of the Appellate Division 2nd Department in *Pounds v. Egbert* (117 A.D. 756 [2d Dept. 1907]) the Court below apparently held that as a matter of law partial performance could not sustain an oral agreement to convey real estate.

This was error.

Pounds vs. Egbert (supra) was decided by the Appellate Division upon an appeal from a judgment after trial in favor of the plaintiff who alleged that an oral partnership had been created between him and the defendant for the purpose of developing an unimproved

tract of land. The Appellate Division reversed upon the ground that plaintiff's evidence was insufficient to sustain a finding of a partnership (117 A.D. at 762). The *Pounds* Court did not hold that partial performance could never sustain an oral agreement for the conveyance of real property and in fact remanded the case for a new trial.

Dobbs v. Vornado, Inc. (576 F. Supp. 1072 [EDNY 1983]), cited by the Court below, discusses *Pounds v. Egbert* (supra) at some length and reached the conclusion that a partnership may exist in reference to the purchase, sale and ownership of lands, and that it may be created by parol agreement (576 F. Supp. at 1081 [FN 1]).

Cases decided in other contexts have held that partial performance may sustain a cause of action for specific performance of an agreement to convey real property. In *Benn v. Benn* (82 A.D. 3d 584 [1st Dept. 2011]) the Appellate Division reversed an order dismissing the plaintiff's complaint to enforce such an

agreement holding that the plaintiff's allegations raised triable issues of fact as to whether his behavior constituted partial performance unequivocally referable to the oral agreement provision to take the alleged agreement out of the Statute of Frauds. Similarly, in *Adelman v. Rackis* (212 A.D. 2d 559[2d Dept. 1995]) the Appellate Division reinstated plaintiff's cause of action for a specific performance of an oral agreement to convey a residence holding that the Statute of Frauds does not preclude a court of equity from compelling a specific performance of an agreement when there has been part performance.

The doctrine of part performance is based on principles of equity, and, specifically recognition of the fact that it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement (*Messner Vetere Berger McNamee Schmetter Euro RSCG v. Aegis Group*, 93 N.Y. 2d 229, 235 [1999]). In the present case the plaintiff has pleaded facts which, if

proven at trial, would sustain the conclusion that he had partially performed the parties' agreement that the land and buildings upon which the partnership business was conducted would be the property of the partnership.

Upon a motion to dismiss pursuant to CPLR §3211 the facts alleged in the complaint must be taken most favorably to the plaintiff (*Weiner v. McGraw-Hill, Inc.* 57 N.Y. 2d 458 [1982]). The sole question to be determined upon a motion such as this is whether from all the facts alleged in the complaint any valid cause of action is stated (*Underwriters at Lloyd's, London v. Richards Frgt. Lines* 12 N.Y. 2d 334 [1963]). The Court must assume on such a dismissal motion that all of the facts alleged in the complaint are true and the only inquiry is whether the pleading states, in some recognizable form, a cause of action known to the law (*Howard Stores Corp. v. Pope*, 1 N.Y. 2d 110, 114 [1956]). The plaintiff's complaint in this action states a cause of action for a declaration that an oral partnership was created for the ownership of a business and the land upon

which is was located. Plaintiff's claim of an interest in the real property should not have been dismissed.

Point II: Plaintiff's complaint sufficiently alleges partial performance on his part of the parties' agreement to remove the case from the Statute of Frauds.

The Statute of Frauds does not preclude a court of equity from compelling the specific performance of an agreement where there has been part performance (General Obligations Law §5-703 [4]). The doctrine of part performance may be invoked only if the plaintiff's action can be characterized as "unequivocally referable" to the agreement alleged (*Anostario v. Vicinanza*, 59 N.Y. 2d 662 [1983]; *Messner Vetere Berger McNamee Schmetter Euro RSCG v. Aegis Group*, 93 N.Y. 2d 229 [1999]). It is not sufficient that the oral agreement gives significance to a parties actions. Rather the actions alone must be "unintelligible or at least extraordinary" and explainable only with reference to the oral agreement. Significantly, the doctrine of part performance is based on principles of equity, in particular, recognition of the fact that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the Statute as a sword rather than a shield

(*Rose v. Spa Realty Associates*, 42 N.Y. 2d 338 [1977]); *Adelman v. Rackis*, 212 A.D. 2d 559 [2d Dept. 1995]). The allegations of the complaint, taken as true for the purpose of defendant's motion to dismiss, are unequivocally referable to the partnership agreement and can be explained only with reference to that agreement, to wit:

- Plaintiff left his studies at Cornell University and began working seven (7) days a week with defendant in the tree farm and nursery business. (16)
- Plaintiff was a signatory upon the business accounts of the tree farm and nursery. (16)
- Plaintiff's living expenses were paid by withdrawals from the business accounts of the tree farm and nursery. (16)
- Plaintiff began residing in a cabin on the business premises. (16)
- Plaintiff made a capital contribution of \$55,000 which was deposited into the business account. (17)

- Defendant stated to various persons that he and plaintiff were business partners. (17)

The only possible explanation for the course of conduct alleged in the complaint in this action is that plaintiff and defendant agreed to become business partners and carried on the tree farm and nursery as a partnership. It is particularly significant that plaintiff made a capital contribution of \$55,000 which at the time was roughly proportional to defendant's equity in the business and real estate (*Kyle v. Ford*, 184 A.D. 2d 1036 [4th Dept. 1992]).

Sterling v. Sterling (23 A.D. 3d 663 [3rd Dept. 2005]), decided by this Court, is similar on its facts to the present case. There, the plaintiff worked on a dairy farm owned by his brother, the defendant. The plaintiff had indirectly contributed to the acquisition of the real estate by the defendant. The plaintiff "proffered evidence that over 30 years he and defendant worked side by side, with both of them making daily sacrifices for the benefit of the farm. Their income was

tied to a success and, although the defendant had a greater role in the management and day-to-day operations, decisions regarding its structural improvements were made by both of them. Evidence was also established that they both contributed their property, skill and knowledge to the operation, albeit in unequal amounts. Finally, testimony from plaintiff, defendant's wife and others indicated that there had been discussions about the existence of an unwritten partnership between them" (23 A.D. 3d at 665).

In *H.P.P. Ice Rink, Inc. v. New York Islanders* (251 A.D. 2d 249 [1st Dept. 1998]), the Court held that triable issues of fact were raised by the defendant's remittance to plaintiff of a check for \$22,000 and its involvement in meetings regarding the construction of the subject ice rinks, as well as assisting plaintiffs to finance the rinks, constituted partial performance "unequivocally referable" to the oral partnership agreement alleged by plaintiff sufficient to take the alleged agreement out of the Statute of Frauds.

Where, as here, a party has alleged a course of conduct unequivocally referable to the oral agreement of the parties, the Courts have held that partial performance of the oral agreement avoids the statutory requirement of a writing (*Rose v. Spa Realty Associates*, 42 N.Y. 2d 338 [1977]; *Benn v. Benn*, 82 A.D. 3d 548 [1st Dept. 2011]; *Pomeranz v. Blodnick*, 162 A.D. 2d 323 [1st Dept. 1990])).

CONCLUSION

The order of the Court below should be modified to reinstate the claim of plaintiff that the real estate upon which the partnership business was conducted is partnership property.

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