To be Argued by:
ADAM R. SCHAYE, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Third Department

Appellate Case No.: 531497

ALAN J. LEONARD,

Plaintiff-Appellant-Respondent,

– against –

STEPHEN CUMMINS,

Defendant-Respondent-Appellant.

BRIEF FOR DEFENDANT-RESPONDENT-APPELLANT

ADAM R. SCHAYE, ESQ.
MILLER MAYER, LLP
Attorneys for Defendant-Respondent-Appellant
215 East State Street, Suite 200
Ithaca, New York 14850
(607) 273-4200
ars@millermayer.com

Tompkins County Clerk's Index No. EF2019-0691

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Can Plaintiff's partial performance of a purported oral partnership agreement be characterized as "unequivocally referable" to not only the alleged oral partnership agreement, but also that the Defendant would contribute his solely owned real property to the alleged partnership, as necessary to remove this case from the statute of frauds?

ANSWER: No. The alleged partial performance could be referable to any number of arrangements between the parties, including a partnership with or without a contribution of real property.

QUESTIONS PRESENTED IN CROSS-APPEAL

1. Did the statute of limitations on the Plaintiff's claim to the real property titled in the Defendant's name begin to run in 2009 when, as alleged by Plaintiff in the Complaint, the Plaintiff first began demanding that Defendant transfer title and the Defendant refused?

ANSWER: Yes. The Court only needs to reach this issue on cross-appeal if it overturns the decision to dismiss the claim on the basis of the statute of frauds.

2. Did the Supreme Court err in denying the Defendant's motion to dismiss the Plaintiff's Complaint in its entirety for failure to state a claim of an oral partnership when the Complaint affirmatively pled that the parties left the amount of the

Plaintiff's capital contribution for future determination and does not allege that parties ever agreed on a price?

ANSWER: Yes. The Plaintiff candidly pled that the parties left for future agreement his contribution to the purported partnership, and thus seeks performance of a mere agreement to agree.

COUNTERSTATEMENT OF FACTS / PRELIMINARY STATEMENT

For purposes of this motion the facts alleged in the Complaint (but not attorney affirmation and brief) are assumed to be true. This dispute arises out of an approximately 15-year working relationship between the Plaintiff and Defendant. (R 9-13). Prior to the events at issue, the Defendant was the sole owner of an operating tree farm and farm stand, including all of the associated equipment and real property. (R 8). In 2005, the Plaintiff began working at the farm fulltime. From 2006 until 2017 he lived and worked at the farm. (R 10).

The parties dispute whether the Plaintiff did this work as an employee and/or independent contractor (as claimed by the Defendant), or as a partner (as claimed by the Plaintiff). Moreover, if the parties did create a partnership, whether the Defendant agreed to contribute all his previously owned farm assets including the real property to that purported partnership.

The Plaintiff seeks a declaration that the parties formed a partnership, and that the partnership owns the real property titled solely in the Defendant's name. He

seeks judicial dissolution of the partnership and an even divide of its assets (including the land). (R12-13). The Defendant answered the Complaint asserting affirmative defenses, including failure to state a claim, statute of limitations, and statute of frauds. (R15-16). The Defendant subsequently bought a pre-discovery motion to dismiss pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), arguing that Plaintiff could not even plead all the elements required to establish his claims and that all claims to the real property were barred by the statue of frauds and statute of limitations.

The Complaint fails to state a claim because it affirmatively alleges that the parties never had a meeting of the minds about the material terms necessary to form a partnership, let alone to any partnership agreement requiring the transfer of real property. Specifically, Plaintiff candidly pled that, "the capital contribution to be made by plaintiff to the partnership was not initially decided and was left by the parties for a future determination." (R 15 at ¶ 12). There is no subsequent allegation that the parties ever agreed on Plaintiff's capital contribution. Accordingly, at most, there were discussions about forming a partnership and an unenforceable agreement to agree.[1]

The pleadings likewise candidly raise the statute of limitations issue. The Complaint explicitly alleges that the Plaintiff has been unsuccessfully trying to get

[1] The Plaintiff did not seek to amend the Complaint to add the simple allegation that the parties later agreed on the capital contribution to be paid in exchange for his partnership interest (and half of Defendant's real property).

the Defendant to transfer the real property titled in his name alone to Plaintiff jointly (or to the purported partnership) since 2009, and that the Defendant has been refusing to do so since at least that date. (R11 at ¶¶ 22 & 23). Accordingly, even if Defendant had somehow agreed to transfer title to his land (which he did not), the Plaintiff's claims are barred by the 6-year statute of limitations.

Finally, Plaintiff's claim to an ownership interest in the Defendant's real property, based only on a purported verbal agreement, is barred by the statute of frauds. There is no contract, partnership agreement, tax document, business registration, insurance policy, mortgage, loan, or title document that even refers to the purported partnership or confirms in any way that (1) Plaintiff is a partner in any partnership, (2) Plaintiff and/or the purported partnership owns any farm assets including the real property, or (3) Defendant ever agreed to contribute his real property to any partnership. To be clear, the Plaintiff's Complaint and response papers make no allegation that there is even a scrap of paper, text or email confirming that the Defendant ever agreed to contribute his real property to the Defendant or a purported partnership.

As discussed in detail below, the supreme court property dismissed all claims to the real property based on the statue of frauds but erred in not dismissing the Complaint in its entirety.

ARGUMENT

THE PARTIAL PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS DOES NOT APPLY BECAUSE PLAINTIFF'S PURPORTED PARTIAL PERFORMANCE WAS NOT "UNEQUIVOCALLY REFERABLE" TO THE ALLEGED AGREEMENT, THEREFORE THE LOWER COURT PROPERLY DISMISSED THE CLAIM

The Plaintiff does not claim there is a single piece of paper from the Defendant indicating he would transfer the real property titled solely in his name to the Defendant or purported partnership, and thus, this case falls squarely within the statute of frauds. To avoid this bar, the Plaintiff claims that he pled facts, which if proven at trial, would sustain the conclusion that he had partially performed the parties' purported agreement that the real property would be contributed to the purported partnership, and thus the "partial performance" exception to the statute of frauds applies.

While the parties apparently agree on the law and the existence of that exception, they disagree on its application to the facts alleged in the Complaint.[2] The Plaintiff's position conflates partial performance of an oral partnership agreement with partial performance of an oral partnership agreement including an agreement to transfer real property. This distinction is critical. The exception does not apply here

2 The cases cited by the Supreme Court in its decision correctly support the proposition that an oral partnership agreement, while not subject to the statue of frauds, does not in of itself avoid the statue regarding the transfer of real property previously owned by one of the partners. This issue was not challenged below or on appeal.

as the Plaintiff does not allege acts constituting partial performance that are "unequivocally referable" to -not merely the parties' agreement to enter a partnership but also- the Defendants' agreement to contribute his solely owned real property to the partnership.

A party's partial performance of an oral agreement conveying an interest in real property will be deemed sufficient to take that contract out of the statute of frauds if it is demonstrated by the party seeking to enforce the contract that the acts constituting partial performance are "unequivocally referable" to the contract. *See Anostario v. Vicinanzo*, 59 N.Y.2d 662 (1983) (plaintiff's complaint was properly dismissed because plaintiff's actions were not unequivocally referable to the alleged agreement as other possibilities could reasonably explain them). "It is not sufficient … that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement." *Id*.; *see also, Barretti v. Detore*, 95 A.D.3d 803 (2d Dep't 2012) ("unequivocally referable" conduct is conduct which is inconsistent with any other explanation).

Plaintiff does not offer any evidence or allegation that the purported partial performance is unequivocally referable to the Defendant contributing his real property to the partnership. The purported conduct (Plaintiff leaving his studies at Cornell and living and working full time on the farm, and Defendant allegedly at

some point calling him a business partner) could instead be referrable to any of the following four scenarios:

(1) the parties agreed the Plaintiff would be an employee of the farm and that the business would provide his housing;

(2) the parties agreed the Plaintiff would be an independent contractor living and working at the farm;

(3) the parties agreed to form a partnership where Plaintiff would contribute his labor and live at the farm, and in exchange, the Defendant would likewise contribute his skill, knowledge, labor, and equipment (i.e., the identical contribution as the Plaintiff plus Defendant's equipment and experience); or

(4) the parties agreed to form a partnership where Plaintiff would contribute his labor and live at the farm, and in exchange, the Defendant would contribute not only his skill, knowledge, labor, and equipment, but also his real property (i.e., substantially more than the Plaintiff).

To prevent the dismissal of all claims related to the real property by operation of the statute of frauds, the Court must find that the acts alleged in the Complaint were unequivocally referable to scenario 4, *and only* scenario 4. The truth is, the parties' acts are consistent with any of those scenarios and thus unequivocally refers to none.

Indeed, even the Plaintiff's analysis of these facts is that "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." (Plaintiff's Memorandum at p. 15). Even Plaintiff's own analysis fails to distinguish between scenario 3 and scenario 4 above.

The distinction between the quoted assertion from Plaintiff's brief and the required assertion is critical. The Plaintiff did not claim, because he cannot claim, that "the only possible explanation for the course of conduct alleged … is that the Plaintiff and Defendant agreed to become business partners and carried on the [business] as a partnership", *and* the Defendant agreed to contribute his real property to that partnership. Accordingly, even assuming *Plaintiff's* claim is correct (and scenarios 2 and 3 are not applicable absent proof) the statute of frauds bars his claim to the real property.

The cases cited by Plaintiff merely confirm the undisputed law that partnerships can be formed by oral agreement or the general proposition that there is a partial performance exception to the statute of frauds. *Sterling v Sterling*, 21 A.D.3rd 663 (3rd Dep't 2005), only confirms that the statute of frauds does not bar oral partnership agreements (not disputed here), but the issue of a real property transfer was not addressed. *H.P.P. Ice Rink, Inc v. New York Islanders,* 251 A.D.2d

249 (1st Dep't 1998) likewise only relates to the formation of a partnership, and not the transfer of real property.

Adelman v. Rackis, 212 A.D.2D 559 (2nd Dep't 1995) has nothing to do with partnerships and partnership agreements. This case is instead the axiomatic example of the proper application of the partial performance exception to the statute of frauds regarding the sale of real property. In *Adelman,* the appellate court held that plaintiff's $430,000 payment, for a $500,000 house, paid in advance of moving into the house was partial performance unequivocally referable to a sale rather than rent.

In short, the cases cited in Plaintiff s own memorandum make clear that all claims as to the Defendant's real property must be dismissed. None of those cases support the argument that the parties' actions here unequivocally relate to Defendant's purported agreement to contribute his land, rather than to the equally likely possibility that the parties agreed to form a partnership without a contribution of the land.

Indeed, another case cited by the Defendant best illustrates the limited application of the partial performance exception. The Court of Appeals held in *Anostario v. Vicinanzo*, 59 N.Y.2d 662 (1983) that:

> The doctrine of part performance may be invoked only if plaintiff s actions can be characterized as "unequivocally referable" to the agreement alleged. It is not sufficient ... that the oral agreement gives significance to plaintiff s actions. Rather, the actions alone must be "unintelligible or at least extraordinary", explainable only with reference to the oral agreement. Plaintiff s actions, viewed alone, are

> not "unequivocally referable" to an agreement to convey a one-half interest in defendant's corporation. While the agreement alleged provides a possible motivation for plaintiff s actions, the performance is equivocal, for it is as reasonably explained by the possibility of other expectations, such as the receipt of compensation other than in the form of an equity interest in the corporation. Moreover, the performance undertaken by plaintiff is also explainable as preparatory steps taken with a view toward consummation of an agreement in the future. Inasmuch as no basis for application of an exception to the Statute of Frauds has been demonstrated, Supreme Court properly dismissed plaintiff s complaint.

Id. (internal citations omitted).

Preventing suits seeking title to another person's real property when there is no writing is precisely the purpose of the statute of frauds, which should bar all claims to the Defendant's real property.

ARGUMENTS IN CROSS-APPEAL

I. PLAINTIFF'S ACTION IS ALSO TIME BARRED BECAUSE THE STATUTE OF LIMITATIONS BEGAN TO RUN WHEN DEFENDANT REFUSED TO TRANSFER TITLE TO HIS REAL PROPERTY IN 2009

The Plaintiff's version of the facts as set out in the Complaint are that (1) Defendant verbally agreed to contribute his real property to a partnership with the Plaintiff, (2) since at the latest 2009, Plaintiff has been actively seeking to get the Defendant to transfer title to the real property to reflect joint ownership/ownership by the purported partnership, and (3) that for over a decade prior to bringing this action the Defendant has consistently refused to do so. (R8-12).

The essence of the Plaintiff's claim is that in 2004 the Defendant agreed that 50% of his real property and farm assets were the Plaintiff's. Thereafter, the Defendant has failed to comply with this purported agreement to contribute the real property titled in the Defendant's name to the purported partnership. Specifically, he has been refusing to do since 2009. In short, Plaintiff was long aware that Defendant would not change the title of the property and did not initiate a suit for, at the least, ten years. Because it is impossible to tell from the Complaint even what year the parties purportedly reached an agreement on Defendant's contribution of the land, perhaps it has been much longer.

The case cited by the Plaintiff, *Benn v. Benn*, 81 A.D.3d 548 (1st Dep't 2011), confirms the proper application of the statute of limitations. In that case, the Court held that "the statute of limitations began to run at the earliest in 2004 [when the property was transferred to the defendant], *and at the latest when in 2005 plaintiff demanded title to his apartment and defendant refused*." *Id.* at 549 (emphasis added).

The Plaintiff cannot avoid the statute of limitations by somehow claiming that the real property has already been transferred to the partnership, despite the obvious import of title and Defendant's decade-plus refusal to transfer title. *See Taintor v. Taintor*, 50 AD3d 887, 855 (2nd Dep't 2008) (claim that a discussed, but not deeded, transfer of real property was not included in the transfer of partnership interests in the reformation of contract and constructive trust barred by the 6-year statute of

limitations); *Khandalavala v. Artsindia.com, LLC*, 2014 NY Slip Op 30940 (N.Y. Sup. Ct. 2014) (failure to make a contractually agreed on capital contribution governed by 6-year breach of contract statute of limitations).

To the extent there was somehow a binding oral agreement to transfer the real property, *Plaintiff alleges in the Complaint* that he has been demanding performance and the Defendant has been refusing for more than ten years. Accordingly, even if the claims to the real property were not dismissed by the application of the statute of frauds, those claims should have also been dismissed by the application of the statute of limitations.

II. THE COMPLAINT FAILS TO STATE A CLAIM BECAUSE IT DOES NOT ALLEGE THAT THE PARTIES HAD A MEETING OF THE MINDS ON AN ESSENTIAL ELEMENT TO FORMING A PARTNERSHIP

The gravamen of this case is whether the Plaintiff and Defendant ever formed a partnership, whereby the Defendant agreed to give up 50% of his land and business to Plaintiff in exchange for consideration. To even make such a claim, Plaintiff needs to at least plead, among other things, that Plaintiff and Defendant entered into a binding partnership agreement wherein the Defendant agreed to give up his valuable assets in exchange for agreed-upon consideration.

The pleadings, taken as true, are clear that there was an initial discussion about forming a partnership in 2004, but the terms of any deal were not then established. Specifically, paragraph 12 of the Complaint candidly admits that the parties did not

agree on an essential element of any deal; "the capital contribution to be made by Plaintiff to the partnership was not initially decided and was left by the parties for future determination." (R9).

Leaving an essential term, i.e., price, for a future determination is an axiomatic example of a non-binding agreement to agree. The remainder of the Complaint never resolves this issue.[3] There is no allegation in the four corners of the Complaint that the parties ever thereafter agreed on the capital contribution, i.e. the price Defendant would pay for his share of the partnership (and Defendant's assets and land). Accordingly, the Plaintiff never pleads the basic elements of an agreement, (1) an offer, (2) covering all material terms, including consideration, and (3) acceptance.

According to the Complaint, the Defendant bound himself to give up 50% of everything he owned and worked for throughout his lifetime, without even getting to know -let alone agree to- what the Plaintiff would give up in return.

"[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105 (N.Y. 1981). "If an agreement is not reasonably certain in its material terms,

[3] Plaintiff did not propose an amended complaint to close this fatal gap in the pleadings, presumably because the Plaintiff is unwilling to make the simple and straight forwarded verified pleading that the parties ever agreed that the money he put into the farm business (years after he claims the partnership was formed) was in exchange for his ownership interest in the farm business.

there can be no legally enforceable contract." Thus, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" *Teutul v. Teutul*, 79 AD3d 851 (2d Dep't 2010) (where parties leave a term to future determination "it cannot be said that the parties intended to create 'a complete and binding contract'").

Here, Plaintiff has only alleged that there was an agreement to agree on the material term of his contribution to the purported partnership. The Plaintiff cannot attempt to avoid this requirement by claiming that the parties' course of conduct alone formed a de facto partnership, at the very least with regard to the purported claim to Defendant's contribution of land and assets. Leaving aside the lack of any confirming documents, Plaintiff can only make a claim to the real property by alleging that Defendant entered into a binding agreement to contribute that property. The Plaintiff did not even allege that there was ever a meeting of the minds about that essential element of the purported contract.

Accordingly, there is no pleading that the parties ever completed the deal that the Complaint acknowledges was fatally incomplete when the parties allegedly discussed forming a partnership. Absent this material element, the Complaint should be dismissed in its entirety for failure to state a claim.

CONCLUSION

The Supreme Court properly found that the statute of frauds barred Plaintiff's claims seeking an interest in the Defendant's real property. The Plaintiff's actions are not unequivocally referable to an agreement that the Defendant would contribute his real property to the alleged partnership. As demonstrated above, there are other scenarios that could reasonably explain Plaintiff's actions. Accordingly, Plaintiff's purported partial performance does not remove this case from the statute of frauds.

Moreover, as plead in the Complaint, the Defendant has been consistently refusing to transfer title to the real property for over a decade. As such, even if the claims to Defendant's real property were not dismissed by application of the statute of frauds, those claims should also be dismissed by application of the statute of limitations.

Furthermore, the parties cannot have formed a partnership absent a meeting of the minds on all essential terms. The Plaintiff candidly plead in the Complaint that the parties left the determination of his contribution for the future and did not plead that any final determination was ever made. Accordingly, the parties at best had an unenforceable agreement to later agree. Absent this material element, the complaint should have been dismissed in its entirety for failure to state a claim.

Dated: January 19, 2021
Ithaca, New York

Adam R. Schaye, Esq.
Miller Mayer, LLP
Attorneys for the Defendant
215 East State Street, Suite 200
Ithaca, New York 14850
(607) 273- 4200

PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR § 1250.8(f) and (j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules and regulations, etc. is 3546 words.