

At a submitted term of the Supreme Court of the State of New York, held in and for the County of Tompkins at the Tompkins County Courthouse in the City of Ithaca, New York on the 27th day of March, 2020.

**PRESENT: HON. GERALD A. KEENE
ACTING SUPREME COURT JUSTICE**

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS

ALAN LEONARD,

Plaintiff,

v.

STEPHEN CUMMINS,

Defendants.

DECISION AND ORDER

Index No. EF2019-0691

RJI No. 2020-0061-M

GERALD A. KEENE, A.J.S.C.

This case involves a claim made by the plaintiff that the parties entered into a verbal agreement to form a partnership for the operation of a tree farm and farm stand. The defendant concedes that for purposes of this motion, the Court must accept as true all of the factual allegations made in the plaintiff's Complaint. The plaintiff's Complaint alleges that the defendant was the owner of land and a business in Tompkins County and that in 2004, the parties agreed to form a partnership to conduct business together. According to the plaintiff, the defendant represented to him that the defendant's capital contribution to the partnership would be the land, nursery and farm stand business, and that the capital contribution to be made by the plaintiff to the partnership "was not initially decided and was left by the parties for future determination." No written agreement was ever prepared and no writing exists conveying or agreeing to convey the real property.

The parties began working together in 2005. In 2007, the plaintiff made a series of payments into the bank accounts of the business. The plaintiff asserts that those payments totaled \$55,000 in cash and that they were his capital contribution to the partnership.

The parties worked together to develop the business for more than ten years. They had various disagreements over the last four years that they worked together and in December of 2018, the defendant told the plaintiff to leave the business, thereby dissolving the partnership. The plaintiff has brought this action asking the Court to declare that the parties formed a partnership, that the partnership included the real property owned by the defendant, that the partnership be dissolved and that the assets of the partnership be divided evenly between the parties.

The defendant has answered the plaintiff's Complaint and has asserted affirmative defenses. He asserts that the Complaint fails to state a claim, that the claims made by the plaintiff are barred by the statute of limitations and that the claims are barred by the statute of frauds. The defendant brings this motion pursuant to CPLR Rules 3211(a)(5) and 3211(a)(7) asking the Court to dismiss the Complaint. The plaintiff has responded to the motion by an affidavit from his attorney.

The plaintiff's Complaint does state a valid cause of action against the defendant. It alleges that the plaintiff and the defendant entered into a verbal agreement that they would be equal partners in a partnership to conduct business at the defendant's tree farm. The Complaint further alleges that pursuant to this partnership, from 2005 until May of 2017, the parties operated a business together as if it was an equal partnership. As stated in Kellogg v. Kellogg, 185 A.D.2d 426 (3rd Dept., 1992):

Among the factors to be considered in determining whether a partnership was created are “the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property,

skill or knowledge” (Boyarsky v Froccaro, 131 A.D.2d 710, 712 (2nd Dept., 1987), quoting Ramirez v Goldberg, 82 A.D.2d 850, 852 (2nd Dept., 1981)).

Here, the plaintiff’s Complaint sufficiently alleges that the parties intended to enter into a partnership by virtue of the defendant’s offer and the plaintiff’s acceptance of the offer to be equal partners. It also alleges that the plaintiff was given access to the business accounts and that the personal and business expenses for both parties were paid from this account with income from the business. Finally, the Complaint alleges that there was a combination of property, skill or knowledge in the form of physical labor performed by the parties and a \$55,000 contribution of cash from the plaintiff. The Complaint does allege that there was a verbal partnership agreement between the parties. For that reason the defendant’s motion to dismiss the Complaint pursuant to CPLR Rule 3211(a)(7) for failure to state a cause of action is denied.

The action is not barred by the statute of limitations. The defendant allegedly dissolved the partnership on December 1, 2018. An action for an accounting must be commenced within six years of the dissolution of the partnership. CPLR Section 213(1); Partnership Law Section 74; Sagus Marine Corp. v. Donald G. Rynne & Co., Inc., 207 A.D.2d 701 (1st Dept., 1994). For that reason, the defendant’s motion to dismiss the Complaint pursuant to CPLR Rule 3211(a)(5) is denied.

The Court agrees with the defendant that any claim by the plaintiff to an interest in the real property owned by the defendant is barred by the statute of frauds. General Obligations Law Section 5-703(2) states that a contract for the sale of any real property, or any interest therein, is void unless the contract is in writing. 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. Pounds v. Egbert, 117 A.D. 756 (2nd Dept.,

1907). Here, the defendant owned the property long before the plaintiff allegedly became his partner. The exception applies to cases where two parties orally agree to form a partnership and purchase a property from a third party. Dobbs v. Vornado, Inc., 576 F.Supp. 1072 (E.D.N.Y. 1983); Najjar v. National Kinney Corp., 96 A.D.2d 836 (2nd Dept., 1983). Accordingly, the plaintiff's claim to an ownership interest in the defendant's real property is dismissed.

For all of the above reasons, it is hereby

ORDERED, that the defendant's motion to dismiss the Complaint pursuant to CPLR Rule 3211(a)(7) is denied; and it is further

ORDERED, that the defendant's motion to dismiss the Complaint pursuant to CPLR Rule 3211(a)(5) for non-compliance with the statute of limitations is denied; and it is further

ORDERED, that the defendant's motion to dismiss the plaintiff's claims for an interest in the defendant's real property is granted.

This constitutes the Decision and Order of the Court.

Dated: May 8, 2020
at Ithaca, New York


HON. GERALD A. KEENE
Acting Supreme Court Justice

ENTER: