

212 A.D.3d 547

Supreme Court, Appellate Division, First Department,
New York.

May R. **TSAI**, Plaintiff–Respondent,

v.

Mark Paul **LO** et al., Defendants–Appellants.

17154

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Index No. 653375/20

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Case No. 2022–03618

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Entered January 24, 2023

Synopsis

Background: Party to joint venture involving purchase and sale of real property sued her former business partners. Former business partners counterclaimed for breach of contract, specific performance, detrimental reliance, fraud and misrepresentation, and breach of fiduciary duty. Party to joint venture moved to dismiss counterclaims. The Supreme Court, New York County, *Debra James, J.*, granted motion. Former business partners appealed.

[Holding:] The Supreme Court, Appellate Division, held that former business partners stated counterclaim for breach of contract.

Affirmed as modified.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

^[1] **Joint Ventures** → Property ownership and transactions

In action brought by party to joint venture, which involved purchase and sale of real property,

against her former business partners, former business partners stated counterclaim for breach of contract by alleging that parties' oral agreement was effectively a limited liability company (LLC) voting agreement, as opposed to an unenforceable oral contract for the sale of real property, under which party to joint venture agreed to vote her membership interest in favor of sale of her former business partners' membership interests or a sale of real property, and that voting agreement was made before notes were executed between parties setting forth that there were to be no oral modifications. *N.Y. General Obligations Law §§ 5-703(2), 15-301(1)*.

^[2] **Appeal and Error** → Nature or Subject-Matter of Issues or Questions

Party to joint venture waived arguments regarding counterclaim for breach of contract brought by her former business partners, on former business partners' appeal from trial court order granting party to joint venture's motion to dismiss counterclaim; arguments were made for first time on appeal and did not involve purely legal issues that could not have been avoided if raised before trial court.

Attorneys and Law Firms

****78** Huang, Chen & Wu PLLC, Flushing (Song Chen of counsel), for appellants.

Holihan & Associates, P.C., Richmond Hill (*Stephen Holihan* of counsel), for respondent.
Kern, J.P., Gesmer, Scarpulla, Rodriguez, JJ.

Opinion

***548** Order, Supreme Court, New York County (*Debra James, J.*), entered March 11, 2022, which granted plaintiff's motion under **CPLR 3211(a)(1) and (7)** to dismiss defendants' counterclaims, unanimously modified, on the law, to reinstate defendants' counterclaim for breach of contract seeking specific performance and monetary relief, and otherwise affirmed, without costs.

Defendants' answer sets forth five counterclaims: breach of contract, specific performance, detrimental reliance, fraud and misrepresentation, and breach of fiduciary duty. The answer and counterclaims alleged, broadly, that there was an oral agreement between the parties in which defendants agreed to join and partially fund a joint venture, operating through Kissena HTL, LLC. In exchange, plaintiff agreed to consent to both the future sale of the real property purchased by the LLC and/or the future sale of defendants' interest in the LLC. The counterclaims also asserted that plaintiff breached that oral agreement by withholding her consent to the sales.

^[1] Supreme Court should not have dismissed defendants' counterclaims for breach of contract and specific performance, which it properly construed as a single claim for breach of contract seeking specific performance and monetary relief. The alleged agreement at issue was not an unenforceable oral contract for the sale of real property, as it did not provide for the sale or transfer of real property or any party's interest in real property (see [General Obligations Law § 5-703\[2\]](#)). Instead, giving defendants' allegations every favorable inference, defendants sufficiently pled that the oral agreement was effectively an LLC voting agreement under which plaintiff agreed to vote her membership interest in favor of defendants' sale of their membership interests or a sale of the property. Furthermore, we reject plaintiff's argument that defendants' counterclaims are barred by [General Obligations Law § 15-301\(1\)](#) and the "no oral modification" clauses set forth in the notes between the parties, because defendants allege that the voting agreement was made before the notes were executed. Plaintiff also failed to establish as a matter of law that the alleged contract was an unenforceable agreement to agree (see [**79 Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher](#), 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541 [1981]).

^[2] We decline to consider plaintiff's remaining arguments relating to the breach of contract counterclaim, because they are improperly made for the first time on appeal and do not involve purely legal issues that could not have been avoided if raised *549 before Supreme Court (see [Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.](#), 65 A.D.3d 405, 408, 884 N.Y.S.2d 24 [1st Dept. 2009]).

Supreme Court properly dismissed defendants' remaining counterclaims as duplicative of their breach of contract counterclaim ([CPLR 3211\[a\]\[7\]](#); see [Cronos Group Ltd. v. XComIP, LLC](#), 156 A.D.3d 54, 62-63, 64 N.Y.S.3d 180 [1st Dept. 2017]; [Morgenroth v. Toll Bros., Inc.](#), 60 A.D.3d 596, 597, 876 N.Y.S.2d 378 [1st Dept. 2009]).

All Citations

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