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COMMERCIAL DIVISION UPDATE

Expert Analysis

Oral Joint Venture Agreements And the Statute of Frauds

A recent decision by the Kings County Commercial Division reaffirms the longstanding New York principle that oral joint venture agreements usually are not subject to the New York Statute of Frauds.¹ In *Mendelovitz v. Cohen*, Justice Carolyn Demarest rejected an argument that the absence of a writing barred enforcement of an alleged oral joint venture agreement, finding that a writing is not required to enforce such an agreement. Because joint ventures ordinarily are terminable at will, the court found that the alleged joint venture agreement was capable of being performed within one year, thereby escaping the reach of the statute of frauds. As an exception to this, *Mendelovitz* and other courts have recognized that the statute of frauds will apply where the joint venture is formed for a term of more than one year, or where the stated purpose of the joint venture cannot be accomplished within one year.

Established Precedent

Oral joint venture agreements can raise a somewhat vexing question for courts charged with assessing their validity. Although the statute of frauds precludes the enforcement of oral agreements that cannot be performed within a year,² joint ventures are usually not created for a particular term and, absent an agreement to the contrary, can be terminated at any time. As such, New York courts have generally concluded that the one year provision of the statute of frauds is limited “to

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those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year.”³

The *Mendelovitz* decision applied this principle. Although the court ultimately rejected the claim that an oral joint venture agreement had been formed, it did not do so on statute of frauds grounds. Rather, in

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rejecting the statute of frauds defense, the court noted that, “absent a definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will.”⁴ On the other hand, if the contracting parties were to agree to a joint venture with “a definite term of at least two years...the statute of frauds would void such agreement in the absence of a writing” because it “is not to be performed within a year.”⁵ Because the facts of *Mendelovitz* made it apparent that the parties’ alleged venture was to be a “continued operation” of no specified duration, the statute of frauds did not bar the enforcement of the oral joint venture agreement as it was capable

of being fully performed within one year.⁶

Several other Commercial Division decisions have applied this general rule to refuse to dismiss oral joint venture claims. For example, in *Polk v. Jordan*,⁷ the plaintiff alleged that he had entered into an oral agreement with the two defendants to create a minority-owned and controlled hedge fund, to be called “Jordan Polk Elite Fund.”⁸ His lawsuit alleged that the defendants breached that joint venture agreement by failing to operate the fund as minority-owned or controlled and by naming their entity the “Niagara Elite Fund, LP,” which the plaintiff further alleged they mismanaged.⁹ Justice Richard Lowe of the New York County Commercial Division found the plaintiff sufficiently alleged the existence of an oral contract based on the parties’ “intent to engage in a joint venture despite the absence of a written agreement.”¹⁰

The *Polk* decision reasoned that a joint venture may be found despite the absence of a writing when there is evidence of “a joint undertaking, a combination of the parties resources, and a provision for the sharing of profits and losses.”¹¹ Taking the complaint’s allegations as true, the parties’ actions evidenced an agreement to create a joint venture because the plaintiff’s name was originally included in the title of the business venture; the plaintiff and one of the defendants, both African-Americans, were to control the business, thereby allowing it to be “minority-controlled”; there was agreement as to ownership of the business; and the parties had had several conversations about their fee-splitting arrangement.¹² In finding for the plaintiff, the court rejected the defendant’s argument that the statute of frauds barred the existence of a binding contract, stating that New York courts “have held that a joint

venture agreement is not subject to the statute of frauds."¹³

Similarly, in *Podstupka v. Kolomick*, Justice Timothy Driscoll of the Nassau County Commercial Division denied the defendant's motion for summary judgment to dismiss a claim for breach of contract.¹⁴ The parties in *Podstupka* were former romantic partners involved in several business ventures together, including an operation called DSSR Beverage, LLC. The parties presented conflicting evidence of ownership and contributions to the various ventures, with the defendant alleging the plaintiff did not sign or contribute to the mortgage of a joint property, while the plaintiff claimed the mortgage payment derived from DSSR Beverage, LLC.¹⁵ The court held that the plaintiff's action was not barred by the statute of frauds, while concluding there were issues of fact as to whether the parties established a joint venture.¹⁶ The court explained that "an oral agreement may be sufficient to create a joint venture relationship and the Statute of Frauds is generally inapplicable thereto."¹⁷

Multi-Year Joint Ventures

An exception to this general rule exists where, by its terms, the alleged joint venture agreement requires that the venture continue for more than one year. In *Jordache Ltd. v. Oved*, for example, the New York County Commercial Division granted summary judgment to the defendant in part because the joint venture agreement was subject to the statute of frauds.¹⁸ In that case, the plaintiff granted the defendants a written sub-license to manufacture trademarked goods, with a master licensing agreement that contained a provision obligating the licensee to pay the licensor royalties for three years.

While the plaintiff claimed the defendants orally agreed to a joint venture separate and apart from this licensing agreement, the court did not agree. Even if the plaintiff could have proven there was an oral joint venture agreement, the court found it would be barred by the statute of frauds based on the underlying license agreement "because it [wa]s incapable of performance within one year."¹⁹ The First Department affirmed that decision, finding that the new business entity, the existence of which the plaintiff alleged, and the licensing agreement were "inextricably intertwined, and plaintiff's relinquishment of its exclusive sub-license to the new entity for a three-year period clearly evidenced that the venture could not be performed within one year."²⁰

Likewise, in *Unicorn Enter., Ltd. v. Stonewall*

Contracting Corp., the Second Department granted the defendant's motion for summary judgment based on the statute of frauds because the alleged oral joint venture agreement with the plaintiff involved a state contract that contained multi-year warranty provisions.²¹ Similarly, the Fourth Department in *Sugar Creek Stores Inc. v. Pitts* dismissed the defendant's counterclaims that relied on the validity of an oral joint venture because defendants admitted the agreements had stated terms for more than one year.²²

Real Estate Joint Ventures

New York courts have also rejected defense efforts to shoehorn joint ventures formed for the purpose of real estate development into the statute of frauds real property rule set forth in General Obligations Law §5-703. Section 5-703 provides: "An estate or interest in real property...cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing...."

In *Reliable Realtors, LLC v. Guerre*, the plaintiff Reliable Realtors, LLC alleged that it entered into an oral agreement with the defendant pursuant to which the company would invest money for the defendant to purchase and develop property.²³ Justice Orin Kitzes of the Queens County Commercial Division denied a motion to dismiss holding that an oral joint venture agreement was not barred by the statute of frauds, because it "was not by its very terms or necessary construction to endure longer than one year. Rather, although the agreement was capable of an indefinite continuance, the agreement could have been fully performed within a year."²⁴

The court found §5-703 to be inapplicable because the parties' purported agreement was to invest in and develop property, and thus "the underlying actions d[id] not involve the creation of property interests. Rather, the agreement involved the creation of a business interest, or a joint venture," which is "not subject to the Statute of Frauds."²⁵

Conclusion

This recent line of Commercial Division cases reinforces the principle that the New

York statute of frauds generally will not bar enforcement of an oral joint venture agreement where the joint venture is terminable at will. Where, however, the alleged agreement formed a joint venture for a term of more than one year, or provides that the object of the joint venture cannot be performed within one year, the statute of frauds may apply, barring the enforcement of the oral joint venture agreement.



1. *Mendelovitz v. Cohen*, NYLJ, Aug. 5, 2010, at 1, 28 Misc.3d 1217(A), 2010 N.Y. Misc. LEXIS 3601, 2010 WL 3036986 (Kings Co. Aug. 5, 2010) (Demarest, J.).

2. Gen. Obl. Law §5-701.

3. *D&N Boening v. Kirsch Beverages Inc.*, 63 N.Y.2d 449, 454, 472 N.E.2d 992, 993, 483 N.Y.S.2d 164, 165 (1984).

4. *Mendelovitz*, NYLJ, Aug. 5, 2010, at 13 (citing *Foster v. Kover*, 44 A.D.3d 23, 27, 840 N.Y.S.2d 328, 332 (1st Dept. 2007)).

5. Id. at 13-14.

6. Id. at 14.

7. *Polk v. Jordan*, No. 06-02274, 2008 N.Y. Misc. LEXIS 7586, at *1 (N.Y. Co. Jan. 22, 2008) (Lowe, J.).

8. Id. at *1.

9. Id. at *3.

10. Id. at *5.

11. Id. at *5.

12. Id. at *5.

13. Id. at *9.

14. *Podstupka v. Kolomick*, No. 011363-09, 2010 N.Y. Misc. LEXIS 2279, at *1 (Nassau Co. May 19, 2010) (Driscoll, J.).

15. Id. at *3.

16. Id. at *8.

17. Id. at *7. See also *Martin v. Cohen*, 17 Misc. 3d 1116A, 851 N.Y.S.2d 64 (Suffolk Co. 2007) (Sgroi, J.) (Denying defendant's motion for summary judgment where facts in the record supported a claim of an oral joint venture agreement along with an exchange of money and services, because "the Statute of Frauds is inapplicable where there is no definite term of duration for either an oral agreement to form a partnership or a joint venture for an indefinite period").

18. *Jordache Ltd. v. Oved*, No. 602348 (N.Y. Co. Aug. 29, 2006) (Moskowitz, J.).

19. Id. at 5.

20. *Jordache Ltd. v. Oved*, 40 A.D.3d 400, 400, 836 N.Y.S.2d 136, 137 (1st Dept. 2007).

21. *Unicorn Enter., Ltd. v. Stonewall Contracting Corp.*, 232 A.D.2d 404, 648 N.Y.S.2d 153 (2d Dept. 1996).

22. *Sugar Creek Stores Inc. v. Pitts*, 198 A.D.2d 833, 604 N.Y.S.2d 407 (1993 4th Dept.).

23. *Reliable Realtors, LLC v. Guerre*, No. 15615, 2009 N.Y. Misc. LEXIS 4613, at *6 (Queens Co. April 7, 2009) (Kitzes, J.).

24. Id. at *6.

25. Id. at *7. See also *Hydro Investors Inc. v. Trafalgar Power Inc.*, 6 A.D.3d 882, 885, 775 N.Y.S.2d 402, 405 (3d Dept. 2004) (Rejecting defendant's statute of frauds defense on a summary judgment motion because "an oral joint venture agreement that involves interests in real property, such as the one alleged here, does not run afoul of the writing requirement because the underlying interest in the joint venture is properly considered personalty").

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