

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Schulman Family Enterprises v. Schulman

104 A.D.3d 934, 962 N.Y.S.2d 342 (N.Y. App. Div. 2013) · Decided March 27, 2013

SUMMARY

The New York Supreme Court, Appellate Division, Second Department, affirmed an order denying both the plaintiffs’ motion for summary judgment on a breach-of-partnership-agreement claim and the defendants’ motion for summary judgment dismissing the complaint. The court also upheld permission to amend a notice of pendency to correct a typographical error and to extend the notice.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Mastro, J.P.; Austin, J.; Cohen, J.; Miller, J.
JURISDICTION	New York
DECIDED	March 27, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from the denial of their motion for summary judgment on a breach-of-partnership-agreement claim. Defendants cross-appealed from the denial of their motion for summary judgment dismissing the complaint and from the grant of plaintiffs' requests to amend and extend a notice of pendency.
STANDARD OF REVIEW	A summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by submitting sufficient evidence in admissible form to demonstrate the absence of material issues of fact. Failure to make that prima facie showing requires denial of the motion regardless of the opposing papers.
PRECEDENTIAL VALUE	published
PARTIES	Schulman Family Enterprises, Plaintiffs v. Schulman, Defendants

TOPICS

- summary judgment
- motion to amend
- lis pendens
- breach of contract
- civil procedure

PRACTICE AREAS

civil procedure

contracts

real estate

commercial litigation

QUESTIONS PRESENTED

1. Whether plaintiffs established prima facie entitlement to summary judgment on their breach-of-partnership-agreement claim.
2. Whether defendants established prima facie entitlement to summary judgment dismissing the complaint.
3. Whether the court properly granted plaintiffs leave to amend a notice of pendency to correct a minor typographical error and properly extended the notice.

HOLDINGS

1. Plaintiffs were not entitled to summary judgment because they failed to establish prima facie the absence of material issues of fact concerning the alleged breach of the partnership agreement.
2. Defendants were not entitled to summary judgment dismissing the complaint because they failed to establish prima facie entitlement to judgment as a matter of law and their submissions revealed material issues of fact with respect to each cause of action.
3. The court properly granted plaintiffs leave to amend the notice of pendency to correct a minor typographical error in the property's legal description and properly extended the notice of pendency.

KEY QUOTATIONS

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact” (935)

“Failure to make such a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers” (935)

FACTUAL BACKGROUND

The action included claims for damages arising from an alleged breach of a partnership agreement and concerned real property described in a notice of pendency. Plaintiffs sought summary judgment on the fourth cause of action, while defendants sought summary judgment dismissing the entire complaint. The parties' submissions disclosed material factual issues, and the notice of pendency contained a minor typographical error in the property's legal description.

PROCEDURAL HISTORY

The Supreme Court, Suffolk County, denied plaintiffs summary judgment on the fourth cause of action, denied defendants summary judgment dismissing the complaint, and granted plaintiffs leave to amend and extend a notice of pendency. The Appellate Division affirmed those portions of the order that were appealed and cross-appealed from.

DISPOSITION

affirmed

CASES CITED

- Moore v 3 Phase Equestrian Ctr., Inc., 83 AD3d 677, 678 [2011]
- Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]
- Cooper v Sun Am., LLC, 92 AD3d 715, 716 [2012]
- Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]
- Zuckerman v City of New York, 49 NY2d 557, 562 [1980]
- Mallick v Farfan, 66 AD3d 649, 649-650 [2009]
- Key Bank Natl. Assn. v Stern, 14 AD3d 656, 657 [2005]
- Gross v Castleton Hous. Corp., 271 App Div 980 [1947]

OPINION

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PER CURIAM.

*935In an action, inter alia, to recover damages for breach of a partnership agreement, the plaintiffs appeal from so much of an order of the Supreme Court, Suffolk County (Molia, J.), dated November 7, 2011, as denied that branch of their motion which was for summary judgment on the fourth cause of action, which alleged breach of a partnership agreement, and the defendants cross-appeal from so much of the same order as denied that branch of their motion which was for summary judgment dismissing the complaint and granted those branches of the plaintiffs' motion which were, in effect, for leave to amend and to extend a notice of pendency. Ordered that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact" (Moore v 3 Phase Equestrian Ctr., Inc., 83 AD3d 677, 678 [2011]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Failure to make such a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers" (Cooper v Sun Am., LLC, 92 AD3d 715, 716 [2012]; see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Here, the Supreme Court properly determined that the plaintiffs failed to establish, prima facie, the absence of any material issues of fact with respect to the fourth cause of action, which alleged breach of a partnership agreement. Thus, the court properly denied that branch of the plaintiffs' motion which was for summary judgment on that cause of action (see Alvarez v Prospect Hosp., 68 NY2d at 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853; Cooper v Sun Am., LLC, 92 AD3d at 716; Moore v 3 Phase Equestrian Ctr., Inc., 83 AD3d at 678). The Supreme Court also properly determined that the defendants failed to

establish, prima facie, their entitlement to judgment as a matter of law dismissing the complaint (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). The defendants' submissions revealed material issues of fact with respect to each cause of action. Thus, the court properly denied that branch of the defendants' motion which was for summary judgment dismissing the complaint (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to the defendants' contention, the Supreme Court *936properly granted those branches of the plaintiffs' motion which were, in effect, for leave to amend a notice of pendency to correct a minor typographical error in the legal description of the subject property and to extend the notice of pendency (see CPLR 2001, 6501, 6513; *Mallick v Farfan*, 66 AD3d 649, 649-650 [2009]; *Key Bank Natl. Assn. v Stern*, 14 AD3d 656, 657 [2005]; *Gross v Castleton Hous. Corp.*, 271 App Div 980 [1947]). The parties' remaining contentions are without merit. Mastro, J.P, Austin, Cohen and Miller, JJ., concur. [Prior Case History: 33 Misc 3d 1234(A), 2011 NY Slip Op 52238(U).]