

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

2300 REALTY CORPORATION,	:	JANUARY TERM, 2002
	:	
Plaintiff,	:	NO. 01904
	:	
v.	:	COMMERCE PROGRAM
	:	
CORPORATE REALTY PARTNERS, & CO., INC., G. KEVIN SMITH, and STEPHANY J. PRESTI,	:	Control Nos.: 061268, 061338
	:	
Defendants.	:	
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G. KEVIN SMITH,	:	MARCH TERM, 2004
	:	
Plaintiff,	:	NO. 05615
	:	
v.	:	
	:	
JONATHAN MARTONE,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 19th day of October, 2005, upon consideration of the Motion for Partial Summary Judgment of 2300 Realty Corp. and Jonathan Martone (“2300’s Motion”), the Motion for Partial Summary Judgment of G. Kevin Smith (“Smith’s Motion”), the respective responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion issued simultaneously herewith, it is hereby **ORDERED** as follows:

1. 2300’s Motion is **GRANTED** in part.
2. Judgment is entered on Count I of 2300 Realty Corp.’s Second Amended Complaint and Count I of Jonathan Martone’s Counterclaim, declaring 2300 Realty Corp. to be the sole owner of the real property located at 2300 W. Allegheny Avenue, Philadelphia, Pennsylvania.

3. Count I of G. Kevin Smith's Amended Complaint for partition is **DISMISSED**.
4. The remainder of 2300's Motion is **DENIED**.
5. Smith's Motion is **GRANTED** in part.
6. Count II of 2300 Realty Corp.'s Second Amended Complaint and Count II of Jonathan Martone's Counterclaim for misrepresentation are **DISMISSED**
7. The portion of Count III of 2300 Realty Corp.'s Second Amended Complaint that is based on the representations and actions of G. Kevin Smith that took place prior to 2300 Realty Corp.'s incorporation is **DISMISSED**.
8. The remainder of Smith's Motion is **DENIED**.

BY THE COURT:

ABRAMSON, HOWLAND, W., J.

the Building, and entered into a lease agreement with a tenant, who was allegedly identified by Smith.

2300 and Martone assert claims against Smith¹ for breach of the parties' agreement based on Smith's alleged failure to pay his half of the expenses for the Building and his failure to participate equally in the construction loan.² 2300 further claims that Smith was negligent in supervising the renovations to the Building. Finally, 2300 and Martone ask for a declaratory judgment that 2300 is sole owner of the Building and that no partnership exists between the parties.

Smith alleges that he paid his half of the expenses to purchase the Building, but that Martone has subsequently refused to recognize Smith's partnership interest. As a result, Smith requests that the Building be partitioned, that Martone account to Smith for the partnership's assets, and that the partnership be dissolved. In the alternative, Smith has asserted an unjust enrichment claim to recover the value of the money and services he contributed to the Building.

Smith has moved for summary judgment requesting that the court dismiss all of 2300's claims and grant Smith's claims for partition, accounting, and dissolution. 2300 and Martone have moved for summary judgment requesting that the court grant the declaratory judgment they

¹ 2300 makes its claims against both Smith and Corporate Realty Partners and Co., Inc. ("CRP"), which is allegedly a real estate brokerage company run by Smith of which his wife is sole shareholder and officer. 2300 claims that CRP was underfunded, that Smith and his wife failed to observe corporate formalities with respect to it, and that Smith's wife failed to supervise him, so that they are personally liable for CRP's actions and for any actions Smith took as its agent.

² 2300 has also asserted a misrepresentation claim against Smith based on his alleged promise to bear half the costs of purchasing and renovating the building. However, the misrepresentation claim must be dismissed under the gist of the action doctrine as duplicative of 2300's breach of contract claim. The gist of the action doctrine: precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. [A tort claim is barred] where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14-19 (Pa. Super. 2002).

seek and dismiss Smith's claims for partition, accounting, and dissolution. Those motions are presently before the court.³

I. 2300 May Prosecute Some Of The Claims It Has Asserted Against Smith.

Smith argues that 2300 is not the proper party to assert claims against Smith for damages because some of the representations and actions that form the basis for these claims occurred prior to 2300's incorporation. Instead, Smith asserts that Martone should be the party bringing such claims.⁴

2300 alleges that "at all relevant times, [Martone] acted as [its] agent." Second Amended Complaint, ¶ 1. However, Martone could not have acted as 2300's agent before 2300 came into existence. Instead, any claims based on Smith's representations that were made to Martone prior to 2300's incorporation belong to Martone individually, not to 2300, and 2300's claims based on those pre-incorporation promises must be dismissed.

II. 2300 Is Entitled To A Declaratory Judgment That It Is Sole Owner Of The Building.

Smith argues that 2300 is not entitled to the declaratory judgment it seeks,⁵ which is in the nature of an action to quiet title in the Building, because, under the partnership agreement, Smith is part owner of the Building. Furthermore, Smith insists that he is entitled to have the court partition the Building between him and Martone/2300.

³ Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999).

⁴ In Smith's action against Martone, Martone counterclaimed against Smith for misrepresentation and breach of contract, so to the extent that the claims asserted by 2300 are more properly asserted by Martone, Martone has asserted them in these consolidated actions.

⁵ Martone requests the same declaratory relief in Count I of his Counterclaim.

Smith may not assert an ownership interest in the Building based on the parties' alleged oral agreement because such a contract is unenforceable under the Statute of Frauds. *See* 33 P.S. § 1 (a contract granting an estate in land must be in writing). Smith may not avoid the Statute of Frauds by claiming part performance of the parties' oral contract because he does not allege that he had "open notorious, exclusive and continuous possession" of the Building, nor does he allege "such improvements and arrangements as will not reasonably admit of compensation in damages." Kurland v. Stolker, 516 Pa. 587, 533 A.2d 1370 (1987). *See also* Redditt v. Horn, 361 Pa. 533, 64 A.2d 809 (1949) (denying specific performance of oral contract concerning land). Therefore, 2300 is entitled to a judgment declaring it sole owner of the Building, and Smith is not entitled to have the Building partitioned.⁶

III. The Statute of Frauds Does Not Bar Smith's Claims Based On The Alleged Partnership Agreement.

Even though the parties' alleged oral agreement is insufficient to vest Smith with partial title to the Building, the Statute of Frauds does not otherwise bar Smith from trying to enforce the parties' alleged oral partnership agreement. *See* 15 Pa. C. S. § 8312 (the "rules for determining the existence of a partnership" do not require a writing); 4-17 Corbin on Contracts § 17.12 (2005) ("there seems little necessity to invoke the statute [of frauds regarding land] in order to protect the parties in title-holding partnerships, there being adequate protection furnished by the provisions of the [Uniform Partnership Act] to lend reliability to the identification of partnership property and the interests of the partners in it.")

The fact that one partner is the exclusive owner of the alleged partnership real property does not preclude the other partner from seeking to share in the equity and/or profits associated

⁶ 2300 and Martone also request a declaratory judgment that no partnership existed between Smith and Martone/2300. However, for the reasons set forth in Section III of this Opinion, the court declines to enter such a judgment at this juncture.

with that property. *See Miller v. Miller*, 370 Pa. 520, 525, 88 A.2d 784, 786 (1952) (“Since the property was purchased with partnership funds, the fact that record title thereto is in the name of one partner alone does not affect its status as partnership property”); *DeMarchis v. D’Amico*, 432 Pa. Super. 152, 637 A.2d 1029 (1994) (court imposed constructive trust on title holders of property for benefit of their business partners). Therefore, if Smith is able to prove the viability of the parties’ partnership agreement, its terms, and his compliance with them, then he may be entitled to the accounting and dissolution he requests. However, since there are disputed issues of fact as to the existence and breach of the parties’ alleged agreement, Smith is not entitled to summary judgment with respect to his remaining claims.⁷

CONCLUSION

For all the foregoing reasons, 2300’s Motion for Partial Summary Judgment is granted in part and denied in part, and Smith’s Motion for Partial Summary Judgment is granted in part and denied in part.

BY THE COURT:

ABRAMSON, HOWLAND, W., J.

⁷ 2300 and Martone have not requested summary judgment with respect to their breach of contract claims, presumably because they recognize that the issues surrounding the parties’ alleged partnership agreement are hotly contested and will, most likely, require an assessment by the finder of fact of Smith’s and Martone’s credibility.