

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**JAGIR SINGH and STAR-BRIGHT**

**ENTERTAINMENT, INC.,  
Plaintiff,**

**Index No.:5808/07  
Motion Date: 4/16/08  
Motion Cal. No.: 42**

**-against-**

**SURINDER KUR, MANJINDER KUR,  
RASNA LLC., RASNA PROPERTIES LLC.,  
and RASNA HOLDINGS, LLC.,  
Defendants.**

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The following papers numbered 1 to 12 read on this application by defendants for an order pursuant to CPLR § 3211 (a)(1) and 3212 dismissing the complaint as against them, and an order canceling the Notice of Pendency, and an order awarding defendants costs and attorneys fees and sanctioning plaintiffs.

|  | PAPERS<br>NUMBERED |
|--|--------------------|
| Order to Show Cause-Affidavit-Exhibits.....      | 1-3                |
| Affidavits of Service.....                       | 4                  |
| Affidavit in Opposition-Affidavits-Exhibits..... | 5-8                |
| Memorandum of Law.....                           | 9-10               |
| Reply Affirmation.....                           | 11-12              |

Upon the foregoing papers it is ordered that this application by defendants for an order pursuant to CPLR § 3211 (a)(1) and 3212 dismissing the complaint as against them, and an order canceling the Notice of Pendency, and an order awarding defendants costs and attorneys fees and sanctioning plaintiffs is decided as follows:

According to the complaint, this action involves allegations that on “December 11, 2001, plaintiff Singh and defendant Kur entered into an agreement whereby the plaintiff delivered to Kur the \$300,000.00 which Kur undertook and agreed to deposit into the treasury of STAR-BRIGHT.” This agreement provided, inter alia, that STAR-BRIGHT was developing and improving certain property owned by it and located at 115-08 101<sup>st</sup> Avenue, Richmond Hill, New York, Block 9433, Lots 1,2, and 5 as recorded in the Queens County Register’s Office. Plaintiff was to provide financing of \$1,100,000.00 in two payments, \$300,000.00 and \$800,000.00 with Kur paying and satisfying any mortgages on the property.

This money was for the purchase of stock in STAR-BRIGHT. Plaintiff Singh gave the \$300,000.00 to Kur, but he did not receive stock ownership and this money was not used in furtherance of the development of the property. Instead, this money was used for Kur's personal benefit and Singh was not given any control of the property or STAR-BRIGHT as the agreement required. Plaintiff thereafter brought this complaint containing causes of action for breach of contract, money had and received, unjust enrichment, breach of a fiduciary relationship, lien on property and specific performance, vacate and set aside deeds, and a derivative action.

Defendants now seek an order dismissing the complaint pursuant to CPLR 3211(a)(1) based upon the lack of a written agreement between the parties and any claim by plaintiffs is barred by the statute of frauds. According to Defendants the purported agreement was only signed by Plaintiff, not any of the Defendants or any other party authorized to sign such an agreement on behalf of the corporation. Plaintiffs opposes this motion, acknowledging that Defendants did not sign the agreement, however, they claim that the Statute of Frauds does not bar enforcement of the parties' agreement as an oral contract.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . ." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . ." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700 (3<sup>rd</sup> Dept 1992.)Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> Dept 1995.) The unsigned agreement submitted by Defendants on this motion qualifies as "documentary evidence" within the meaning of CPLR 3211(a)(1). This documentary evidence establishes that the parties did not have an agreement and Plaintiff Jagir Singh did not make a payment of \$300,000.00 to Defendants as provided for in the agreement. Without an agreement and payment, Defendants have established a defense that resolves in their favor all issues relating to the causes of action in the complaint.

Plaintiffs reliance upon the existence of a binding oral agreement that is not barred by the Statute of Frauds is misplaced. The Statute of Frauds provides, in pertinent part, that "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing ... if such agreement, promise or undertaking ... by its terms is not to be performed within one year from the making thereof" (General Obligations Law § 5-701[a][1]). This provision does not apply to an agreement that "appears by its terms to be capable of performance within the year; nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year" (North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171, 176); it applies to "those contracts only which by their very

terms have absolutely no possibility in fact and law of full performance within one year" (D & N Boening v Kirsch Beverages, 63 NY2d 449, 454). Plaintiff's alleged oral agreement with the defendant, being one of indefinite duration and not terminable at will, is void by virtue of the Statute of Frauds (see, General Obligations Law § 5-701[a][1]; Zimmer-Masiello, Inc. v Zimmer, Inc., 159 AD2d 363, 367-368, lv dismissed 76 NY2d 772; see also, D & N Boening v Kirsch Beverages, 63 NY2d 449).

Furthermore, even if the Statute of Frauds did not bar enforcement of the alleged oral agreement due to partial performance of the oral agreement, Plaintiffs have not submitted sufficient documentary evidence of their partial performance. CPLR 3211 (a)(1). N.Y. Gen. Oblig. Law § 5-703(4). Plaintiffs claim of partial performance is that they provided \$300,000.00 to defendant Kur. They have submitted Plaintiff Singh's self-serving affidavit, an improperly sworn affidavit of Ashok Kumar, and an improperly sworn affidavit of Amit Gandhi. Affidavits do not constitute documentary evidence (Fleming v Kamden Properties, 41 AD3d 781 [2d Dept 2007] and as such, Plaintiffs have not sufficiently countered the conclusive nature of the documentary evidence presented by Defendants that showed no agreement existed and no payment was made by Plaintiff Jagir Singh.

Moreover, Plaintiff Singh's affidavit indicates he gave Kur a brown bag containing \$300,000.00 as a down payment for his investment in the corporation, yet he did not receive any receipt or other indication of this transaction. Neither Kumar nor Gandhi swear to the truth of the statements contained within their affidavits. Moreover, both of them claim to have heard Harbans Singh state that he and his partner received \$300,000.00 from Jagir Singh to purchase fifty percent of the subject real estate. The Court finds that Singh's self-serving affidavit cannot establish the payment of the down payment and as such cannot raise an issue of fact as to partial performance on the oral contract. Here, the agreement anticipated the payment of this money by Singh and then the signing of this agreement by defendants. Under such circumstances, it is inexplicable why Singh would make such a surreptitious payment without any verification by Defendants. See, Schleifer v. Schlass, 303 A.D.2d 204 (1st Dept 2003.) The statements by Kumar and Gandhi are also less than credible given that they are not properly sworn and they consist of hearsay statements. See Rodriguez v Sixth President, 4 AD3d 406 (2d Dept 2004.) As such, they raise no issue regarding whether the payment was made by Singh in partial performance of the oral agreement. The Court notes that Plaintiffs have not submitted sufficient evidence to establish that an oral agreement existed.

Based on the above, the Court is satisfied that there was no enforceable oral agreement between the parties. Since it is conceded that there was no written agreement, the Defendants have established a defense that resolves all issues as a matter of law and conclusively disposes of the complaints' causes of action. Accordingly, the motion to dismiss the complaint by plaintiff pursuant to CPLR 3211 is granted. Moreover, there are no issues of fact as to the lack

of any binding agreement between the parties and therefore, the Court also finds it appropriate to grant dismissal pursuant to CPLR 3212.

The branch of the motion seeking an order cancelling the Notice of Pendency is granted. Pursuant to CPLR 6501, a notice of pendency may be filed in any action in which the judgment would affect the title, possession, use or enjoyment of real property. (See, 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313.) Here, as set forth above, the complaint has been dismissed. Accordingly, the notice of pendency on the property known 115-08 101<sup>st</sup> Avenue, Richmond Hill, New York, Block 9433, Lots 1,2, and 5 is cancelled.

The branch of the motion seeking an order awarding Defendants costs and attorneys fees and sanctioning plaintiffs is denied. Defendants have not set forth a sufficient basis to support this branch of the motion.

**Dated: April 22, 2008**

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**ORIN R. KITZES, J.S.C.**