

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23539
C/kmg

_____AD3d_____

Argued - May 4, 2009

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
FRED T. SANTUCCI
RUTH C. BALKIN, JJ.

2008-04386

DECISION & ORDER

Howard Silver, et al., respondents,
v Rhona Silver, et al., appellants.

(Index No. 5097-07)

McDonough & Artz, P.C., Binghamton, N.Y. (Kevin F. McDonough of counsel), for appellant Barry Newman, and Smith Buss & Jacobs, LLP, Yonkers, N.Y. (Jeffrey D. Buss of counsel), for the remaining appellants (one brief filed).

David A. Kaminsky & Associates, P.C., New York, N.Y. (Martin Gerald Dobin of counsel), for respondents.

In an action, inter alia, for an accounting, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), as denied their motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) or for summary judgment dismissing the complaint, with leave to renew after discovery.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The Supreme Court properly denied the branch of the defendants' motion which was to dismiss the complaint pursuant to CPLR 3211(a)(7), as the complaint states valid causes of action for an accounting (*see East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089), constructive trust (*see Mendelovitz v Cohen*, 37 AD3d 670; *Doxey v Glen Cove Community Dev. Agency*, 28 AD3d 511), for a declaration of the existence of a joint venture (*see Kaufman v Torkan*, 51 AD3d 977; *Tilden of N.J. v Regency Leasing Sys.*, 230 AD2d 784, 785-86), and alleging shareholder derivative claims (*see Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575).

June 16, 2009

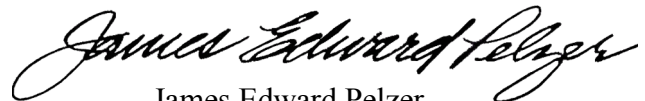
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Additionally, the Supreme Court properly denied those branches of the defendants' motion which were to dismiss pursuant to CPLR 3211(a)(5) based on a statute of frauds defense, and for summary judgment, with leave to renew after discovery. Under the circumstances of this case, the plaintiff is entitled to discovery before he is required to show that he has satisfied the statute of frauds (see *WPP Group USA v Interpublic Group of Cos.*, 228 AD2d 296, 297; *International Trading & Sales v Philipp Bros.*, 99 AD2d 983). Moreover, “[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Amico v Melville Volunteer Fire Co., Inc.*, 39 AD3d 784).

MASTRO, J.P., DILLON, SANTUCCI and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court