Cointech, Inc. v Masaryk Towers Corp.

2002 NY Slip Op 30006(U)

November 21, 2002

Supreme Court, New York County

Docket Number: _300108/3672

Judge: Paula J. Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Omansky, Justice

PART 47

Cointech Inc

- v -

Marsaryk Towers Corp

INDEX NO. 108367-02

MOTION DATE 10/15/02

MOTION SEQ. NO. 01

MOTION CAL. NO. 6

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
DEC 10 2002

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______

Dated: 11/21/02

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

---X

COINTECH, INC. Index No. 108367/02

Plaintiff,

DECISION AND ORDER

-against-

MASARYK TOWERS CORPORATION

Defendant.

--- X

PAULA J. OMANSKY, J.:

In this action for breach of contract, promissory estoppel, interference with property, detrimental reliance, and misrepresentation, defendant Masaryk Towers Corporation moves tc dismiss the complaint in accordance with the provisions of CPLR 3211(a)(1) and (7).

Plaintiff Cointech, Inc. cross-moves for summary judgment on its claim for specific performance or for an award of damages.

FACTS

Plaintiff is in the business of providing coin-metered laundry facilities at multi-family apartment buildings and leases space in the residential buildings and prcvides an in-house laundry amenity to the residential tenants.

Defendant is a domestic corporation organized under, and pursuant to, the provisions of the Private Finance Housing Law for the purpose of owning, maintaining and operating a "Mitchell-Lama" limited-profit corporative housing complex functioning under the direct supervision of the Department of Housing Preservation and

Development, City of New York ("HPD"), a non-party. Defendant's housing complex consists of six residential buildings containing 1,108 apartments occupied by tenant-shareholders and located on the lower East Side on Columbus Street, between Houston and Delancy Streets.

In February, plaintiff's president, Theodore R. Yates, contacted defendant's on site account executive, Al Barnett who works for Arco Management ("Arco"), a non-party. Yates met with Barnett on February 20, 2001. At this meeting Barnett and Yates walked around the property and Yates performed an "on site" inspection and survey. During the meeting, Bates allegedly told Yates that the residents were unhappy with the present laundry operator and had numerous complaints about the equipment. Plaintiff alleges that it was invited to submit a proposal for laundry operation. Yates maintain that he contacted Barnett on a number of occasion with regard to various questions about the residential profile, the resident usage of the equipment and the hours and days of operation. Yates also said that he inquired about the cleaning schedule of the laundry room. Yates then prepared and submitted a proposal to defendant on June 15, 2001.

In July 2001, Barnett contacted Yates and requested a list of references. In early August 2001, Barnett contacted Yates informing him that defendant's board had narrowed its decision down to three laundry operators. Yates stated that Barnett informed him

in October 2001 that plaintiff was selected as the laundry operator and requested that Yates prepare and submit the company's standard laundry lease agreement. On October 19, 2201, Yates delivered to Barnett, two signed lease agreements, requesting that they be submitted to the Board for review and acceptance.

Yates alleges that defendant informed him that the lease was acceptable to the Board and that Bernice McCallum, the Board president, had countersigned the two copies *of* the lease and both were returned to Yates.

Yates contacted Barnett on several occasions to ascertain when plaintiff could install the equipment. Barnett directed Yates to Scott Langan, the Vice-president of Arco.

Yates states, that in a letter dated December 13, 2001, he wrote to Langan to confirm and coordinate an installation date. Langan telephoned Yates, informing him that Arco could not locate the original copy of the fully executed lease agreement and that HPD required an original signature. Yates maintains that this was the first time he was informed that HPD was involved in the transaction and that in his next conversation with Barnett he asked his about HPD's involvement and Barnett explained that HPD had to approve the lease. According to Yates, Barnett assured defendant that HPD's approval was a procedural formality -- a "rubber stamp,'' and nothing more.

On December 19, 2001, plaintiff forwarded another lease with

an original signature. Yates continued to call both Langan and Barnett to establish a lease start date and was informed that HPD was "dragging its feet" and not yet provided the necessary approval. Yates wrote to Barnett on February 1, 2002 to explain that plaintiff was to incur equipment storage fees of $780.00 per month beginning March 2002.

On February 4, 2002, Barnett and Yates spoke and the former assured the latter that the lease was in the process of being approved and again explained that this was a mere fcrmality. Barnett allegedly informed Yates that defendants would pay all storage fees that were incurred. On February 11, 2002, Yates again spoke to Barnett who alleged assured that defendant was merely waiting for HPD's stamp of approval.

Defendants counsel, Stanley B. Dryer, who did not assist in the negotiation of the underlying lease, communicated with HPD in March 2002 to determine the status of the approved process and the reasons, if any, for the delay in acting upon the submitted lease agreement. On March 13, 2002 and March 27, 2002 Yates again wrote to Barnett asking for an installation date and reminding him of the $780.00 monthly storage fee plaintiff was incurring.

In order to comply with the provisions of section 3-07, an approved License Agreement was prepared and transmitted to defendant on March 28, 2002, together with appropriate instruction for due execution by the parties and return to the law firm for

submission to HPD for processing and approval.

On April 3, 2002, Yates stated that defendant sent him a proposed license agreement for the laundry operation. This agreement differed from the previously executed lease agreement. Yates contacted Barnett and Langan both of whom stated that HPD had the authority to reject the fully executed lease.

On June 20, 2002, Gary Sloman of the Director of Operations informed Dryer that the proposed lease agreement between plaintiff and defendant, dated October 19, 2001, for the installation and maintenance of laundry room equipment was not approved by HPD because the agreement failed to comply with section 3-07 of the Mitchell-Lama rules found in the Regulations and Rules of the City of New York).

Defendant states that plaintiff's lease agreement does not contain the proper cancellation language required by HPD or the provision against bribery and collusion. HPD also maintains that it only grants service providers a licence to operate on the premises. Defendant also asserts that HPD rejects a contract or requires the removal from any agreement with a supervised housing company any clause providing for automatic renewal in concravention of the pertinent provisions of the General Obligations Law. HPD also requires that all contracts contain a provision requiring service providers to designate HPD as an additional certificate holder and additional insured in the liability insurance coverage.

HPD also rejects agreements which do not contain a provision against a change in the price and/or cycle structure of the coin operated laundry equipment without the expressed written consent of both the housing company and HPD.

Defendant states that all of the required provisions were omitted from the plaintiff's lease agreement.

Plaintiff rejected HPD's proposed license. All attempts to settle the parties' differences were unsuccessful.

DISCUSSION

The Mitchell-Lama program is designed to encourage the private development of low- and middle- income housing in areas where such affordable housing cannot readily be provided by the ordinary unaided operation of private enterprise (Private Housing Finance Law § 11). The Mitchell-Lama program encourages private investment in housing by offering to developers long-term, low- interest government mortgage loans, and real estate tax abatements. In addition to State and City financing, Mitchell-Lama buildings are entitled to receive Federal interest subsidies which reduce the effective interest on governmental mortgages to 1%. In return for these financial benefits, developers agree to regulations severely limiting profits, rents, tenant selection, and the transfer of property (Private Housing Finance Law §§ 20 to 23, 28, 31 and 38).

Mitchell-Lama projects may be held either by a not-for profit corporation or an entity known as a "mutual housing company'' which

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is defined to be a "not-for-profit cooperative corporation." Section 2(15) of the Private Finance Housing Law designates HPD as the supervising agency for Mitchell-Lama projects located in the City of New York. HPD *is* not only responsible for monitoring the Mitchell-Lama program (Axelrod v Gliedam, 104 AD2d 327, 328 [1st Dept 19841, order affd, appeal dismissed 64 NY2d 876 [1985]; 2550 Olinville Ave., Inc. v Crotty, 141 Misc2d 238 [Sup Ct, NY County 1988]), it is also empowered to promulgate supplementary rules and regulations with respect to municipally-aided projects (Private Finance Housing Law § 23).

Here, defendant states the New York City's rules and regulations require that "[i]n housing companies with five hundred (500) dwelling units or greater, contracts over $10,000 shall be submitted for HPD written approval" (28 RCNY § 3-07 [b])[2])[1]. Moreover, HPD requires that contract contain strict renewal and cancellation clauses. Section 3-07[b](7) *of* the Regulations and Rules of the City of New York provides that

> [a]ll contracts for building services or maintenance of building equipment on an annual or time basis shall be submitted to HPD for written approval before execution by

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State-financed Mitchell-Lama projects are supervised by the DHCR and are governed by the New York Codes, Rules, and Regulations (9 NYCRR part 1700 et seq.). However, defendant's attached exhibit containing the text of the regulation clearly indicates that this provision is promulgated by HPD under its statutory mandate. Buildings financed by loans issued by the City of New York (the "City") and supervised by HPD (Private Housing Finance Law § 2[15]) are governed by the Regulations and Rules of the City of New York (RCNY, vol. 10, title 28, chapter 3).

> the housing company, and prior to expiration of the previous contract, if any. Where a contract does not provide for automatic renewal, a new contract must be submitted for approval to HPD at least thirty (30) days prior to expiration of the existing contract. All contracts for building services or maintenance of building equipment shall provide that the are subject to termination without cause upon thirty (30) days written notice by either party or upon ten days written notice by HPD, and immediately upon notification by the housing company or HPD that the contractor has materially breached his contract

(8 RCNY § 3-07[b][7]). In order to protect Mitchell-Lama projects from improper or illegal practices, HPD also requires that all contracts contain a provision which provides that

> [n]o company, association, director, officer, employee, agent or other person shall solicit or receive, directly or indirectly any commission, bonus, gratuity, fee or any other payment not expressly authorized by HPD from any individual, firm or corporation which may submit any bid, or to whom any contract is proposed to be awarded. Violation of this subdivision (c) by any company, association, director, officer, employee, agent or other person shall be cause for discharge and any other appropriate action; and a provision to such effect shall be incorporated in all employment agreements entered into by the company.

(28 RCNY § 3-07[c]). "Any contract, agreement or retainer, entered into by the housing company or its managing agent in violation of the provisions herein shall be subject to cancellation by HPD (28 RCNY § 3-07[d]).

Plaintiff argues that its lease contract is not subject to HPD's review since the former is renting the space from the defendant and is required to pay defendant a rental fee of $7,500 a month. However, the court rejects plaintiffs's argument that the

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provisions of section 3-07 of the Regulations and Rules of the City of New York only apply to contracts where the Mitcell-lama project actually expends funds. The laundry contract directly impacts on the residents of defendant project because they will bear the costs of the service. In addition, plaintiff's proposed contract could subject defendant and HPD to damages. For example, plaintiff's lease contains a provision which gives plaintiff the right of refusal which as plaintiff argues entitles it to a 7 yea-year minimum renewal term which is allegedly worth $249,112.50. Plaintiff has cited no authority which contradicts HPD's right to review contracts which would subject its projects to potential damages.

Plaintiff's argument that defendant cannot reject the contract because it suffered actual damages, such as lost revenues and storage costs for equipment which it is reserving for use at the project, is also unavailing. The doctrine of equitable estoppel requires that plaintiff show that defendant's conduct was calculated to convey the impression that the facts are otherwise than, and inconsistent with, that which defendant subsequently asserts, that defendant knew that the conduct/representation would be acted upon and that defendant had actual or constructive knowledge of the true facts (Health-Loom Corp. v Soho Plaza Corp., 272 AD2d 179, 181 [1st Dept 2000]).

Plaintiff, a sophisticated business entity with a long history

of doing business in the field of laundry operations, cannot now claim that it was unaware of the Mitchell-Lama program, which has been in existence for many years. Moreover, buildings which are subject to the Mitchell-Lama requirements are a matter of public record. There is no evidence that defendant's agent or that HPD or its attorney misled plaintiff as to the true status of the building or approval of the contract. At no time did McCallum or Barnett ever represent that they had final contracting authority. The record shows that Barnett made plaintiff aware that HPD needed to review and approve the contract as early as December 2001.

Moreover, this court shall not permit plaintiff to evade the governing law. In exercising its regulatory powers over defendant's project, HPD is acting in its governmental capacity (Scruqqs-Leftwich v Rivercross Tenants' Corp., 70 NY2d 849, 851 [1987], citing NY Const art XVIII [remaining citation omitted]). Estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory.duties (Scruqqs-Leftwich v Rivercross Tenants' Corp., supra). Plaintiff may not use the doctrine of equitable estoppel to create a right or to relive it from the mandatory operation of statutes (Scheurer v New York Citv Employees' Retirement Svs., 223 AD2d 379 [lst Dept 1996]). Application of the doctrine of equitable estoppel in this instance would impermissibly relieve plaintiff from the mandatory operation of statutes and regulations which are clear and unambiguous and

would create a right to have a contract which does not provide the required safeguards (ibid. at 380, citing Galanthay v New York State Teachers' Retirement Sys., 50 NY2d 984, 986 [1980]).

This court also finds that plaintiff has not shown that it will suffer manifest injustice from defendant's rejection of the submitted laundry contract (Scheurer v New York City Employees' Retirement System, supra, 223 AD2d, at 379; Brennan v New York City Housing Authority, 72 AD2d 410, 413 [1st Dept 19801; cf., Eden v Board of Trustee of State University, 49 AD2d 277, 284 [2d Dept 19751, stav denied 38 NY2d 938 [1976]).

The fact that the Board president, McCallum, signed the contract with plaintiff does not bind defendant since neither McCallum nor Arco Management had the authority to waive HPD's requirements. McCallum and Arco Management, therefore, lacked the capacity to negotiate or enter into a contract which violated HPD's regulations. Parties dealing with an agent do so at their peril and must make the necessary effort to discover the agent's actual authority (Ford v Unitv Hospital, 32 NY2d 464, 472-473 [1973]; Barden & Robeson Corp. v Czvz, 245 AD2d 599, 600 [3d Dept 19971).

This court also rejects plaintiff's argument that it was mislead by the statements of Barnett an employee of Arco Management. In New York, an agent cannot by his own ends imbue himself with authority (Lindenbaum v Albany Post Property Assocs., Inc. __ AD2d __, 747 NYS2d 118, 119 [2d Dept 20021. In New York an

agent may only be appointed "to do the same acts and to achieve the same legal consequences as if the principal had himself personally acted except as to acts which by their nature, by public policy, *or* by contract, require personal performance, or acts which are illegal (Central Trust Co. v Rochester v Sheehen, 66 AD2d 1015 [4th Dept 1978]). As already noted, New York Law and applicable municipal regulations limit the type of contract into which a Mitchell-Lama housing project may enter. Furthermore, plaintiff's argument that defendant acted as if it had authority is unpersuasive under the presented fact pattern. The existence of apparent authority depends upon a factual showing that defendant relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal which in this case is actually HPD, the regulatory agency (Health-Loom Corp. v Soho Plaza Corp., 272 AD2d, at 182).

Plaintiff's misrepresentation claims also fail. Plaintiff has not stated sufficient facts which if proven would show that defendant misrepresented a material fact knowing it was false (Gradubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 122 [1995]). Defendant's failure to secure HPD's approval does not permit an inference that Barnett's statement that HPD approval was a mere formality was false when made and chat defendant knew that the lease contract as written was inadequate to satisfy HPD's regulations (see, Bernstein v Golden Press Holding, LLC, 293 AD2d

414, 415 [1st Dept 2002]).

The court has considered plaintiff's remaining arguments and finds that they are without merit.

Defendant's motion to dismiss the entire complaint for failure to state a cause of action is granted. In turn, defendant's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: November , 2002

ENTER:

PAULA J. OMANSKY
J.S.C.