

Chong Min Mun v Soung Eun Hong

2006 NY Slip Op 30607(U)

May 26, 2006

Supreme Court, New York County

Docket Number: 604158/2005

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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CHONG MIN MUN and SK NEW YORK, LLC,
Plaintiffs,

Index No. 604158/2005

- against -

SOUNG EUN HONG,
Defendant.

**DECISION
AND ORDER**

FILED

JUN 12 2006

NEW YORK
COUNTY CLERK'S OFFICE

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RICHARD B. LOWE, III, J.:

Defendant Soung Eun Hong (Hong) brings this motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) based on documentary evidence and for failure to state a cause of action for, inter alia, breach of fiduciary duty, breach of contract, breach of the implied covenants of good faith and fair dealing, and misrepresentation. In the alternative, Hong moves to consider this motion to dismiss as a motion for summary judgment pursuant to CPLR 3211 (c), arguing that there are no disputed issues of material fact and that summary judgment is warranted as a matter of law.

BACKGROUND

This dispute arises over the loss and failed re-acquisition of real property known as Seoul Plaza, located at 150-24 Northern Boulevard, in Flushing, New York.

In or around December 1, 2000, plaintiff SK New York (SKNY) completed the development of Seoul Plaza. In connection with the purchase and development of Seoul Plaza, SKNY and its managing member Chong Min Mun (Mun) executed and delivered a mortgage to GMAC Mortgage Corp. (GMAC) in the sum of \$12,500,000.00. In January 2002, GMAC commenced a mortgage foreclosure action against SKNY, scheduling the foreclosure sale for February 25, 2005. On February 24, 2005, SKNY filed a petition in bankruptcy, which stayed the mortgage foreclosure

action until April 28, 2005. The sale was subsequently postponed and rescheduled for June 3, 2005.

During the interim, it is alleged that SKNY began discussions with Hong and others to form a partnership whose sole purpose was to provide SKNY with funds to redeem the mortgage from GMAC or to acquire Seoul Plaza at the foreclosure sale. In April 2005, SKNY and Mun met with non-party Gene J.S. Kim (Kim) and Hong. The plaintiffs allege that the meeting consummated in an alleged partnership with the purpose of purchasing or allowing SKNY to redeem the mortgage on Seoul Plaza. The essential terms were set forth in writing and signed by the parties (the "partnership agreement").

The plaintiffs allege that Hong convinced the partners to bid up to \$15 million for Seoul Plaza at the June 3, 2005 sale, which they did. However, one Heegun Lee (H. Lee) outbid the partners with \$18 million; it is alleged that H. Lee is a manager of several properties owned by Hong and that Hong deliberately caused H. Lee to outbid the partners. Even so, a third party outbid both the alleged partnership and H. Lee, winning the auction. Because that party was financially unable to close on the property, another sale was set for August 19, 2005.

The alleged partners agreed that SKNY would submit an application to the Bankruptcy Court to redeem the mortgage prior to the August 19 auction. However, the plaintiffs allege that Hong and Kim intentionally delayed providing the requisite proof to effectuate the redemption and caused SKNY to lose the opportunity to redeem.

Nonetheless, the alleged partners agreed to attend the sale on August 19, 2005, after the plaintiffs revealed their business plans to the defendant, and consented to bid up to \$20 million for Seoul Plaza. At the auction, the alleged partners bid \$20 million for Seoul Plaza; however, a Daniel Lee (D. Lee), alleged to be acting on behalf of Hong, bid a sum of \$20.1 million, which was declared

the winning bid. D. Lee assigned his winning bid to a Roosevelt Avenue Corporation, of which D. Lee is the president, and of which the plaintiffs allege Hong is a shareholder and officer. However, D. Lee notes that he has never had any business relationship with defendant Hong, nor is Hong a shareholder or officer of Roosevelt Avenue Corporation (*see* Slotnick Aff, Ex. C [D. Lee Aff]; *see also* Slotnick Reply Aff, Ex. B [D. Lee Aff]).

The plaintiffs, on November 22, 2005, brought action against the defendant by Summons and Complaint. The plaintiffs allege four causes of action: breach of fiduciary duty (first cause of action); breach of contract (second cause of action); breach of the implied covenants of good faith and fair dealing (third cause of action); and misrepresentation (fourth cause of action).

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211 (a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). However, on a motion to dismiss pursuant to CPLR 3211 (a) (1), “where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]). In addition, based on evidence submitted by the parties, the court may, pursuant to CPLR 3211 (c), duly consider a motion to dismiss as a motion for summary judgment.

Hong argues that because a condition precedent did not happen under the terms of the agreement, the agreement never became effective. Alternatively, Hong avers that the agreement itself is vague and ambiguous, and, as a matter of law, ineffective. Here, the court finds that while

one of the clauses of the agreement effectuates certain causes of action, the agreement itself is vague and ambiguous, warranting the determination that the partnership agreement as a whole is void as a matter of law. In addition, even though the court finds that one of contractual clauses does effect certain causes of action, nonetheless the court converts the motion to dismiss into a motion for summary judgment because the evidence submitted shows that there are no issues of material fact and dismissal is warranted as a matter of law.

I. *Vague and Ambiguous Contract*

The court first turns to Hong's argument that the contract is vague and ambiguous and invalid as a matter of law. Whether an ambiguity exists relative to a contract term is a question of law to be determined by the court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). A "court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]; *see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999]). It is axiomatic that "if an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). Furthermore, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Martin Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *see also Matter of 166 Mamaroneck Ave. Corp.*, 78 NY2d at 91).

Here, the partnership agreement is laden with vague and ambiguous terms, and, as a matter of law, is void. Indeed, the memorandum neither provides nor defines any material terms as to the rights and obligations of the various signatories to the agreement. While there is a provision that

provides that each shall contribute their pro rata share of investment capital on an equal basis, the parties fail to supply a number (*see* Kim Aff; *see also* Slotnick Aff, Ex. B). There is also no determination as to how Seoul Plaza would be paid for by the parties, other than the fact that “the remainder of the purchase price shall be paid by bank loan” (*id.*). In addition, the agreement does not provide for how profits and losses would be shared (*id.*). Finally, the memorandum notes that either the LLC (Limited Liability Corporation) or LLP (Limited Liability Partnership) laws of the State of New York will apply, but there is no delineation as to whether this is an actual partnership or a corporation, nor does the memorandum give any indication as to how the new corporation or partnership would be run (*id.*). Indeed, even if the agreement and the Complaint is read liberally and in favor of the non movant, the memorandum lacks any material terms establishing a contractual agreement among the parties.

The plaintiffs respond by noting that this was only a writing as to the essential terms of the parties’ agreement, since these were the subjects “discussed and orally agreed upon by the parties” (Pl Memo in Opposition at 3). They even go so far as to argue in a footnote that “[p]erhaps use of the definitional term “Partnership Agreement” for the writing between the parties was unfortunately loose” (*id.*). First, the Complaint does not allege any facts to indicate that there was an “oral” agreement between the parties. Even in the liberal construction of the Complaint (CPLR 3026), the court will not otherwise read into the Complaint facts not plead (*see Didier v Macfadden Publications*, 299 NY 49, 53 [1949] [statements in the Complaint “cannot be used as a substitute for matters of substance”]). Furthermore, even if there was an oral agreement between the parties, the agreement fails to suggest that there was any such oral agreement. Finally, the partnership agreement still lacks any material terms that would otherwise change this court’s determination. Here, the

agreement is but a “mere agreement to agree” (*Martin Delicatessen*, 52 NY2d at 109). The terms of the agreement are unenforceable.

Accordingly, in reviewing the various causes of action, the court dismisses the second cause of action for breach of contract as there was no contract that could have been breached.

II. *Condition Precedent*

As to the remaining causes of action for breach of fiduciary duty, breach of the implied covenants of good faith and fair dealing, and misrepresentation, the court finds that the plaintiffs have alleged feasible causes of action defeating a motion to dismiss. Here, the plaintiffs base these causes of action on the fact that the condition precedent could not be fulfilled because the defendant colluded with others to keep the alleged partnership from purchasing Seoul Plaza.

The relevant clause at issue, translated into English by the plaintiffs’ interpreter, provides that:

After execution of this Memorandum, each of all three parties shall be legally liable without limit for the damage caused by breach of the terms and conditions of the Memorandum, unilateral breach of the partnership, or any unjustifiable activity which causes the acquisition to fail or any damage. Further, this Memorandum shall become effective only after the purchase [is] completed. In addition, the distribution of rights of the new company including pro rata of shares among the three shall be decided upon completion of the purchase, in accordance with the previous agreement by the three parties.

(See Kim Aff [emphasis added]).

As translated by the defendant’s interpreter, the crucial section states:

After this Memorandum of Understanding has been executed, all three parties agree that if any party, by breach of the terms of the Memorandum of Understanding or unilateral act of the breach of the partnership, engages in an unjustifiable act which undermines the interest of the others, such as causing the acquisition to fail, he or she shall be liable for all damages indefinitely. Also, this Memorandum

of Understanding shall be valid only when the acquisition of the property has been completed. In addition, the three parties agree that all rights such as the pro rata shares in anew company shall be decided, after the acquisition has been consummated, as provided by the previous agreement of the three parties.

(*See Slotnick Aff, Ex. B [emphasis added]*).

“It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed” (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1999]; quoting *Breed v Insurance Co.*, 46 NY2d 351, 355 [1978] [internal quotations omitted]). Here, the partnership agreement, whether translated by the plaintiffs’ interpreter or the defendant’s, would “be valid only when the acquisition of the property has been completed” (*see Slotnick Aff, Ex. B; see also Kim Aff*). While the court finds that the contract is void as a matter of law, nonetheless the plaintiffs adequately state causes of action based on the allegation that Hong made the acquisition fail due to his connections to the other bidders and through self-dealing tactics. The defendant argues that because the condition precedent was not fulfilled, there was no partnership. However, here, the plaintiffs are not arguing that the condition precedent went unrealized, but it was the defendant that caused the condition precedent to go unsatisfied. That is because the above noted clause goes to the understanding between the parties as to the condition required to be fulfilled prior to the consummation of a partnership, and not to the contractual relationship itself. Such allegations make adequate causes of action for the three remaining causes of action.

Even so, the court converts this motion to dismiss into a motion for summary judgment and dismisses these remaining causes of action because the evidence provided plainly demonstrate that there was no collusion and that there was no conspiracy (CPLR 3211 [c]). As to each of the remaining causes of action, the plaintiffs basically allege that the defendant conspired with other

bidders to take over Seoul Plaza and, due to this conspiracy and self-dealing, caused the bid to fail. In turn, this conspiracy on the part of the defendant and his cohorts caused a breach of fiduciary duty, breach of the covenants of good faith and fair dealing, and misrepresentation on the part of Hong to the plaintiffs. However, the affidavit of D. Lee and the undisputed evidence demonstrate that Hong was not connected in any way to any of the individuals or corporations that the plaintiffs allege Hong to be affiliated with. As such, Hong could not have engaged in transactions causing the acquisition to fail, especially where it was D. Lee who made the successful bid on the building. Indeed, the evidence shows that there was no connection between Hong and any of the other alleged conspirators the plaintiffs aver he was affiliated with. Nor have the plaintiffs rebutted this evidence to otherwise show any conspiracy.

In addition, the plaintiffs' own evidence only furthers Hong's contention that there was no conspiracy between Hong and the alleged conspirators. The plaintiffs provide a number of checks written out and signed by defendant, totaling \$1.5 million, "for use as the deposit in [the partnership's] bid at the auction" (*see* Mun Aff ¶ 8; Ex. A). If there was in fact a partnership as the plaintiffs allege, then it would be contrary to suggest that Hong would conspire with others to bring about its demise, especially where Hong himself wrote checks totaling \$1.5 million for use by the alleged partnership. Indeed, the \$1.5 million in checks from Hong's own account plainly demonstrate that the defendant was as engaged as the plaintiffs in retrieving Seoul Plaza on behalf of the plaintiffs. There was no conspiracy, and the plaintiffs have failed to provide any evidence to show otherwise.¹

¹ Though the court need not deal with the Bankruptcy Court proceedings of SKNY and finds it irrelevant as to this discussion, it is nonetheless telling that Hong has not been named as a party in any adversary proceeding.

For the reasons set forth, the defendant's motion to convert this motion to dismiss into a motion for summary judgment is granted, the motion for summary judgment is granted, and the remaining causes of action are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Soung Eun Hong's Motion to Dismiss is granted to the extent dismissing the second cause of action for breach of contract; it is further

ORDERED that defendant Soung Eun Hong's Motion for Summary Judgment is granted and the first (breach of fiduciary duty), third (breach of the implied covenant of good faith and fair dealing), and fourth (misrepresentation) causes of action are dismissed; it is further

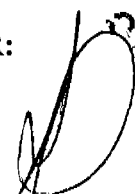
ORDERED that the Complaint is dismissed in its entirety, with costs and disbursements to the defendant as taxed by the Clerk of the court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May __, 2006

ENTER:


RICHARD B. LOWE III
CLERK OF THE COURT
NEW YORK COUNTY CLERK'S OFFICE

FILED
JUN 12 2006