

Freemont Realty Capital, LP v MCL CDC P21, LLC

2007 NY Slip Op 31201(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0603184/2006

Judge: Richard B. Lowe

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

PRESENT: LOWE
Justice

PART 56

Index Number : 603184/2006
FREMONT REALTY CAPITAL, L.P.
vs
MDL CDC P21, LLC
Sequence Number : 002
DISMISS

INDEX NO. 603184/06
MOTION DATE 2/13/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 15 2007

COUNTY CLERK'S OFFICE
NEW YORK

REGISTERED MAIL
MAY 15 2007
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/11/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X

FREEMONT REALTY CAPITAL, LP.,

Index No: 603184/06

Plaintiff

-against-

DECISION AND ORDER

MCL CDC P21, LLC; MCL CDC LAND, LLC;
MCL COMPANIES OF CHICAGO, INC; and
DANIEL E. MCLEAN,

Defendants

-----X

RICHARD B. LOWE III, J:

Plaintiff Freemont Realty Capital, LP (“Freemont”) brings the instant action against Defendants MCL CDC P21, LLC (“MCL P21”); MCL CDC Land, LLC (“MCL Land”); MCL Companies of Chicago, Inc. (“MCL Inc.”); and Daniel E. McLean (“McLean”) (collectively, “the Defendants”) for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent inducement. In the instant motion, the Defendants move to dismiss the fraudulent inducement claim pursuant to CPLR 3211(a)(7) as duplicative of the breach of

contract claim. They also seek to dismiss the entire complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.¹

BACKGROUND

Freemont is a limited partnership organized under California law, with its principal place of operations in New York City. It is in the real estate-investment business, whereas it provides mezzanine-level financing for both public and private real estate operating companies.

Defendants MCL P21. and MCL Land are limited liability companies organized under Delaware Law, and have their principal place of business in Chicago, Illinois. MCL P21 was formed to construct and sell condominium units in Chicago. MCL Land wholly-owns MCL P21.

Defendant MCL Inc. is a corporation organized under Illinois law, with its principal place of business in Chicago. It has no direct corporate relationship with MCL P21 and MCL Land.

Defendant McLean is a Illinois resident, and the president of MCL Inc. He is also the manager of MCL Land and MCL P21.

In December 2005, non-party CBRE/L.J. Melody & Company (“CBRE/Melody”), a real estate broker, sent Freemont an offering memorandum on behalf of MCL P21. MCL P21 sought mezzanine-level financing from Freemont for a high-rise condominium it was constructing in Chicago.

¹ In a footnote in its moving papers, the Defendants argue that MCL Land and MCL Inc were improperly joined in the instant action, and the complaint should be dismissed as against them. (*See, Defendants Memo of Law at page 3, footnote 2*) However, the Defendants fail to notify this Court in its Notice of Motion that it is moving for this, they do not address their argument in the body of the moving papers, nor do they provide legal authority for their contention. Accordingly, this Court will not address this request for relief.

Freemont became interested in conducting the transaction with the Defendants. Upon McLean's invitation, Freemont's representatives went to Chicago for a meeting in January 2006. CBRE/Melody was present during the meeting's entirety; Keith A. Huizinga, its Vice President, met Freemont's delegates at the airport and drove them to the meeting.

Negotiations ensued for approximately the next month. Freemont, from its New York office, communicated with both McLean and CBRE/Melody about entering into an agreement. On February 7, 2006, an application was signed on behalf of MCL P21 by MCL Land and MCL, Inc.; McLean issued a personal guarantee. It provided, *inter alia*, that MCL P21 was to pay certain costs and fees to Freemont. The parties dispute whether this application constitutes a binding agreement.

On May 4, 2006, Freemont learned that MCL P21 obtained mezzanine-financing from another lender. Freemont then demanded that they remit the costs and fees provided for in the application; the Defendants refused. On September 11, 2006, Freemont commenced the instant action, contending that CPLR 302(a)(3) confers jurisdiction over the Illinois-based Defendants.

In the instant motion, the Defendants move to dismiss the Third Cause of Action, Fraudulent Inducement, pursuant to CPLR 3211(a)(7) because they aver Freemont does not plead a cognizable claim against them. In addition, they contend that they have no sufficient contacts with New York for it to confer jurisdiction over them. Accordingly, they move to dismiss the entire complaint under CPLR 3211(a)(8).

DISCUSSION

Third Cause of Action, Fraudulent Inducement: Dismissal Pursuant to CPLR 3211(a)(7)

“A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . .” (CPLR 3211(a)(7)) In a motion to dismiss, 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 AG Capital Funding Partners, LP v State Street Bank and Trust Co*, 5 NY 3d 582 [2005]). “The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993].)

The Defendants contend that the fraudulent inducement claim should be dismissed because it is simply a restatement of the breach of contract claim. Freemont avers that it adequately plead that the Defendants willfully misrepresented then-present facts in order to induce it to enter into the purported contract.

“To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.” (*Krantz v Chateau Stores of Canada*, 256 AD 2d 186 [1st Dept 1998]; *See, also, First Bank of Americas v Motor Car Funding, Inc.*, 257 AD 2d 287 [1st Dept 1999].) “No cause of action for fraud is stated or exists where the only fraud charged relates to a breach of a contract.” (*See, Dalton v Union Bank of Switzerland*, 134 AD 2d 174 [1st Dept 1987].) “The mere

addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud.”

(Devlin v 645 First Ave. Manhattan Co, 229 AD 2d 343 [1st Dept 1996].)

Here, Freemont pleads that

. . . Defendants consistently assured Plaintiff of their intention to abide by the terms and the conditions of the Contract. . .

(Complaint at page 7, ¶ 38)

Plaintiff is informed and believes that Defendants entered into the Contract without the intention of performing their obligations thereunder. . .

(Id, ¶ 39)

Relying detrimentally on Defendants’ false representations that they intended to enter into the transaction contemplated by the Contract, Plaintiff proceeded with due diligence for the transaction

(Id at page 8, ¶ 40)

Freemont’s fraudulent inducement-claim pleading does not contain any allegations beyond those found in the breach-of-contract claim. Both claims allege, summarily, that Freemont upheld its part of the alleged bargain and that the Defendants failed to abide by theirs; Freemont therefore sustained damages, including lost profits. *(Id, at pages 5-6, ¶ 24-31; pages 7-8, ¶ 37-41)* The fraudulent inducement claim does contain the additional contention that the Defendants “made false representations” in order to induce Freemont to enter into the employment relationship. *(Id, ¶ 39-40)* But this aversion reverts back to the breach-of-contract claim because it is this alleged fraud that lead to the purported contract’s formation. This is merely an additional allegation that the Defendants did not intend to honor their contractual

obligations. The pleadings are therefore insufficient to sustain a fraudulent inducement cause of action apart from the breach of contract claim, on which the former is premised upon.

However, if a complaint is found to be insufficient, “affidavits that contain sufficient detail, which are submitted in opposition, may cure any defects found in the complaint.” (*See Leiderman v Gilbert*, 176 AD 2d 525 [1st Dept 1991].) Here, Christopher B. Taube, Fremont’s Vice President, attests that he attended the January 2006-Chicago meeting with the Defendants.

During the meeting

[Daniel McLean] also instructed [Fremont] that we should communicate directly and exclusively with CBRE/Melody regarding requests for information, due diligence activities. . .and any other matters with respect to the terms and conditions of any potential mezzanine financing proposal. . .In no uncertain terms, Daniel McLean held CBRE/Melody out to be Defendants’ sole and exclusive agent for the mezzanine financing of the project.

(*Taube Aff’d*, at pages 2-3, ¶ 7) ²

In contrast, McLean attests that “[CBRE/Melody] was not authorized to negotiate. . .on behalf of the Defendants.” (*McLean Aff’d*, at page 3, ¶ 11) Furthermore, he attests that “Neither I nor any of the MCL Companies ever requested or authorized CBRE/Melody to communicate or negotiate with Fremont on our behalf.” (*Id*, at page 4, ¶ 18) These dueling affidavits present a factual issue as to what was conveyed to Fremont at the January 2006-Chicago meeting regarding CBRE/Melody’s relationship with the Defendants. However, when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), the analysis is focused on the pleadings, not the

² Frederick P. Zarrilli, Managing Director of Fremont, attests to the same in his affidavit. (*See, Zarrilli Aff’d*, at page 3, ¶ 9)

proffered affidavit's veracity as a matter of law. (*See, ILG Capital LLC v Archipelago LLC*, 36 AD 3d 401 [1st Dept 2007].)

“To establish a prime facie claim of fraudulent inducement, [the] plaintiff must establish that a material representation, known to be false, has been made with [the] intention of inducing reliance on [the] misstatement, and as a result of the reliance plaintiff sustained damages.”

(*Smalley v Dreyfus Corp*, 2007 WL 685995 [N.Y.A.D.1st Dept].) Furthermore, there must be a demonstrated nexus “between [the] alleged misrepresentations and [the] losses purported to have been sustained.” (*Megaris Furs, Inc v Gimbel Bros Inc*, 172 AD 2d 209 [1st Dept 1991].)

Here, the purported agreement is between Freemont and the Defendants, with the appropriate signatures affixed to it. (*See, Oberdier Aff'd, Ex 2*). Regardless of Taube's attestation that he and his colleagues believed CBRE/Melody to be the Defendants' agent, Freemont alleges that it spoke directly with McLean regarding the purported contract's terms and formation. (*See, Complaint at page 4, ¶ 18; Taube Aff'd at page 4, ¶ 11*) Moreover, the complaint and accompanying affidavits are bereft of any allegations that Freemont agreed to provide the Defendants with the financing *because* it believed CBRE/Melody was the latter's agents. Freemont fails to plead, even with the affidavits' addition, that the damages are the result of the Defendants alleged misrepresentation regarding CBRE/Melody's agency status. Rather, the alleged damages incurred are the result of the Defendants' non-performance. (*Complaint at page 6, ¶ 31; at page 8, ¶ 41*)

Accordingly, the affidavits do not allege a wrong beyond those plead in the contract-breach claim. Rather, the fraudulent inducement claim is a repackaging of the breach of contract cause of action. The fraudulent inducement claim therefore must be dismissed.

Dismissal Pursuant to CPLR 3211(a)(8) for Lack of Personal Jurisdiction

CPLR 302(a)(3)

Freemont avers that New York has personal jurisdiction over the Defendants pursuant to CPLR 302(a)(3). This is premised on its allegation that the Defendants committed a tortious act in New York, which caused injury to it. Moreover, Freemont contends that the Defendants regularly do business in New York and derive a substantial amount of its income from said activity. (*See, Complaint at page 2, ¶ 7*)

A court “may exercise personal jurisdiction over any non-domiciliary. . .who in person or through his agent. . .commits a tortious act within the state causing injury within the state if [she/he] regularly does business in New York or engages in any other persistent course of conduct or derives substantial revenue from. . .services rendered in the state.” (*CPLR 302(a)(3)(I)*) Moreover, if the individual “expects or should reasonably expect the [tortious] act to have consequences in the state and derives substantial revenue from interstate or international commerce”, she/he is subject to New York’s personal jurisdiction. (*See, CPLR 302(a)(3)(ii)*)

In order to confer personal jurisdiction under CPLR 302(a)(3), “the plaintiff must show that the defendants committed a tort outside the state, causing injury to the plaintiff in New York.” (*Fantis Foods, Inc v Standard Importing Co, Inc*, 49 NY 2d 317 [1980].) Here, Freemont

fails to sufficiently plead that the Defendants committed a tort, i.e., they fraudulently induced it to enter into the loan application.³ Because the complaint does not contain a properly-pleaded cause of action sounding in tort, the Defendants are not subject to New York's jurisdiction under CPLR 302(a)(3).

In opposition to this motion, Freemont contends for the first time that New York can exert personal jurisdiction over the Defendants under CPLR 301 and CPLR 302(a)(1). CPLR 301 establishes standard principles for personal jurisdiction while CPLR 302(a)(1) provides for long-arm jurisdiction. (*See Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988].)

Plaintiffs bear the burden of pleading the factual basis for this court's exercise of personal jurisdiction over the defendants. (*See, Teplin v Manafort*, 81 AD 2d 531 [1st Dept 1981].) To be sure, the complaint asserts jurisdiction on the non-viable grounds that the Defendants committed a tort that had its effects in New York. However, "there is no requirement in New York pleading practice that the complaint allege the basis for personal jurisdiction." (*Fishman v Pocono Ski Rental, Inc*, 82 AD 2d 906 [2nd Dept 1981], *see also Siegel, New York Practice* § 215.) Freemont does allege that the Defendants transact business in New York and derive income here. (*See, Complaint at page 4, ¶ 7*) While this allegation is part of the jurisdictional conferral under CPLR 302(a)(3), it nevertheless pleads a basis for personal jurisdiction based upon the Defendants' alleged business transactions. Accordingly, this Court will entertain the arguments for jurisdiction under CPLR 301 and CPLR 302(a)(1) asserted in the parties' memoranda of law.

CPLR 301

³ *See, supra.*

“A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.” (*CPLR 301*) An entity doing business in New York is deemed present here for purposes of jurisdiction under CPLR 301. (*See, Kreutter, supra*) The determination as to whether a business entity is doing business in New York is based on several factors, but only one is needed to establish a presence here. (*See, Georgia-Pacific Corp v Multimark's Int'l Ltd*, 265 AD 2d 109 [1st Department 2000].) Among the factors considered is whether the entity solicits business in New York. (*Id.*)

Here, Freemont avers that the Defendants are doing business in New York because of their affiliation with a real estate project at 455 Central Park West. Taube attests that during the January 2006-Chicago meeting

Daniel McLean also suggested that, as part of Freemont's due diligence. . . Freemont representatives should visit MCL Companies' high-profile project located at 455 Central Park West in New York City. This project was included in the Parkview Offering Memorandum provided by CBRE/Melody to Freemont, and appears as one of MCL Companies' projects on its website.

(*Taube Aff'd at page 3, ¶ 8*)

Indeed, the MCL Companies's website contains a link to residential properties entitled “Beyond Chicago.” (*See, <http://www.mclcompanies.com>*) The link is to a website for the 455 Central Park West property, which identifies the MCL Companies as the project's developer. (*See, Zarrilli Aff;d, Ex B*) Furthermore, McLean gave interviews in 2001 and 2003 for New York Times articles about the project. (*Zarrilli Aff'd, Ex C and Ex D*) These articles identify McLean and the MCL Companies as the project's developers. (*Id.*)

McLean, however, attests that

other than myself, the Defendants. . . have no interest or involvement whatsoever in the 455 CPW Project. There is no corporate relationship whatsoever - direct or indirect - between these Defendants and the companies involved in the 455 CPW Project.

(McLean Reply Aff'd at page 2, ¶ 3)

The only relationship. . . is that I have a partial equity interest in each of them: I hold a minority equity interest. . . in the entities involved in 455 CPW Project and a 60% equity interest. . . in Defendants MCL P21 and MCL Land, which are involved in the condominium project at issue. . .

(Id, ¶ 4)

Additionally, I am the sole shareholder of Defendant MCL, Inc., but that entity has no interest in either the 455 CPW Project or the condominium project at issue in this lawsuit.

(Id, ¶ 5)

The MCL Companies [identified as the 455 CPW Project's developer] are a large group of investment companies that each focus on separate, discrete real estate projects. As head of the MCL Companies, I seek out opportunities for real estate development. . . [and] manage the development projects on behalf of those investors.

(Id, ¶ 6)

McLean further attests to the 455 CPW Project's ownership:

455 CPW LLC is the owner of the 455 CPW Project. . . I own a direct 27.5% interest and an indirect interest of about 14.37% in 455 CPW LLC

(Id at page 4, ¶ 16-17).

Moreover, he identifies the other owners and managers of the project. *(Id.)* A copy of the limited-liability agreement for 455 CPW LLC is also proffered to support his assertion. *(Id, Ex*

B)

Here, none of the corporate defendants are connected to the New York-based development project. While the named Defendants are part of the wider-ranging MCL Companies, the developer of 455 CPW, there is no basis to confer jurisdiction on them. Indeed, in order to confer jurisdiction over a sister/subsidiary because of the sister/parent's activities, the control must be so complete that the entities are considered one in the same. (*See, Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY 2d 426 [1972].) New York cannot exert personal jurisdiction over MCL P21, MCL Land, and MCL, Inc because of the MCL Companies involvement in 455 CPW.

McLean, however, admittedly is involved here. (*Id at page 5, ¶ 24*) But his involvement in 455 CPW was in his corporate capacity as 455 CPW LLC's representative. (*Id*) Fremont's complaint names McLean *individually*. A company executive "does not subject [herself/himself], individually, to the CPLR 301 jurisdiction of our courts. . . unless [she/he] is doing business in our state individually." (*Laufer v Ostrow*, 55 NY 2d 305 [1982].)

Since McLean's role was in a corporate rather than individual capacity, CPLR 301 does not confer jurisdiction over him.

CPLR 302(a)(1)

A court "may exercise personal jurisdiction over any non-domiciliary. . . who in person or through his agent. . . transacts any business within the state or contracts anywhere to supply. . . services in the state." (*CPLR 302(a)(1)*) In order for New York to exercise jurisdiction over a non-domiciliary, such person "must have purposely availed herself of the privilege of transacting

business in New York so as to invoke the benefits and protections of [its] laws.” (*Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD 3d 351 [1st Dept 2004].)

Here, the genesis of the contacts between Freemont and the Defendants is the offering memorandum sent to the former allegedly on behalf of the latter by CBRE/Melody. (*Tauhe Aff’d at page 1*, ¶ 3) While McLean attests that CBRE/Melody was not the Defendants’ agents with respect to the financing transaction ⁴, they evidently knew about this solicitation and agreed to meet with Freemont. Subsequently, the parties met in Chicago followed by telephonic conferences between New York-based Freemont and Illinois-based CBRE/Melody and McLean. The Defendants were never present in New York for purposes of the mezzanine-financing loan.

Generally, a non-domiciliary is subject to the jurisdiction of a New York court if she or he has purposely transacted business within the State, and there is a “substantial relationship” between the activity and the cause of action. (*See, Kreutter, supra*) In order for the Defendants to be subject to New York’s jurisdiction, Freemont “must make a prime facie showing that [they are] subject to the jurisdiction of the Supreme Court” because there is a nexus between their contacts with New York and the alleged contract breaches. (*Alden Personnel v David*, 2007 WL 853195 [2nd Dept].)

Interstate negotiations by telephone are insufficient to impose personal jurisdiction in New York over a non-resident. (*See, Edelman v Taittinger, SA*, 298 AD 2d 301 [1st Dept 2002].) Moreover, if the contract was negotiated *without* any New York presence by the defendants, CPLR 302(a)(1) does not confer jurisdiction. (*See, Worldwide Futgol Assocs Inc v Event*

⁴ See, *McLean Aff’d at page 3*, ¶ 11, *supra*.

Entertainment, Inc., 983 F Supp 173 [SDNY 1997], *applying New York law.*) Here, CBRE/Melody's solicitation to New York and the phone conversations to New York related to the preliminary negotiations regarding the proposed mezzanine-financing deal. There is no dispute that the Defendants failed to negotiate or execute the purported contract in New York. They only communicated telephonically to New York from Chicago to discuss preliminary negotiations. This is insufficient to confer jurisdiction under CPLR 302(a)(1).

"A party may move for judgment dismissing one or more causes of action asserted against [the Defendants] on the ground that the court has no jurisdiction of the person of the defendant." (*CPLR 3211(a)(8)*) Since there is no basis for New York to assert personal jurisdiction over the Defendants, their motion to dismiss the complaint pursuant to CPLR 3211(a)(8) is granted. ⁵

⁵ In a footnote in their opposition papers, Freemont requests that if this Court does not find that the Defendants are subject to New York's personal jurisdiction, their motion should nevertheless be denied pursuant to Rule 3211(d). (*See, Freemont Memo in Opp'n at page 11, footnote 3*) Freemont fails to plead the existence of facts, not yet discovered, that would confer jurisdiction over the Defendants. Accordingly, its request is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Freemont's complaint is dismissed pursuant to CPLR 3211(a)(8)

This shall constitute this Court's decision and order.

Dated: May 7, 2007

ENTER:



RICHARD B. LOWE, III, J.S.C.

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