

**County of Nassau v 100 Black Men of Long Island  
Development Group, Inc.**

2007 NY Slip Op 34254(U)

December 21, 2007

Supreme Court, Nassau County

Docket Number: 0867-06/

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 12**

\_\_\_\_\_  
COUNTY OF NASSAU

Plaintiff,

-against-

INDEX NO.: 020867/2006  
MOTION DATE: 10/02/2007  
MOTION SEQUENCE: 008

100 BLACK MEN OF LONG ISLAND DEVELOPMENT GROUP, INC., INCORPORATED VILLAGE OF HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, EDWARD DICKMAN, THE UNITED STATES POSTAL SERVICE, NEW YORK CONTRACTING MANAGEMENT CORP., MICHAEL BLADYKAS, ARC MECHANICAL CORP., ALL SERVICE ELECTRIC, INC., NAHAS RUG COMPANY and "JOHN DOE #1 through #100 inclusive, the last 100 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or corporations having an interest in the property described in the complaint,

Defendants.

\_\_\_\_\_  
100 BLACK MEN OF LONG ISLAND DEVELOPMENT GROUP, INC.,

Third Party Plaintiff,

-against-

VILLAGE OF HEMPSTEAD, WAYNE J. HALL, SR., as MAYOR OF THE VILLAGE OF HEMPSTEAD, and CLAUDE GOODING, as COMMISSIONER OF THE INCORPORATED VILLAGE OF HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY,

Third Party Defendants.  
\_\_\_\_\_

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.....	1
Memorandum of Law in Support of Plaintiff's Motion to Dismiss Counterclaim and for Summary Judgment.....	2
Memorandum of Law in Opposition to the County of Nassau's Motion to Dismiss.....	3
Reply Affirmation of Marc E. Wieman, Esq. & Exhibits Annexed.....	4

This motion by plaintiff for an order pursuant to CPLR § 3211(a)(7) dismissing the counter claim asserted against plaintiff and for an order pursuant to CPLR § 3212 granting summary judgment for the relief demanded in the complaint is granted.

This action was commenced to foreclose on a mortgage encumbering that certain real property situate at 100 Main Street, Hempstead, New York. A loan was made in the amount of \$10,000,000 by defendant, the Incorporated Village of Hempstead Community Development Agency (the CDA), to co-defendant 100 Black Men of Long Island Development Group Inc., (OBM). The loan is evidenced by a Note to CDA in the amount of \$10,000,000 and a Mortgage. On October 27, 2001, OBM executed an Assignment of Rents Leases and Other Contract Rights to the CDA.

The Mortgage was assigned by the CDA to plaintiff, the County of Nassau, on August 9, 2001, as was the Assignment of Rents Leases and Other Contract Rights.

Defendant OBM answered the complaint and asserted, inter alia, one Counter Claim against the plaintiff for breach of contract. Accordingly issue has been joined and the matter is ripe for summary judgment. Plaintiff has not served an answer to the Counter Claim and moves for its dismissal.

Plaintiff has established a prima facie right to summary judgment to foreclose on the mortgage. It has established the making of the mortgage, an assignment to Nassau County and a default in payment as of August 1, 2005. Accordingly, the burden shifts to defendant to raise a triable issue of fact as to why plaintiff should not foreclose on the mortgage.

Defendant OBM does not deny a default in payment of the mortgage Note according to its terms. It does assert causes of action against certain co-defendants for tortious interference with

contract and tortious interference with prospective economic relations. However, it is the determination of the Court that these cross-claims are substantially similar to the third party claims asserted by the defendant OBM in its third party complaint, also pending before this court, and are therefore dismissed without prejudice as cross-claims and shall proceed as third party claims. The aforesaid third party claims have been addressed in a companion Order of even date.

Defendant OBM also asserts a counterclaim against plaintiff. There is a single cause of action for an alleged breach of contract by plaintiff. Counter claimant alleges that plaintiff undertook to pay approximately \$500,000 for the renovation of the subject property pursuant to a putative Lease with Nassau County BOCES, and that before the build-out was completed, plaintiff refused to pay any more expenses of the project which resulted in mechanics liens being filed against the premises and a fatal delay in occupancy of the proposed leasehold.

Plaintiff moves to dismiss defendants' counterclaim for failure to state a cause of action. In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, and the complaint will be construed in the light most favorable to plaintiffs (see generally Leon v Martinez, 84 N.Y.2d 83; Guggenheimer v Ginzburg, 43 N.Y.2d 268; Rovello v Orfino Realty Co., 40 N.Y.2d 633.) Plaintiff's allegations must be taken as true, Pietropaoli Trucking v Nationwide Mutual Insurance Co., 100 A.D.2d 680 (3d Dept 1984), the only duty of the court being to review the allegations stated in the complaint, take them as true and resolve all reasonable inferences in favor of plaintiff. Cron v Hargro Fabrics, Inc., 91 N.Y.2d 362, 366 (1998).

Two legal principles militate in favor of dismissal. First, the elements of a breach of contract claim are 1) the existence of a contract; 2) due performance by the plaintiff; 3) breach of the contract by defendant; and 4) damage as a result of the breach. Campo v First Nationwide Bank, 857 F. Supp 2d 264, 270 (E.D.N.Y. 1994). "The complaint must plead the terms of the agreement upon which [plaintiff's] liability rests." Posner v Minnesota Mining & Manufacturing Co., 713 F. Supp 2d 562, 563 (E.D.N.Y. 1989). Failure to establish the existence of a contract requires dismissal of a contract claim. Caniglia v Chicago Tribune- New York News Syndicate

[\* 4 ]  
Inc., 204 A.D.2d 233 (1<sup>st</sup> Dept 1994).

Defendants pleading fails to establish the existence of a contract. Apparently plaintiff paid a substantial portion of the construction costs of renovating 100 Main Street for BOCES. The counterclaim states in pertinent part: "The County elected to pay for the renovations directly rather than underwrite the bank financing 100BMDG [OBM] secured to cover the construction costs because the bank required that their construction loan be given priority over the County's mortgage with 100BMDG. ... As a result of the County's continual course of conduct in paying construction related expenses ... the County impliedly covenanted that it would proceed in good faith and deal fairly with 100BMDG. The County's decision to cease performance breached the covenant ..." Answer at ¶¶ 37 & 41. The County's extended course of conduct in paying the construction related expenses for the BOCES build-out at 100 Main Street does not establish a contract. OBM provides no written contract. Although a legally enforceable agreement can be created by the parties' course of conduct, Barry, Bette & Led Duke, Inc. v State of New York, 169 Misc.2d 594 (Court of Claims, 1996), citing to Brown Bros. Elec. Contrs. v Beam Constr. Corp., 41 N.Y.2d 397, 399-400, none of the elements necessary to define a contract are present. There is not a scintilla of evidence about what the bargain might have been, assuming for purposes of argument that it is not necessary to be in writing to be enforceable. See G.O.L. § 5-701, Nassau County Charter § 2206.

Second, the plaintiff is a municipal entity and all contracts must be in writing, after approval of the legislature, must be signed by the County Executive or an authorized deputy, and must be filed with the Comptroller. Nassau County Charter § 2206. Maidgold Associates v City of New York, 64 N.Y.2d 1121 (1985); Gladsky v City of Glen Cove, 164 A.D.2d 567 (2d Dept 1991).

Defendant's opposition does not change this result. Dalton v Educ. Testing Serv., 87 N.Y.2d 384 (1995), relied upon by defendant, is the quintessential statement that good faith and fair dealing describes the duty of performance of a contract. Absent a contract there is no such abstract duty. As far as the applicability of the provision of the Nassau County Charter cited by

[\* 5 ]  
plaintiff no citation need be entered to substantiate the statement that a contract to pay construction expenses of \$500,000 cannot be made without adherence to formal prerequisites.

On the basis of the foregoing, plaintiff's motion for summary judgment is granted, and it is

ORDERED that plaintiff is authorized to foreclose on the underlying mortgage, and it is further

ORDERED that the counterclaim asserted against plaintiff is dismissed with prejudice for failure to state a cause of action, and it is further

ORDERED that the cross-claims asserted in the answer of defendant One Hundred Black Men of Long Island Development Group, Inc., are dismissed without prejudice.

The foregoing constitutes the decision and order of the court.

Dated: December 21, 2007

  
J.S.C.

**ENTERED**

JAN 03 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**