

Town House Stock LLC v Coby Housing Corp.

2007 NY Slip Op 34383(U)

March 16, 2007

Supreme Court, New York County

Docket Number: 602514/06

Judge: Helen E. Freedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Helen E. Freedman
Justice

PART 39

Index Number : 602514/2006
TOWN HOUSE STOCK LLC,
vs
COBY HOUSING CORP.,
Sequence Number : 004
PSJ

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the written memorandum of law.*

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: March 16, 2007 _____ *HZF*
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

PART 39

-----X
TOWN HOUSE STOCK LLC, MEADOW MANOR STOCK
LLC, STEVENSON TOWERS STOCK LLC, COLUMBUS
MANOR STOCK LLC, WESTWOOD HOUSE STOCK LLC,
HIGHBRIDGE HOUSE STOCK LLC, TOWN HOUSE BI
L.P., MEADOW MANOR BI L.P., STEVENSON TOWERS BI
L.P., COLUMBUS MANOR BI L.P., WESTWOOD HOUSE
BI L.P., HIGHBRIDGE HOUSE BI L.P. and STELLAR
BISCAYNE LP,

Plaintiffs,

Index No. 602514/06

- against -

COBY HOUSING CORP., THE JONATHAN COMPANY-
TW, THE JONATHAN COMPANY-MM, THE JONATHAN
COMPANY-ST, THE JONATHAN COMPANY-CM, THE
JONATHAN COMPANY-WH, HIGHBRIDGE HOUSE
COMPANY, T.H.W. HOUSING CO., INC., MEADOW
MANOR, INC., STEVENSON TOWERS HOUSING CO.,
INC., COLUMBUS MANOR INC., WESTWOOD HOUSE,
INC., HIGHBRIDGE HOUSE, INC., HIGHBRIDGE
HOUSING ASSOCIATES, AFFORDABLE HOUSING LLC,
PORTOFINO BISCAYNE LLC, LESLIE M. WESTREICH
and SS SONTAG QI LLC.,

Defendants.

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Helen E. Freedman, J.S.C.

Defendants' motion for partial summary judgment pursuant to CPLR 3212 (e) is granted as set forth below.

In this action, plaintiffs seek (1) a declaration that defendants breached an agreement to purchase a Florida apartment complex known as "Portofino" by refusing to close on the scheduled date, despite a time of the essence clause, entitling plaintiffs to a \$4.5 million deposit and attorneys' fees (2) a permanent injunction to prevent defendants from commencing another proceeding related to the \$4.5 million deposit, and (3) to recover \$10 million that plaintiffs paid

over and above the originally agreed upon price for New York properties claiming defendants fraudulently induced plaintiffs to enter into an agreement settling prior litigation and breached the implied covenant of good faith and fair dealing. Defendants move for partial summary judgment dismissing the injunction request, attorneys' fees, fraudulent inducement, and breach of the covenant of good faith and fair dealing claims. Contending that the only proper parties in this action include those entities relevant to the Portofino deal, defendants also move to dismiss claims by plaintiffs except for Stellar Biscayne L.P. and against defendants except Portofino Biscayne LLC.

The parties have been engaged in court battles in New York and Florida concerning enforcement of real estate contracts to purchase and sell properties in both of those states for several years. Under the "Portofino Agreement" dated March 17, 2005, plaintiffs agreed to sell defendants Portofino. Under the "Option Agreement," defendants agreed to sell plaintiffs six Mitchell Lama buildings in New York City. A Supplemental Agreement connected the two deals. In an effort to resolve the prior litigations in New York and Florida, the parties executed an agreement entitled "Agreement Amending Option Agreement, Portofino Agreement and Supplemental Agreement" dated April 3, 2006 (the "Settlement Agreement"), which amended certain provisions of the Option and Portofino Agreements and declared the Supplemental Agreement null and void. The purchase price for Portofino remained \$95 million. However, the parties agreed to increase the price of the New York properties from \$120 million to \$130 million.

The Settlement Agreement provided that Portofino and the first group of New York properties would close simultaneously, and it contained a time of the essence clause. The parties

[* 4]

agreed to adjourn the closing to June 29, 2006 pursuant to the adjournment rights set forth in the Settlement Agreement. On June 29th, the parties closed on five of the six New York properties pursuant to the Settlement Agreement, and thus plaintiffs paid an allocated portion of the \$130 million purchase price, approximately \$119 million. The parties agreed to close on the sixth property after defendants could legally tender the deed pursuant to the Division of Housing and Community Renewal (“DHCR”) regulations for the privatization of Mitchell Lama buildings. However, defendants refused to close the \$95 million Portofino deal.

On June 23, defendants filed an action in Florida, *Portofino Biscayne, LLC v. Stellar Biscayne, L.P.*, Case No. 06-12284-CA-06, in the 11th Judicial Circuit Court of Miami-Dade County, Florida, seeking the \$4.5 million deposit.

On July 17, 2006, plaintiffs commenced this New York action claiming that defendants breached the Portofino Agreement by refusing to close despite the time of the essence provision, entitling them to the \$4.5 million deposit. The Complaint also alleges that plaintiffs would not have agreed to pay an additional \$10 million for the New York properties had they known that the defendants never intended to close on Portofino. This allegation grounds both the fraudulent inducement and breach of the covenant of good faith and fair dealing claims.

In a decision entered on September 11, 2006, this Court denied an application to stay this action in favor of the Florida action because it had been extensively involved in the prior litigation that had culminated in the Settlement Agreement. The Appellate Division affirmed the stay denial in *Town House Stock LLC v. Coby Housing Corp.*, 36 A.D.3d 509 (1st Dept. January 23, 2007) based on “this action’s connection to the New York litigation.” On November 11, 2006, the Florida court stayed the Florida action in favor of this New York action. Because the

[* 5]

Florida action is already stayed, plaintiffs acknowledge that the cause of action seeking to enjoin defendants from commencing additional proceedings is moot.

In a decision dated March 12, 2007, this Court granted plaintiffs' motion for partial summary judgment on the cause of action seeking a declaratory judgment, awarded plaintiffs the \$4.5 million deposit, and awarded attorneys' fees in an amount to be determined after reference to a Special Referee. Thus, the \$4.5 million claim and attorneys' fees claim have been decided. When this Court denied defendants' application to stay this action in favor of the Florida action, it deferred the issue of the validity of the fraudulent inducement claim. However, the Appellate Division dismissed that claim in *Town House Stock LLC v. Coby Housing Corp.*, 36 A.D.3d 509 (1st Dept. January 23, 2007) on the grounds that the fraud claim was not sufficiently distinct from the declaratory judgment cause of action, which is essentially a breach of contract claim, and that general allegations that a party entered into a contract with the intention not to perform it are insufficient to support a fraud claim.

Because the prior proceedings have resolved many of the issues, the only real dispute here concerns the validity of the breach of the implied covenant of good faith and fair dealing claim. Defendants contend that, like the fraudulent inducement claim, the breach of the implied covenant of good faith and fair dealing claim is duplicative of the declaratory judgment cause of action. Plaintiffs contend that claim is not duplicative of the declaratory judgment action because it concerns a different contract and seeks a different sum of money.

The covenant of good faith and fair dealing is implied in every contract, and the claim will not lie where it does not set forth any factual allegations in addition to the allegations

6]

supporting the breach of contract claim. *See Pemasteelisa, S.P.A. v. Lincolnshire*, 16 A.D.3d 352 (1st Dept. 2005). Here, both the breach of contract and breach of covenant of good faith and fair dealing claims arise from defendants' failure to close on Portofino on June 29, 2006. Plaintiffs allege that defendants did not intend to close on Portofino when the parties executed the Settlement Agreement, and then defendants breached the Settlement and Portofino Agreements by not purchasing Portofino on June 29, 2006. Plaintiffs' remedy for this breach is limited to the \$4.5 million deposit as liquidated damages and attorneys' fees pursuant to the Portofino Agreement default provisions. There is no reason for plaintiffs to receive a refund for a portion of the New York properties' purchase price where they do not claim defendants breached the Option Agreement concerning the properties already purchased.

In the cases that plaintiffs cited, the courts either dismissed the breach of the covenant of good faith and fair dealing claim as duplicative of the breach of contract claim, *see Siradas v. Chase Lincoln Fiurst Bank, N.A.*, 1999 WL 787658 (S.D.N.Y. 2005), or upheld the claim because it was based on allegations separate from the breach of contract claim, *see Richmond Shop Smart, Inc. v. Kenbar Dev. Ctr., LLC*, 32 A.D.3d 423 (2nd Dept. 2006). In the latter case, the plaintiff stated claims for breach of a lease, fraud, and breach of the implied covenant of good faith and fair dealing where the plaintiff alleged the defendant breached the lease by renting space to another tenant and also alleged defendant engaged in a scheme to induce plaintiff to terminate the lease and surrender possession. Here, plaintiffs do not allege a separate scheme.

Because this decision and the March 12, 2007 decision have resolved all of the issues in this action, and plaintiffs have already clarified that only Stellar Biscayne L.P. seeks to recover the \$4.5 million deposit, there is no need to amend the caption or dismiss claims against certain

parties going forward.

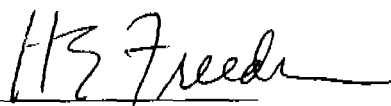
Accordingly, it is

ORDERED that defendants motion for partial summary judgment is granted to the extent that the third cause of action for breach of the implied covenant of good faith and fair dealing and the fourth cause of action seeking a permanent injunction are dismissed; and based on previous decisions, the remainder of the motion is moot, and it is further,

ORDERED that the Clerk is directed to enter judgment dismissing the third and fourth causes of action.

DATED: March 16, 2007

ENTER:


Helen E. Freedman, J.S.C.

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE