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

PRESENT: RICHARD B. LOWE III PART 59

Justice

Index Number : 602011/2007

HILFIGER, TOMMY

VS.

25 WEST 39TH STREET REALTY LLC

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 602011-07

MOTION DATE 3/3/08

MOTION SEQ. NO. #001

MOTION CAL. NO.

ad on this 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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 28 2008

COUNTY CLERK'S OFFICE NEW YORK

Dated: 8/20/08

RICHARD B. LOWE III 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

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TOMMY HILFIGER U.S.A., INC.,

Plaintiff,

Index No: 602011/07

-against-

DECISION AND ORDER

25 WEST 39TH STREET REALTY, LLC and 25 WEST 39TH STREET HOLDINGS, LLC,

Defendants.

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RICHARD B. LOWE III, J:

This dispute arises out of an agreement for the sale of real property. The plaintiff seeks to enforce a profit participation provision asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference. On this motion, Defendants move to dismiss pursuant to CPLR 3211[a][7].

BACKGROUND

On August 24, 2005, Tommy Hilfiger U.S.A., Inc. ("Hilfiger") and 25 West 39th Street Realty ("Realty") entered into a Sale-Purchase Agreement (the "Agreement") for the sale of a building and property located 25 West 39th Street, New York, New York 10018 (the "Property") (Compl ¶ 6).

Under the Agreement, Paragraph 2C provides that:

> [i]n the event Purchaser sells the Property prior to the date which is three hundred sixty five (365) days after the date of Closing to an entity which is not affiliated with Purchaser or Purchaser's primary investors (and for purposes hereof, a sale shall be deemed to have occurred if and only if a deed to the Property whenever same shall actually be recorded, based upon a contract of sale entered into within such 365 days period), then concurrently therewith, Purchaser shall pay to Seller a sum equal to the product of twenty percent (20%), multiplied by the positive

> difference between (i) the net sales price actually received by Purchaser in connection with the sale and (ii) the Purchase Price.

(*Id.* ¶ 7; Compl Ex A at 3.)

Thus, the Agreement provided that if Realty sold the Property to another entity within one year of the closing, Hilfiger would be entitled to a twenty percent (20%) profit participation. Under the Agreement, the closing occurred on December 2, 2005 (the "Closing") (Compl ¶ 6). Subsequently, a deed, reflecting Hilfiger as grantor and Realty as grantee, was recorded in January 2006 (Sitt Aff Ex B). As of the commencement of this action, no deed relating to the Property was ever executed, delivered, or recorded after the Closing (Sitt Aff ¶ 5).

25 West 39th Street Holdings ("Holdings") owned one hundred percent (100%) of the equity interest in, and wholly controlled, Realty (Compl ¶ 9). In September of 2006, Holdings entered into a Membership Interest Purchase And Sale Agreement (the "Membership Sale Agreement") (Sitt Aff ¶ 6). Under the Agreement, an entity called 25 Bryant LLC acquired all of the membership interests in Realty formerly owned by Holdings (Sitt Aff ¶ 7). The Hilfiger Membership Sale Agreement was entered into in September of 2006 (id. at ¶ 6) and the closing occurred on December 3, 2006 (*id.* at ¶ 7).

Hilfger alleges that, within one year of the Closing, Realty entered into an agreement effectively to sell the Property to Bryant (*id.* at ¶ 11). Realty structured a transaction to avoid a literal sale of the Property by agreeing to sell control of Realty through transfer of all of the interest of Holdings to 25 Bryant LLC ("Bryant") for $80,000,000 (*id.*). And, that as a result of the transfer of an interest in Holdings within one year of the Closing, Hilfiger is entitled to a twenty percent (20%) profit participation; namely, twenty percent (20%) of the difference between the Purchase Price and "the net sales price actually received by Purchaser in connection

with the sale" to Bryant (*id.* at ¶ 12).

Hilfiger commenced this action asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference.

Defendants Realty and Holdings move to dismiss. Hilfiger cross-moves pursuant to CPLR 3124 compelling responses to Hilfiger's disclosure devices and pursuant to CPLR 3111[d] denying Defendants' motion to dismiss until such time as Hilfiger has had full and fair discovery.

DISCUSSION

Defendants' motion to dismiss

On a motion to dismiss, "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see Callaghan v Goldsweig*, 7 AD3d 361 [1st Dept 2004]).

Breach of contract

Defendants Realty and Holdings argue that Hilfiger's breach of contract cause of action must be dismissed because no obligation under Paragraph 2C was triggered and, therefore, Defendants did not breach the Agreement. Moreover, even if a sale occurred, Defendants argue that Paragraph 2C should be construed as requiring the recording of a deed and a contract of sale within one year in order to constitute a sale.

The operative provision, Paragraph 2C, of the Agreement provides that

> In the event Purchaser sells the Property prior to the date which is three hundred sixty five (365) days after the date of Closing to an entity which is not affiliated with Purchaser or Purchaser's primary investors (and for purposes hereof, a sale shall be deemed to have occurred if and only if a deed to the Property whenever

> same shall actually be recorded, based upon a contract of sale entered into within such 365 days period), then concurrently therewith, Purchaser shall pay to Seller a sum equal to the product of twenty percent (20%) . . . .

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent[, and that t]he best evidence of what parties to a written agreement intend is what they say in their writing. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008] [internal quotation marks and citations omitted]). "The court discerns ambiguity from the face of the contract alone and without regard to extrinsic evidence" (*Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 [2001]). In the event that the Court determines a contract is unambiguous, then it proceeds to interpret the contract according to its terms. (*R/S Assocs. v NY Job Dev. Auth.*, 98 NY2d 29, 32 [2002]).

Defendants and Hilfiger dispute the meaning of a "sale" under Paragraph 2C of the Agreement. Defendants assert that a "sale" is defined within the Paragraph and that a "sale" does not contemplate Holdings' transfer of ownership interest to Bryant (*see* Mem in Support at 12-13). Hilfiger asserts an alternative interpretation of the language in Paragraph 2C. Relying on extrinsic evidence, Hilfiger asserts that the parties intended a "sale" under Paragraph 2C to also mean a change in ownership interest of the Property in exchange for a purchase price (*see* Mem in Opp at 17-18).

This Court agrees with Defendants and finds that Paragraph 2C of the Agreement is unambiguous. Further, this Court construes the language "and for purposes hereof, a sale shall be deemed to have occurred if and only if a deed to the Property whenever same shall actually be

recorded, based upon a contract of sale entered into within such 365 days period" susceptible to only one interpretation: that a recording of the deed to the Property and a contract of sale within one year were expressly required to constitute a "sale" under Paragraph 2C. Thus, regardless of whether a "sale" under Paragraph 2C contemplates the transaction Holdings entered into with Bryant, Paragraph 2C identified predicate conditions before entitling Hilfiger to the profit participation (*see Oppenheimer & Co. v Oppenheim*, 86 NY2d 685, 690 [1995] ["A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises."] [internal quotation marks omitted]).

Arguing against the existence of such conditions, Hilfiger claims that the language "and for purposes hereof, a sale shall be deemed to have occurred if and only if a deed to the Property whenever same shall actually be recorded, based upon a contract of sale entered into within such 365 days period" was included only for illustrative purposes, and not to add conditions to the meaning of a "sale." Hilfiger contends that the language "was added, by way of example only, to clarify that if resale of the property was accomplished by deed," the timing of the recording of the deed was irrelevant, "so long as the contract of sale was entered into" within one year (Mem in Opp at 18 n. 4). However, Hilfiger offers no canon of contractual interpretation, and this Court is aware of none, that permits this Court to construe "a sale shall be deemed to have occurred *if and only if* . . ." to mean "a sale shall be deemed to have occurred *if, for example* . . ." Accordingly, this Court rejects Hilfiger's contention.

Defendants and Hilfiger also debate the meaning of a "sale" under Paragraph 2C of the Agreement. Defendants assert that a sale of real property has long been held to be distinct from

a sale of membership interest in the corporate entity which owns the real property. Hilfiger, on the other hand, contends that the sale of a controlling membership interest in an entity owning real property is equivalent to selling the real property. While this Court finds it unnecessary to resolve this debate on this motion, this Court remarks on an observation which confirms this Court's interpretation of Paragraph 2C.

Hilfiger relies on New York State Tax Legislation to support its contention that by transferring its membership interest to Bryant, Holdings effected a sale. Hilfiger asserts that by filing a Real Property Transfer Tax Return in connection with the transfer to Bryant, Holdings recognized that a sale had indeed occurred. A filing is required in the event of a "conveyance" (TP-584-I [5/07]). The filing instructions define a "conveyance" as "the transfer or transfer of any interest in real property by any method including . . . transfer or acquisition of a controlling interest in any entity with an interest in real property" (Instructions for Form TP-584, Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax, TP-584-I [11/04]; Gursky Aff Ex G). Notably, the "Closing Documents" paragraph under the Agreement includes a provision relating to a TP-584 filing (Compl Ex A ¶ 7[A][iii] at 9). Because the parties were aware that a "conveyance," for tax purposes, included a transfer of a controlling interest in real any entity with an interest in real property, the parties could have defined a "sale" to have occurred under similar circumstances. Thus, rather than demonstrating that a sale of an entity that owns real property is equivalent to a sale of real property, the regulation demonstrates that the parties were capable of defining a sale to include the transfer of an entity owning real property and chose not to. Based on the principle that the omission of any similar reference in certain provisions while

specifying the particular reference in other provisions must be assumed to have been intentional (*i.e.*, *expressio unius est exclusio alterius*), this Court finds that the parties did not intend to trigger the profit participation provision through the transfer of an entity owning the Property (*see United States Fidelity & Guaranty Co. v Annunziata*, 67 NY2d 229, 233 [1986]; *Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007]).

"Rather than rewrite an unambiguous agreement a court should enforce the plain meaning of that agreement" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990]). The Agreement required the sale of the Property, the recording of a deed to the Property, and a contract of sale withing one year. Even if the transaction entered into by Defendants constitutes a sale as a matter of law, a further requirement of a recorded deed was not satisfied. Based upon this finding, Realty's obligation under the terms of the Agreement to share its profit was never triggered (*Oppenheimer*, 86 NY2d at 690 ["Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract . . ."]). Because Realty's obligation to share its profit was never triggered, Realty did not breach Paragraph 2C of the Agreement. Accordingly, Hilfiger fails to state a claim for breach of contract.

Breach of the covenant of good faith and fair dealing

Defendants argue that Hilfiger's breach of the covenant of good faith and fair dealing cause of action must be dismissed because the claim seeks to imply terms contradicted by the Agreement.

A bedrock principle relating to the breach of the covenant of good faith and fair dealing is that the implied covenant cannot create new duties that negate explicit rights under a contract

(*D & L Holdings v RCG Goldman Co.*, 287 AD2d 65, 73 [2001]). However, "even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract" (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003]). Nor may that right be exercised to deprive a party of "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]).

Here, Hilfiger alleges that Realty breached the implied duty of good faith and fair dealing "by, in bad faith, structuring the transfer of the Property to circumvent its contractual obligations to Hilfiger under the Agreement" (Compl ¶ 21). While the cases cited by Hilfiger support the proposition that the implied duty of good faith and fair dealing may be invoked to enforce the express terms of an agreement, the cases fail to support Hilfiger's attempt to enforce Paragraph 2G. In the cases cited by Hilfiger, a cause of action for breach of contract was asserted (*Hirsch v Food Resources, Inc.*, 24 AD3d 293 [1st Dept 2005]; *N.Y. Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 13 AD3d 425 [2d Dept 2004]; *Quigley v Capolongo*, 53 AD2d 714 [3d Dept 1976]). However, in *Hirsch* and *Fatato Realty*, the courts found the terms, which were allegedly breached, to be ambiguous and, therefore, could not determine whether a good or bad faith breach had occurred (*Hirsch*, 24 AD3d at 295 ["In dismissing plaintiffs' contract claims, the motion court erred in finding that the [] agreement is unambiguous . . ."]; *Fatato Realty*, 13 AD3d at 428 [finding a cognizable claim for breach of contract where a transfer of property may have triggered a right of first refusal]). Accordingly, the ambiguity compelled the courts to sustain the causes of action for breach. Here, this Court finds that the disputed terms of

Paragraph 2C are unambiguous. Therefore, *Hirsch* and *Fatato Realty* are inapplicable and present no impediment to dismissal.

In *Quigley*, 53 AD2d 714, the breach of contract was asserted in connection with a right of first refusal. The court held that, based on the defendant's conduct, the defendant demonstrated a willingness to sell, thus, triggering plaintiff's right of first refusal (*Quigley*, 53 AD2d at 715 ["we do conclude that in the circumstances of this case [the third-party contract] formalized defendant-owners' intention to sell the premises in response to the offer by [the third-party], thus activating plaintiffs' right of first refusal"]). While the court found that the defendant acted in bad faith, the court's holding was nonetheless predicated on a breach of an express contractual term (*see id.*). As the court in *Quigley* did, this Court applied Realty's conduct to the unambiguous terms of Paragraph 2C and determined whether the express terms had been breached. This Court finds that Defendants' conduct did not create an obligation entitling Hilfiger to the profit participation. Although this Court reaches a different outcome than the court in *Quigley*, this Court's determination squarely conforms to its reasoning. It would be incongruous to say that an inference may be drawn that Realty impliedly agreed to a provision which would be destructive of Holdings right to transfer its membership interests. The parties may by express agreement limit or restrict their respective rights, but to imply a limitation upon an already narrow right would be internally inconsistent *(see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]; *see also Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2003]). Accordingly, because Hilfiger's breach of the covenant of good faith and fair dealing cause of action seeks to imply terms contradicted by express terms under the Agreement, the claim is dismissed. While this Court is not convinced that Hilfiger's

allegations are baseless, the law and facts compel a conclusion in favor of Defendants.

Moreover, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], citing *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1995]; *Sheth*, 273 AD2d 72, 73 [2000] [a claim for breach of the implied covenant of good faith and fair dealing may not be used as a substitute for a nonviable claim of breach of contract]). Here, the breach of contract claim is identical to the breach of the implied duty of good faith and fair dealing claim.

Tortious interference

Lastly, Defendants Realty and Holdings argue that Hilfiger's tortious interference cause of action must be dismissed because Hilfiger fails to allege each essential element of the cause of action. First, Hilfiger fails to allege the existence of a breach of contract. Second, Hilfiger fails to allege malice or illegality.

To state a claim for tortious interference, a party must allege "the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Here, Hilfiger's claim for tortious interference stands upon a purported breach of the Agreement (Compl ¶ 27). Because an essential element of the claim is missing, namely, that of breach, the claim must fall (*see id.*). Accordingly, Hilfiger's cause of action for tortious interference is dismissed.

Hilfiger's cross-motion to deny dismissal pursuant to CPLR 3124 and to compel disclosure pursuant to CPLR 3211[d]

Hilfiger cross-moves for disclosure pursuant to CPLR 3211[d], asserting that facts essential to oppose Defendants' motion to dismiss may exist but cannot currently be stated.

Here, Hilfiger fails to make a "sufficient start" to establishing that Defendants breached the Agreement in order to justify further disclosure (*see Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]). Hilfiger fails to allege a valid cause of action for breach of Paragraph 2C of the Agreement. Moreover, Hilfiger fails to demonstrate how further disclosure will lead to uncover information that would justify sustaining its causes of action. Accordingly, plaintiff's cross motion is denied.

Hilfiger's cross-motion compelling discovery is denied as moot.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 21, 2008

ENTER:

J.S.C.