

Alpha Manhattan, LLC v UBS Real Estate Sec., Inc.

2008 NY Slip Op 32976(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 604076/07

Judge: Charles E. Ramos

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

PRESENT: CE Ramos
Justice

PART 53

Index Number : 604076/2007
ALPHA MANHATTAN LLC
VS.
UBS REAL ESTATE SECURITIES INC
SEQUENCE NUMBER : 001
DISMISS ACTION

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

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

FILED
NOV 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

IS DISPOSED OF
**IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.**

Dated: 10/23/08

Charles E. Ramos
CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
ALPHA MANHATTAN, LLC,

Plaintiff,

Index No.

-against-

604076/07

UBS REAL ESTATE SECURITIES, INC.,

Defendant.

FILED
NOV 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Defendant UBS Real Estate Securities, Inc. (003) moves
(001¹) to dismiss the amended complaint (CPLR 3211 [a] [1] [7];
3016 [b]).

UBS additionally moves (003) for a protective order with
respect to plaintiff Alpha Manhattan, LLC's (Alpha) first request
for Discovery and Inspection (CPLR 3103 [a]), or alternatively,
for a stay of discovery (CPLR 3214 [b]).

Background ²

Alpha and its former partner, ONA Manhattan House, LLC
(ONA), owned property (the Property) in New York, from 2005 to
2007. During this period, a dispute developed between the
partners, resulting in the commencement of an action by Alpha
against ONA in the New York County Supreme Court (the
Litigation). On June 12, 2007, Justice Fried ordered Alpha to

¹ Motion sequence numbers 001 and 003 are consolidated for
disposition.

² The facts set forth in this section are taken from the
amended complaint, and are assumed to be true for the purposes of
this motion.

elect to either purchase ONA's interest in the Property by July 14, 2007, or to sell its own interest to ONA by August 13, 2007.

Subsequently, Alpha applied to UBS for a loan for the purpose of buying out (the Buyout) ONA's interest in the Property, and to refinance the Property's mortgage. UBS was allegedly aware of the Litigation regarding the Property, and that the Buyout could not be completed if financing was not provided by August 1, 2007.

On June 28, 2007, UBS and Richard Kalikow, Alpha's principal, agreed to a summary of principal terms (the Term Sheet) for the loan (the Loan), in the amount of \$850,000,000. The Term Sheet was not a loan commitment, but contained "the general terms under which UBS would be willing to fund the Loan" (Term Sheet, 3).

The Term Sheet obligated UBS to make "commercially reasonable efforts to close the Loan on or before August 13 2007." Further, the Term Sheet required Alpha to make a \$1 million good faith deposit (Deposit) to UBS, that was to be refunded less out-of-pocket expenses if closing did not occur,

"solely due to Lender [UBS]. Otherwise, Lender shall retain the Good Faith Deposit as liquidated damages (...) ... related to the failure of the Loan to close ... If lender willfully fails to close the Loan, then Borrower [Alpha] shall be entitled to a refund."

The Term Sheet additionally contains a provision entitled, "Additional Conditions," including,

"[n]o ongoing or threatened litigation regarding the property deemed material by Lender in its sole

discretion against Borrower, Sponsor, Guarantor of affiliates thereof."

After the Term Sheet was agreed to, Alpha alleges that it sought assurances from UBS that the ongoing crisis in the capital markets would not affect the Loan, and again indicated that the Buyout could not proceed without the Loan from UBS. UBS allegedly communicated to Alpha in July of 2007 that the Loan had been approved by UBS's head office, and that the Loan could close on or before August 13, 2007. Additionally, UBS allegedly assured Alpha that it could rely on the approval from UBS's head office, and consequently, that Alpha could enter into a binding commitment for the Buyout.

In alleged reliance on UBS's representation, Alpha made its election to make the Buyout on July 14, 2007. Notwithstanding UBS's representations that the Loan had been approved by its home office, on July 26, 2007, UBS communicated to Alpha that UBS would not fund the Loan unless and until Alpha obtained a dismissal with prejudice of the Litigation involving ONA, in addition to a release of all actual and potential claims relating to the Property. On July 31, 2007, the day before the mortgage payoff notice was due to the existing mortgage holder on the Property, UBS confirmed to Alpha that it would not provide the Loan.

Subsequently, Alpha requested that UBS return the Deposit. UBS responded that it would be willing to return the Deposit if Alpha provided UBS with a general release from all potential

claims relating to the Term Sheet (Exhibit D, annexed to the Amended Complaint). When the parties failed to resolve the issues surrounding the return of the Deposit, Alpha commenced this action, seeking the return of the Deposit and other damages stemming from UBS's alleged misrepresentations.

Discussion

For the reasons stated below, affording the complaint a liberal construction, accepting the facts alleged as true and according Alpha the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]), the motion to dismiss is granted, in part, and denied, in part.

I. Breach of Contract Claims

UBS moves to dismiss Alpha's first claim for breach of contract, wherein Alpha seeks the return of the Deposit on the ground that Alpha's request for its return was untimely.

Alpha asserts that the Term Sheet does not set forth any time limit within which Alpha was required to seek the return of the Deposit.

Where a contract contains no time requirement for requesting the return of a deposit, the requestor is allowed a reasonable amount of time to make the request (*Tendler v Lazar*, 141 AD2d 717, 720 [2d Dept 1988]).

The Term Sheet does not contain a requirement within which Alpha was required to request the return of the Deposit, nor does

it specify that time was of the essence. Further, although the Term Sheet expired on August 31, 2007, Alpha requested the Deposit's return three weeks later, on September 21, 2007. The Court determines that because the Term Sheet did not specify that time was of the essence, Alpha's request for the return of the Deposit three weeks after its expiration was reasonable as a matter of law (*Tendler*, 141 AD2d at 720).

UBS additionally contends that it is entitled to retain the Deposit as liquidated damages, because Alpha's own judicial admissions establish that the Loan did not fail to close "solely due" to UBS or due to UBS's "willful failure to close."

According to UBS, Alpha made representations during the Litigation that ONA had threatening to seek money damages in the Litigation even after the Buyout, that contradicts Alpha's assertion that the Loan failed to close due to UBS. Alpha counters that judicial admissions, if any, made during the Litigation were informal, and that issues of fact exist regarding whether UBS wilfully caused the Loan not to close.

"Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding ... they are not conclusive, though they are evidence of the fact or facts admitted" (internal citations omitted) (*Matter of Liquidation of Union Indem. Ins. Co.*, 89 NY2d 94, 103 [1996]).

Alpha's proposed pleading in the ONA litigation constitutes

an informal judicial admission, and, while evidence of the facts admitted, is not conclusive and does not completely dispose of the issues raised in Alpha's breach of contract claim for the return of the Deposit. Moreover, determining whether UBS's decision not to close on the Loan was willful requires the resolution of issues of fact, the determination of which is not proper at the pleading stage. Therefore, UBS's motion to dismiss the first claim for breach of contract is denied.

UBS moves to dismiss the second claim for breach of contract, premised on its alleged failure to make "commercially reasonable" efforts to close the Loan. UBS claims that the term "commercially reasonable" in the Term Sheet is indefinite and unenforceable, and in any event, the Term Sheet by its terms does not constitute an enforceable contract.

Alpha does not address UBS's arguments in support of dismissal of this claim, and otherwise does not oppose dismissal. Accordingly, the Court presumes that Alpha intends to abandon the claim and hereby dismisses it.

II. Promissory Estoppel

Alpha's claim for promissory estoppel is premised upon allegations that UBS made promises after the Term Sheet was entered into, that it had approved the Loan and used words to the effect that the closing was "guaranteed," and that it was foreseeable that Alpha would rely upon these representations.

UBS moves to dismiss the claim on the ground that it is

duplicative of its breach of contract claim, and that the promises alleged, if any, are ambiguous. Further, UBS contends that Alpha's reliance, if any, is unreasonable, because the Term Sheet Expressly states that it is not binding.

A cause of action for promissory estoppel requires the allegation of a clear and unambiguous promise that gave rise to reasonable detrimental reliance (*Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 384 [1st Dept 2008]).

Alpha fails to allege the breach of a duty independent of the duties that arose under the Term Sheet (*Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004]). Therefore, the motion to dismiss the third and fourth claims is granted.

III. Equitable Estoppel

Alpha seeks to invoke the doctrine of equitable estoppel to estop UBS from denying that it willfully prevented the Loan from closing and that it made commercially reasonable efforts to close the Loan.

The doctrine of equitable estoppel may be invoked in the interest of fairness to prevent a fraud or injustice upon the person against whom enforcement of a right is sought, and who justifiably relied upon the opposing party's words or conduct, (*Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 184 [1982]).

However, Alpha's claim for equitable estoppel is duplicative of its breach of contract claim seeking the return of the Deposit

on the ground that UBS willfully caused the Loan not to close, or otherwise did not engage in commercially reasonable efforts in proceeding to closing (*Guerrero v West 23rd Street Realty, LLC*, 45 AD3d 403, 403 [1st Dept 2007], *lv denied* 10 NY3d 707 [2008]). Therefore, UBS's motion to dismiss the claim for equitable estoppel is granted.

IV. Fraud

UBS moves to dismiss the fraud claim on the grounds that it is duplicative and is not pled with requisite particularity. Alpha alleges that UBS engaged in a deliberate scheme to mislead Alpha into believing that UBS had approved the Loan in order to retain the Deposit.

Alpha's conclusory allegations of a fraudulent scheme and mere recitations of the elements of fraud are insufficient to sustain the claim (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Therefore, UBS's motion to dismiss the fifth claim for fraud is granted.

V. Negligent Misrepresentation

A claim for negligent misrepresentation requires, in the first instance, the existence of a special or privity like relationship imposing a duty on the defendant to impart correct information to the plaintiff (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 [2007]).

Generally, an arm's length borrower-lender relationship is not of a confidential or fiduciary nature, and thus, will not

support a cause of action for negligent misrepresentation (*River Glen Assocs., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [1st Dept 2002]).

Alpha and UBS indisputably were engaged in an arms-length lender-borrower transaction, and thus, a claim for negligent misrepresentation cannot be sustained. Therefore, the motion to dismiss the sixth claim for negligent misrepresentation is granted.

VI. Protective Order and/or Stay of Discovery

UBS moves for a protective order with respect to Alpha's first request for Discovery and Inspection, or, alternatively for a stay of discovery on the ground that Alpha's discovery demands are burdensome and irrelevant.

In light of this disposition, the scope of discovery has been altered. UBS's motion is therefore denied as moot.

Accordingly, it is

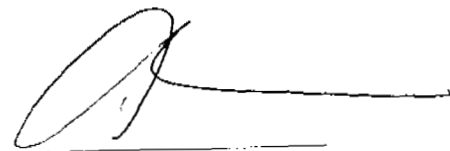
ORDERED that defendant's motion (001) to dismiss the complaint is granted, in part, and denied, in part, and the second, third, fourth, fifth and sixth claims are dismissed; and it is further

ORDERED that defendant's motion (003) for a protective order or for a stay of discovery is denied and a compliance conference will address further discovery; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order

with notice of entry.

Dated: October 23, 2008



J.S.C.

HON. CHARLES E. RAMOS

FILED

NOV 03 2008

COUNTY CLERKS OFFICE
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