

383 Madison LLC v Bear Stearns Cos., Inc.

2008 NY Slip Op 33409(U)

December 18, 2008

Supreme Court, New York County

Docket Number: 601570/08

Judge: Herman Cahn

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

PRESENT: cahn

PART 49

Index Number : 601570/2008

383 MADISON LLC,

VS.

BEAR STERARNS

SEQUENCE NUMBER : 001

DISMISS

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED

DEC 19 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 12/18/08

Alan Cahn

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 49

----- X

383 Madison LLC,

Plaintiff,

- against -

The Bear Stearns Companies, Inc.; Gregory
Properties Inc.; ABN AMRO Bank N.V.; and
JPMorgan Chase & Co.,

Defendants.

----- X

Index No. 601570/08

FILED
DEC 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

CAHN, J.:

Defendants The Bear Stearns Companies Inc. (Bear Stearns), Gregory Properties Inc. (Gregory), ABN AMRO Bank N.V. (ABN), and JPMorgan Chase & Co. (JPMorgan) move for dismissal of the complaint on the grounds of a defense founded on documentary evidence and failure to state a cause of action, CPLR 3211 (a) (1) and (a) (7).

The complaint contains the following allegations: Plaintiff 383 Madison LLC, a New York corporation, is the fee owner of the land located at 383 Madison Avenue, New York, New York (Property). Pursuant to a ground lease entered into between Plaintiff, as landlord, and Gregory, as tenant, dated as of August 26, 1997 (Ground Lease), Bear Stearns and its wholly-owned subsidiary, Gregory, took possession of the Property for a 99-year period. As contemplated by the Ground Lease, Bear Stearns constructed a new building (Building) at the Property, which it began occupying in the Spring of 2003.

Section 16 of the Ground Lease creates a "Right of First Offer," which right takes effect in the event that Bear Stearns should ever propose to sell its interest under the Ground Lease. The right requires that, prior to any transfer of Bear Stearns's interest under the Ground Lease,

there must be a 45-day window during which Bear Stearns and Plaintiff will negotiate in good faith to offer to effect a sale of that interest, including the Building, to Plaintiff. Section 16.2 (a) of the Ground Lease provides, in part:

In the event Tenant shall, at any time, propose to sell its interest in this Ground Lease and vacate the Property, prior to accepting any offer from any third party to acquire, or prior to making any offer to any third party to sell, Tenant's interest in this Ground Lease, Tenant shall give Landlord written notice (the 'Sales Notice') of its intention so to sell and specifying in detail the material business terms on which Tenant would be prepared to consummate such sale. Tenant shall, for a period of forty-five (45) days after delivery of the Sales Notice to Landlord, negotiate in good faith with Landlord on an exclusive basis and consider, in good faith, any offer made by Landlord with respect to such sale.

Pursuant to a leasehold refinancing, Bear Stearns refinanced the Building in 2003 by entering into an amended and restated sublease with ABN, under a so-called "synthetic lease" arrangement, whereby ABN nominally became the named tenant under the Ground Lease. At all times, however, Bear Stearns remained the tenant under the Ground Lease, and was subject to the obligations of the Right of First Offer.

Bear Stearns entered into an Agreement and Plan of Merger with JPMorgan, dated as of March 16, 2008 and amended as of March 24, 2008 (Merger Agreement). Section 6.11 of the Merger Agreement provides that if the merger is not consummated, instead of a break-up fee, JPMorgan has the right to purchase the Building for \$1.1 billion (Asset Option). Specifically, it provides:

6.11 Asset Option. In consideration of entering into this Agreement and the Guaranty attached hereto as Schedule 6.12, the Company hereby grants, on behalf of itself and its Affiliates, to Parent, subject to the terms and conditions set forth in this Section 6.11, the irrevocable right and option to acquire all of the Company's and its Affiliates' rights, title and interest (free and clear of all

encumbrances) in and to the Company's headquarters building located at 383 Madison Avenue, New York, New York (the 'HQ Property') for an amount in cash equal to the RE Consideration (as defined below) (the 'Asset Option').

As for exercisability, as amended, the Merger Agreement provides, in part:

The Asset Option shall only be exercisable if (i) the approval of the Company's stockholders required by Section 7.1(a) shall not have been obtained at the first duly held meeting of stockholders convened for the purpose of approving and adopting this Agreement, in which case the Asset Option shall be exercisable at Parent's discretion from the time of such stockholder meeting until the date that is 120 days following the date of such stockholder meeting or (ii) this agreement is terminated either by Parent pursuant to (1) Section 8.1(e) or (2)(x) Section 8.1(d) or by either Parent or the Company pursuant to Section 8.1(c) or 8.1(f), and (y) prior to such termination an Alternative Proposal shall have been publicly announced or otherwise communicated or made known to the Company . . . and shall not have been irrevocably withdrawn, in any such case the Asset Option shall be exercisable at Parent's discretion from the time of such termination until the date that is six months following the date of such termination.

Bear Stearns apparently recognized that there was a possibility that the merger would not be consummated, but it, nonetheless, agreed to the Asset Option. Bear Stearns never took any steps, however, to comply with its obligations under the Right of First Offer, either by fully complying with the technical requirements or even attempting to comply with the spirit of its obligations.

The complaint contains three causes of action. The first is against Bear Stearns, Gregory and ABN for breach of contract. It is claimed that, by failing to provide Plaintiff with an opportunity to purchase Bear Stearns's interests in the Building, prior to executing the Merger Agreement, Defendants breached the Ground Lease by depriving Plaintiff of its opportunity to purchase the Building. Plaintiff seeks specific performance or, in the alternative, damages.

The second cause of action is also against Bear Stearns, Gregory and ABN, seeking a declaration that, based upon the foregoing, Bear Stearns has breached a material covenant of the Ground Lease.

The third cause of action is against JPMorgan for tortious interference with contract. It alleges that JPMorgan, which had known or should have known of the Ground Lease and the Right of First Offer, wrongfully induced Bear Stearns to breach the Ground Lease and the Right of First Offer for its own gain, and which enabled it to obtain the right to purchase the Building for \$1.1 billion, which is substantially less than the Building's fair market value.

In moving for dismissal of the complaint based upon documentary evidence, Defendants argue that: (1) the plain language of the Ground Lease demonstrates that there has been no breach; (2) any alleged past breach has been cured; (3) Plaintiff has suffered no cognizable harm; and (4) the contract remedies that Plaintiff seeks are legally unavailable. Defendants also argue that Plaintiff's other two claims (declaratory judgment and tortious interference) fail because there was no breach of contract, upon which their viability depends.

Plaintiff argues that the complaint alleges that Bear Stearns breached the Right of First Offer, and that the documentary evidence does not dispose of this issue in Bear Stearns's favor. Plaintiff argues that the safe harbor provision of the merger is not applicable because, by its own terms, the Asset Option was not a transfer incident to a merger, but rather an offer to sell the Building if the merger was not completed. Plaintiff also argues that the breach was not cured because Plaintiff was deprived of the opportunity to purchase the building for \$1.1 billion at the moment that Bear Stearns decided to grant JPMorgan the Asset Option. Moreover, by giving JPMorgan an irrevocable offer to purchase the building, Bear Stearns repudiated the Ground

Lease which gave Plaintiff the right to declare that the Right of First Offer had been breached, and to seek the relief that it seeks in this action.

Discussion

The complaint alleges that, although the nominal tenant is ABN (which did not offer to sell the Building), Bear Stearns (which did offer to sell the Building) breached the Ground Lease because, through its wholly-owned subsidiary Gregory, it agreed to continue to be primarily and solely responsible for the performance of the obligations of the tenant under the Ground Lease. Even assuming the correctness of this assertion for purposes of this motion, and it has support in the record,¹ dismissal of the complaint is warranted because there are no factual issues, and the documentary evidence disposes of all claims as a matter of law in Defendants' favor (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]).

Section 16.2 (c) of the Ground Lease exempts from the Right of First Offer situations in which the tenant determines to sell its interest to "any entity into which or with which Tenant may be merged." It provides, in part:

Notwithstanding anything to the contrary contained in Section 16.2(a), Tenant shall in no event be obligated to give to Landlord any Sales Notice or to otherwise comply with the provisions of Section 16.2(a) in the event that Tenant shall determine to sell, transfer or otherwise dispose of its interest in this Ground Lease to (i) any entity into which or with which Tenant may be merged, consolidated or combined or any entity which shall purchase all or substantially all of the assets of Tenant;

Bear Stearns has not violated the plain meaning of the language employed in this provision because it "determine[d] to sell, transfer or otherwise dispose of" its interest in the

¹ See e.g. Exhibit C to Affirmation of Sarah L. Hartley, Esq. (letter agreement, dated August 28, 2003).

Ground Lease to an entity “with which Tenant *may be* merged . . .” (emphasis added). Thus, the safe harbor provision is applicable even to those situations where a potential merger is contemplated, and it is not contingent upon the actual occurrence of a merger. Unambiguous contract terms must be enforced as written (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Bianco v Bianco*, 36 AD3d 490, 491 [1st Dept 2007]). Subsequent events (stockholder approval and consummation of the merger) have shown that the contemplated merger was not a pretext to avoid the operation of the Right of First Offer.

Attempting to negate the effect of this provision, Plaintiff describes the relevant language of 16.2 (c) as triggering the safe harbor to the Right of First Offer in only those situations where “Bear Stearns *is* ‘merged, consolidated or combined’ with the purchasing entity” (Pl Opp Br, at 7) (emphasis added). Plaintiff contends that the Asset Option was contingent upon the failure of the merger, and that it could only come into play where there is no merger. It is beyond dispute, however, that by entering into the Merger Agreement, Bear Stearns was “determined” to sell the Building to an entity “into which or with which Tenant may be merged.” Plaintiff’s interpretation – changing “may be” to “is” – seeks to rewrite the parties’ contract (*Blonder & Co. v Citibank, N.A.*, 28 AD3d at 182) and distorts the meaning of the terms used (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Moreover, in construing a contract, the court must search for the parties “probable intent,” aiming to accord the contract language with a “fair and reasonable meaning” (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982]). The aim is a practical interpretation so that there is a realization of the parties’ reasonable expectations (*id.* at 555; *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]). Plaintiff’s interpretation is unreasonable,

and fails to accomplish the purposes intended by the relevant provisions of the Ground Lease, because it would require Bear Stearns to sell the Building to Plaintiff notwithstanding the fact that Bear Stearns consummated the merger with JPMorgan, and the Ground Lease expressly negated a forced sale to Plaintiff in such circumstance.

Plaintiff characterizes the Right of First Offer as an “irrevocable offer” and that, through the Asset Option, Bear Stearns put the sale of the Building outside its control, and thereby repudiated its obligations under the Ground Lease. This is not a valid characterization, because it gives the impression that, upon the signing of the Merger Agreement, JPMorgan, alone, had the power to decide whether or not to make the purchase. The merger was subject to the approval of the stockholders of Bear Stearns, and Section 6.3 of the Merger Agreement expressly acknowledges the necessity of stockholder approval.

Thus, contrary to the assertion by Plaintiff, the sale to JPMorgan was never “out of [its] power” (Pl Opp Br, at 3), and Bear Stearns retained control through the action of its stockholders. Indeed, the Asset Option provision was never triggered. On May 29, 2008, it was announced that the stockholders of Bear Stearns approved the merger with JPMorgan, pursuant to which each outstanding share of the common stock of Bear Stearns was to be converted into the right to receive 0.21753 shares of JPMorgan common stock, with Bear Stearns becoming a direct subsidiary of JPMorgan. Thereupon, Bear Stearns and JPMorgan revoked the Asset Option.

Therefore, Plaintiff’s reliance upon the doctrine of anticipatory breach is unavailing. Under this doctrine, “a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach”

(*American List Corp. v U.S. News & World Report*, 75 NY2d 38, 44 [1989]). For there to be an anticipatory breach, there must be an unequivocal intention by Defendant to not perform or to abandon the contract (*HRL Union Ave. Corp. v New York City Hous. Auth.*, 223 AD2d 486, 487 [1st Dept 1996], *lv denied* 88 NY2d 803 [1996]). There must be a “definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action” (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 267 [1st Dept 1995]).

Plaintiff argues that “[b]y definition, an option to purchase property puts the power to decide whether the property will be sold in the hands of the buyer, not the seller” (Pl Opp Br, at 12). Assuming for purposes of the motion that the Asset Option provision of the Merger Agreement violates the Ground Lease, the necessity of a stockholder vote approving of the merger creates the possibility of a “cure” of the breach. As stated above, the Asset Option was revoked. Where an opportunity to cure exists, there is no unequivocal repudiation (*Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [1st Dept 2001]). Thus, Bear Stearns did not put performance under the Ground Lease “out of its power” by entering into the Merger Agreement, as required by the doctrine (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 78 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003]).

Based upon the foregoing, the remaining two claims – for a declaration that Bear Stearns has breached a material covenant of the Ground Lease and against JPMorgan for tortious interference with contract – are dismissed, because they are dependent upon a viable claim of breach of contract.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 18, 2008

ENTER:



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