Neviot Realty Holdings, LLC v Wadsworth Equities Holdings, LLC
2009 NY Slip Op 32783(U)
November 24, 2009
Supreme Court, New York County
Docket Number: 603173/08
Judge: Judith J. Gische
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.

SCANNED ON 11/30/2009

[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 603713/2008

NEVIOT REALTY HOLDINGS

VS.

WADSWORTH EQUITIES

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

n 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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
NOV 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/24/09

JUDITH J. GISCHE, J.S.C. 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 10

---x

NEVIOT REALTY HOLDINGS, LLC and MORDECHAI BOAZIZ,

Plaintiff,

-against-

WADSWORTH EQUITIES HOLDINGS, LLC,

Defendant.

---x

Decision/Order
Index No.: 603713/08
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

FILED
NOV 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's motion [SJ] w/EL affirm, RT affid, exhs	1
FW affirm	2

Upon the foregoing papers, the decision and order of the court is as follows:

In this action, plaintiff seeks to recover monies due on a promissory note and guarantee. Defendant Wadsworth Equities Holdings, LLC ("Wadsworth") now moves, pursuant to CPLR § 3212, for summary judgment on the counterclaims in its favor and against plaintiffs Neviot Realty Holdings, LLC ("Neviot") and Mordechai Boaziz. Since issue has been joined, but note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004).

The facts are largely undisputed or based upon the documentary evidence provided on this motion. On October 18, 2007, Wadsworth agreed to loan to Neviot an amount which could be up to $3.5 million, as evidenced by a Mezzanine Promissory Note (the "Note"). The terms of the loan were further memorialized in a Mezzanine

Loan Agreement dated October 17, 2007 (the "Loan Agreement"). The Loan Agreement provides in pertinent part:

> 2.1.1. Agreement to Lend and Borrow. ... The Loan may be funded in two traunches. The first traunch shall consist of Two Million and 00/100 Dollars ($2,000,000.00) which shall be funded at closing (the "First Traunch"), the Second Traunch shall consist of an additional One Million Five Hundred Thousand and 00/100 Dollars ($1,500,000.00) and shall be funded at Lender's sole option any time prior to the Maturity Date (the "Second Traunch").
>
> 2.1.2. Disbursement to Borrower. Borrower may request and receive only the First Traunch hereunder in respect of the Loan, and any amount borrowed and repaid hereunder in respect of the Loan may not be reborrowed. The Second Traunch may be funded by Lender at Lender's sole option. Lender shall have no obligation to fund the Second Traunch.

The initial maturity date of the Loan was April 28, 2009. Repayment of the loan was secured by a pledge of the membership interests of Neviot, which was memorialized in a Mezzanine Pledge and Security Agreement also dated October 18, 2007 (the "Security Agreement"). Neviot is the owner of 165 condominium units located in Temple Terrace, Florida (the "Property").

To further secure repayment of the Loan, plaintiff Boaziz executed, in favor of Wadsworth, a Mezzanine Guaranty of Payment dated October 17, 2007 (the "Guaranty"). Pursuant to the Guaranty, Boaziz personally guaranteed the unconditional payment of all amounts which may become due from Neviot under the Loan documents.

The First Traunch of $2 million was paid to plaintiffs on October 18, 2007. In February 2008, upon Neviot's request, Wadsworth loaned an additional funding of $200,000.

The Property is encumbered by a first and second mortgage held by New York

Community Bank, which loans exceed $16 million. The Loan is subordinate to the two mortgages. David Galanter, a member of Wadsworth, states in his affidavit that "in light of the two superior mortgages, Defendant's assessment of the value of the Property and the general economic climate, Defendant chose not to proceed with the Second Traunch."

It is undisputed that since October 2008, Neviot defaulted under the Loan documents by failing to pay the monthly interest payments required thereunder. Pursuant to Article 8.1 of the Loan Agreement, this non-payment constitutes and event Event of Default. In light of the foregoing, Wadsworth seeks summary judgment against Neviot and a money judgment in its favor for $2,702,500 representing the principal due and owing, $2.2 million, $484,000 in accrued but unpaid interest and $18,700 for unpaid late charges.

Plaintiffs commenced this action with a complaint containing two causes of action: seeking a permanent injunction enjoining Wadsworth from selling and conveying Neviot's membership interests; and for specific performance of the balance of the loan, to wit: $1.3 million. Wadsworth answered the complaint, asserted affirmative defenses, and three counterclaims: [1] against Neviot for breach of the loan documents; [2] against Boaziz for breach of the Guaranty; and [3] against both defendants for legal fees. Plaintiffs' reply to the counterclaims contained only general denials and no defenses.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its

favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). Wadsworth has met its burden on this motion by establishing that Neviot and Boaziz breached their respective agreements with Wadsworth to make timely payments.

Plaintiffs' sole argument in opposition to the motion is that Wadsworth itself defaulted under the Loan Agreement first by failing to pay the balance of the Second Traunch due when the partial payment of $200,000 was made. This claim is based upon the argument that the Loan Agreement was modified, vis-a-vis the $200,000 payment and/or emails from Wadsworth's principal, to become an option contract so that Wadsworth's $200,000 funding bound it to fully fund the balance of the Second Traunch.

First, plaintiffs incorrectly use the term "option contract." An option contract is an offer included in a contract, i.e. an agreement to hold an offer open for a specified period of time. Mere use of the term "option" in the subject agreements does not transform same into an "option contract."

Second, the Loan documents are clear and unambiguous insofar as Wadsworth could fund up to $3.5 million at any time prior to December 31, 2009, with no less than $2 million being paid immediately at closing of the loan. Contract provisions are to be interpreted in a manner that gives fair meaning to all of the language employed and leaves no provision without force or effect. God's Battalion of Prayer Pentacostal Church, Inc. v. Miele Associates, LLP, 6 NY3d 371 (2006); Travelers Indemnity Co. v. Commerce and Industry Ins. Co. of Canada, 36 AD3d 1121 (3d Dept 2007); American Express Bank Ltd. v. Uniroyal, Inc., 164 AD2d 275 (1st Dept 1990). Plaintiffs' interpretation of the Loan documents is inconsistent with the language employed. Absent a written modification, Wadsworth was only required to deliver $2 million to Neviot. The promise by Wadsworth to fund up to an additional $1.5 million, at its sole discretion, is not enforceable because Wadsworth's performance was optional and did not contain a commitment to perform. An illusory promise is not enforceable (see Curtis Properties Corp. v. Greif Companies, 212 AD2d 259 [1st Dept 1995]).

The only writing that plaintiffs claim modified the loan documents to require the full $1.5 million additional funding is an email from David Galanter, a principal of Wadsworth. On May 30, 2008, Galanter wrote the following to Boaziz:

> The additional funding is expected to be ready in July. If you want to send me a check for July that would be fine.

I am going to need you to update all the financial information for me prior to the additional funding. Just a heads up.

Plaintiff's argument premised upon this email is rejected since Galanter did not, on behalf of Wadsworth, unequivocally promise to pay the full $1.5 million funding. For all of these reasons, plaintiff has failed to show that the loan documents were modified.

Accordingly, Wadsworth's motion for summary judgment on its counterclaims for breach of the Loan documents and the Guaranty against Neviot and Boaziz, respectively, is granted.

As for the third counterclaim for legal fees, the Loan Agreement and Guaranty obligated plaintiffs to reimburse Wadsworth for all reasonable costs and expenses, included attorneys' fees and disbursements, incurred in connection with the prosecution of this action in the event that the plaintiffs' breached their respective agreement. Wadsworth has, however, failed to provide an itemization of the fees and expenses it has incurred, or an affidavit attesting to the reasonableness thereof. Accordingly, Wadsworth is only entitled to summary judgment on the issue of plaintiffs' liability on the third counterclaim; Wadsworth's damages on this claim remains to be determined. The court hereby refers the issue of what reasonable fees and expenses Wadsworth is entitled to recover from plaintiffs to a Special Referee to hear and report. Wadsworth is directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

The court hereby schedules a conference in this matter for January 14, 2010 at Part 10 at 9:30 a.m. to determine the status of the remainder of this action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Wadsworth's motion for summary judgment is granted to the extent that Wadsworth is entitled to summary judgment on the first and second counterclaims, and summary judgment on the issue of plaintiffs' liability on the third counterclaim, only; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of defendant Wadsworth Equities Holdings, LLC and against plaintiffs Neviot Realty Holdings, LLC and Mordechai Boaziz, joint and severally, in the total sum of $2,702,700.

ORDERED that the issue of what damages Wadsworth is entitled to recover from plaintiffs on the third counterclaim for fees and expenses is hereby referred to a referee to hear and report. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned..

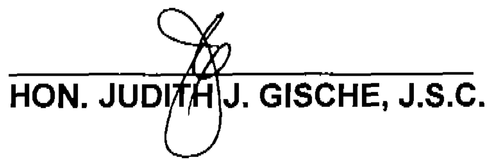
Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
November 24, 2009

FILED
NOV 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.