ERC 16W L.P. v Xanadu Mezz Holdings LLC
2009 NY Slip Op 33368(U)
September 9, 2009
Sup Ct, New York County
Docket Number: 600870/2009
Judge: Bernard J. Fried

17

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

PRESENT: BERNARD J. FRIED Justice

E-FILE PART 60

ERC 16W Limited Partnership,

Plaintiff,

- v -

Xanadu Mezz Holdings LLC,

Defendant.

INDEX NO. 600870/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☐ No

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

This action arises out of an agreement between Plaintiff, ERC 16W Limited Partnership, and Defendant Xanadu Mezz Holdings LLC, for Defendant to provide financing for the construction and development of a sports and entertainment complex in the Meadowlands Sports Complex in Northern New Jersey. Plaintiff contends that Defendant failed to perform its obligations under the Construction Loan Agreement (Loan Agreement). Defendant now moves to dismiss the Complaint (motion sequence 001) and Plaintiff cross-moves, seeking attorneys' fees and to impose sanctions. For the reasons stated below, Defendant's motion is granted and Plaintiff's motion is denied.

Defendant argues that Plaintiff is misreading the Loan Agreement to infer that Defendant, a "Closing Date Participant" under that agreement, should be treated as a "Lender" as defined by the Loan Agreement. The significance of this characterization is that Section 2.9.2(a) of the Loan Agreement imposes the obligations at issue here – those which Plaintiff alleges Defendant failed to perform, namely to make certain monetary advances – on Lenders exclusively. Indeed, Plaintiff conceded at oral argument that this motion can only succeed if I find that

Defendant is bound by Section 2.9.2(a). Transcript of July 17, 2009 Oral Argument at 12 - 13 ("[This motion] turns on whether Your Honor agrees that under 2.9.2(e), the closing date participants are required to fund in accordance with [2.9.2(a)].").

In support of its argument that Defendant is, in fact, bound by Section 2.9.2(a), Plaintiff notes that, whereas several sections of the Loan Agreement list the rights and remedies available to Closing Date Participants, Section 2.9.2(a) is the only section to address Closing Date Participants' obligations. Plaintiff argues that to read that section to impose no obligation on Defendant is illogical because Defendant would then have no obligations at all under the Loan Agreement and there would be no purpose for Defendant to be a party to that agreement. This scenario is implausible, Plaintiff argues, particularly among such sophisticated parties as those litigating here. Furthermore, according to Plaintiff, those sections of the Loan Agreement that enumerate Closing Date Participants' rights and obligations, such as Section 2.12, incorporate Section 2.9.2(a), thus bring Closing Date Participants within the scope of that provision.

Defendant responds that Section 2.12 unequivocally limits the execution of the Loan Agreement by Closing Date Participants to Sections 2.9.2(e), (f), and (g) and Section 2.11. Thus, Defendant argues that it is not a party to Section 2.9.2(a) and not obligated thereunder to make the advances at issue in this case. Indeed, as Defendant argues it its papers in support of this motion, it is hornbook law that a defendant in a breach of contract action must be a party to the contractual provisions the defendant is alleged to have breached. *Dember Const. Corp. v. Staten Island Mall*, 56 AD2d 768, 392 NYS2d 299 (1st Dep't 1977); *Crabtree v. Tristar Automotive Group, Inc.*, 776 F. Supp. 155, 166 (S.D.N.Y. 1991); *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 NY2d 972, 973, 395 NYS2d 151, 152 (1977); *Blank v. Noumair*, 239 AD2d534, 658 NYS2d 88 (2d Dep't 1997); *Int'l Customs Assocs., Inc. v. Ford Motor Co.*, 893 F. Supp. 1251 (S.D.N.Y. 1995).

In this case, the language of Section 2.12 is clear and leaves no room to dispute Defendant's argument that it is not a party to the contractual provisions of

which Plaintiff alleges a breach. Section 2.12 provides:

> "Anything herein or in the other Loan Documents to the contrary notwithstanding, each of the Closing Date Participants (i) joins in the execution of this Agreement for the sole purpose of acknowledging its agreement under Sections 2.9.2(e), (f) and (g) and Section 2.11 of the Agreement and (ii) agrees that it shall have no rights or remedies under or relating to this Agreement or the other Loan Documents other than those which are directly related to such sections of this Agreement."

Loan Agreement § 2.12, Exhibit A to the Affirmation Jacob S. Pultman. Because this provision is unambiguous on its face, I will not consider argument or parol evidence that may or may not suggest that the parties intended this Section to mean something other than what it says. To the extent that Plaintiff is in position of evidence that is not contained in the record of this case and which may or may not indicate that Defendant considered itself to be bound by Section 2.9.2(a), such evidence would not be admissible for purposes of contract interpretation but Plaintiff may file an affirmation of merit along with a motion for leave to amend the complaint in order to include that evidence in the record of the case.

Furthermore, Defendant argues, Defendant does indeed have other obligations under Sections 2.9.2(e), (f), and (g) and Section 2.11 and the interpretation it suggests would not, as Plaintiff argues, render Defendant's participation in the Loan Agreement meaningless. Without discussing the extent of these other obligations, I note that Defendant does, indeed, have obligations pursuant to the Loan Agreement other than that at issue here. Consequently, Defendant's participation in that Agreement is not meaningless, even though I find that Defendant is not a party to the provisions of the Loan Agreement that Plaintiff alleges have been breached and, thus, Plaintiff fails to state a cause of action against Defendant for breach of those contractual provisions.

Accordingly, Defendant's motion to dismiss is GRANTED. For the reasons set forth above, I find that Defendant's motion to dismiss has merit and, consequently, Plaintiff's motion for sanctions, made on the ground that Defendant's motion is frivolous, is DENIED.

HON. BERNARD J. FRIED

Dated: 9/9/09

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE