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

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 601624/2009
GE BUSINESS FINANCIAL
VS.
166 WEST 75TH STREET
SEQUENCE NUMBER : 003
DISMISS

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 ~~and cross-motion are~~ is decided in accordance with accompanying memorandum decision.

FILED

MAY 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: May 20, 2010

SALIANN SCARPULLA 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: CIVIL TERM: PART 19

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GE BUSINESS FINANCIAL SERVICES INC.,
f/k/a MERRILL LYNCH CAPITAL,

Plaintiff,

Index No.: 601624/09
Submission Date: 3/10/10

- against-

166 WEST 75TH STREET, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY DIVISION OF HOUSING AND COMMUNITY RENEWAL OFFICE OF RENT ADMINISTRATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY CRIMINAL COURT, and JOHN DOES 1-500, the last five hundred names being fictitious and unknown to plaintiff, the persons and parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

DECISION AND ORDER

Defendants.

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For Plaintiff:
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, New York 10022

For Defendant 166 West 75th Street, LLC:
Kriss & Feuerstein LLP
360 Lexington Avenue, Suite 1200
New York, NY 10017

Papers considered in review of this motion to dismiss:

Notice of Motion 1
Aff in Support 2
Memo of Law 3
Aff in Opp 4
Memo of Law 5
Reply Memo of Law. 6

HON. SALIANN SCARPULLA, J.:

In this foreclosure action, plaintiff GE Business Financial Services ("GE Business"), formerly known as Merrill Lynch Capital, a division of Merrill Lynch

Business Financial Services Inc. ("Merrill") moves pursuant to CPLR 3211(a)(1) and (a)(7) to strike and/or dismiss the affirmative defenses and counterclaims asserted by defendant 166 West 75th Street, LLC ("166 West 75th").

According to 166 West 75th, it owns a sixteen (16) story residential apartment building located at 166 West 75th Street, New York, New York. To purchase the property, 166 West 75th obtained mortgage financing from Merrill. Merrill and 166 West 75th entered into a Loan Agreement dated July 9, 2007, for a loan in the amount of $35,882,529. Together with the Loan Agreement, 166 West 75th also executed and delivered to Merrill a Consolidated, Amended and Restated Promissory Note in the amount of $35,882,529 (the "Note"). To secure the Loan, the Loan Agreement and the Note, 166 West 75th executed a Mortgage and Security Agreement and an Assignment of Leases and Rents.

As asserted by 166 West 75th, the loan was designed to allocate certain funding amounts for specific purposes, including: (1) an initial funding amount, specified for acquiring the property; (2) a holdback for the costs of buying-out or relocating the tenants and occupants of single room occupancy ("SRO") units at the property; (3) a holdback for capital improvements to the property, including but not limited to renovations to the apartment units previously occupied by SRO tenants; and (4) a holdback for interest on the loan to be paid to Merrill.

GE Business commenced this action seeking to foreclose its mortgage lien in or about May, 2009. In its verified complaint, GE Business alleges that pursuant to the Loan

Agreement and Note, 166West 75th was to make payment of accrued interest on the loan on the first day of each month, beginning on August 1, 2007, and that failure to make any payments within five (5) days after the amount was due would constitute an "Event of Default." Upon an Event of default, Merrill was afforded a variety of remedies under the Loan documents, including the right to accelerate the Loan by declaring all amount owing there under immediately due and payable and the right to foreclose on the mortgaged property.

GE Business further alleges that an Event of Default occurred when 166 West 75th failed to make a payment for $173,299.32 in accrued interest on February 1, 2009, and the Accrued Interest Reserve lacked sufficient funds to cover the amount due. The verified complaint also contains allegations that another event of default occurred on March 1, 2009 when another interest payment was missed, and again there were insufficient funds in the Accrued Interest Reserve to pay the interest.

In response to the verified complaint, 166 West 75th served an amended answer, and asserted counterclaims and affirmative defenses. 166 West 75th does not deny that it failed to make the payments on February 1, 2009 and March 1, 2009. However, in its counterclaims and affirmative defenses, 166 West 75th alleges that GE Business failed to make advances required by the loan documents.

GE Business now moves to strike or dismiss 166 West 75th's affirmative defenses and counterclaims. GE Business argues that the counterclaims and affirmative defenses

asserted are legally baseless and do not meet the basic pleading requirements of CPLR 3211(a)(1) and (a)(7).

In particular, GE Business argues that 166 West 75th has not and can not allege that it satisfied its obligation to tender written notice and an opportunity to cure the claims to GE Business as required under Section 11.14 of the Loan Agreement. GE Business argues that 166 West 75th provided no notice of these claims or defenses prior to this action, and therefore the counterclaims and affirmative defenses must be stricken or dismissed. GE Business further argues that even if the 166 West 75th had properly alleged notice, the counterclaims and affirmative defenses are legally deficient under CPLR 3211(a)(7) because they are vague and fail to allege with requisite specificity which provisions of the loan documents were breached, when and how they were breached, or how GE Business's alleged breached harmed 166 West 75th's plans to develop the property.

In addition, GE Business argues that 166 West 75th's allegations of "scheme" liability should be dismissed because the allegations fail to plead the requisite elements of the claim with necessary specificity. GE Business further argues that the affirmative defenses of bad faith, unclean hands, estoppel and unconscionability should be stricken or dismissed as they are based on conclusory allegations.

Lastly, GE Business argues that the ninth affirmative defense, which alleges that Merrill Lynch Capital was not organized or qualified to do business in New York at the

time the Loan documents were executed, should be stricken or dismissed based on documentary evidence pursuant to CPLR 3211(a)(1).

In opposition, 166 West 75th argues that GE Business has waived the right to make this motion pursuant to the terms of a stipulation extending the time to respond to the counterclaims. 166 West 75th further argues that even if GE Business has not waived its right to make this motion, it must fail as the counterclaims and affirmative defenses alleged are proper.

Discussion

On a motion to dismiss pursuant to CPLR § 3211(a), the test is not whether the opposing party "has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep't 1998). The standard is the same when reviewing a motion to dismiss a defense. *See Federici v. Metropolis Night Club, Inc.*, 48 A.D.3d 741, 743 (2d Dep't 2008).[1]

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[1]166 West 75th's argument, that this motion is improper because GE Business waived the right to move to dismiss per the stipulation entered into by the parties to extend the time for GE Business to answer the counterclaims, is without merit. CPLR 3211(e) provides that a motion to dismiss a complaint pursuant to CPLR 3211(a) must be made "at any time before service of the responsive pleading is required." Therefore, "[a] stipulation which extends the time in which to answer a complaint also extends the time in which to move, unless a contrary intent is clearly stated." *Santos v. Chappell*, 63 Misc. 2d 730 (Sup. Ct. Nassau Co. 1970) (citing Seigel, Practice Commentary, McKinney's Cons. Law of N.Y., Book 7B, CPLR 3211). Because the stipulation extending the time to answer was "silent beyond the extension of time to answer . . the motion to dismiss was

GE Business argues that the Ninth Affirmative Defense which claims that Merrill Lynch Capital was not an entity organized and/or qualified to do business in New York at the time the Loan documents were executed should be dismissed based on documentary evidence pursuant to 3211(a)(1). "A CPLR 3211(a)(1) motion 'may be appropriately granted only where the documentary evidence utterly refutes [the] factual allegations, conclusively establishing a defense as a matter of law.'" *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171, 180 (2d Dep't 2008) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)).

In support, GE Business submits a document from the New York Department of State which certifies that as of September 16, 2009, "GE BUSINESS FINANCIAL SERVICES, INC., . . . filed an Application for Authority to do business in the State of New York on 05/05/1987, under the name MERRILL LYNCH BUSINESS FINANCIAL SERVICES INC. [and] that so far as shown by the records of the Department [of State], such corporation is still authorized to do business in the State of New York." (Emphasis in original.)

In addition, GE Business submitted along with its summons and verified complaint a document entitled "Notice of Lender Change of Name and Change of Address" which declares that "Merrill Lynch Capital, a division of Merrill Lynch Business Financial Services Inc. . . . has changed its name to GE Business Financial Services Inc. . . ."

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timely made . . . ." *Santos*, 62 Misc. 2d at 730.

166 West 75th failed to make any argument in opposition to GE Business's claim that the ninth affirmative defense should be dismissed.

GE Business has established by documentary evidence that the Lender, Merrill Lynch Capital, a division of Merrill Lynch Business Financial Services, was in fact authorized to do business in New York at the time it entered into the Loan documents with 166 West 75th, and the ninth affirmative defense is dismissed.

GE Business argues that the remaining affirmative defenses as well as all counterclaims should be dismissed pursuant to CPLR 3211(a)(7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true all allegations in the pleading, "accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001). However, "bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he has stated one." *Ruffino v. NYCTA*, 55 A.D.3d 817 (2d Dep't 2008) (internal citations omitted).

GE Business asserts that the counterclaims and affirmative defenses must be dismissed as 166 West 75th failed to plead notice, a required element under the terms of the loan agreement. Section 11.14 of the Loan agreement provides, in part that:

> Lender shall not be in default under this Agreement . . . unless a written notice specifically setting forth the claim of Borrower shall have been given to Lender within three (3) months after Borrower first had knowledge if the occurrences of the event which Borrower alleges gave rise to such claim and Lender does not remedy or cure the default, if any there be, promptly thereafter. Borrower waives any claim, set-off or defense against Lender arising by reason of any alleged default by Lender as to which Borrower does not give such notice timely as aforesaid. Borrower acknowledges that such waiver is or may be essential to Lender's ability to enforce its remedies without delay and that such waiver therefore constitutes a substantial part of the bargain between Lender and Borrower with regard to the Loan.

GE Business asserts that the amended answer and counterclaims fail to allege that 166 West 75th gave notice in compliance with this provision, and that 166 West 75th cannot allege compliance as it failed to give GE Business notice as required. 166 West 75th does not counter this argument in its opposition papers.

"It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms." *Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep't 2000). Terms of a contract should be interpreted in accordance with their plain meaning, and Courts will interpret an agreement to give meaning to each provision. *Petracca v. Petracca*, 302 A.D.2d 576 (2nd Dept. 2003); *In re Total MRI Management, LLC*, 11 Misc. 3d 1062A (Sup. Ct. Nassau Co. 2006). "The question of whether a writing is ambiguous is one of law to be resolved by the courts." *In re Wallace*, 86 N.Y.2d 543, 548 (1995).

Here, the loan agreement plainly requires that 166 West 75th provide notice to GE Business or waive the claim against GE Business. 166 West 75th failed to plead that it provided GE Business with notice. Accordingly, 166 West 75th's affirmative defenses and counterclaims, to the extent they rely upon GE Business's alleged breach of the loan documents, are dismissed for 166 West 75th's failures to plead that it gave GE Business notice of GE Business's default under the loan documents.

166 West 75th argues that regardless of this notice provision in the loan agreement and its failure to allege its compliance with it, 165 West 75th has sufficiently plead a cause of action for breach of contract. This assertion is premised on allegations made "upon information and belief" as well as allegations regarding the intention of the parties. To determine the intent of the parties, however, the Court can only look within the four corners of the agreement, and cannot consider extrinsic evidence, where, as here, the language of the agreement is unambiguous. *Klingsberg v. River Terrace Apts.*, 7 Misc. 3d 1029A (Sup. Ct. Bronx Co. 2005). As such, 166 West 75th's argument is unavailing.[2]

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[2] In the alternative, GE Business argues that regardless of 166 West 75th's alleged failure to comply with the notice provisions contained in Section 11.14 of the loan agreement, the first and second counterclaims and affirmative defenses should be dismissed for failure to state a cause of action for breach of contract and anticipatory breach. It is well settled that to plead a cause of action for breach of contract, a complaint or counterclaim must make out all the elements of the claim: "terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant." *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dep't 1986). *See also JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010). Here, 166 West 75th's allegations of breach of contract lack sufficient detail to state a claim for breach of contract. Where the specific terms of the agreement are not set forth, it is proper to dismiss the cause of action. *See Steiner v. Lazzaro & Gregory, P.C.*, 271

The allegations of the second affirmative defense and second counterclaim and of the sixth affirmative[3] and fourth counterclaim also fail to meet the threshold for stating a cause of action for breach of contract. All allegations for the second affirmative defense and second counterclaim are made "upon information and belief." Moreover, 166 West 75th's allegation (on information and belief) that GE Business failed to honor its funding obligation is duplicative of its first counterclaim that it "failed to fully fund loan requests." In addition, the allegations of anticipatory breach in the sixth affirmative defense and fourth counterclaim are completely conclusory. For these reasons, the second counterclaim and second affirmative defense, and sixth affirmative defense and fourth counterclaim are dismissed.[4]

A.D.2d 596, 597 (2d Dep't 2000) ("cause of action alleging a breach of contract must be dismissed since the terms of the [] agreement are not set out in the complaint"); *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d 719, 720 (2d Dep't 1994).

[3] 166 West 75th alleges two "sixth affirmative defenses." The first is alleged with the fourth affirmative defense, at ¶¶110-113, and is addressed herein. The second "sixth affirmative defense" alleges estoppel, waiver and unclean hands, at ¶ 114.

[4] To the extent that 166 West 75th is alleging a fraudulent scheme on the part of GE Business, such a cause of action will also be dismissed. 166 West 75th fails to plead the necessary elements for a cause of action of fraud. *NYU v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995) ("elements of a cause of action for fraud are representation of a material existing fact, falsity, *scienter*, deception and injury")(citations omitted). Additionally, the allegations fail to meet the heightened particularity standard for a fraud cause of action, as required by CPLR 3016(b). *See Bank Leumi Trust Co. of N.Y. v. D'Evori Int'l, Inc.*. 163 A.D.2d 26, 32 (1st Dep't 1990). Moreover, to state a cause of action for fraud, one must do more than merely replead the allegations of a breach of contract cause of action cannot. *Canstar v. J.A. Jones Construction Co.*, 212 A.D.2d 452, 453 (1st Dep't 1995) ("counterclaim sounding in fraud fails as it merely is an improper attempt to recast the breach of contract claim in terms of fraud. Indeed, there is no assertion that plaintiff allegedly breached any obligation collateral to or separate and apart

For its third counterclaim and fourth affirmative defense, 166 West 75th alleges that GE Business breached the implied covenant of good faith and fair dealing. These claims are no more than conclusory allegations. Moreover, this "counterclaim is redundant since a breach of an implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from a breach of contract." *Canstar v. J.A. Jones Construction Co.*, 212 A.D.2d 452, 453 (1st Dep't 1995). *See also Deer Park Enterprises, LLC v. Ali Systems, Inc.*, 57 A.D.3d 711,712 (2d Dep't 2008) (same). Accordingly, the third counterclaim and fourth affirmative defense are dismissed.

Lastly, 166 West 75th sixth through eighth affirmative defenses alleging bad faith, unclean hands, estoppel, plaintiff's own culpable conduct and unconscionability must be stricken, as they are no more than vague legal conclusions. Affirmative defenses "which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *Petracca v. Petracca*, 305 A.D.2d 566, 567 (2d Dep't 2003). *See also 170 West Village Assocs. v. G&E Realty, Inc.*, 56 A.D.3d 372, 372-373 (1st Dep't 2008) ("challenged affirmative defenses, which pleaded conclusions of law without supporting facts, were properly stricken as insufficient").

Therefore, pursuant to CPLR 3211(a)(7), the first counterclaim and first and third affirmative defenses which rely on GE Business's alleged breach of the loan documents are dismissed for 166 West 75th's failure to plead that it provided GE Business with

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from the obligations it had agreed to perform pursuant to contract.") (Citations omitted).

notice as required by the loan documents; the second counterclaim and second affirmative defense are dismissed as duplicative of the first counterclaim and first affirmative defense; the third counterclaim and fourth affirmative defense are dismissed because they plead a breach of the implied covenant of good faith and fair dealing, which is duplicative of the breach of contact claims; and the third and fourth counterclaims and sixth (both), seventh and eight affirmative defenses are dismissed because they are mere conclusory allegations. In addition, pursuant to CPLR 3211(a)(1) the ninth affirmative defense is dismissed based upon documentary evidence.

In accordance with the foregoing, it is

ORDERED that the motion to dismiss by plaintiff GE Business Financial Services, Inc., f/k/a Merrill Lynch Capital is granted, the defendant 166 West 75th Street, LLC's counterclaims and affirmative defenses is granted, and the Clerk of the Court is directed enter a judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 20, 2010

ENTER:

Saliann Scarpulla, J.S.C.