

Randall's Is. Aquatic Leisure, LLC v City of New York

2010 NY Slip Op 31934(U)

July 20, 2010

Supreme Court, New York County

Docket Number: 111146/09

Judge: Karen Smith

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.

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

PRESENT: KAREN S. SMITH
Justice

PART 62

RANDALL'S ISLAND AQUATIC LEISURE, LLC,
AQUATIC DEVELOPMENT GROUP, INC., AND
RECREATION DEVELOPMENT, INC.,
Plaintiff,

INDEX NO. 111146/09

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, THE
NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION, AND THE RANDALL'S ISLAND
SPORTS FOUNDATION,
Defendant.

FILED
JUL 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Reply _____

1
2
3

Cross-Motion: Yes No

Defendants the City of New York, the New York City Department of Parks and Recreation, the New York City Economic Development Corporation's motion to dismiss plaintiff's complaint as against them, pursuant to CPLR 3211, is granted for reasons provided below.

Plaintiffs commenced this action against RISF and the City, Parks, and the EDC to recover losses suffered when the City terminated the Concession Agreement. The first through third causes of action allege that defendants breached the Concession Agreement, the fourth cause of action alleges that defendants breached their implied obligation of good faith, cooperation, and fair dealing, and the fifth and sixth causes of action allege that plaintiff are entitled to recover under a promissory estoppel theory. Defendants the City, Parks, and the EDC (collectively "the City and EDC") argue in the instant motion that, based on the Concession Agreement, and pursuant to CPLR 3211(a)(1) and CPLR 3211(a)7), plaintiffs' complaint should be dismissed.

In May 1999, the New York City Economic Development Corporation ("the EDC") sought proposals for the creation of a park on Randall's Island. The EDC asked developers to propose a design for a family-themed entertainment venue and a sports center complex. Plaintiffs won the bidding process with a proposal to construct an outdoor waterpark with an additional sports complex. On June 14, 2006, the City of New York ("the City"), by and through the New York City Department of Parks and Recreation ("Parks"), and plaintiff Randall's Island Aquatic Leisure, LLC ("RIAL") entered into a concession agreement ("the Concession Agreement"). RIAL is a limited liability company formed by the principals of plaintiff Aquatic Development Group ("ADG") as a single purpose entity to design, construct, and operate the proposed park. Plaintiff Recreational Development Inc. ("RDI") was also formed by ADG for the purpose of bidding on the waterpark project.

Pursuant to the Concession Agreement, RIAL was required, *inter alia*, to (1) obtain written commitments for 25 percent of the necessary financing within 120 days from the date of execution

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

(2) obtain written commitments for the remainder of the financing within 180 days; (3) close the financing within 225 days. Plaintiffs were unable to meet their first deadline to secure written obligations to finance 25 percent of the project by December 16, 2006. Plaintiffs requested and were given an extension of time (until December 22, 2006) to comply with the financing requirements of the Concession Agreement, but plaintiffs were unable to meet that deadline. The City then gave plaintiffs another extension, this time asking plaintiffs to choose the extension deadline. Plaintiffs chose September 19, 2007. On September 5, 2007, RIAL contacted RISF regarding the possibility of the City loaning plaintiff's approximately \$25,000,000 to fund the project. The City did not agree to the loan and plaintiff's were unable to meet the September 19, 2007 deadline.

On September 21, 2007, the City provided written notice to plaintiffs that it was terminating the Concession Agreement effective October 26, 2007 pursuant to Sections 22.1.18, 22.3.1, and 33.1 of the agreement.

On a motion to dismiss pursuant to CPLR Section 3211, the pleading is to be afforded a liberal construction, and courts are to "accept the facts as alleged in the complaint as true, accord plaintiffs every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]).

THE CONTRACTUAL CLAIMS

The City and EDC argue that plaintiffs' first cause of action, for breach of contract, fails because plaintiffs cannot demonstrate that they obtained written financing commitments for the waterpark project within the time limitations contained in Section 33.1 of the Concession Agreement, as amended by an April 25, 2007 letter, which set the new deadline for obtaining financing until September 19, 2007. The City and EDC argue that plaintiffs' contention that they expected, and should have been afforded, an additional extension, is barred by Article 27 of the Concession Agreement, the merger clause, which codifies the parties' intent that the agreement is to be considered a completely integrated writing.¹ Moreover, the City and the EDC argue that Section 33.2 of the Concession Agreement specifically provides for "extensions of the financing deadlines by *mutual agreement of the parties*" (emphasis added). The City and the EDC argue further that plaintiffs' breach of Article 33 of the Concession Agreement triggered Parks' right to terminate the contract under Sections 22.1.18 and 22.3.1, which provide that failure to timely secure financing would constitute a default, which triggers Parks' right to terminate the Concession Agreement.²

Plaintiffs argue that their first cause of action for breach of contract should not be dismissed because the prior course of dealing between the parties established that "the project was more important than specific deadlines and it was established that Defendants were amenable to waiving deadline requirements by offering numerous extensions in order to get the Waterpark built." Specifically, plaintiffs rely

¹ The merger clause of the Concession Agreement provides:

This Agreement, together with the Exhibits hereto, contains all of the promises, agreements, conditions, inducements and understandings between the Licensor and Licensee concerning the Premises, and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, expressed or implied, between them other than as expressly set forth herein or as may be expressly contained in any enforceable written agreements or instruments executed simultaneously herewith by the parties hereto.

² Section 22.1.18 provides that: "if Licensee fails to meet any of the obligations set forth in Article 33 below." Section 22.3.1 provides that:

If an Event of Default occurs, and any applicable cure periods set forth herein have expired and such Event of Default remains uncured, and provided that neither the Recognized Lenders nor the Minority Equity Investors have exercised their cure rights as provided for in Article 23 hereof, Licensor, at any time thereafter, at its option, gives Licensee notice stating that this Agreement and the Term shall terminate on the date specified in such notice, which date shall not be less than (30) days after the giving of the notice (the "Termination Date"), then this License and the Term and all rights of Licensee under this License shall expire and terminate as if the date specified in the notice were the Expiration Date, and Licensee shall quit and surrender the Premises forthwith.

on the fact that defendants extended the deadline to secure financing on three occasions, in one instance granting the extension after the previous extension had expired. Plaintiffs concede that where an agreement contains a merger clause, extrinsic evidence that adds to or varies its terms should be precluded, but argue that even in the case of an integrated written contract, the meaning of the words may depend on various surrounding circumstances that are in dispute and the circumstances must be found as a fact before interpretation can proceed. Plaintiffs argue further that the bar against extrinsic evidence should be lifted in cases where equitable estoppel is appropriate, namely, when the conduct relied upon to excuse the requirement of a modification cannot otherwise be compatible with the agreement as written. Under this equitable estoppel theory, plaintiffs contend that the Court should allow evidence that shows that the defendants waived the deadline requirement by their prior conduct, and oral assurances. Moreover, plaintiffs argue that the equities balance in their favor since they have expended substantial time, effort, and money; specifically, plaintiffs allege that they spent \$9,907,883 towards the development of the waterpark under the Concession Agreement. Plaintiffs argue that, since the contract was modified through course of conduct, they were not in default under Section 33.1 and 33.2, and defendants could not terminate the agreement for failure to meet the financing deadlines under the default terms of Sections 22.1.18 and 22.3.1.

Here, plaintiffs defaulted under 33.1 and 33.2 of the Concession Agreement by failing to secure financing by the deadlines set out in the contract. As such, defendants were entitled to terminate the contract pursuant to Sections 22.1.18 and 22.3.1. The merger clause of Article 27 of the Concession Agreement precludes the type of extrinsic evidence on which plaintiffs base their argument that the terms of the agreement were changed by the extension, and defendants' oral representations (*See Vision Dev. Group of Broward County, LLC v. Chelsey Fundl.*, 43 A.D.3d 373, 374 [1st Dept 2007] [holding that where "the agreement contains a merger clause and a 'no oral modification' clause, the court should not resort to extrinsic evidence in construing the language of the agreement"]). As such, the first cause of action should be dismissed against the City and EDC.

As to plaintiffs' second cause of action, which alleges that there was no material basis to terminate the Concession Agreement for cause, and calls for reimbursement, as foreseen by Sections 2.2.2 and 2.3 of the Concession Agreement, in the case of at will, discretionary termination by Parks,³ the City and EDC argue that Parks did not terminate the concession agreement pursuant to the provision for at-will termination. Specifically, the City and EDC argue, Parks terminated the Concession Agreement pursuant to Sections 33.1, 22.1.18, and 22.3.1 of the Concession Agreement based on plaintiff RIAL's failure to obtain written financing commitments (Section 33.1) which constituted a default (Section 22.1.18) under the Concession Agreement.

For the same reasons they argued that they did not breach the contract, plaintiffs argue that their second cause of action for termination under the at will termination clause, Section 2.2.2 of the Concession

³Section 2.2.2 of the concession agreement provides, in relevant part, that:

"Notwithstanding anything to the contrary contained herein, this Agreement is terminable at will by Licensor in its sole discretion, at any time (an "Early Termination"), provided, however, that such termination shall not be arbitrary or capricious. For purposes hereof, Licensor and Licensee agree that termination by Licensor shall not be considered arbitrary or capricious where a determination is made by Licensor that the Premises is need for an alternative park-related use. However, the above is not a an exhaustive list of reasons for termination by Licensor that shall not be considered arbitrary or capricious. Licensor shall not terminate this Agreement solely for the purpose of issuing a new concession agreement to another party for the operation of a waterpark facility. However, the above is not an exhaustive list of the arbitrary or capricious reasons to terminate by Licensor."

Section 2.3 provides, in relevant part, that:

Licensor and Licensee acknowledge and agree that Licensee's capital and other investment in the Premises provides long term value to the Premises intended to benefit the operation and performance of the Premises. Accordingly, should Licensor terminate this Agreement pursuant to Section 2.2.2, Licensee shall be reimbursed by Licensor for the unamortized portion of the costs of constructing the Waterpark Facility at the Premises (the "Termination Payment")

Agreement, should not be dismissed. As such, plaintiffs argue that they are entitled to a Termination Payment.

As explained above, Parks properly terminated the contract pursuant to Sections 22.1.18 and 22.3.1, rather than the at-will provision of the contract, which did not entitle them to a termination payment. As such, plaintiffs second cause of action, for termination under Sections 2.2.3 and 2.3, should be dismissed.

Plaintiffs' third cause of action alleges that the Concession Agreement was terminated at-will and that the termination was arbitrary and capricious, citing: 1) the City's alleged "efforts to solicit another party to construct an amusement park at Coney Island," 2) defendants' need "to defuse the public opposition of the Comptroller to the sole source process for the concession agreement" and 3) EDC's former president Robert Lieber's "arbitrary and mistaken position that the Waterpark could not be financed." The City and EDC argue that plaintiffs list of reasons that Parks terminated the contract are conclusory, and contradicted by documentary evidence which establishes that Parks terminated the contract with plaintiff for cause.

For the same reasons they argue that they did not breach the Concession Agreement, plaintiffs contend that their third cause of action, for arbitrary and capricious termination of the contract, should not be dismissed. Specifically, plaintiffs argue that since they were not in breach of the Concession Agreement, defendants termination could have no basis in fact, and was therefore arbitrary and capricious or otherwise dishonest.

As explained above, Parks properly terminated the contract pursuant to Sections 22.1.18 and 22.3.1, rather than the at-will provision of the contract. As such, plaintiffs' second cause of action, which asserts that Parks impermissibly terminated the contract for arbitrary and capricious reasons under Sections 2.2.3 and 2.3 of the Concession Agreement, should be dismissed.

Plaintiffs' fourth cause of action is for breach of the Implied obligation of good faith, cooperation and fair dealing. The City and EDC argue that the covenant of good faith and fair dealing will be enforced only to the extent that it is consistent with the provisions of the contract. Specifically, the City and EDC argue that Parks' conduct in terminating the contract was consistent with the contract, as Article 33 contains express contractual provisions regarding financing obligations and extensions, and Section 34.9 contains a no-waiver clause which provides that any waiver, modification, alteration or change to any of its provisions must be in writing, and signed by both Parks and RIAL, and that any waiver of a default will neither affect the Concession Agreement nor any existing or subsequent default that may occur.⁴

Plaintiffs argue that their fourth cause of action, for implied breach of the implied covenant of good faith and fair dealing, should not be dismissed since plaintiffs raise allegations of bad faith, namely Parks termination of the contract. Moreover, plaintiffs argue that the Court should not foreclose an inquiry into these allegations of bad faith simply because a no-waiver clause exists in the contract.

The City and EDC are correct that the "implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract" (*Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, 51 A.D.3d 549, 550 [2008]). Here, plaintiffs are asking the Court to find that the implied covenant of good faith and fair dealing prevented Parks from doing what the contract expressly permitted it to do, namely terminate for failure of the plaintiffs to secure financing. As such, plaintiffs' fourth cause of action, for breach of the implied covenant of good faith and fair dealing, should be dismissed.

⁴ Section 34.9 provides that:

No covenant, agreement, term or condition of this Agreement shall be changed, modified, altered, waived or terminated except by a written instrument of change, modification, alteration, waiver or termination executed by Licensor and Licensee. No waiver of any Default shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent Default thereof.

THE PROMISSORY ESTOPPEL CLAIMS

Plaintiffs, in their fifth cause of action claims that promissory estoppel precluded Parks and the City from terminating the Concession Agreement based upon: 1) five extensions by EDC of the plaintiff ADG's conditional designation as the preferred developer; 2) three extensions of financing deadlines granted by Parks, the third of which was granted despite the expiration of the second extension, an act by which, plaintiffs claim, defendants waived any provision requiring written modification of contract; 3) defendants' continued investment in infrastructure improvements on Randall's Island; 4) defendants alleged oral agreement to invest \$25 million in the waterpark; 5) defendants' alleged instruction to plaintiffs to redesign the waterpark in January 2007; 6) defendants alleged knowledge that plaintiffs were relying on a further extension and spending millions of dollars in connection with the waterpark project.

The sixth cause and final cause of action is a variation of the promissory estoppel claim, relying on a letter written to plaintiffs by Joanne Imohosen, of Parks' Revenue Division, on May 11, 2006, which explained why Parks insisted on the termination of the at-will provision, and noted that Parks has rarely enforced the provision. The letter also assured plaintiffs that if Parks terminated the contract pursuant to the at-will provision, plaintiffs would be entitled to a termination payment. Plaintiffs claim that they relied on Imohosen letter, as well as verbal commitments to the same effect made prior to the letter. Absent from the letter are any statements regarding terminations for cause resulting from a default.

The elements of a claim for promissory estoppel are "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance thereon" (*Braddock v. Braddock*, 871 NYS2d 88, 77 [1st Dept 2009]). In *Braddock*, the First Department held that dismissal of a promissory estoppel claim was inappropriate where these elements are met, even when there is a contract whose terms contradict the promise relied upon (*Id.*).

The City and EDC argue that both of plaintiffs' promissory estoppel claims should be dismissed. Specifically, the City and EDC argue that merger clause in the Concession Agreement precludes plaintiffs' attempts to introduce extrinsic evidence. The City and EDC argue further that plaintiffs can point to no clear and unambiguous oral promise that states that defendants Parks would grant further extensions and not terminate the Concession Agreement. Moreover, the City and EDC argue the final extension letter, dated April 25, 2007, specifically states that plaintiff RIAL may not be granted a further extension and that if RIAL does not obtain written financing commitments for the waterpark by September 19, 2007, Parks can hold RIAL in default and terminate the Concession Agreement.

Plaintiffs argue that the fifth and sixth causes of action, each for promissory estoppel, should not be dismissed, arguing that defendants' representations that further extensions would be granted, if necessary, resulted in the plaintiffs spending \$9,907,883 in reliance on defendants' representations. Specifically, plaintiffs contend that they continued work from January 4, 2007 until April 25, 2007 under assurances that a future deadline would be granted, even though there was no existing valid deadline. Plaintiffs also argue that they relied, to their detriment, on the letter from Joanne Imohosen, of Parks' Revenue Division, on May 11 2006, which explained why Parks insisted on the termination of the at-will provision, and that Parks has rarely enforced the provision. Plaintiffs further argue that they relied on defendants' September 14, 2007 email in which defendants suggested a meeting to discuss the City lending plaintiffs money in order to help plaintiffs meet their financing requirements would take place during the week of September 24, 2007, the week after the September 21 deadline to secure financing. Plaintiffs argue further that the merger is merely one factor to consider in the analysis of a promissory estoppel claim, and plaintiffs' substantial business relationship can be used to demonstrate reasonable reliance.⁵

⁵ The April 25, 2007 letter states, in relevant part:

Please note that Randall's Island is an important New York City Resource and Parks fully expects Randall's Island Aquatic Leisure, LLC to meet these new deadlines and may not grant further requests...For the avoidance of doubt, if...the written commitments required pursuant to Section 33.1.2 of the Concession Agreement are not obtained by September 19, 2007...an Event of Default shall be deemed to have occurred provided, however, that no party...shall have the right to cause such dates to be extended and provided further that the Concession Agreement shall terminate and expire and all rights under the Concession Agreement...In such event, each party shall pay its costs and expenses incurred in connection with the Concession Agreement, and the Concession Agreement shall

Here, plaintiffs' fifth cause of action must be dismissed because plaintiffs' complaint does not allege that defendants made a "clear or unambiguous" promise to grant an additional extension to the deadline to secure financing. Instead, plaintiffs essentially allege that, given all of the circumstances, their assumption that an extension would be granted was reasonable. Plaintiffs' sixth cause of action, which relies on the letter of Joanne Imohlosen, should be dismissed as Imohlosen's letter does not make any clear and unambiguous promise not to terminate the Concession Agreement following a default. Instead, the letter is an explanation of why Parks required a provision for at-will termination, and how that provision works. Imohlosen never promised that Parks would not use the provision, only that it has been rarely used in other contracts containing a similar provision. In any event, Parks did not terminate the Concession Agreement pursuant to the at-will provision, and Imohlosen's letter cannot be the basis for a claim for promissory estoppel since plaintiffs could not have reasonably relied upon it. Moreover, subsequent to Imohlosen's letter, Parks sent a letter in regard to the final deadline extension which explicitly stated that Parks may terminate the contract if plaintiffs failed to meet the deadline. As such, plaintiffs' fifth and sixth causes of action, for promissory estoppel, must be dismissed.

Accordingly, it is

ORDERED that this motion by co-defendants the City of New York, the New York City Department of Parks and Recreation, the New York City Economic Development Corporation's to dismiss plaintiff's complaint as against them, is granted.

This constitutes the decision and order of the Court. It should be noted that the Court also granted defendant Randall's Island Sports Foundation, Inc's motion to dismiss (Motion Seq. 02), and, therefore, this is a final determination of the action.

FILED
JUL 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/20/2010

K.S.S.
Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

terminate without any liability of either party to any person or other party.