Medical Provider Fin. Corp. III v Parkway Acquisition I, LLC
2011 NY Slip Op 31404(U)
May 17, 2011
Sup Ct, Queens County
Docket Number: 489/11
Judge: Orin R. Kitzes

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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MEDICAL PROVIDER FINANCIAL CORPORATION III,

Plaintiff,

Index No.: 489/11
Motion Date: 5/11/11
Motion Cal. No.: 23

-against-

PARKWAY ACQUISITION I, LLC f/k/a PARKWAY HOSPITAL ASSOCIATES, THE PARKWAY HOSPITAL, INC., IAN GAZES, CHAPTER 7 TRUSTEE FOR THE ESTATE OF THE PARKWAY HOSPITAL, INC., ROBERT AQUINO, CAPITOL HEALTH MANAGEMENT SERVICES LIMITED, SPRINT SPECTRUM L.P., NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS f/k/a BELL ATLANTIC MOBILE, OMNIPOINT COMMUNICATIONS, INC., DIRECT CARE CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, SEGNA ELECTRIC INC., UNITY COOL CORP., PROSPECT PAYMENT SPECIALIST, INC., HEALTHPRO NURSING SOLUTIONS, LLC, NOUVEAU ELEVATOR INDUSTRIES INC., MARY ANDREA, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., "JOHN DOE #1" through "JOHN DOE #20," the last twenty names being fictitious and unknown to plaintiff, the persons or 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,

Defendants.

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The following papers numbered 1 to 12 read on this motion by plaintiff for an order pursuant to CPLR Rules 3211(a)(1) and 3211(a)(7) and CPLR Section 3013 dismissing Defendant Parkway Acquisition I, LLC f/k/a Parkway Hospital Associates' ("Parkway") counterclaims for failure to state a claim and failure to plead with sufficient particularity and because the allegations of the counterclaims are contradicted by documentary evidence, (2) an Order striking the affirmative defenses set forth in paragraphs 136, 137, 139, and 140 of Parkway's Verified Answer and Counterclaims, and (3) an Order sanctioning Parkway and its counsel and awarding plaintiff Medical Provider Financial Corporation III reasonable attorney's fees and costs pursuant to N.Y.C.R.R. § 130-1.1.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-8
Memorandum of Law.....	9-10
Reply Memorandum of Law.....	11-12

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR Rules 3211(a)(1) and 3211(a)(7) and CPLR Section 3013 dismissing Defendant Parkway Acquisition I, LLC f/k/a Parkway Hospital Associates' ("Parkway") counterclaims for failure to state a claim and failure to plead with sufficient particularity and because the allegations of the counterclaims are contradicted by documentary evidence, (2) an Order striking the affirmative defenses set forth in paragraphs 136, 137, 139, and 140 of Parkway's Verified Answer and Counterclaims, and (3) an Order sanctioning Parkway and its counsel and awarding plaintiff Medical Provider Financial Corporation III reasonable attorney's fees and costs pursuant to N.Y.C.R.R. § 130-1.1, is decided as follows:

According to the pertinent sections of the complaint, plaintiff is the owner and holder of certain mortgages and notes evidencing debts owed by Parkway to MPFC which are secured by a property located at 70-35 113th Street, Forest Hills, New York 11375 (the "Mortgaged Property"). Such mortgages include the Amended and Restated Mortgage and Security Agreement (the "Amended Term Mortgage") dated August 8, 2001 and the Amended and Restated Revolving Mortgage and Security Agreement (the "Amended Revolving Mortgage" and together with the Amended Term Mortgage the "Mortgages") dated August 8, 2001. Plaintiff commenced this action to foreclose on the Mortgages and defendant Parkway served a Verified Answer and Counterclaim in connection with this action. In its Verified Answer and Counterclaim, Parkway alleges that, pursuant to a letter of Jeffrey R. Patterson, dated July 6, 2010, plaintiff offered to enter into a binding agreement to discharge Parkway's entire debt in exchange for the payment of $2.6 million. This offer was conditioned upon necessary court approvals and certain due diligence, including an appraisal that verified Parkway's estimated value of the Mortgaged Premises. Parkway accepted the offer set forth in the July 6, 2010 letter. Parkway claims the conditions set forth in the letter were met and seeks a judgment declaring that plaintiff must specifically perform its agreement to permit Parkway to discharge its debt to plaintiff and satisfy the Parkway mortgages for the payment of $2.6 million. Parkway has two counterclaims, both seeking specific performance of the alleged agreement, one based on breach of contract, the other on promissory estoppel. Plaintiff now seeks to dismiss the counterclaims on the grounds that a defense is founded upon documentary evidence, fails to state a cause of action, and is not to pleaded with sufficient particularity . Defendant Parkway opposes this branch of motion.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground

that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, plaintiff's submissions in support of its motion include the complaint, the July 6, 2010 letter, a pre-negotiation agreement, correspondence between the parties, correspondence and affidavit of Jeffrey Patterson, attorney representing Thomas A. Seaman, Federal Court Receiver ("Receiver") for Medical Capital Corporation, appraisal of the Parkway property by Grubb & Ellis, prepared for the Receiver, broker opinion of value by Cassidy/Turley, prepared for the Receiver, and the sealed complaint brought in before United States Magistrate Judge, Southern District, against, inter alia, Robert Aquino, as CEO of Parkway Hospital, alleging various criminal activity including the offering of bribes to a New York State Senator in connection with various Hospital benefits. Plaintiff claims this evidence establishes that Parkway entered into a "pre-negotiation" agreement which superseded all prior agreements, including any agreement alleged to have arisen from the July 6 letter; the conditions of the July 6 letter were not satisfied; and Parkway continued to negotiate the discounted payoff of its debt and made a counter-offer to pay additional amounts to discharge its debt, thereby terminating any alleged prior offers.

The July 6, 2010 letter, was sent by the Receiver's attorney to Mr. Dilascio, Principal of Johnson Capital, which was engaged by Parkway to procure a loan to pay off certain obligations, in pertinent part, reads as follows:

. . . . On behalf of the Receiver, we are responding to your letter of June 25, 2010, containing a proposal for a discounted payoff in the amount of $2.1 million by your client Parkway Associates, on the mortgage held by MCC on the above referenced Property, which secures a loan in the original principal amount of $8.9 million ("Mortgage"). The Receiver [*i.e.* the Lender] has considered your proposal and, subject to certain due diligence and all necessary court approvals, is prepared to accept a payoff amount of $2.6 million in satisfaction of and consideration for a reconveyance of the Mortgage. In order to provide sufficient justification for such a steep discount to the Court and creditors of the MCC estate, the Receiver estimates that he will need 45 to 60 days to complete his due diligence regarding the financial status of the borrower and guarantor, and to verify through appraisal the estimated value of the property, as suggested in your proposal. Assuming the results of the due diligence and appraisal are satisfactory, the Receiver would be required to submit a motion for approval of the discounted payoff agreement to the U.S. District Court for the Central District of California, where the MCC receivership case is pending. Closing shall occur within five business days of Court approval.. . .

Parkway does not refute that there were several conditions set forth in this letter. The affidavit of Jeffrey Patterson, attorney for the Receiver makes clear that the conditions of the

July letter were not met. Specifically, plaintiff obtained several appraisals for the Mortgaged Property of $15.1 million, $11 million, $12.3 million to $13.8 million and $12.9 million to $15.8 million. These values were significantly higher than what Parkway had estimated and based its offer to the Receiver of $2.1 million.

Mr. Patterson's affidavit and the correspondence indicates that the Receiver and Parkway failed to come to an agreement regarding the terms of a pre-negotiation agreement. The Receiver obtained the above mentioned appraisals of the subject property and thereupon, in a letter, dated January 5, 2011, Mr. Patterson informed Mr. Matthew Kasindorf, the attorney for Parkway, that "if Parkway wishes to proceed with the negotiations, . . the Receiver's asking price is $4.75 million for a discounted payoff of the loans secured by the Parkway Hospital Property. On February 4, 2011, Parkway's counsel Kasindorf provided Mr. Patterson with a written counteroffer to payoff the Mortgages and other loan documents for the amount of $3.8 million. The July 6 Letter also made plain that any agreement was subject to court approval. Neither plaintiff nor Parkway sought any such court approval. Moreover, Mr. Patterson states that Parkway never responded to the July 6, 2010 letter. Furthermore, on February 22, 2011, Mr. Patterson informed Parkway that the Receiver would not be negotiating with Parkway any further about the possible discounted payoff fo the loans and discussions were terminated.

Plaintiff also refers to the pre-negotiation agreement as a clear indication that the July 6 letter was not an agreement. First, the pre-negotiation agreement was signed by Parkway on or about December 22, 2010. Therein, Parkway acknowledged that plaintiff had no obligation to discuss, negotiate, or agree to any restructuring or reinstatement of the Mortgages or any of the related loan documents. The Pre-Negotiation Agreement expressly states that plaintiff and Parkway agree that the Pre-Negotiation Agreement "supersedes any prior or contemporaneous representations, statements, understandings or agreements concerning the subject matter of this Agreement."

The Court finds that these submissions constitute documentary evidence and establish, as a matter of law, that the July 6, 2010 letter was not an agreement between plaintiff and Parkway. Parkway claims that this same evidence indicates there was such an agreement. There is no basis for Parkway's understanding of the July 6, 2010 letter. It is clear that the letter was not an "offer" and was not capable, upon unqualified acceptance, of becoming a contract that bound plaintiff to accept a $2.6 million payoff of the Mortgages. The July 6 Letter merely indicated that the Receiver was "prepared" to agree to a $2.6 million payoff or sale, and only if his due diligence showed that $2.6 million was a fair price that was likely to be acceptable to the Receivership Court and plaintiff's creditors. It is clear that once the appraisals were made, the Receiver did not find the $2.6 million to be a fair price. It is also clear that Parkway never agreed to the fair price the Receiver offered and in fact made a counter-offer-a clear indication that it did not believe an agreement had been reached in the July letter.

The Court finds that Parkway has failed to show any evidence that sufficiently refutes plaintiff's evidence that the July 6, 2010 letter was not an agreement, or even a promise by plaintiff, and consequently Parkway has failed to prevent a finding that resolves all issues in

Plaintiff's favor. Accordingly, the branch of the plaintiff's motion seeking to dismiss the counterclaims based upon CPLR 3211(a)(1) is granted. Based upon this finding, the Court shall not address the branches of the motion pursuant to CPLR 3211(a)(7) and CPLR Section 3013, as they have been rendered academic.

Based on the above dismissal of the counterclaims, the branch of the motion seeking an Order striking the affirmative defenses set forth in paragraphs 136, 137, 139, and 140 of Parkway's Verified Answer and Counterclaims is granted. These defenses are based upon the existence of an agreement stemming from the July letter, and as discussed, this Court finds such did not exist. The branch of the motion seeking an Order sanctioning Parkway and its counsel and awarding plaintiff Medical Provider Financial Corporation III reasonable attorney's fees and costs pursuant to N.Y.C.R.R. § 130-1.1 is denied. This Court finds that the counterclaims were not so frivolous as to warrant a sanction.

Dated: May 17, 2011

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ORIN R. KITZES, J.S.C.