

**Tamach Airport Mgr., LLC v HRC Fund III Pooling
Domestic LLC**

2011 NY Slip Op 32755(U)

October 6, 2011

Supreme Court, New York County

Docket Number: 603817/2008

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 603817/2008
TAMACH AIRPORT MANAGER, LLC
VS.
HRC FUND III POOLING DOMESTIC
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

OCT 14 2011

Upon the foregoing papers, it is ordered that this motion

is denied NEW YORK COUNTY CLERK'S OFFICE

per attached

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

Dated: 10/6/11

[Signature]
EMILY JANE GOODMAN L.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

TAMACH AIRPORT MANAGER, LLC,

Plaintiff,

Index No. 603817/08

-against-

HRC FUND III POOLING DOMESTIC LLC,

Defendant.

-against-

TAMACH REAL ESTATE MANAGEMENT, INC.,
CARLOS GONZALEZ, MANUAL MARIN,

Index No. 590212/08

Third-Party Defendants.

FILED

-----X

Emily Jane Goodman, J.S.C.:

OCT 14 2011

This action arises out of a \$6 million loan made by an entity known as Hudson Realty Capital Fund III, LP, Tamach Airport Manager, LLC (Tamach), by virtue of a Loan Agreement dated January 17, 2006. Tamach complains that defendant HRC Fund III Pooling Domestic LLC (HRC), the party to whom the \$6 million Note was directed, failed to deal in good faith with Tamach in negotiating an extension to the maturity date of the loan, causing Tamach to default and lose its investment. In this motion, HRC moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), as to Tamach's cause of action for breach of the covenant of good faith and fair dealing, which Tamach claims governs the parties' relationship.

In a prior motion for injunctive relief brought by Tamach, this court found that Tamach had failed to show a likelihood of success on the merits and that, in fact, the evidence showed that Tamach had "borrowed vast sums of money from defendant which remains unpaid" Decision dated February 26, 2009, Notice of Motion, Ex. B.

The loan was originally due on February 1, 2008. Tamach and HRC negotiated an extension to the maturity date until July 17, 2008. Upon Tamach's inability to meet that deadline, the parties tried, and failed, to reach an accord as to a further extension of the loan. In this action, Tamach bases its claim on its belief that HRC breached the covenant of good faith and fair dealing, implicit in all contracts, when HRC refused to extend the maturity date of the loan at terms favorable to Tamach, and called the loan due. Tamach maintains that HRC owed Tamach a duty to propose a reasonable extension of time in which to pay back the loan.

The Loan Agreement itself contains a provision which states that "[n]o modification, amendment, waiver, extension, discharge or termination of any kind under any of the Mezzanine Loan Documents shall be valid unless in writing and signed by the parties to such document[s]." Ex. A to Complaint (Notice of Motion Ex. A), § 8.5, at 65. Further, the Note contains similar language, and adds "Mezzanine Lender does not hereby agree to,

[* 4]

nor does Mezzanine Lender commit itself to, enter any Modification." Ex. B to Complaint, ¶ 12. Therefore, any agreement to extend the maturity date of the loan would necessarily have to be in writing.

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); see also *Leon v Martinez*, 84 NY2d 83 (1994). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007) ("[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

"[T]he implied covenant of good faith and fair dealing between the parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *One Step Up, LTD v Webster Business Credit Corp.*, 87 AD3d 1, 14 (1st Dept 2011), quoting *Moran v Erk*, 11 NY3d 452, 456 (2008); see also *Murphy v American Home Products Corp.*, 58

NY2d 293 (1983). The covenant of good faith and fair dealing cannot "create new duties that negate explicit rights under a contract." *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 (1st Dept 2003). Nor can such a covenant exist where there is "a lack of a valid and binding contract from which such a duty would arise." *American-European Art Associates, Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 (1st Dept 1996). In short, "[n]o obligation can be implied ... which would be inconsistent with other terms of the contractual relationship." *Murphy v American Home Products Corp.*, 58 NY2d at 304.

Tamach's basic argument is that HRC negotiated for a first extension, and so, was obligated to negotiate in good faith for another extension. However, the contract documents belie this claim. The Note specifically states that HRC did not have to agree to any modifications of the agreement at all, much less agree twice, so that compelling HRC to negotiate for a second extension would be in violation of express terms in that agreement. Further, the agreement was at an end when the loan matured at the end of the first extension date, and so, there was no contract from which to import a covenant of good faith and fair dealing. In short, Tamach had no reasonable expectation requiring HRC to commit itself to a second extension, and certainly no expectation that HRC was contractually committed to

act against its own self interest in order to give Tamach a deal satisfactory to Tamach.

Because the cause of action for breach of the covenant of good faith and fair dealing is dismissed, the cause of action for a permanent injunction is also dismissed. Therefore, the complaint must be dismissed in its entirety.

Accordingly, it is

ORDERED that defendant HRC Fund III Pooling Domestic LLC 's motion to dismiss the complaint is granted, and the complaint is hereby dismissed with costs and disbursements to defendant HRC Fund III Pooling Domestic LLC as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue on the counterclaim and third party complaint.

Dated: October 6, 2011

FILED

OCT 14 2011

NEW YORK
ENTER: COUNTY CLERK'S OFFICE



J.S.C.
EMILY JANE GOODMAN