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

PRESENT: MELVIN L. SCHWEITZER J.S.C. PART 45
Justice

Cari, LLC

INDEX NO. 650690/10

MOTION DATE

-v-

415 Greenwich Fee Owner, LLC, et al.

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 by plaintiff for leave to file a second amended complaint herein is DENIED per the attached Decision and Order.

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

Dated: June 14, 2011

MELVIN L. SCHWEITZER J.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 45

CARI, LLC, Plaintiff, -against- 415 GREENWICH FEE OWNER, LLC, KBS 415 GREENWICH, LLC, KBS TRIBECA SUMMIT, LLC, KBS CAPITAL ADVISORS, LLC, 415 GREENWICH SENIOR MEZZANINE OWNER, LLC Defendant.	Index No. 650690/10 DECISION AND ORDER Motion Sequence Nos. 004 and 005

MELVIN L. SCHWEITZER, J.:

Defendants move to dismiss the first amended complaint, which seeks specific performance of two contracts (the Contracts) for the sale of commercial condominium units (the Units) by the former developers of a building in Tribeca (the Building). The basis for the motion is that the purported Contracts to purchase the Units at $3 million less than their market value are actually options that are unsupported by any consideration, thereby rendering the Contracts void as a matter of law. The Building is a landmarked, first-class, ten-floor condominium comprised of luxury multimillion dollar apartment units. Defendants contend that the Contracts, entered into by the former developers who have been removed from control, purport to grant an investor in adult entertainment clubs a free option to purchase the ground floor Units in the Building for approximately one-third of their stated prices in the condominium offering plan. According to defendants, while these Contracts masquerade as real estate purchase agreements, they are nothing of the sort. They actually do not commit plaintiff to anything. Defendants point to an

identical clause in the Contracts that they would permit plaintiff to proceed with the transaction or not as plaintiff wills. As defendants see it, from the moment the ink on the Contracts was dry, plaintiff could decide not to purchase the Units, and obtain the return of its deposits with interest. The Contracts thus do not represent a real bargain, but rather a charade. As such, they are unenforceable.

The clauses that defendants rely upon read as follows:

> Notwithstanding anything to the contrary contained in this Agreement or the Plan, [plaintiff] may cancel this Agreement, for any reason, by providing Sponsor with written notice no later than ten (10) business days prior to the Closing Date. If [plaintiff] so elects to cancel this Agreement, Sponsor shall within thirty (30) days after receipt of notice of cancellation from [plaintiff], return to [plaintiff] all sums deposited by [plaintiff] hereunder, together with interest earned thereon. . . .

Ex. 3 § 5.1; Ex. 4 § 5.1

Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004) (quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994)). "Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or actually contradicted by documentary evidence," will not sustain a claim. *Kliebert v McKoan*, 228 AD2d 232 (1st Dept 1996). In particular, where the parties' written agreement renders the plaintiff's claims untenable, "the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim." *Bodner*, 14 AD3d at 5; *see also Baystone Equities, Inc v Gerel Corp.*, 305 AD2d 260 (1st Dept 2003) (dismissing claim for specific performance of contracts for sale of real property because "the contracts, rationally construed, are

not consistent with plaintiff's contention"); *Robinson v Robinson*, 303 AD2d 234, 235, 757 NYS2d 13, 15 (1st Dept 2003) (dismissing complaint where the documentary evidence "amply demonstrates that plaintiff's claims against appellant are unsupportable"). This rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern." *Bodner*, 14 AD3d at 6 (internal quotation marks omitted).

Plaintiff argues that its obligation to provide "notice no later than ten (10) business days prior to the Closing Date" is sufficient consideration to establish mutuality of obligation. The court does not agree. Plaintiff's obligation to give such notice does not provide defendants with anything of value or cost plaintiff anything. Rather, it is just a condition precedent to plaintiff's right to unilaterally avoid performance under the Contracts at plaintiff's will, and obtain a return of its downpayment with interest. Plaintiff is free to give such notice any time solely at its discretion. This is different from the situation where an employer can terminate an employee's employment by giving a certain number of days' notice. In that situation, the employer is giving up something, the employer remains obligated to pay the employee in the interim preceding the notice, and there is mutuality of obligation on the part of both employer and employee. *Cf McCall Co. v Wright*, 133 AD 62 (1st Dept 1909), *affd*, 198 NY 143 (1910).

The court agrees that the Contracts are unenforceable for want of mutuality, and, accordingly, dismisses the first amended complaint.

Under New York law, agreements that are illusory and lack mutuality of obligation are unenforceable. "There is no mutuality of obligation where one party can terminate his promise at will." *Dorman v Cohen*, 66 AD2d 411, 418 (1st Dept 1979). "[I]f one of the promissor parties is free to perform it or not, as he wills, [the contract] is illusory, and will not be enforced." *Ivor B.*

Clark, Inc. v Boston Rd. Shopping Ctr., Inc., 24 Misc 2d 84, 89 (Sup. Ct. N.Y. County 1960). Thus, in *Dorman*, "the plaintiffs, but not defendants, ha[d] the option to break the agreement" without cause or prior notice, and the First Department held that the agreement was "illusory for lack of mutuality of obligation." *Dorman* at 415. As possessors of a free and "unilateral right to cancel," the First Department explained, "plaintiffs did not, in effect, bind themselves to do anything." *Id.*

As in *Dorman*, plaintiff here also possesses a unilateral, unrestricted right to cancel. The Contracts are dated as of December 17, 2008 and state that the "Closing Date" shall be "December 1, 2009" (*i.e.* about one year later). Exs. 3 and 4 § 5.1. Because plaintiff was free to perform or not, the Contracts are an illusory bargain and unenforceable. *See Dorman*, 66 AD2d at 415, 413 NYS2d at 380. "The contract, lacking mutuality of obligation, may not be held enforcible [sic] merely because, in form, it appeared to consist of an offer and acceptance." *Balsam Farm, Inc. v Evergreen Dairies, Inc.*, 6 AD2d 720 (2d Dept 1958) (holding unenforceable contract that required plaintiff to bottle milk supplied by defendant but did not require defendant to supply any quantity of milk); *see also Leonard v Ickovic*, 79 AD2d 603 (2d Dept 1980) (holding that "an option contract" is an agreement to hold an offer open in exchange for "consideration [that] is forfeited if the option is not effectively exercised"), *affd*, 55 NY2d 727 (1981).

Prior to the submission of defendants' motion to dismiss the first amended complaint (Motion Sequence 004), plaintiff moved for leave to file a second amended complaint (Motion Sequence No. 005). Apart from the procedural infirmities inherent in such a tactic, the second amended complaint cannot and does not change the fact that the clauses in the Contracts render

the agreements illusory and unenforceable for lack of mutuality. The court, therefore, denies plaintiff's motion for leave to file a second amended complaint.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the first amended complaint is granted; and it is further

ORDERED that plaintiff's motion for leave to amend and file a second amended complaint is denied.

Dated: June 14, 2011

ENTER:

J.S.C.