

**Harvest Town VII. Vestavia Hills LLC v Tvillage Tulsa  
LP**

2013 NY Slip Op 31976(U)

August 20, 2013

Sup Ct, New York County

Docket Number: 650146/13

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

HARVEST TOWN VILLAGE VESTAVIA HILLS LLC
et al

INDEX NO. 650146/13

MOTION DATE

TVILLAGE TUSA LP, et al

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by plaintiff counterclaim defendant to dismiss defendant counterclaim plaintiff's first counterclaim is DENIED per the attached Decision and Order.

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

Dated: August 20, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
 HARVEST TOWN VILLAGE VESTAVIA HILLS LLC, :  
 HARVEST TOWN VILLAGE STERLING HEIGHTS :  
 LLC, HARVEST TOWN VILLAGE TULSA LLC, :  
 HARVEST TOWN VILLAGE AUDUBON PARK LLC, :  
 HARVEST WATERFORD LLC, HARVEST :  
 TROWBRIDGE LLC, :  
 :  
 :  
 Plaintiffs-Counterclaim Defendants, :  
 :  
 -against- :  
 :  
 TVILLAGE TULSA LP, TV MEMPHIS LP, TV :  
 STERLING LP, TV VESTAVIA LP, THE PARK AT :  
 TROWBRIDGE LP, and CSH-ING WATERFORD LP, :  
 :  
 Defendants-Counterclaim Plaintiffs, :  
 -and- :  
 :  
 CHICAGO TITLE INSURANCE COMPANY, :  
 (as escrow agent) :  
 :  
 Nominal Defendant. :  
 -----X

Index No. 650146/13  
 DECISION AND ORDER  
 Motion Sequence No. 001

**MELVIN L. SCHWEITZER, J.:**

This action arises out of a contract dispute between plaintiffs-counterclaim defendants Harvest Town Village Vestavia Hills LLC, Harvest Town Village Sterling Heights LLC, Harvest Town Village Tulsa LLC, Harvest Town Village Audubon Park LLC, Harvest Waterford LLC and Harvest Trowbridge LLC (Holiday) and defendants-counterclaim plaintiffs TVillage Tulsa LP, TV Memphis LP, TV Sterling LP, TV Vestavia LP, The Park At Trowbridge LP, CSH-ING Waterford LP (Chartwell), and Nominal Defendant Chicago Title Insurance Company (Escrow Agent). In response to Holiday’s Complaint, Chartwell filed an Answer and two Counterclaims. Holiday moved to dismiss Chartwell’s First Counterclaim.

## Background

Holiday and Chartwell entered into a Purchase and Sale Agreement (the Purchase Agreement) on June 15, 2012. Holiday agreed to purchase six Senior Housing Facilities and all related assets in Oklahoma, Tennessee, Michigan, Alabama and Ohio from Chartwell for \$165,500,000. Holiday paid a \$4,137,5000 deposit, which was held in escrow by the Escrow Agent.

The purchase was originally scheduled to close on November 1, 2012. On September 14, 2012, Holiday and Chartwell extended the Closing Date to December 14, 2012. On November 21, 2012, the parties extended the Closing Date, to January 31, 2013.

There were certain conditions in the Purchase Agreement both parties were required to fulfill prior to closing. Among those, Chartwell agreed to “use commercially reasonable efforts to . . . operate and manage the [Senior Housing Facilities] in the ordinary course in a normal business like manner consistent with past practice” and “maintain the [Senior Housing] Facilities in good condition and repair.” Chartwell also agreed to provide accurate and complete financial statements concerning the Senior Housing Facilities.

Holiday agreed to use commercially reasonable efforts in good faith to obtain each of Chartwell’s lender’s approval of Holiday’s assumption of their outstanding loans.

In October and November of 2012, Holiday raised concerns about improper management of the Senior Housing Facilities. In response, Chartwell sent Holiday figures of their capital expenditures on November 14, 2012. On November 16, 2012 Chartwell denied these claims and urged that Holiday obtain lender approval, as it was obligated to do prior to closing. On November 19, 2012 Holiday notified Chartwell of their alleged breach of the Purchase

Agreement and requested condition reports of the Senior Housing Facilities, as well as permission to perform property condition assessments. On December 17, 2012, Holiday wrote to Chartwell, informing them of receipt of further information of the severity of the alleged breach, and of the termination of the Purchase Agreement.

Holiday filed a complaint on January 15, 2013, alleging that Chartwell “intentionally breached the Purchase Agreement by failing to (i) use commercially reasonable efforts to operate and manage the Senior Housing Facilities in the ordinary course in a normal businesslike manner consistent with past practice, (ii) maintain the Senior Housing Facilities in good condition and repair, and (iii) provide accurate financial information that fairly presents the true financial condition of the Senior Housing Facilities.” They alleged Chartwell significantly reduced food expenditures, resulting in various food shortages and drastically reduced other capital expenditures in the months prior to the Closing Date. They alleged Chartwell provided false and misleading financial information. In their complaint, Holiday sought the return of their deposit in escrow, as well as other compensatory, incidental, and consequential damages arising out of Chartwell’s alleged breach.

On January 28, 2013, Chartwell served interrogatories on Holiday, requesting that Holiday address their allegations. In their response, Holiday suggested several facilities that significantly reduced expenditures, based on data furnished by Chartwell. Chartwell states that none of the Senior Housing Facilities experienced significant reductions in expenditures, as per the financial information provided to Holiday. Chartwell states that the factual information they sent to Holiday in response to their initial concerns contradicts Holiday’s assertions and shows that there were no reductions in capital and food expenditures. Consequently, according to

Chartwell, Holiday had no cause for the termination of the Purchase Agreement and the filing of the lawsuit.

In response to Holiday's suit for breach of the Purchase Agreement, Chartwell filed Counterclaims for willful breach of contract, asking for damages not limited by the liquidated damages provision in the Purchase Agreement. The First Counterclaim alleges that Holiday, not Chartwell, breached the Purchase Agreement, and Chartwell seeks indemnification beyond liquidated damages. Chartwell alleges Holiday willfully breached its obligations under the Purchase Agreement to obtain the lenders' approval of Holiday's assumption of the existing loans.

Chartwell alleges that Holiday "fabricated the allegations against Chartwell . . . to deprive Chartwell of the deposit to which it is entitled and thereby inflict monetary harm on Chartwell." Chartwell states that since the claims were fabricated for the purpose of depriving them of the deposit in escrow, they are entitled to compensation beyond liquidated damages. Chartwell states that Holiday knowingly fabricated the allegations in its complaint by alleging conduct that directly contradicted the Income Statements and Financial Information they provided. They seek compensatory, special and consequential damages under the Indemnification Clause of the Purchase Agreement.

Holiday has moved to dismiss Chartwell's First Counterclaim with prejudice pursuant to New York Civil Practice Law and Rules, pursuant to 3211 (a) (7) for failure to state a cause of action and CLPR 3211 (a) (1) as founded on documentary evidence.<sup>1</sup>

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<sup>1</sup> Chartwell's Second Counterclaim, not at issue in this motion to dismiss, sought damages under the liquidated damages provision for breach of contract.

## Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). “To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff’s claim.” *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, “documentary evidence [must] utterly refute plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff’s complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether “from the [complaint’s] four corners[,] ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Under CLPR 3211 (c), “either party may submit any evidence that could properly be considered on a motion for summary judgment.” In a motion to dismiss, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v Martinez*, 84 NY2d 83, 88 (1994). Thus, “affidavits may be used freely to preserve inartfully

pleaded, but potentially meritorious claims.” *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 (1976).

This counterclaim cannot be dismissed under CLPR 3211 (a) (1), because the documentary evidence provided by Holiday is not conclusive. Although the Purchase Agreement contains a liquidated damages provision, the evidence is not sufficient to dismiss the counterclaim because a liquidated damages provision is subject to waiver. The conduct alleged can render void the liquidated damages provision. The Purchase Agreement is insufficient documentary evidence to support dismissal under CLPR 3211 (a) (1).

A liquidated damages provision estimates the amount of injury a party would sustain in the event of a contract breach. *Truck Rent- A-Center v Puritan Farms 2nd*, 41 NY2d 420, 424 (1977). The provision must “[bear] a reasonable proportion to the probable loss and the amount of actual loss [must be] incapable or difficult of precise estimation.” *Id.* at 425. Courts give weight to freely negotiated provisions between sophisticated parties. *See id.* at 427 (“The agreement was fully negotiated and . . . [t]here is no indication of any disparity of bargaining power or of unconscionability.”)

Liquidated damages provisions are not recognized when doing so would be contrary to public policy. *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L. C.*, 47 AD3d 239, 244 (1st Dept 2007). These provisions are generally enforceable, except in the event of “willful or grossly negligent acts.” *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 (1983). They are not enforceable “when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing.” *Id.* at 385.

Courts have construed wrongful conduct and “willful acts” very narrowly, even in instances in which a liquidated damages provision contained particular exceptions for willful

behavior. In *Noble Lowndes*, the parties had an exception to recovery under a liquidated damages provision for willful acts. *Metro. Life Ins. Co. v Noble Lowndes Int'l, Inc.*, 84 NY2d 430, 433 (1994). The court found that in their exempting willful acts, “the parties intended to narrowly exclude from protection truly culpable, harmful conduct, not merely intentional nonperformance of the Agreement motivated by financial self-interest.” *Id.* at 438. The defendant’s repudiation “was motivated exclusively by its own economic self-interest in divesting itself of a highly unprofitable business undertaking.” *Id.* at 439. Breach motivated by legitimate economic self-interest does not constitute wrongful conduct exempted by a liquidated damages provision. *Id.*; *Atari, Inc. v Carlyle Trading Corp.*, 2012 WL 3541165 \*4 (2012). Contracting parties have “[t]he option to breach a contract and pay damages . . . , even where the breaching party had no intention of performing its obligations when it entered into the agreement.” *Solow Bldg. Co. II, L.L. C.*, 47 AD3d at 248.

Despite the predisposition to enforce liquidated damages provisions when the breach committed was in the breaching party’s economic self-interest, it does not apply to tortious and other misconduct. *Id.* at 247.

In *Solow Bldg.*, the court denied the defendant’s motion for partial summary judgment and found cause to override the liquidated damages provision because there was a question of fact as to whether the defendant acted in bad faith and attempted to commit economic duress. *Id.* at 249-250. The defendant’s “misconduct extend[ed] well beyond a simple breach of the parties’ agreement, seeking to impose upon [the Plaintiff] a new contractual burden unrelated to the lease.” *Id.* at 248. The court stated that this behavior could manifest intent to inflict monetary harm, which would make the liquidated damages provision non-enforceable. *Id.* at 250.

In Chartwell's counterclaim, Holiday is accused of willfully breaching the Purchase Agreement by not obtaining lender approval, which in itself would not constitute a waiver of the liquidated damages provision. However, Chartwell has stated a cause of action with its allegations that Holiday fabricated its complaint in order to retrieve the security deposit and other damages from Chartwell, thereby allowing them to breach the Purchase Agreement without forfeiting their deposit, as stipulated in the Purchase Agreement. Accepting these allegations as true, there is the possibility of recovery beyond what is stipulated by the liquidated damages provision. What Chartwell is alleging, intent to inflict economic harm, is tortious behavior that constitutes a waiver of the liquidated damages provision.

Chartwell alleges Holiday falsely initiated a lawsuit on fabricated grounds in order to bypass the agreed-upon forfeiture of Holiday's security deposit in the event of breach. Holiday is attempting to secure a benefit rightly belonging to Chartwell and inflict economic harm by filing suit for the return of its security deposit and additional damages. Chartwell is entitled to the deposit in the event of Holiday's breach, and Holiday is seeking to deprive Chartwell of that, as well as additional damages.

If they no longer wished to follow through with the purchase of the Senior Housing Facilities, Holiday could have breached the contract and forfeited their deposit, and Chartwell would not be entitled to any additional damages, as per the liquidated damages provision. The court in *Noble Lowndes* stated that parties could breach a contract that appears to be "a highly unprofitable business undertaking." 84 NY2d at 439. But, as the court stated in *Solow Bldg.*, a party cannot commit a tortious act even if it is in their own economic self-interest. While it is clearly in Holiday's economic self-interest to recoup their \$4.1 million deposit plus additional

damages, Chartwell's allegations, taken as true, would constitute conduct that waives the liquidated damages provision.

The allegations made by Chartwell suggest conduct "well beyond a simple breach of the parties' agreement." *Solow Bldg. Co. II, L.L. C.*, 47 AD3d at 248. Chartwell states that they sent Holiday evidence in direct contradiction of Holiday's claims. It is alleged Holiday nonetheless brought this claim. Holiday allegedly acted in bad faith and committed intent to inflict economic harm to obtain damages from Chartwell and avoid forfeiting its security deposit.

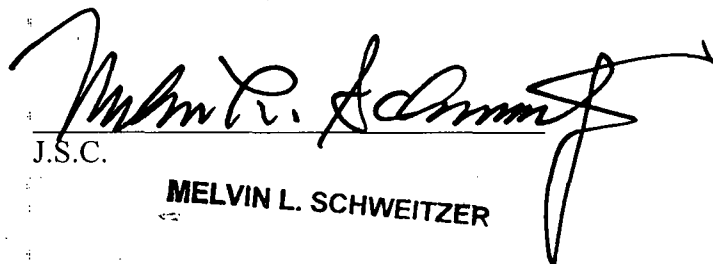
Chartwell has raised a material issue of fact as to whether Holiday's conduct "smacks of intentional wrongdoing." *Kalisch-Jarcho, Inc.*, 58 NY2d at 385. There is a plausible cause of action to address Holiday's alleged conduct, and a material issue of fact as to whether Holiday committed tortious behavior that would allow for recovery of damages beyond the parties' liquidated damages provision.

Accordingly, it is

ORDERED that the Plaintiff-Counterclaim Defendants' motion to dismiss the Defendant-Counterclaim Plaintiffs' First Counterclaim is denied.

Dated: August 20, 2013

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER