

Honua Fifth Ave. LLC v 400 Fifth Realty LLC

2014 NY Slip Op 31223(U)

May 5, 2014

Supreme Court, New York County

Docket Number: 652237/2010

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

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HONU A FIFTH AVENUE LLC,

Plaintiff,

-against-

Index No. 652237/2010
Motion Seq. Nos.: 005, 006
Motion Date: 11/19/2013

400 FIFTH REALTY LLC and UNICREDIT S.P.A.
f/k/a UNICREDIT CORPORATE BANKING S.P.A.
f/k/a UNICREDIT BANCA D'IMPRESA S.P.A.,

Defendants.

-----X

BRANSTEN, J.

Motion sequence numbers 005 and 006 are consolidated herein for disposition.

In motion sequence number 005, defendant UniCredit S.p.A. ("UniCredit") seeks dismissal with prejudice of all claims in the second amended complaint asserted against it, pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff Honua Fifth Avenue LLC ("Honua") cross-moves for leave to amend the second amended complaint to add fraud claims against UniCredit, or, in the alternative, for an order granting it leave to renew its prior motion to amend. In motion sequence number 006, Honua restates the request for relief made in its cross motion.

For the reasons that follow, UniCredit's motion to dismiss is granted and Honua's motion to amend is denied.

I. Background

The relevant substantive and procedural history of this action was fully set forth in this Court's Decision and Order entered May 24, 2013, and will not be repeated here, except as necessary for clarification. *See Honua Fifth Ave. LLC v. 400 Fifth Realty LLC*, Index No. 652237/2010 (Sup. Ct. N.Y. Cnty. May 24, 2013), *aff'd* 111 A.D.3d 579 (1st Dep't 2013) ("Prior Order").

Briefly, this action concerns a dispute between Honua and defendant 400 Fifth Realty LLC ("400 Fifth") arising out of 400 Fifth's construction of, and Honua's failure to purchase, a combined luxury hotel and residential condominium development located at 400 Fifth Avenue in Manhattan (the "project"). UniCredit is the lead mortgage lender to 400 Fifth and holds first mortgage liens on both the hotel and residential portions of the project.

In 2007, Honua, as purchaser, and 400 Fifth, as seller, entered into two purchase and sale agreements. The first agreement, dated August 22, 2007, memorialized Honua's agreement to purchase, upon satisfaction of certain conditions precedent, approximately 130 to 180 hotel units, as well as certain commercial space, for \$255 million (the "Hotel PSA"). In the second agreement, dated December 4, 2007, Honua agreed to purchase, upon satisfaction of certain conditions precedent, the residential condominium apartment

units on floors 30 through 37 of the hotel premises for \$95 million (the "Residential PSA").

On December 30, 2009, Honua and 400 Fifth executed a third amendment to the Hotel PSA (the "Third Amendment") in which Honua authorized the release of the \$45 million Hotel PSA deposit from escrow, upon receipt of a letter prepared by UniCredit certifying that 400 Fifth had made a \$110 million equity investment of its own funds in the project (the "estoppel letter").

Honua contends that it later learned that 400 Fifth had not invested its own funds, and that both UniCredit and 400 Fifth knew that the investment representation in the estoppel letter was false when made.

In December 2010, Honua unilaterally terminated the Hotel PSA and demanded return of the \$45 million that had been released from escrow, on the grounds that the hotel suffered from excessive and unacceptable levels of air infiltration through an exterior wall. Honua later unilaterally terminated the Residential PSA and demanded return of the \$5 million Residential PSA deposit, citing the same alleged air infiltration defect. The Residential PSA deposit remains held in escrow.

In December 2010, Honua commenced this action to recover the \$45 million Hotel PSA deposit. Honua then filed a notice of pendency against the property and served a first amended complaint, in which it asserts claims for breach of the Hotel PSA and for

foreclosure of Honua's alleged vendee's lien arising out of the Hotel PSA deposit. In that complaint, Honua joined UniCredit as a defendant, citing its status as 400 Fifth's mortgage lender on the project.

In the Prior Order, this Court denied 400 Fifth's motion for partial summary judgment on the fifth and sixth counterclaims. The court also granted 400 Fifth's request to discharge the notice of pendency upon the filing by 400 Fifth of an undertaking in the amount of \$45,000,000, together with interest at the rate of 0.18% annually.

In addition, the Court's Prior Order granted Honua's cross-motion for leave to amend the first amended complaint to add a claim for breach of the Residential PSA but denied its request for leave to assert fraud claims against UniCredit and 400 Fifth arising out of alleged misrepresentations made in the estoppel letter. Honua appealed the denial of leave to amend to add the fraud claims, and the denial of Honua's request to apply a 9% statutory interest rate in calculating the final amount of the undertaking. By order dated November 26, 2013, the Appellate Division, First Department unanimously affirmed the Prior Order, to the extent appealed.

Meanwhile, Honua filed a second amended complaint including a claim for breach of the Residential PSA. In addition, on June 10, 2013, 400 Fifth posted the required undertaking, and the notice of pendency was canceled.

II. UniCredit's Motion to Dismiss

UniCredit now brings the instant motion, arguing that Honua fails to state a claim for any equitable lien on either the hotel or the residential portions of the property, and that Honua's attempts to subordinate UniCredit's mortgage liens therefore must be dismissed. UniCredit's arguments with respect to the Hotel PSA and the Residential PSA are addressed in turn below.

A. Motion to Dismiss Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiff and the plaintiff must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). However, "factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dep't 1991) (citation omitted), *lv. denied* 80 N.Y.2d 788 (1992); *see also Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233 (1st Dep't 1994).

B. *Hotel PSA Claims*

UniCredit first seeks dismissal of Honua's equitable lien claim as it pertains to the hotel portion of the property. Since 400 Fifth filed an undertaking and the notice of pendency has been cancelled, UniCredit contends that any claimed equitable lien has detached from the property and attached to the undertaking. Inasmuch as Honua no longer holds a lien against the hotel property, there is no lien to which UniCredit's mortgage lien may be subordinated, and, therefore, UniCredit is no longer a proper party to this action.

The Court agrees. Unicredit is not a necessary or proper party to this action, with respect to the claims asserted against it arising out of the Hotel PSA deposit.

Upon the filing of an undertaking, any equitable lien detaches from the property, and is transferred to the undertaking. *See White Plains Sash & Door Co. v. Doyle*, 262 N.Y. 16, 19-20 (1933); *Tri-City Elec. Co. v. People*, 63 N.Y.2d 969, 971 (1984). After the alleged equitable lien has shifted to the undertaking, the property is relieved of the encumbrance. *See Yonkers Builders Supply Co. v. Luciano & Son, Inc.*, 269 N.Y. 171, 177 (1935). Once the encumbrance is lifted, the party claiming the equitable lien has no claim against parties holding prior liens on the property, inasmuch as the only available remedy is to procure a judgment on the undertaking, rather than foreclose on the property. *See Morton v. Tucker*, 145 N.Y. 244, 248-249 (1895).

There is no dispute that 400 Fifth filed the required undertaking, or that the notice of pendency has been discharged. With the undertaking in place and the notice of pendency cancelled, Honua no longer has a claim for an equitable vendee's lien against the property and the project. Any claim for subordination of UniCredit's mortgages is moot, and Honua's claims against 400 Fifth are now for damages secured by the undertaking. As this court held in the Prior Order, "the undertaking . . . adequately protects Honua's interests, without the necessity of subordinating UniCredit's first mortgage lien." (Prior Order at 30.)

Contrary to Honua's contention, the undertaking posted is in an amount sufficient to protect Honua's interests and secure the equitable lien. Pursuant to the doctrine of law of the case, Honua is not entitled to 9% in statutory interest, allegedly amounting to some \$14 million. "An appellate court's resolution of an issue on a prior appeal constitutes law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law." *Board of Managers of the 25 Charles St. Condo. v. Seligson*, 106 A.D.3d 130, 135 (1st Dep't 2013), quoting *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dep't 2007). The Appellate Division, First Department has held in this action, "[b]ecause this action to foreclose on the vendee's lien is equitable in nature, [Honua] is not entitled as of right to the 9% statutory interest rate in

the calculation of 400 Fifth's undertaking." *Honua Fifth Ave. LLC v. 400 Fifth Realty LLC*, 111 AD3d at 580.

C. *Residential PSA Claims*

Next, UniCredit contends that Honua's claim for an equitable lien on the residential units fails, inasmuch as Honua does not allege that the \$5 million Residential PSA deposit has been released from escrow. UniCredit further contends that any claim for return of the Residential PSA deposit can be satisfied by the escrowed funds.

Again, the Court agrees. Unicredit is not a necessary or proper party to this action with respect to the claims asserted against it arising out of the Residential PSA deposit, since no basis upon which to subordinate UniCredit's mortgage presently exists.

An executed contract for purchase and sale of land confers on the vendee an equitable lien on the land as security for the purchase money it has already paid. Where the sale contract fails, *absent fault of the purchaser*, courts in New York will enforce in favor of the purchaser (vendee) a lien on the subject property to the extent of monies paid so that the purchaser may assert his rights in a court of equity to get out of the land what he paid on it.

Donerail Corp. N.V. v 405 Park LLC, 30 Misc.3d 1221(A), at *11 (Sup. Ct. N.Y. Cnty. 2011) (internal quotation marks and citation omitted), *aff'd* 100 A.D.3d 131 (1st Dep't 2012).

Here, Honua's interest in the return of the \$5 million Residential PSA deposit is fully protected by the continued escrow of that deposit. Honua's entitlement to return of that deposit depends upon whether Honua proves that it was within its rights when it unilaterally terminated the Residential PSA, which cannot be determined at this juncture.

While Honua correctly argues that, as a plaintiff, it is entitled to assert at the pleading stage alternative legal theories in support of its demands, *see, e.g., Beach v. Touradji Capital Mgmt. L.P.*, 85 A.D.3d 674, 675 (1st Dep't 2011), Honua has failed to plead a claim related to the Residential PSA and the \$5 million deposit sufficient to hold UniCredit in this action.

III. Honua's Cross-Motion for Leave to File a Third Amended Complaint

In the cross-motion and in motion sequence number 006, Honua seeks leave to amend the second amended complaint.¹ Through the third amended complaint, Honua proposes to add new claims for fraudulent inducement and aiding and abetting fraud, arising from defendants' alleged misrepresentations in the estoppel letter regarding 400 Fifth's investment in the project. Plaintiff claims that this misrepresentations were made in order to induce Honua to agree to the release of the Hotel PSA deposition from escrow.

¹ In the alternative, Honua also sought leave to renew its earlier motion to amend, which was denied by the Court in the Prior Order. Since the Court's denial of the motion to amend was affirmed by the First Department, *see Honua Fifth Ave. LLC v. 400 Fifth Realty LLC*, 111 A.D.3d 579, 579 (1st Dep't 2013), Honua's instant motion to renew is denied.

Honua argues that, in the proposed claims, it has corrected the fatal deficiencies in earlier versions of these claims, which found by the court in the Prior Order.

UniCredit opposes, contending that the motion is precluded by the law of the case on the ground that the Court previously denied leave to amend to add the same fraud claims pleaded under the same theory. UniCredit also contends that the proposed claims are defective on their face, since Honua once again failed to allege fraud with sufficient particularity and failed to allege sufficient facts in support of each necessary element of a claim for fraud.

In the Prior Order, this Court denied Honua's motion for leave to amend the complaint to assert claims for fraudulent inducement and aiding and abetting fraud that are, at their core, identical to those which Honua now seeks to add. A court's prior holding that the basis for a fraud claim was "nonmeritorious" precludes a subsequent motion to amend the complaint to add a fraud claim. *See, e.g., Community Energy Alternatives v Peatco II*, 243 A.D.2d 371, 371-372 (1st Dep't 1997).

Like the fraud claims proposed in Honua's previous motion, the instant proposed fraud claims are not alleged with sufficient particularity. Although leave to amend is freely granted absent prejudice or surprise, "leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." *Davis & Davis v. Morson*, 286 A.D.2d 584, 585 (1st Dep't 2001) (internal citations

omitted). The party seeking to amend bears the burden of showing that the proffered amendment is not patently devoid of merit. *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010).

"The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury." *Century 21 v. Woolworth Co.*, 181 A.D.2d 620, 625 (1st Dep't 1992). CPLR § 3016(b) requires a plaintiff to plead the elements with particularity, and the facts alleged must "suffice to permit a 'reasonable inference' of the alleged misconduct." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).

Where the claim asserted is aiding and abetting fraud, the plaintiff must plead that the alleged aider had knowledge of the fraudulent nature of the representations, and rendered substantial assistance to the principal actor. *Nat'l Westminster Bank v. Weksel*, 124 A.D.2d 144, 147-148 (1st Dep't 1987), *lv denied* 70 N.Y.2d 604 (1987). "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009), *lv denied* 13 N.Y.3d 709 (2009) (quotations marks and citations omitted).

The new detail alleged by Honua regarding a motive for the fraud and how the fraud was accomplished adds nothing substantial to Honua's repeated allegation that UniCredit falsely certified in the estoppel letter that 400 Fifth had invested \$110 million of equity in the project. Honua now alleges that, in a clandestine side deal, 400 Fifth obtained the funds from loans arranged through UniCredit by 400 Fifth's principal, Bizzi. Significantly, however, Honua still fails to allege that the \$110 million investment was not made in full, nor does Honua allege facts regarding how or why Bizzi's alleged loans render the estoppel letter fraudulent. Honua never explains how or why 400 Fifth's equity investment, even if it came from another loan from UniCredit, was improper. How Honua raised the funds that it invested is irrelevant to the question of whether the funds were, in fact, invested in the project.

Further, Honua does not provide any information about the individual who provided the new details. While reliance on a confidential source may sometimes be necessary in cases involving fraud, the source must supply sufficient facts for the opposing party and the court to determine the source's veracity and access to relevant information.

[W]here plaintiffs rely on confidential personal sources but also on other facts, they need not name their sources as long as the latter facts provide an adequate basis for believing that the defendants' statements were false. Moreover, even if personal sources must be identified, there is no requirement that they be named, provided they are described in the

complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.

Novak v. Kasaks, 216 F.3d 300, 314 (2d Cir. 2000); *see* CPLR 3016.

Here, Honua has failed to provide the court with any means with which to determine the basis or veracity of the confidential informant's allegations that it has set forth in an attorney's affirmation of merit. Honua makes no attempt to provide background information from which the court may infer that the confidential source is an individual with knowledge of the underlying facts, or is merely guessing, or is biased in some way.

Honua has failed to allege damages sufficient to support a claim of fraud. As this Court held in the Prior Order, the "release of the deposit, by itself, has caused Honua to suffer no damages, and Honua will not suffer any damages, unless and until it prevails upon its claim for return of the Hotel PSA deposit, and 400 Fifth fails to return the deposit." (Prior Order at 28.)

Honua's new damages allegation, that it would have been able to secure materially more favorable terms and conditions for the Third Amendment, is speculative and defective. "[T]he loss of an alternative contractual bargain . . . cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain was undeterminable and speculative." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 422 (1996)

(internal quotation marks and citation omitted); *Rather v. CBS Corp.*, 68 A.D.3d 49, 58 (1st Dep't 2009) (affirming dismissal of fraud claim, and rejecting plaintiff's "claim that, but for CBS's fraud, he could have had more remunerative employment than that which he ultimately obtained at HDNet"), *lv denied* 13 N.Y.3d 715 (2010).

In addition, Honua once again does not explain its delay and failure to raise these arguments in its first motion for leave to add these fraud claims. *See* Prior Order at 27. Honua merely represents that, after denial of its prior motion, it continued to investigate its concerns in connection with the representations made in the estoppel letter.

The proposed fraudulent inducement claim is also fatally defective on the ground that it is duplicative of a claim that 400 Fifth failed to fulfill its contractual obligation to obtain a truthful estoppel letter. "A cause of action for breach of contract cannot be converted into one for fraud by merely alleging that defendant did not intend to fulfill the contract." *Non-Linear Trading Co. v. Braddis Assoc.*, 243 AD2d 107, 118 (1st Dep't 1998).

Accordingly, Honua's cross-motion to amend is denied.

IV. Conclusion

Accordingly, it is

ORDERED that defendant UniCredit S.P.A. f/k/a UniCredit Corporate Banking S.P.A. f/k/a UniCredit Banca D'Impresa S.P.A. to dismiss the second amended complaint is granted (motion sequence number 005) and that the second amended complaint is severed and dismissed in its entirety as against defendant UniCredit, with costs and disbursements to that defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that Plaintiff Honua Fifth Avenue LLC's cross-motion for leave to amend, or in the alternative, to renew is denied in its entirety; and it is further

ORDERED that Plaintiff Honua Fifth Avenue LLC's motion for leave to amend, or in the alternative, to renew (motion sequence number 006) is denied in its entirety.

Dated: New York, New York

May 5, 2014

ENTER:



Hon. Eileen Bransten, J.S.C.