

**Antares Real Estate Servs. III, LLC v 100 WP
Prop.--DOF II, LLC**

2014 NY Slip Op 31312(U)

May 16, 2014

Supreme Court, New York County

Docket Number: 652829/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ANTARES REAL ESTATE SERVICES III, LLC,

Index No.: 652829/2013

Plaintiff,

DECISION & ORDER

-against-

100 WP PROPERTY – DOF II, LLC, ROBERT
GINSBURG, DANIEL HEFLIN, TREVOR
ROZOWSKY, and STEVEN ALTMAN,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants 100 WP Property – DOF II, LLC (DOF), Robert Ginsburg, Daniel Heflin,
Trevor Rozowsky, and Steven Altman move to dismiss the Complaint pursuant to CPLR 3211.
Defendant’s motion is granted for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the Complaint.

Plaintiff Antares Real Estate Services III, LLC (Antares) is the former property manager
of a commercial office building in Connecticut (the Property) currently owned by DOF.
Complaint ¶ 1. In March 2007, a non-party corporate affiliate of Antares, called Antares 100
WP LP (the Antares Prior Owner), purchased the Property for approximately \$130 million. ¶ 26.
A total of \$200 million was raised to purchase and renovate the Property, \$40 million of which
was equity. ¶¶ 27-28. The “Antares group of companies” (the Antares Group) invested in \$22
million of the equity. ¶ 28. Of the \$160 million of debt, a company called ING Clarion Capital
Partners was the most junior lender, owning the final \$30 million. ¶ 29. This junior debt was
later acquired by DOF. *Id.*

At the outset of the Antares Prior Owner's purchase of the Property in 2007, another non-party member of the Antares Group (the Antares Prior Manager) – not plaintiff Antares – was the Property's manager.¹ Between 2008 and 2011, due to the recession, the Property experienced financial difficulties, preventing the Antares Prior Owner from paying off its loans. ¶¶ 35-47. The Antares Prior Owner was given multiple extension of the loans' maturity date but, towards the end of 2011, the Property had to be sold because the lenders were unwilling to further refinance. *Id.*

In January 2012, defendants Ginsburg, Heflin, Rozowsky, and Altman, who work for DOF and its affiliate Torchlight, began negotiating to purchase the Property. ¶ 51. DOF's new lenders wanted the Antares Group to continue managing the property. ¶ 68. This led to negotiations between DOF and Jim Cabrera, a senior principal of the Antares Group, about a new property management contract. ¶¶ 52-53. Plaintiff Antares was selected (and may have specifically been created for the purpose of) managing the Property under DOF's ownership.² Antares' primary demand from DOF was an entitlement to a "promote", which is a financial incentive compensation structure for a non-owner who contributes to the development of a property. A promote is structured so that increases to the property's value lead to an increase in the developer's compensation. Antares believed that since it had been managing the Property since 2007, it was entitled to a promote of \$1.6 million for the work it had already performed. ¶¶ 50, 56. The obligation to pay this promote, as defendants correctly aver, was an obligation the Antares Prior Owner had to the Antares Prior Manager. Antares, nonetheless, sought to negotiate a guaranteed entitlement to a promote from DOF. ¶¶ 56-63. DOF refused. *Id.*

¹ Defendants explain that the Antares Prior Manager was an entity called Antares Real Estate Services II, LLC. *See* Dkt. 12 at 4.

² Hence, plaintiff being called Antares Real Estate Services **III**, LLC. *See* Note 1, *supra*.

On April 30, 2012, according to Antares, defendant Ginsburg allegedly made the following representations to Cabrera: “(i) [Antares] had earned and was entitled to the entire Promote, (ii) the Promote would be paid upon sale or appraisal of the Property unless [Antares] was terminated with cause, and (iii) [Antares] was to be given use of 17 Field Point [part of the Property] as its office space.” ¶ 64. On May 15, 2012, Ginsburg further “promised Cabrera that [DOP] would not exercise any purported right it might have under the PMLA [discussed below] to terminate [Antares] without cause [and] that if [Antares] were threatened with termination for cause, it would have a period of time to cure the default.” ¶ 65. Ginsburg allegedly made these promises to induce Antares to sign a written contract to manage the Property (the PMLA, discussed below). The PMLA does not contain terms providing Antares with the benefit of such oral assurances (e.g. a guaranteed promote). ¶ 66. Antares argues that by signing a new property management contract, Antares relinquished its right to receive a \$1.6 million promote under its prior management contract.³ ¶ 70.

In June 2012, Antares and DOF executed a Property Management and Leasing Agreement (the PMLA). ¶ 72. The PMLA had an initial term of 3 years, with automatic 1 year renewals unless it was terminated. ¶ 75. Section 11.2 states that Antares is to be provided office

³ Antares’ narrative about the \$1.6 million makes little sense. DOF did not owe Antares a promote before the PMLA was executed, and would not have owed \$1.6 million to Antares had DOF selected a different property manager. In other words, the \$1.6 million was not leverage Antares had over DOF; it was a vanishing financial goal that Antares sought to recoup by working with DOF. And, even if Antares relinquished its right to the \$1.6 million by signing the PMLA, doing so was not inherently irrational. Antares appears to have made the decision to give up a tenuous right to \$1.6 million (which may never have been paid) for a possible right to millions more. By signing the PMLA, Antares was taking a risk that if, for whatever reason, DOF terminated it, it might be worse off. Signing the PMLA may have been unwise, but doing so under the circumstances was clearly not irrational. For the reasons explained below, by signing the PMLA and agreeing to the inclusion of a merger clause, Antares is bound by the contract it signed.

space at 17 Field Point Road, but that Antares must vacate such office space when the agreement is terminated. Section 20.1 sets forth the calculation of the promote:

Provided this Agreement is still in full force and effect or for a period of 180 days after the termination of this Agreement if [Antares] has not been terminated “for cause”, [Antares] shall be entitled to receive a one-time additional fee.

Dkt. 8 at 16. Section 20.1 describes the two scenarios in which a promote would be calculated. They are, simply put, 20% of either (1) the profits if DOF sells the Property; or (2) the appraised value of the Property after five years if DOF still owns the Property. Section 20.1 concludes by stating:

If [Antares] has been terminated prior to such five-year period but not for cause, the [promote] shall be prorated based upon the number of months [Antares] served as property manager for the Premises. For purposes of this Agreement, the term “for cause” shall include any intentional breach of this Agreement, any failure to cure [, and other conditions, such as bankruptcy].

Section 21.2 requires amendments to be in writing. Section 21.5 states that “[t]his Agreement constitutes the entire agreement between [DOF] and [Antares].” Dkt. 8 at 17.

In a letter dated January 29, 2013, DOF notified Antares that it was terminating the PMLA as of February 28, 2013. ¶ 80. Antares contends that it was terminated so that DOF would not have to pay it a promote. Antares commenced this action to recover a promote under contract and fraud theories. The Complaint, filed on August 12, 2013, contains seven causes of action: (1) fraud; (2) fraudulent inducement; (3) promissory fraud; (4) breach of [oral] contract; (5) breach of the covenant of good faith and fair dealing; (6) quantum meruit; and (7) breach of the PMLA.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Fraud

To properly plead a cause of action for fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). Pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.* To maintain a claim for fraudulent inducement, a complaint

must allege “a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged.”

Perrotti v Becker, Glynn, Melamed & Muffly LLP, 82 AD3d 495, 498 (1st Dept 2011), citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996).

“A fraud-based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.’” *Manas v VMS Assocs., LLC*, 53 AD3d 451, 453 (1st Dept 2008) (citation omitted). Antares’ conclusory allegations about defendants’ secret intention not to perform are insufficient under CPLR 3016(b). *Braddock v Braddock*, 60 AD3d 84, 98-99 (1st Dept 2009) (“it is well established that what is properly no more than a claim for breach of promise may not be transformed into one for fraud by the mere addition of a perfunctory allegation that the promisor did not intend to keep his or her promise.”), accord *N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995) (“General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim.”); see also *Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 (1st Dept 1994) (“A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract ... when he made it.”). Additionally, Antares’ fraud claim concerning its termination by DOF is improperly duplicative since DOF’s ability to terminate Antares is expressly governed by the PMLA. See *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004) (fraud claim is only viable when “the alleged misrepresentation [is a fact] extraneous to the contract and involve[s] a duty separate from or in addition to that imposed by the contract.”).

Moreover, Antares' fraud claims are little more than an attempt to enforce the alleged oral agreements preceding the PMLA. The express terms of the PMLA do not guarantee Antares a promote, prohibit not-for-cause termination, or guarantee the use of office space even if Antares is terminated (terms allegedly promised orally). Antares' attempt to enforce its prior contract or collateral agreement is barred by the merger clause that states "this Agreement continues the entire agreement between [the parties]" – this attempt cannot succeed when repackaged as a fraud claim. *See Friedman v Ocean Dreams, LLC*, 15 Misc3d 1146(A), at *10 (Sup Ct, Kings County 2007) (Demarest, J.) (courts give "full effect" to merger clauses and, even without a merger clause "a subsequent contract regarding the same subject matter supersedes the prior contract"), quoting *Indep. Energy Corp. v Trigen Energy Corp.*, 944 FSupp 1184, 1195 (SDNY 1996); *see also Mandarin Oriental Mgmt, (USA) Inc. v N.Y. Hotel & Motel Trades Council*, 2014 WL 345211, at *11 (SDNY 2014) (collecting cases). It is well settled that "where a contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'" *Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 (2013), quoting *Primex Int'l Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 599 (1997); *In re E. 51st St. Crane Collapse Lit.*, 100 AD3d 503, 503-04 (1st Dept 2012) ("agreement contained a broad merger clause, and thus, extrinsic evidence, such as the oral agreements alleged by [defendant], should not be considered to alter, vary or contradict the written agreement"); *Ashwood Capital, Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 9 (1st Dept 2012) ("the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing"). If Antares has a fraud claim in

this case, merger clauses would be meaningless because every merger clause could be vitiated by a claim that, as Antares alleges here, a prior oral agreement was in place that contradicts the terms of the written contract.

It should be noted that Antares conflates⁴ the concept of merger clauses and warranty waivers. It is well settled that broad waivers generally disclaiming reliance on all of the parties pre-contract representations do not immunize specific instances of fraud. *See Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 667 (1st Dept 2011). Only specific, itemized waivers disclaiming reliance on particular representations are valid. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 (1st Dept 2014); *Steinhardt Group Inc. v Citicorp*, 272 AD2d 255, 256 (1st Dept 2000), accord *Danann Realty Corp. v Harris*, 5 NY2d 317 (1959). But waivers of representations are not the same – either conceptually or under the law – as written statements declaring that the written contract is the only enforceable agreement between the parties. Warranty waivers concern facts relied upon when entering into a contract; a merger clause disclaims the existence of other agreements. The rule requiring specificity of warranty waivers does not logically apply to merger clauses since a defendant has no way of knowing what purported oral agreement a plaintiff will allege existed of in subsequent litigation. If a specificity rule applied to merger clauses, merger clauses would be worthless.

Merger clauses are an essential tool for procuring certainty in complex commercial transactions. They prevent parties from being blindsided in litigation by attempts to change the terms of the deal with fraud claims or the pleading of collateral agreements. Allowing claims

⁴ Antares also misapprehends the *Rose v Spa Realty Assocs.* doctrine, which governs when *post*-contract oral agreements are enforceable when the written contract prohibits oral modifications. *See* 42 NY2d 338 (1977). This case involves a *pre*-contract oral agreement. *Rose* is therefore inapplicable.

based on collateral agreements or fraud notwithstanding a merger clause compromises the integrity of commercial dealings and foments intolerable uncertainty into New York's economy.

For these reasons, Antares' fraud claims are dismissed.

B. Remaining Claims

Antares cannot maintain good faith and quantum meruit claims because the express terms of the PMLA govern. Quasi contract claims not allowed when a written contract governs. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). Additionally, a claim for breach of the duty of good faith and fair dealing cannot contravene the express terms of the contract. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). Had the parties agreed to retain Antares until a promote was earned or for a longer period than defendants did, such a clause would have been included in the PMLA.

Finally, the Complaint's seventh cause of action appears to state two claims for express breaches of the PMLA. The first claim, which is not clearly pled, seems to indicate that certain management fees (aside from the promote) are owed to Antares. If this is what is alleged, Antares is given leave to file an amended complaint to provide more clarity about the amounts owed so that discovery can be targeted and limited to such claim.

The second claim, which is raised in Antares' brief but seemingly not pled in the Complaint, is for a prorated promote based on the time Antares was the property manager (15%, which is 9 out of the contemplated 60 month term). This claim is based on Section 20.1, which seems to provide that if Antares is terminated "not for cause" (e.g. Antares not breaching the contract), Antares is entitled to a prorated promote, but not before the Property is sold or five years elapses. Ergo, a claim to recover damages is not ripe. Since this claim was not expressly

pled nor was it adequately briefed, Antares also has leave to add a declaratory judgment claim in its amended complaint regarding its purported entitlement to a prorated promote under Section 20.1. Accordingly, it is

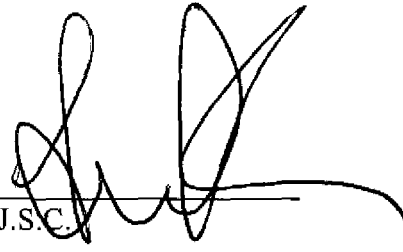
ORDERED that the motion by defendants 100 WP Property – DOF II, LLC, Robert Ginsburg, Daniel Heflin, Trevor Rozowsky, and Steven Altman to dismiss the Complaint is granted as follows: (1) the first through sixth causes of action (fraud, fraudulent inducement, promissory fraud, breach of oral contract, breach of the covenant of good faith and fair dealing, and quantum meruit) are dismissed with prejudice; and (2) the seventh causes of action for breach of contract is dismissed without prejudice, with leave to replead as separate claims for (i) compensation due under the PMLA other than the promote; and (ii) a declaratory judgment claim regarding whether Section 20.01 provides for a prorated promote; and it is further

ORDERED that plaintiff's deadline to file an amended complaint is June 30, 2014; and it is further

ORDERED that if an amended complaint is not filed by such date, this action will be dismissed with prejudice.

Dated: May 16, 2014

ENTER:



J.S.C.