SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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PHILIPPE CHALLANDE,

Plaintiff,

-against-

TERRACE CAPITAL, INC.,

Defendant.

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DECISION AND ORDER

Index No. 160646/13

HON. ANIL C. SINGH, J.:

Defendant moves to dismiss the complaint pursuant to CPLR 3211(a), contending that monies paid by plaintiff to defendant were earned at the time of agreement and also non-refundable. Plaintiff opposes the motion and cross-moves for summary judgment pursuant to CPLR 3212.

The complaint alleges the following facts.

Defendant Terrace Capital, Inc. ("Terrace Capital"), is in the business of providing real estate investment banking services, including making loans to commercial properties.

In December 2009, plaintiff Philippe Challande and the defendant entered into an agreement in connection with refinancing of real property located at 105 Reade Street in Manhattan. Pursuant to the terms of the agreement, plaintiff paid Terrace Capital the sum of $52,500 as an "upfront fee."

The complaint alleges that Terrace Capital was unable to provide plaintiff with a loan within a reasonable amount of time, so plaintiff demanded that Terrace Capital return plaintiff's upfront fee. According to the complaint, Terrace Capital agreed to return the fee. Plaintiff alleges further that Terrace Capital repeatedly gave plaintiff assurances that the fee would be reimbursed. Despite due demand, however, Terrace has not refunded any of the $52,500 that is allegedly due and owing to plaintiff.

The complaint asserts three causes of action. The first cause of action is for breach of contract. The second is for unjust enrichment. The third is for money had and received.

Defendant contends that the complaint should be dismissed based on the written agreement between the parties, which states in pertinent part:

> Loan Fee: A one percent (1%) loan origination fee, one-half of which shall be earned and payable upon issuance of this Application Letter for services rendered. The remaining balance shall be payable at Commitment.
>
> Expenses: The Borrower(s) agrees to pay all costs associated with the loan including: attorneys' fees, lien searches, filing fees, insurance premiums, underwriting fees, appraisal reports, engineering reports, environmental reports, title searches whether or not closing occurs.
>
> Entire Agreement: This term sheet contains the entire understanding between the Lender and supercedes any prior understanding and agreements between them respecting the subject matter hereof.
>
> . . .
>
> If the terms and conditions of this letter are acceptable, please so indicate by signing the original of this letter in the appropriate spaces and return

> to the undersigned within five (5) days from the date hereof along with your non-refundable third party report/underwriting fee expense deposit ($20,000) and partial origination fee ($32,500).

(Motion to Dismiss, exhibit B).

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accepting the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]). The court's sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Polonetsky v. Better Homes Depot, 97 NY2d 46, 54 [2001]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions, as well as factual claims, flatly contradicted by the record are not entitled to any such consideration (see Morone v. Morone, 50 NY2d 481 [1980]).

"A motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (Granada Conominium III Association v. Palomino, 78 A.D.3d 996, 996 [2d Dept., 2010]).

Defendant's first contention is that its alleged promises that the monies would be refunded are not actionable for two reasons. First, there is no obligation of reimbursement within the written agreement, which contains a merger clause. Further, the documentary evidence establishes that no reimbursement was agreed to or even contemplated, for the written agreement states unambiguously that the monies are non-refundable. Second, to the extent that the alleged promise constitutes a new or separate agreement, there is no allegation of any consideration on the part of the plaintiff for this new agreement.

Viewing the allegations of the complaint in a light most favorable to plaintiff, the Court finds that the breach of contract action is stated sufficiently to withstand a motion to dismiss.

Defendant's second contention is that the causes of action for unjust enrichment and for monies had and received should be dismissed.

"A quasi-contract cause of action may not be duplicative of a breach of contract cause of action" (22A N.Y.Jur.2d Contracts, section 571). Accordingly, the second and third causes of action must be dismissed.

We turn next to plaintiff's cross-motion for summary judgment.

Plaintiff Philippe Challande states in a sworn affidavit that defendant breached a contract to provide a refinancing loan of $6.5 million. Challande asserts that he provided defendant with all documents and information necessary to complete the

loan, as well as thousands of dollars in deposits and pre-paid expenses. According to Challende, he was informed by defendant that the good-faith deposit was refundable. He contends further that, despite the fact that under the agreement the loan was to have been finalized within 60 days of execution, and the fact that the agreement contained a "time of the essence" provision, Terrace Capital informed him that the loan was being delayed. Finally, Challande asserts that on March 24, 2010, he was informed by defendant that it could not lend him any money whatsoever, and subsequently, defendant agreed to refund the deposits, minus the actual expenses that had been incurred in obtaining third-party reports.

In opposition, defendant exhibits the sworn affidavit of John Dragone, who states that he is the Managing Director of the defendant. Dragone asserts that Terrace Capital never waived entitlement to the non-refundable fee or half of its already earned origination fees due at the agreement's signing.

A movant seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). It is well settled that summary judgment may not be granted where there is any doubt as to the existence of a triable issue (see Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231 [1978]). Summary judgment motions are viewed in the light most favorable to the party opposing the motion (see Martin v. Briggs, 235

A.D.2d 192, 196 [1st Dept., 1997]).

In short, the Court finds that the conflicting affidavits demonstrate that there are genuine issues of material fact.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the second and third causes of action of the complaint are dismissed; and it is further

ORDERED that the cross-motion for summary judgment is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on November 12, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: Aug 27, 14
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE