

**Walison Corp. v Abbey Manor Special Needs Apts.,
L.P.**

2015 NY Slip Op 30085(U)

January 13, 2015

Supreme Court, New York County

Docket Number: 654442/2013

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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WALISON CORP.,

Plaintiff,

-against-

Index No.: 654442/2013

Mtn. Seq. No. 002

DECISION AND ORDER

ABBEY MANOR SPECIAL NEEDS APARTMENTS,
L.P., AMSN HOUSING DEVELOPMENT FUND
COMPANY, INC., SOUTHERN TIER
ENVIRONMENTS FOR LIVING, INC.,
SOUTHERN TIER FOUNDATION, INC.,
STEVEN ALD, THOMAS WHITNEY, JOHN DOE
"1" through John Doe "10", defendants
being unknown to plaintiff and
intended to designate individuals,
corporations, or other legal entities
that are or were recipients of funds
diverted from the Trust of which ABBEY
MANOR SPECIAL NEEDS APARTMENTS, L.P.
is a Trustee, as described in this
complaint, THE COMMUNITY PRESERVATION
CORPORATION, JOHN ROE "1" through
JOHN ROE "10", defendants being
unknown to plaintiff and intended to
designate individuals who are or were
officers and/or directors of THE
COMMUNITY PRESERVATION CORPORATION,
JANE ROE "1" through JANE ROE "10",
defendants being unknown to plaintiff
intended to designate individuals,
corporations, or other legal entities
that are or were recipients of funds
diverted from the Trust of which THE
COMMUNITY PRESERVATION CORPORATION is
a Trustee, as described in this
complaint,

Defendants.

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JEFFREY K. OING, J. :

Plaintiff moves for the following alternative reliefs:

- (a) a Temporary Restraining Order and Preliminary Injunction preventing defendant The Community Preservation Corporation ("CPC") from drawing on plaintiff's letter of credit, in bad faith and in violation of the Parties' Stipulation which requires a conference with the Court and determination by the Court that an event of default has or has not occurred, as described in the annexed affidavit of Sal Rajput; and
- (b) a Temporary Restraining Order prohibiting defendants Abbey Manor Special Needs Apartments, L.P., AMSN Housing Development Fund Company, Inc., Southern Tier Environments for Living, Inc., and Southern Tier Foundation, Inc. (collectively, the "Abbey defendants") from violating the Parties' Stipulation and Settlement Agreement as described in the annexed affidavit of Sabah Rajput, pending the hearing and determination of this order to show cause, and further enforcing the terms of Walison and Abbey defendants' Stipulation and Settlement Agreement; and
- (c) in the alternative, if CPC is permitted to draw on Walison's letter of credit, a declaratory judgment requiring the Abbey defendants to immediately obtain a substitute letter of credit or sufficient funds in the sum of One Hundred Fifty Thousand Dollars (\$150,000), in accordance with the construction Contract; and
- (d) in the alternative, if CPC is permitted to draw and the Abbey defendants fail to substitute sufficient funds, judgment requiring the Abbey defendants to immediately indemnify Walison herein for all amounts plus attorney's fees, costs and disbursements pursuant to the Indemnification Agreement.

The Abbey defendants cross move, pursuant to CPLR 3211(a)[1] and [7], for an order dismissing the complaint.

Familiarity with the facts is presumed. Briefly, on March 31, 2011, plaintiffs entered into a contract with the Abbey

defendants (the "Contract", NYSCEF Dkt No. 67) to renovate an existing four story structure in Town of Hempstead, Nassau County (the "Project"). Defendant CPC financed the Project through a construction loan. As part of the construction loan, CPC required a Letter of Credit, which plaintiff reluctantly obtained in the amount of \$582,428. Thereafter, sharp disputes arose with respect to plaintiff's work and the Abbey defendants' obligations, which had a negative impact on the Letter of Credit. This action ensued.

Plaintiff served and filed a verified complaint on December 23, 2013 (NYSCEF Dkt No. 1). Plaintiff served and filed an amended verified complaint on October 20, 2014 (NYSCEF Dkt No. 135). CPC interposed its answer on November 10, 2014 (NYSCEF Dkt No. 167). The Abbey defendants served and filed their amended answer on November 14, 2014 (NYSCEF Dkt No. 169). Defendants Steven Ald and Thomas Whitney interposed their answer on November 17, 2014 (NYSCEF Dkt No. 170). Plaintiff interposed a reply to the counterclaims asserted by CPC on December 1, 2014 (NYSCEF Dkt No. 171) and by the Abbey defendants on December 4, 2014 (NYSCEF Dkt No. 174).

In a letter dated August 26, 2014, CPC advised the parties and this Court that it was exercising its right to draw on the Letter of Credit, which by that point had been reduced to the

amount of \$150,000. CPC notified Valley National Bank of its decision in a letter dated August 27, 2014. On September 24, 2014, plaintiff's counsel sought a temporary restraining order enjoining release of the Letter of Credit. At that time, by way of in-court appearance by plaintiff's counsel and telephone conference call with CPC's and the Abbey defendants' counsel, CPC's counsel advised the parties and this Court that notwithstanding its August 26 letter it advised Valley National Bank to process the draw, but not to release the funds pending further direction. This Court denied plaintiff's application for a temporary restraining order. Immediately thereafter, CPC directed Valley National Bank to release the funds to CPC. Under these circumstances, that branch of the motion seeking injunctive relief as to the letter of credit is denied as moot. Further, that branch of the motion seeking to enjoin defendants from violating the parties' Stipulation and Settlement Agreement is denied. Such equitable relief is not proper given that plaintiff has an adequate remedy of law in the form of breach of contract.

That branch of the motion for summary judgment seeking a declaration that the Abbey defendants obtain a substitute letter of credit is denied. Subparagraph 11.4.1 of the Contract provides, in relevant part:

The Letter of Credit (as same may be extended, renewed and/or replaced) shall remain in full force and effect

until the satisfaction of both (i) Contractor's requirements under this Agreement, and (ii) Owner's Permanent Loan Conditions (as such term is defined in the Loan Document) or, if no permanent loan is being offered to Owner by CPC in connection herewith, until the Loan Documents are satisfied in full, provided, however, that if no uncured default by Contractor or its agents then exists and CPC consents to the termination thereof, which consent shall not be unreasonably withheld, conditioned or delayed, the obligation of Contractor to provide the Letter of Credit shall terminate ninety (90) days after the issuance of the temporary certificate of occupancy. Unless CPC waives the requirement of a Letter of Credit and the Loan Documents at that time, prior to the expiration of Contractor's obligation to provide the Letter of Credit as provided herein, Owner shall be obligated to provide a substitute Letter of Credit to CPC in the amount then required by CPC in its reasonable discretion and as otherwise provided in the Loan Documents.

(NYSCEF Dck No. 67). Here, notwithstanding the fact that CPC exercised its right with respect to the Valley National Bank Letter of Credit, the issue that remains is whether prior to exercising its rights plaintiff satisfied the condition precedent to trigger a substitute Letter of Credit. On that issue, the record demonstrates that the parties are in sharp dispute.

That branch of the motion seeking a declaration that the Abbey defendants indemnify plaintiff pursuant to the parties' Reimbursement and Indemnity Agreement (the "Indemnity Agreement") is denied. Paragraph 4 of the Indemnity Agreement provides, in relevant part:

The Indemnitors acknowledge and agree that this Agreement may be enforced by Contractor in accordance

with CPLR 3213 and that Indemnitors shall pay to Contractor, or reimburse Contractor for, all out-of-pocket expenses incurred by Contractor in connection with the enforcement of this Agreement, including, but not limited to, the reasonable attorneys' fees and disbursements of counsel to the Contractor.

(NYSCEF Dkt No. 73).

Notwithstanding the parties' agreement, whether the Indemnity Agreement falls within the scope of CPLR 3213 is questionable. Here, plaintiff failed to demonstrate that the terms of the Indemnity Agreement are for the payment of money only and that there was a failure to make the payment as required (Ian Woodner Family Collection, Inc. v Abaris Books, Ltd., 284 AD2d 163, 164 [1st Dept 2001]). Indeed, a careful reading of the Indemnity Agreement demonstrates that it was not an unconditional promise to pay a sum certain at a given time or over a stated period (Id.).

In any event, the Abbey defendants' obligation as indemnitor is triggered by a "Non-Contractor Default Draw" with respect to the Letter of Credit. Further, such obligation does not ripen if a draw is the result of a "Contractor default under and as defined in the Construction Contract" (NYSCEF Dkt No. 73). As noted, supra, the record demonstrates sharp factual disputes as to whether plaintiff did not default so to impose on the Abbey defendants an indemnity obligation.

The Abbey defendants' cross-motion, pursuant to CPLR 3211(a)[1] and [7], to dismiss the verified complaint is denied inasmuch as it appears to be directed at the plaintiff's original complaint, which has been superceded by plaintiff's service and filing of an amended verified complaint (CPLR 3025(a)). Even if the cross-motion were directed at the amended pleading, it would still be denied. The original complaint interposed the following claim against the Abbey defendants and CPC: breach of contract. Plaintiff further interposed the following three additional claims against the Abbey defendants: 1) breach of implied covenant of good faith and fair dealing; 2) declaratory judgment regarding a substitute letter of credit; and 3) fraud in the inducement.

In its amended verified complaint, plaintiff asserts eleven causes of action. As against the Abbey defendants, plaintiff interpose the following claims: 1) breach of the construction contract; 2) breach of the repair contract; 3) breach of the indemnity agreement; 4) breach of the settlement agreement; 5) breach of the implied covenant of good faith and fair dealing; and 6) quantum meruit. Plaintiff asserts the following claims against the Abbey defendants and individual defendants Steven Ald and Thomas Whitney: 1) fraud in the inducement of the construction contract and 2) trust fund violation. With regard

to CPC, plaintiff asserts claims for 1) breach of the stipulation agreement, 2) trust fund violation, and 3) fraud in the inducement concerning the stipulation and settlement agreement.

Clearly, plaintiff's amended pleading is far more extensive and detailed than its original complaint. A review of the allegations and the documentary proof demonstrate that plaintiff has set forth sufficient facts to state its claims so as to warrant denial of the cross-motion.

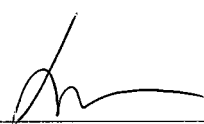
Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the Abbey defendants' cross-motion, pursuant to CPLR 3211(a)[1] and [7], to dismiss the amended verified complaint is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/13/15


HON. JEFFREY K. OING, J.S.C.