MRC RE Holdings LLC v Schreiber
2015 NY Slip Op 30235(U)
February 9, 2015
Supreme Court, New York County
Docket Number: 653480/2013
Judge: Eileen Bransten

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

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MRC RE HOLDINGS LLC,

Plaintiff,

-against-

Index No.: 653480/2013
Motion Seq. No. 002
Motion Date: 7/25/2014

JOEL SCHREIBER, WB 25th STREET HOLDINGS LLC, and MAPLE WEST 25TH OWNER, LLC,

Defendants.

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BRANSTEN, J.

In motion sequence number 002, defendants Joel Schreiber ("Schreiber"), WB 25th Street Holdings LLC ("WB") and Maple West 25th Owner, LLC ("Maple West") seek dismissal of the Amended Verified Complaint ("Complaint"), pursuant to CPLR 3211(a)(1) & (7). Alternatively, defendants seek an order dismissing Schreiber from the action and disqualifying Jerold C. Feuerstein as plaintiff's counsel pursuant to Rule of Professional Conduct 3.7, on the grounds that Feuerstein is a necessary witness.

The Complaint purports to state three causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and, (3) tortious interference. For the reasons stated below, the motion to dismiss is granted as to the second cause of action for breach of the implied covenant of good faith and fair dealing, and is otherwise denied, with leave to renew the motion to disqualify Jerold C. Feuerstein after the completion of discovery.

I. Background

The instant action concerns an "Exclusivity" clause of a loan commitment ("LC") executed by plaintiff and defendants WB and Schreiber. *See* Affirmation of Joaquin Ezcurra ("Ezcurra Affirm.") Ex. 2 at 5.[1] The LC was intended to reflect the terms of a loan from plaintiffs to defendant WB to finance the purchase of 119 West 25th Street, New York, New York ("the Property").

The express language of the "Exclusivity" clause states that WB would work solely with plaintiff to obtain a loan for purchase of the Property and that WB would not obtain, or attempt to obtain, financing from another party. In the event that WB, its members, or its affiliates procured financing elsewhere, the clause goes on to require that WB pay a "break-up" fee of $760,000. The exclusivity clause also states that WB and Schreiber would be liable for any expenses, including attorneys' fees incurred in connection with the collection of the break-up fee.

The LC specified that the closing was to take place on June 28, 2013. However, on that date, plaintiff's counsel sent a letter to defendants, stating that defendants' attorney "has advised us [plaintiff] that Borrower [defendant WB] does not intend to close the Loan." *See* Ezcurra Affirm. Ex. 3 at 1. Notwithstanding WB's apparent refusal to close, the letter stated that plaintiff both was ready, willing, and able to originate the loan and

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[1] Schreiber signed the LC as a member of WB and as personal guarantor for WB.

had reserved the principal of $38,000,000. On July 12, 2013, plaintiff sent a demand for the break-up fee and legal expenses to WB and Schreiber. The fee was not paid.

Defendants ultimately obtained alternate financing for the Property from a source other than Plaintiff. The financing to acquire the Property came from Ladder Capital Finance LLC, and on July 15, 2013, the Property was purchased in the name of a newly-created entity, Defendant Maple West. Plaintiff alleges that Maple West is dominated and controlled by WB and/or Schreiber and that Maple West tortiously interfered with the LC by causing the breach of the exclusivity clause.

II. **Analysis**

A. *Legal Standard for a Motion to Dismiss*

"On a motion to dismiss, the complaint is to be liberally construed and the alleged facts accepted as true, affording the plaintiff every possible favorable inference. *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 478-79 (1st Dep't 2007). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003).

B. *The Breach of Contract Claim*

"[T]he essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *US Bank N.A. v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep't 2012).

Defendants' dismissal arguments hinge on the first element – the existence of a contract. Defendants argue that the LC is an unenforceable contract. Specifically, defendants maintain that the LC is an illusory agreement to agree, lacks mutuality and consideration, and manifests no intent by the parties to be bound. Defendants have proffered the LC as documentary evidence in support of these contentions. Plaintiff opposes, arguing that the LC is enforceable because it demonstrates an intent to be bound and agreement on the material terms.

First, defendants argue that the LC is an illusory agreement to agree. This argument is premised on the claim that the LC is lacking a material term, i.e., the loan amount, and required further documentation.

Defendants are correct that an "agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Henri Assoc. v. Saxony Carpet Co.*, 249 A.D.2d 63, 66 (1st Dep't 1998) (quoting *Joseph Martin, Jr., Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 (1981). However "[t]he court shall enforce a contract if the parties have completed negotiations of essential elements . . .." *Aiello v. Burns Int'l Sec. Servs. Corp.*, 110 A.D.3d 234, 243 (1st Dep't 2013) (internal citation omitted).

The "Loan Amount" is defined as follows: "[t]he lesser of (i) Thirty Eight Million and 00/100 Dollars or (b) Seventy percent (70%) of the 'as is' value of the Property." (Ezcurra Affirm. Ex. 2 at 1.) Defendants argue that the "as is" value of the Property "was never defined and . . . no method of calculation [of the "as is" value] was provided." *See* Defs.' Br. at 9. *See* Defs.' Moving Br. at 9. Review of the LC demonstrates otherwise.

"A price term may be sufficiently definite if it may (1) be determined without the need for new expressions by the parties, (2) be found within the agreement, or (3) be ascertained by reference to an extrinsic event, commercial practice or trade usage." *Henri Assoc.*, 249 A.D.2d at 66. The "Due Diligence" clause explains plaintiff's right to order appraisals and other related reports in determining the value of the Property during due diligence. *See* Ezcurra Affirm. Ex. 2 at 3. ("Due diligence will commence upon Lender's receipt of this Commitment Letter and payment of the Expense Deposit. The Lender reserves the right to perform and order all reports deemed necessary in evaluating the Property and the Collateral,[2] including without limitation, appraisal, environmental, engineering, and zoning reports.") This language provides the means by which the "as is" value may be determined, rendering further expression of the parties unnecessary. Accordingly, it appears that there are no material terms absent from the LC.

Defendants' argument that the LC is illusory because it required further documentation is also without merit.

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[2] The Collateral is defined as the Property in the Loan Commitment.

> A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement. The Letter Agreement contains all of the essential terms of the contract, and the fact that the parties intended to negotiate a 'fuller agreement' does not negate its legal effect.

Conopco, Inc. v. Wathne Ltd., 190 A.D.2d 587, 588 (1st Dep't 1993) (internal quotation and citation omitted). The LC is "a binding agreement that is nevertheless to be further documented, [and] which is enforceable with or without the formal documentation." *Kowalchuk v. Stroup*, 61 A.D.2d 118, 123 (1st Dep't 2009) (internal quotation and citation omitted). Here, the parties have agreed upon all the material terms, and thus, the need for further documentation does not render it illusory.

Second, defendants argue that the LC lacks mutuality because "[i]t is clear that Plaintiff is in no way bound by the Loan Commitment." (Defs.' Moving Br. at 10.) Defendants premise this argument on the language of the "Additional Conditions" clause, which reads in part: "The Loan Commitment and the funding of the Loan is subject to, and conditioned upon, completion of all due diligence and execution of legal documentation to the satisfaction of Lender and its counsel in their sole and absolute discretion . . ." (Ezcurra Affirm. Ex. 2 at 4-5.)

Defendants argue that this language manifests a lack of mutuality by granting plaintiff a unilateral right to decline the loan at its sole discretion. In furtherance of this contention, defendants cite to *Souveran Fabrics Corp. v. Virginia Fibre Corp.* 37 A.D.2d 925, 925-26 (1st Dep't 1971), which states that "unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound." Defendants then

state that "Courts do not place limitations on powers contractually granted to parties in their sole 'discretion.'" *See* Defs.' Moving Br. at 10. In support of this assertion, Defendants rely on *Hunter v. Deutsche Bank AG N.Y. Branch*, 56 A.D.3d 274 (1st Dep't 2008) and *Sullivan v. Harnisch*, 96 A.D.3d 667 (1st Dep't 2012).

Hunter and *Sullivan* are not on point. Both cases involve disputes over the issuance of bonuses by financial institutions. In *Hunter*, the plaintiff-employee sued his employer, an investment bank, on the ground that he was wrongfully refused an annual bonus. The trial court dismissed the suit, and the First Department affirmed, holding that the "sole discretion" clause of the employee contract and employee handbook permitted the employer to withhold the bonus. *Sullivan* is much the same; the First Department held that the operating agreement of the fund granted the defendant sole discretion to determine the bonus pool.

However, the subject matter and circumstances of the LC are vastly different than the situations in *Hunter* and *Sullivan*. In those cases, the "sole discretion" clauses were a single term, which governed only a portion of compensation, in agreements that encompassed a much broader employment relationship. Withholding a bonus did not vitiate the entire purpose of the employment agreements, and, thus, the sole discretion to do so was permissible.

With regard to the LC, if plaintiff withheld approval of the loan arbitrarily or unreasonably, the entire purpose of the LC would be vitiated. Defendants would have a colorable claim for breaching the implied covenant of good faith and fair dealing. The

covenant is an implicit obligation imposed on parties to a contract. *See Dalton v. Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). It is "a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.* 98 N.Y.2d 144, 153 (2002) (internal citation omitted).

The "exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement . . ." *African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 213 (1st Dep't 2013) (internal citations omitted). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Dalton*, 87 N.Y.2d at 389.

Had plaintiff unreasonably withheld the funds, defendants would have recourse; thus, the LC possesses mutuality of obligation. In any event, plaintiff did not withhold approval; its letter of June 28, 2013 stated that it was ready willing and able to originate the loan, and had reserved the principal sum of $38,000,000. Defendants have produced no evidence whatsoever to contradict the letter.

Third, defendants' argument that the LC lacks consideration is also unpersuasive. Defendants claim that they undertook significant obligations and contributed substantial consideration, while plaintiff has contributed nothing. One of defendants' contributions was an expense deposit of $150,000, which was "to be applied towards credit and background checks, a site inspection/evaluation of the Property and the Collateral, legal

fees and expenses, environmental reports and zoning reports." (Ezcurra Affirm. Ex. 2 at 2.)

Plaintiff supported the LC with consideration as well. As alleged in paragraph 13 of the Complaint, and amplified by its June 28, 2013 letter, plaintiff was ready, willing and able to originate the loan, and had reserved the principal. Additionally, the "Exclusivity" clause itself recited plaintiff's consideration: "The Borrower and Guarantor hereby expressly agree and acknowledge that Lender is devoting its personnel and financial resources to the consideration of the Loan . . . Lender cannot, as a result of this underwriting and analysis, commit its resources to other potential transactions and may be deprived of business opportunities." (Ezcurra Affirm. Ex. 2 at 5.)

Finally, defendants contend that the LC does not manifest an intention of parties to be bound. Like those preceding it, this argument is unavailing. In support of this assertion, defendants refer to the terms of the opening line of the LC: "[f]ollowing are proposed terms pursuant to which MRC RB Holdings LLC ('Madison' or 'Lender') is willing to offer a loan to Borrower (the 'Loan'), which offer is expressly subject to the terms and conditions set forth in this Loan Commitment." *Id.* at 5.

In *Bed Bath & Beyond Inc. v. IBEX Construction, LLC*, 52 A.D.3d 413 (1st Dep't 2008), defendant IBEX advanced the argument that "subject to" language demonstrated an intent not to be bound and failed. "Contrary to IBEX's contention, use of the language 'subject to' in the LOI [Letter of Intent], and reference to the execution of a Construction Agreement as a 'qualification,' do not amount to an express reservation of the right not to

be bound." *Id.* at 414. The same argument was unsuccessful in *Emigrant Bank v. UBS Real Estate Sec., Inc.*, 49 A.D.3d 382 (1st Dep't 2008). In *Emigrant Bank*, the First Department determined that "'[s]ubject to' in the bid form did not unmistakably condition assent on the execution of a definitive agreement at some later juncture. Any later agreement to be executed was limited to terms substantially the same as those in the agreement posted on the bidding Web site ..." *Emigrant Bank*, 49 A.D.3d at 383. This is in contrast to the non-binding letter of intent in *Aksman v. Xiongwei Ju*, 21 A.D.3d 260, 260 (2005), *lv denied* 5 N.Y.3d 715 (2005), which expressed "the parties intention to enter into a contract 'at a later date,'" that repeatedly recited that it would be replaced by a contract, and stated its purpose as merely a "a basis for conducting business." *Id.* at 261-262. The LC contains no such language.

Moreover, the intention to be bound is manifested through examination of the agreement as a whole, not by cherry picking one clause. *See Conopco, Inc. v. Wathne Ltd.*, 190 A.D.2d 587, 588 (1st Dep't 1993) ("The parties' intention to be bound by the letter dated February 12, 1988 is evidenced by its language and terms, and it is such manifestation of the parties' intention . . ."); *see also Trolman v. Trolman, Glaser & Lichtman, P.C.*, 114 A.D.3d 617, 618 (1st Dep't 2014) ("The memorandum's plain language expressed the parties' intention to be bound.").

The LC contains language which indicates the parties' intent to be bound. The final clause reads: "[p]lease acknowledge your acceptance of the terms and conditions described herein by faxing Madison an executed copy of this letter and wiring the

Expense Deposit. Once receipt is confirmed, the due diligence process will commence." (Ezcurra Affirm. Ex. 2 at 6.) The signature page is signed by Schreiber on behalf of WB and as personal guarantor of WB. *Id.* at 7. Further indicia of intent to be bound can be found in the actions of defendants, who wired the Expense Deposit on June 26, 2013. *See* Ezcurra Affirm. Ex. 6.

C. *Piercing of Maple West's Corporate Veil*

Piercing the corporate veil is not a cause of action, but an equitable remedy to be applied when the facts demand so. *Matter of Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Generally, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Id.*

Throughout the complaint, plaintiff makes specific allegations regarding Maple West, and Schreiber's and WB's connection to Maple West. Further, plaintiff attaches to its Complaint a deed to the Property with Maple West designated as the owner (exhibit C), a mortgage on the property, which lists Maple West as the borrower (exhibit D), and an article from a real estate publication, which mentions Schreiber's involvement in the purchase of the Property (exhibit E). Defendants have not submitted documentary evidence under CPLR 3211(a)(1) that definitively refutes the documentation and

allegations. It is premature for the court to rule out the remedy of piercing the corporate veil in the pre-discovery phase.

D. *The Breach of the Implied Covenant of Good Faith and Fair Dealing Claim*

Defendants' arguments in favor of dismissal of this claim have merit, as the breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim. The implied covenant claim arises from the same facts and seeks the same damages as the breach of contract claim. On these grounds, the claim must be dismissed. *See Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 588 (1st Dep't 2011) (affirming dismissal of breach of the implied covenant of good faith and fair dealing claim since claim "arose from the same facts and sought identical damages, [and] was duplicative of the contract claim"); *see also Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010); *Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 257-258 (1st Dep't 2004).

E. *The Tortious Interference Claim*

Defendants argue that the tortious interference claim must be dismissed because Maple West did not exist when the breach of the LC took place and that plaintiff has not adequately alleged "but for" causation.

While defendants have submitted a New York Department of State report indicating that Maple West was registered in New York on July 3, 2013, *see* Ezcurra

Affirm. Ex. 5, they have not submitted the date of its Delaware incorporation. Thus, they have not provided any documentation to support their claim that Maple West did not exist at the time that the LC was breached.

In order to succeed on a claim for tortious interference "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007).

Paragraphs 39-44 of the Complaint are sufficient to state a cognizable claim for tortious interference. These paragraphs allege that: Maple West had actual knowledge of the LC; Maple West caused the breach of the LC by WB and Schreiber for its own benefit; and, plaintiff was damaged by this breach when WB and Schreiber refused to pay the breakup fee. Accordingly, plaintiff has sufficiently pleaded a claim for tortious interference.

F. *Defendant Joel Schreiber's Motion to Dismiss*

Schreiber may not be dismissed from this action; as guarantor, he is jointly liable with WB for the costs related to collecting the breakup fee, should a breach be found. As the LC states, "Borrower and Guarantor shall be responsible for Lender's fees and costs in connection with the collection of the break-up fee." (Ezcurra Affirm. Ex. 2 at 5.)

G. *Disqualification of Plaintiff's Counsel Pursuant to Rules of Professional Conduct [22 NYCRR 1200.0] Rule 3.7*

"Rule 3.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, unless certain exceptions apply, [a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." *Twin Sec., Inc. v. Advocate & Lichtenstein, LLP*, 97 A.D.3d 500, 500 (1st Dep't 2012) (internal quotation marks omitted). However, "[t]he challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his [or her] disqualification." *Dishi v. Fed. Ins. Co.*, 112 A.D.3d 484, 484 (1st Dep't 2013) (internal quotation marks and citation omitted). Moreover, "[d]isqualification [under the advocate-witness rule] may be required only when it is likely that the testimony to be given by the witness is necessary." *Id.*

Defendants' argue that since plaintiff's counsel in the instant action was also counsel to plaintiff with respect to the disputed agreement, he will be a necessary witness. Specifically, they argue that his testimony will be necessary because he engaged in correspondence with defendants' counsel during negotiation of the LC and in the aftermath of the failure of the loan to close.

While defendants' argument is not unreasonable, prior to discovery, it is premature to disqualify counsel. "Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make the attorney's testimony necessary."

Talvy v. Am. Red Cross in Greater N.Y., 205 A.D.2d 143, 152 (1st Dep't 1994), *aff'd* 87 N.Y.2d 826 (1995); *see also Dishi*, 112 A.D.3d at 484 ("Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence."). Accordingly, Defendants' motion to disqualify plaintiff's counsel is denied, with leave to renew following the completion of discovery.

III. **Conclusion**

Accordingly, it is

ORDERED that defendants' motion to dismiss the first cause of action for breach of contract is denied in its entirety; and it is further

ORDERED that defendants' motion to dismiss the second cause of action for breach of the implied covenant of good faith and fair dealing is granted in its entirety; and it is further

ORDERED that defendants' motion to dismiss the third cause of action for tortious interference is denied in its entirety; and it is further

ORDERED that defendants' motion to disqualify plaintiff's counsel, Jerold C. Feuerstein is denied, with leave to renew following the completion of discovery; and it is further

ORDERED that defendants' motion to dismiss defendant Joel Schreiber from the action is denied; and it is further

ORDERED that defendants are directed to serve an answer to the Amended Verified 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 442, 60 Centre Street, on March 10, 2015.

Dated: New York, New York
February 9, 2015

ENTER

Hon. Eileen Bransten, J.S.C.