Affordable Hous. Assocs., Inc. v Town of Brookhaven
2015 NY Slip Op 30358(U)
February 26, 2015
Supreme Court, Suffolk County
Docket Number: 34138/10
Judge: Elizabeth H. Emerson

[* 1]

SHORT FORM ORDER

COPY

INDEX
NO.: 34138-10

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-8-14; 8-1-14
SUBMITTED: 11-20-14
MOTION NO.: 002-MD
003-MOT D

AFFORDABLE HOUSING ASSOCIATES, INC., d/b/a BEACON WIRELESS MANAGEMENT,

Plaintiff,

-against-

TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN DEPARTMENT OF FINANCE, MID-ATLANTIC WIRELESS, L.L.C., SITE TECH WIRELESS LLC, EDWARD MOONEY, JOY MOONEY-GRAZIANO, SUFFOLK TOWERS, INC., SUFFOLK TOWERS II, LLC and HIGHLANDER WIRELESS,

Defendants.

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Upon the following papers numbered 1-50 read on this motion and cross-motion for partial summary judgment ; Notice of Motion and supporting papers 1-9 ; Notice of Cross Motion and supporting papers 10-19 ; Answering Affidavits and supporting papers 20-44 ; Replying Affidavits and supporting papers 45-47; 48-50 ; it is,

ORDERED that the motion by the defendants Edward Mooney; Joy Mooney-Graziano; and Mid-Atlantic Wireless, LLC; Site Tech Wireless, LLC; Suffolk Towers, Inc.; Suffolk Towers II, LLC; and Highlander Wireless, for partial summary judgment dismissing the fifth cause of action is denied; and it is further

ORDERED that the cross motion by the defendants Town of Brookhaven and Town of Brookhaven Department of Finance for partial summary judgment dismissing the first, second, third, and fourth causes of action is granted as to the second and third causes of action and so much of the first cause of action as seeks to recover damages that accrued more than 18 months before the commencement of this action; and it is further

ORDERED that the cross motion is otherwise denied.

In 2003, the defendant Town of Brookhaven (the "Town") solicited proposals for the services of a professional consultant to assist it in developing wireless telecommunications facilities on Town-owned properties. The plaintiff submitted a proposal that the Town found to be acceptable. On May 7, 2003, the plaintiff and the Town entered into a written contract in which the plaintiff agreed to identify specific locations on Town-owned properties where telecommunications towers could be built, to construct such towers and lease them to telecommunications carriers. The monthly rental revenue would be split between the plaintiff and the Town 60/40 during the initial five-year term of the contract and during two subsequent five-year renewal terms and 50/50 during the third five-year renewal term. Additional renewals would be at the Town's sole option. The plaintiff identified 28 Town-owned properties where telecommunications towers could be built, which it later narrowed down to five. They were the Center Moriches DPW yard in Center Moriches, the Brookhaven Landfill in Yaphank, the Brookhaven Airport in Shirley, the Centereach Pool in Centereach, and the Veterans' Ballfield in North Selden. On or about August 23, 2007, the plaintiff submitted applications to the Town to construct wireless telecommunication towers on each of the five sites. In addition, the plaintiff identified and contacted site-acquisition agents for various telecommunications carriers in order to enter into rental agreements with the carriers. Among them were the defendants Edward Mooney; Joy Mooney-Graziano; and Mid-Atlantic Wireless, LLC; Site Tech Wireless, LLC; Suffolk Towers, Inc.; Suffolk Towers II, LLC; and Highlander Wireless, all of which are owned or controlled by the defendants Edward Mooney and Joy Mooney-Graziano (collectively "the Mooney defendants"). The Mooney defendants were engaged in the business of developing wireless communication sites on Long Island and were the plaintiff's competitors. The plaintiff contends that the Mooney defendants conspired with the Town to cause it to contract with them instead of with the plaintiff to construct wireless communication towers on two of the five sites identified by the plaintiff, the Centereach Pool and the Brookhaven Landfill, causing the plaintiff to lose its share of the rental revenues therefrom.

The plaintiff commenced this action on September 16, 2010, against the Mooney defendants, the Town and the Town's Department of Finance (the "Town defendants"). The complaint contains one cause of action against the Mooney defendants for tortious interference with contract and four causes of action against the Town defendants for breach of contract, for breach of the implied convenant of good faith and fair dealing, for fraud, and for an accounting. By an order dated May 31, 2012, this court (Pines, J.) denied the Mooney defendants' motion to dismiss the complaint insofar as it was asserted against them. Discovery is now complete. The Mooney defendants move and the Town defendants cross move for summary judgment

dismissing the complaint insofar as it is asserted against each of them respectively.

The Mooney defendants contend that the plaintiff cannot establish that they induced the Town to breach its contract with the plaintiff. The Mooney defendants contend that the plaintiff's agreement with the Town is not exclusive and that there is no evidence in the record that their procurement of the alleged breach was solely malicious.

As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (**Mennerich v Esposito**, 4 AD3d 399, 400 [and cases cited therein]). Accordingly, the Mooney defendant's reliance on deficiencies in the plaintiff's proof is insufficient to establish their entitlement to judgment as a matter of law on the fifth cause of action for tortious interference with contract.

In any event, contrary to the Mooney defendants' contentions, the contract between the plaintiff and the Town is non-exclusive only insofar as it reserves to the Town the right to enter into *lease agreements* with telecommunications *carriers* directly. As Justice Pines correctly found, it does not provide that the Town is free to contract with other telecommunications *developers* such as the Mooney defendants. Moreover, the plaintiff's claim of tortious interference with contract does not require the plaintiff to establish that the Mooney defendants procured the alleged breach by unlawful or improper means (*see*, **Meghan Beard, Inc. v Fadina**, 82 AD3d 591, 592). That criterion is only applicable in a cause of action for tortious interference with prospective advantage or business relations (**Id.**). When, as here, there is an existing, enforceable contract, the plaintiff may recover even if the defendant was engaged in lawful behavior (**Carvel Corp. v Noonan**, 3 NY3d 182, 189-190). It is only when there has been interference with a nonbinding relationship or prospective contract rights that the plaintiff must show that the defendant engaged in conduct that was not lawful or for the sole purpose of inflicting intentional harm on the plaintiff (**Id.** at 190). The court declines to follow **Schmidt & Schmidt, Inc. v Town of Charlton** (103 AD3d 1011 [3rd Dept]), upon which the Mooney defendants rely. It holds that a plaintiff must establish that the defendant's conduct was solely malicious in order to sustain a cause of action for tortious interference with contract. **Schmidt** is both wrongly decided and not binding on this court. Accordingly, the Mooney defendants' motion for summary judgment is denied.

Turning to the cross motion, the Town defendants contend that the plaintiff's first cause of action for breach of contract is time-barred. Under Town Law § 65, "no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued." A breach of contract cause of action accrues at the time of the breach or when one party omits the performance of a contractual obligation (**Squeri v Moriches Assocs.**, 307 AD2d 260, 261). Thus, the plaintiff's breach-of-contract claim did not accrue when the Town entered into negotiations with the Mooney defendants, when the Town passed resolutions approving the construction of wireless communication towers by the Mooney defendants on the Centereach

Pool and Brookhaven Landfill sites, or even when the Town entered into agreements with the Mooney defendants for the construction of towers on those two sites. Rather, the plaintiff's breach-of-contract claim accrued when the Town failed to perform under its agreement with the plaintiff, i.e., when the Town failed to turn over to the plaintiff its share of the rental revenues from the two sites.

When a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period (**Westchester County Correction Officers Benevolent Assn., Inc., v County of Westchester**, 65 AD3d 1226, 1228). The parties' agreement provided that the Town defendants would turn over to the plaintiff its share of the monthly rental revenues from the Centereach Pool and Brookhaven Landfill sites. Thus, a new breach occurred for statute-of-limitations purposes each time the Town defendants allegedly failed to make a required monthly payment to the plaintiff, and only those claims for damages that accrued more than 18 months before the commencement of this action are time-barred (**Id.**, *see also*, **Beller v William Penn Life Ins. Co. of N.Y.**, 8 AD3d 310, 314). Accordingly, the first cause of action is dismissed insofar as it seeks to recover any damages that may have accrued more than 18 months before the commencement of this action.

The second cause of action for breach of the implied covenant of good faith and fair dealing is based on the same facts and seeks the same measure of damages as the first cause of action for beach of contract. It is, therefore, dismissed as duplicative (*see*, **Deer Park Enters., LLC v Ail Sys., Inc.**, 57 AD3d 711, 712).

The third cause of action for fraud is also duplicative of the first cause of action for breach of contract. A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 389). When, as here, the plaintiff is essentially seeking enforcement of its bargain, the action should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.**, 79 NY2d 540, 552). Accordingly, the third cause of action is dismissed.

The fourth cause of action is for an accounting. The agreement between the plaintiff and the Town requires the Department of Finance to act as an escrow agent, holding and disbursing the rental revenues that are the subject of this action. The Town defendants seek dismissal of this cause of action on the grounds that it is duplicative of the first cause of action for breach of contract; that the Department of Finance is not a party to the agreement between the plaintiff and the Town; and that, in any event, the agreement does not obligate the Department of Finance to supply the plaintiff with an accounting.

The right to an accounting rests upon the existence of a fiduciary relationship and a breach of the duty imposed by that relationship with respect to the property in which the party seeking the accounting has an interest (**Palazzo v Palazzo**, 121 AD2d 261, 265). While a simple contract does not create a fiduciary relationship giving rise to special duties, a fiduciary duty is

alleged when, as here, the defendant has a duty to hold monies belonging to the plaintiff in a special account for the benefit of the plaintiff (**CBS, Inc. v Ahern**, 108 FRD 14, 25; *see also*, **Talansky v Schulman**, 2 AD3d 355, 359 [it is settled law that an escrow agent owes his or her beneficiary a fiduciary duty]). Moreover, the same conduct that may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by the contract, but that is independent of the contract itself (**Mandelblatt v Devon Stores, Inc.**, 132 AD2d 162, 167-168).

The court finds that the Department of Finance, as the escrow agent for funds in which the plaintiff had an interest, owed the plaintiff a fiduciary duty that was independent of the contract between the plaintiff and the Town. Moreover, the Department of Finance purportedly breached that duty by failing to turn over to the plaintiff its share of the rental revenues from the Centereach Pool and Brookhaven Landfill sites. Accordingly, the court declines to dismiss the fourth cause of action for an accounting.

Dated: **February 26, 2015**

HON. ELIZABETH HAZLITT EMERSON

J.S.C.