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| Hutton Group, Inc. v Cameo Owners Corp. |
| 2015 NY Slip Op 31741(U) |
| August 11, 2015 |
| Supreme Court, Queens County |
| Docket Number: 710015 2014 |
| Judge: Carmen R. Velasquez |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38
Justice

FILED
AUG 13 2015
COUNTY CLERK
QUEENS COUNTY

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|--------------------------------|---|-----------------|---------------------|
| <u>THE HUTTON GROUP, INC.,</u> | x | Index | |
| | | Number | <u>710015</u> 2014 |
| Plaintiff, | | Motion | |
| -against- | | Date | <u>May 22,</u> 2015 |
| CAMEO OWNERS CORP., | | Motion Seq. No. | <u>1</u> |
| Defendant. | | | |
| | x | | |

The following numbered papers read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7) and (a)(8), and for sanctions.

| | <u>Papers</u> <u>Numbered</u> |
|---|----------------------------------|
| Notice of Motion - Affidavits - Exhibits..... | EF 7 |
| Answering Affidavits - Exhibits..... | EF, 9-14 |
| Reply Affidavits..... | EF 15 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action sounding in breach of contract arises out of defendant's termination of an agreement entered into between the parties on June 14, 2013 whereby defendant engaged plaintiff to provide services to design and implement the conversion of defendant, a cooperative corporation, to a condominium form of ownership. As an initial matter, defendant has withdrawn that part of its motion which is for dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Furthermore, defendant does not assert that the allegations of the complaint, when accepted as true and afforded every possible favorable inference as they must be on a CPLR 3211(a)(7) motion, do not make out any cognizable legal claim. (See *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001].)

Rather, defendant contends that documentary evidence defeats plaintiff's causes of action.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded upon documentary evidence, a defendant must present unambiguous documentary evidence which refutes all factual allegations of the complaint and definitively disposes of plaintiff's claim as a matter of law. (See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Gordon v Boyd*, 96 AD3d 719 [2012]; *Melnicke v Brecher*, 65 AD3d 1020 [2009]; *Farber v Breslin*, 47 AD3d 873 [2008].) Dismissal is available based upon evidentiary material submitted in support of a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) only where the evidence conclusively establishes that plaintiff has no cause of action. (See *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976].) The evidence relied upon by defendant is insufficient to meet these standards.

The parties' dispute concerning performance under their agreement centers upon the percentage of shareholders whose consent to the conversion would be required to approve the conversion. Although the parties' agreement provides that the proposed conversion would be subject to a vote of approval by the shareholders in accordance with the bylaws, it is clear that the selected provisions of defendant's bylaws and proprietary lease presented by defendant do not specifically address the voting requirements for a conversion from a cooperative corporation to a condominium form of ownership. Nor are the excerpts proffered directed to the dissolution of the corporation which appears to be contemplated under the terms of the parties' agreement.

Even assuming that the conversion would fall within the voting requirements set forth in Article IX of the bylaws for the sale or disposition of the corporation's property, the documentary evidence presented does not resolve as a matter of law whether plaintiff's proposal for a vote to amend the bylaws to avoid that requirement would be substantial performance under the contract or whether the parties had agreed at the outset to seek the conversion upon the consent of two-thirds of the shareholders.

The proprietary lease provision referenced by defendant governs the termination of leases by the lessor under circumstances

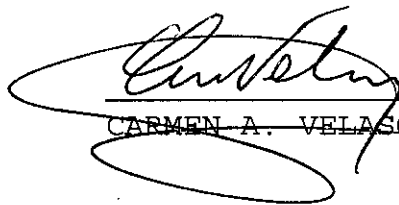
where the lessee would then quit and surrender the apartment to the lessor which in turn would have the right to re-enter the apartment and remove all persons and personal property therefrom. This provision, by its terms, would not appear to be applicable to the conversion plan at issue. In any event, the particular paragraph cited by defendant for its voting requirement applies to the termination of all proprietary leases and there is no evidence that the termination of all the proprietary leases would be necessary to effectuate the conversion.

Furthermore, the submitted email from plaintiff's principal, which is selectively quoted from in defendant's memorandum of law, is not the form of unambiguous authentic and undeniable material which qualifies as documentary evidence for the purposes of CPLR 3211(a)(1), and also does not conclusively establish that plaintiff repudiated the contract. (See *JBGR, LLC v Chicago Tit. Ins. Co.*, 128 AD3d 900 [2015]; *Zellner v Odyll, LLC*, 117 AD3d 1040 [2014]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012]; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2010].)

Defendant's claims concerning the authorization of plaintiff, a New Jersey corporation, to do business in New York and/or New Jersey also fail to definitively dispose of plaintiff's causes of action. Even if plaintiff was doing business in New York before being authorized to do so under Business Corporation Law § 1301, "the failure of a foreign corporation to obtain authority to do business in [New York] shall not impair the validity of any contract or act of the foreign corporation." (Business Corporation Law § 1312[b]; see *Von Arx, AG. v Breitenstein*, 41 NY2d 958 [1977], *affg* 52 AD2d 1049 [1976]; *Acno-Tec Ltd. v Wall St. Suites, L.L.C.*, 24 AD3d 392 [2005].) In addition, defendant's conclusion that plaintiff lacked the capacity to enter into the parties' agreement because of regulatory actions against it in New Jersey is unsubstantiated. There is no proof that plaintiff's corporate existence was affected by any regulatory action. (Cf. *442 Decatur St. LLC v Spheres Realty, Inc.*, 14 AD3d 535, 536 [2005]; *Farrell v Housekeeper*, 298 AD2d 488 [2002]; see also *Rubenstein v Mayor*, 41 AD3d 826 [2007].) Moreover, defendant has not offered any evidentiary material demonstrating that plaintiff misrepresented its corporate status.

4] Accordingly, the parts of the motion that are to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), and for sanctions, are denied.

Dated: August //, 2015


CARMEN A. VELASQUEZ, J.S.C.

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