

SFA Prop., LLC v Maamin Prop., LLC

2015 NY Slip Op 32028(U)

October 28, 2015

Supreme Court, New York County

Docket Number: 651443/15

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SFA PROPERTIES, LLC,

Plaintiff,

Index No. 651443/15

-against-

DECISION/ORDER

MAAMIN PROPERTIES, LLC,

Defendant.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff SFA Properties, LLC (“SFA”) commenced the instant action against defendant Maamin Properties, LLC (“Maamin”) asserting claims for breach of contract, account stated, promissory estoppel, fraudulent misrepresentation and prima facie tort arising out of an agreement between the parties. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment on its first cause of action for breach of contract and striking defendant’s affirmative defenses insofar as they are asserted as defenses to the first cause of action. For the reasons set forth below, plaintiff’s motion is denied.

The relevant facts are as follows. In early 2014, Maamin approached SFA, an experienced real estate developer, with the idea of forming a joint venture through which the parties would co-develop a

property located at 24-16 Queens Plaza South in Long Island City (the “Property”). On or about February 12, 2014, SFA and Maamin entered into an initial agreement (the “Initial Agreement”) in order to explore the potential of jointly developing the Property (the “Project”). Specifically, the Initial Agreement was to serve “as the exclusivity and cost agreement” for the handling of “all out-of-pocket expenses incurred by [the parties] until the expiration of the Exclusivity Period...” As the terms of the scope of the Project evolved, the Initial Agreement was amended and supplemented by various additional agreements dated March 31, 2014, April 11, 2014, May 29, 2014, July 8, 2014, July 31, 2014, August 20, 2014, which extended the Exclusivity Period to “6:00 p.m. (EST) on September 1, 2014” (together hereinafter referred to as the “Agreement”).

In or around December 2014, both SFA and Maamin mutually agreed through written communications that they would not move forward with the Project. Thereafter, plaintiff requested reimbursement from Maamin for certain costs it incurred pursuant to the Agreement. In an e-mail dated December 12, 2014, Roy Kirsch, the managing member of Maamin stated as follows:

My accountants are in the process of reviewing all of the bills and preparing the appropriate payments. Per our letter agreement, we want you to continue to pay the outstanding pursuit costs and pre-development bills. Forward us proof of payment and we will remit to you within 15 business days. This includes payment for the abatement, as well as the other costs incurred.

However, plaintiff asserts that Maamin has refused to make certain payments in violation of the Agreement. Thus, plaintiff commenced the instant action for, *inter alia*, breach of contract against Maamin and now moves for partial summary judgment on said cause of action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the

existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

The court finds that plaintiff has established its *prima facie* right to partial summary judgment as to liability on its first cause of action for breach of contract. To establish a *prima facie* right to summary judgment on a claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) the plaintiff’s performance under the contract; (3) the defendant’s breach of the contract; and (4) damages as a result of the breach. *See Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303 (1st Dept 2004). Here, plaintiff has provided the Agreement between the parties; evidence that it has performed pursuant to the Agreement by paying certain costs; evidence that defendant has breached the Agreement by failing to reimburse plaintiff for certain costs; and evidence that it has been damaged as a result of defendant’s breach.

Defendant’s assertion that plaintiff’s motion should be denied on the ground that it failed to show that it performed under the Agreement because it failed to pay *all* “Pursuit Costs,” which was a requirement under the Agreement is without merit. The Agreement provides, in pertinent part, as follows:

Subject to the foregoing and the following, all out-of-pocket expenses incurred by SFA or its affiliates in connection with the Proposed Transaction shall be referred to herein as “Pursuit Costs” (provided that any individual expense, or series of related expenses, as to the Proposed Transaction in excess of \$25,000 (whether in a single occurrence or series of related occurrences) must be approved by each of SFA and [Maamin] in order to be considered a “Pursuit Cost” hereunder). The term “Pursuit Costs” shall specifically exclude any expenses incurred following the earlier of (x) the termination of the Exclusivity Period pursuant to Paragraph 1(a)(ii) or Paragraph 1(a)(iii) hereof, (y) the date upon which the undersigned parties or their respective affiliates mutually agree in

writing that they will not move forward together with the Proposed Transaction [the "Terminating Event"]....

Prior to the occurrence of the events outlined in any of clauses (x), (y)...above, all Pursuit Costs shall be paid by SFA (and thereafter shall subject to applicable adjustment as outlined below (subject to the terms hereof)); provided that if SFA provides to [Maamin] (i) an invoice relating to any such Pursuit Cost (or portion thereof), (ii) proof of payment by SFA as to such Pursuit Cost (or portion thereof) reasonably acceptable to [Maamin] and (iii) a resulting invoice for fifty percent (50%) of such Pursuit Cost (or portion thereof) so incurred by SFA, then, so long as clauses (i)-(iii) above are satisfied as to the relevant Pursuit Cost(s) (as well as the balance of the provisions hereof), then (subject to below) [Maamin] shall reimburse SFA for fifty percent (50%) of any such Pursuit Cost(s) (or portion thereof) within fifteen (15) business days of receipt of the invoice referred to in clause (iii) above. In the case of clauses (x) or (y) above, all such Pursuit Costs shall then be adjusted to reflect the ratio of ninety percent (90.0%) on behalf of [Maamin] and ten percent (10.0%) on behalf of SFA (after taking into account all payments and reimbursements among them (including the Pursuit Cost split outlined in the previous sentence)). Any such reimbursement(s) owed by [Maamin] to SFA in connection with the foregoing shall then be made within fifteen (15) business days following the termination of the Exclusivity Period (in the case of clause (x) above) or within fifteen (15) business days of the date of any such mutual agreement not to move forward together with the Proposed Transaction (in the case of clause (y) above).

Based on the clear language of the Agreement, Maamin is obligated to reimburse SFA for 90% of the Pursuit Costs SFA incurred prior to the earliest Terminating Event. However, nowhere in the Agreement does it state that SFA is obligated to pay *all* Pursuit Costs prior to being entitled to collect 90% of the Pursuit Costs it did pay from defendant prior to a Terminating Event.

Defendant's assertion that plaintiff's motion should be denied on the ground that it failed to show that it performed under the Agreement because it failed to substantiate its reimbursement requests as required under the Agreement is also without merit. Based on the clear language of the Agreement, prior to a Terminating Event, SFA was obligated to pay all Pursuit Costs. The Agreement provides that during that time, if SFA sent Maamin the invoices relating to said Pursuit Costs, proof of

payment of said Pursuit Costs reasonably acceptable to defendant and an invoice for 50% of said Pursuit Costs directed to defendant, then, and only then, would defendant “reimburse SFA for fifty percent (50%) of any such Pursuit Cost(s) (or portion thereof) within fifteen (15) business days of receipt of the invoice.” However, the Agreement explicitly provides that once a Terminating Event occurs, as it did in this case, Maamin is responsible for 90% of the Pursuit Costs paid by plaintiff. Nowhere in the Agreement is plaintiff required to provide Maamin with invoices, proof of payment or an invoice directed to Maamin once a Terminating Event occurs.

However, the court finds that plaintiff’s motion for summary judgment must be denied on the ground that there exists an issue of fact as to the amount plaintiff is entitled to recover from defendant as reimbursement for the Pursuit Costs. As an initial matter, there is an issue of fact as to whether defendant approved any of the Pursuit Costs incurred by plaintiff that were in excess of \$25,000.00, as required by the Agreement. In defining “Pursuit Cost,” the Agreement provides that “any individual expense, or series of related expenses, as to the Proposed Transaction in excess of \$25,000 (whether in a single occurrence or series of related occurrences) must be approved by each of SFA and [Maamin] in order to be considered a ‘Pursuit Cost’ hereunder.” As plaintiff has failed to establish that Maamin approved all Pursuit Costs incurred which were in excess of \$25,000.00, it has not established that it is entitled to 90% of said Pursuit Costs as reimbursement as they may not be considered Pursuit Costs under the Agreement. Additionally, there is an issue of fact as to whether the Pursuit Costs for which plaintiff seeks reimbursement were in accordance with the Agreement. The Agreement provides that “[a]ll Pursuit Costs incurred by SFA or its affiliates in connection with the Proposed Transaction must be in accordance with the Pre-Development Budget and the terms hereof.” However, plaintiff has failed to show that the Pursuit Costs for which it seeks reimbursement were in accordance with the Pre-Development Budget.

Moreover, plaintiff's motion for summary judgment must be denied on the ground that there exists an issue of fact as to what was the earliest Terminating Event. Indeed, it is undisputed that the parties mutually agreed in December 2014 not to move forward with the Project. However, while defendant asserts that the termination of the Exclusivity Period occurred on September 1, 2014, plaintiff asserts that the parties were still negotiating the joint venture up until December 2014 and that the Exclusivity Period was extended by the parties based on said negotiations and communications.

As this court has denied plaintiff's motion for partial summary judgment on its first cause of action for breach of contract as to damages, that portion of plaintiff's motion for an Order striking all of defendant's affirmative defenses which relate to plaintiff's breach of contract claim is denied.

Accordingly, plaintiff's motion for summary judgment against defendant on its first cause of action for breach of contract is granted only as to liability but denied as to damages. This constitutes the decision and order of the court.

Dated: 10/28/15

Enter: _____
 J.S.C.

CYNTHIA S. KERN
 J.S.C.