SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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ROBERT ROSANIA,

Plaintiff,

-against-

LAURENCE GLUCK, STELLAR BRUCKNER, LLC, STELLAR SUTTON LLC, STELLAR 117 GARTH, LLC, STELLAR 750 TUCKAHOE, LLC, STELLAR 330 EAST 54, LLC, STELLAR WEST 110 LLC, STELLAR MORRISON LLC, STELLAR KVI LLC, STELLAR STRONG ISLAND MEMBER LLC, STELLAR WEST 28 LLC, STELLAR PWV LLC, HEMPSTEAD STELLAR PLAZA LLC, STELLAR JANEL MEMBER LLC, STELLAR COURT PLAZA LLC, AND "JOHN DOES" 1-7

Defendants.

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LAURENCE GLUCK, individually, and derivatively on behalf of STELLAR CALIFORNIA MANAGEMENT CO.,

Counterclaim-Plaintiff,

- against –

ROBERT ROSANIA,

Counterclaim-Defendant,

and,

STELLAR CALIFORNIA MANAGEMENT CO.,

Nominal Defendant.

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DECISION and ORDER

Index No. 150476/2015
Motion Seq. Nos. 001

HON. SALIANN SCARPULLA, J.:

In this action between former real estate partners, plaintiff Robert Rosania ("Rosania") moves (in motion sequence number 001) pursuant to CPLR § 3211(a)(7) to dismiss two counterclaims asserted against him by defendant Laurence Gluck ("Gluck")[1].

Defendant Gluck founded Stellar Management, a New York company that owns and operates residential and commercial real estate, in 1985. Plaintiff Rosania commenced working at Stellar Management in 1998 and became the company's CEO in 2005. Together, Gluck and Rosania participated in numerous lucrative real estate deals in New York and elsewhere. The real estate interests are held through Special Purpose Entities ("SPEs"), including the LLC Defendants, that were created solely for the operation, ownership and management of Rosania's and Gluck's property interests.

During the course of their professional relationship, Gluck made loans and advances to Rosania to enable Rosania to personally participate in various real estate deals. These loans and advances are memorialized in a series of "A" and "B" notes from Rosania to Gluck. The notes state the amounts owed by Rosania to Gluck on each deal and specify that the maturity date for the loans is March 31, 2029. As per the language of the notes, the maturity date for the principal sum and all deferred and accrued interest

[1] Although Rosania's complaint is against Gluck and Stellar Bruckner LLC, Stellar Sutton LLC, Stellar 117 Garth LLC, Stellar 750 Tuckahoe LLC, Stellar 330 East 54 LLC Stellar West 110 LLC, Stellar Morrison LLC, Stellar KVI LLC, Stellar Strong Island Member LLC, Stellar West 28 LLC, Stellar PWV LLC, Hempstead Stellar Plaza LLC, Stellar Janel Member LLC, Stellar Court Plaza LLC, and "John Does" 1-7 (the "LLC Defendants"), the counterclaims at issue in this motion are only brought by Gluck.

accelerates to "no later than sixty (60) days after [Rosania] first ceases to be an employee in good standing of Stellar Management or any of its affiliates as a result of a voluntary resignation or a termination for willful misconduct, fraud or gross negligence."

Rosania executed "A" and "B" notes for two different California properties known as the Villas at Parkmerced in San Francisco, California ("Parkmerced") and Larkspur Shores in Larkspur, California ("Larkspur"). These properties are also the subject of two "settlement agreements" entered into between Rosania and Gluck.

Gluck alleges that he invested more than $21 million into the Parkmerced property deal and an additional $7 million on Rosania's behalf as a loan to enable Rosania to participate in the deal. Following the market crash, "Parkmerced was underwater and needed to be recapitalized." Gluck alleges that, without consulting him, Rosania made a deal with Fortress Investment Group ("Fortress") to recapitalize Parkmerced without Gluck. Gluck states that Rosania's maneuvering left Gluck with no choice but to forego his ownership stake in the property. As a result, Gluck and Rosania entered into a settlement agreement on Sept. 29, 2010 (the "Parkmerced Agreement"). The Parkmerced Agreement provided that: 1) Gluck would surrender his Parkmerced ownership interest to Rosania in exchange for receiving the first $27 million otherwise payable to Rosania from Parkmerced (*i.e.* Rosania's "Carried Interest"); 2) further proceeds payable to Rosania from Parkmerced should be provided to Gluck to pay down other Notes that Rosania owed to Gluck; 3) Rosania would give copies of written agreements between Rosania and Fortress regarding Parkmerced to Gluck; 4) Rosania would "promptly notify Gluck in writing any time Rosania receives funds attributable to the Carried Interest," and

5) while Rosania had "any role in the ownership or operation of Parkmerced, Rosania shall use commercially reasonable efforts to cause Stellar California Management Co. to act as property manager and asset manager of Parkmerced."

For the Larkspur property, Gluck invested $3 million and loaned an additional $1.3 million to Rosania, which Rosania in turn invested in the Larkspur property. Thereafter, this property investment was "underwater" due to the housing market's downturn and Rockpoint Group ("Rockpoint") bought out Gluck's and Rosania's Larkspur interests. In March 2011, Rosania, who was participating in Rockpoint's recapitalization of Larkspur, entered into a settlement agreement (the "Larkspur Agreement") with Gluck. Rosania agreed to provisions similar to those in the Parkmerced Agreement. Any carried interest received by Rosania would again be payable first to Gluck to repay him for his initial investment in the property and then to pay down Rosania's other outstanding notes. The Larkspur Agreement stated that Rosania was to deliver copies of written agreements between Rosania and Rockpoint relating to Larkspur to Gluck.

Both parties agree that the professional relationship between Rosania and Gluck ended in 2013 but each has a very different version of the facts surrounding the breakup. Rosania alleges that he was "ousted," without prior notice, from Stellar Management's offices and that his company-based health insurance was cancelled. In contrast, Gluck alleges that he "maintained a patient, benevolent and compassionate approach towards Rosania, keeping his salary and benefits going for years while Rosania was performing

little or no services for Stellar Management" until Rosania's "voluntary" resignation to pursue other business interests.[2]

Rosania brought this action on January 15, 2015, alleging, among other things, breach of contract arising out of Gluck's withholding of monies and records from various real estate transactions.[3] On February 20, 2015, Gluck served a Verified Answer and Counterclaims. Rosania then filed a Motion to Dismiss the Counterclaims and Certain Affirmative Defenses on April 10, 2015. A hearing on the Motion to Dismiss was held before me on September 30, 2015. Following the hearing, on October 20, 2015, Gluck served a First Amended Verified Answer and Counterclaims individually and derivatively on behalf of Stellar California Management Co., which was also added as a nominal defendant. The parties then stipulated that Plaintiff's Motion to Dismiss the Counterclaims remained pending only as to the Second and Third Counterclaims and was otherwise withdrawn.

Defendant's Second and Third counterclaims are for breach of the aforementioned settlement agreements concerning Parkmerced and Larkspur as well as for breach of the implied covenant of good faith and fair dealing with respect to Parkmerced.

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[2] Gluck argues that Rosania's resignation is evidenced by an email on July 3, 2013 that said, "Just left Stellar. Dropped off Embassy House capital call check. Asked Barbara to please have sent to my house a full copy of all the executed a notes together with schedule which I need since a copy is mine." Gluck further contends that Rosania's voluntary resignation triggered the payment acceleration provision on the Notes for Parkmerced and Larkspur.

[3] Rosania also brought an earlier action against Gluck, Index No. 160289/2013, alleging, among other things, breach of contract. This action is also pending before me.

Discussion

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), the court accepts as true the complaint's factual claims and accords the plaintiff the benefit of all favorable inferences in order to determine "whether the plaintiff can succeed upon any reasonable view of the facts as stated. " *Schneider v. Hand*, 296 A.D.2d 454 (2d Dept. 2002). In addition, a court "may use affidavits in its consideration of a pleading motion to dismiss." *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635 (1976).

Under New York law, a plaintiff asserting a breach of contract claim must allege facts showing (1) the existence of a contract; (2) the plaintiff's performance under that contract; (3) the defendant's breach of its contractual obligations; and (4) damages resulting from the breach. *See Elisa Dreier Reporting Corp., v. Global Naps Networks, Inc.*, 84 A.D.3d 122, 127 (2d Dept. 2011).

1. The Parkmerced Agreement

According to Gluck, Rosania breached the Parkmerced Agreement by failing to: 1) deliver to Gluck copies of all written agreements between Rosania and Fortress relating to Parkmerced; 2) promptly notify Gluck in writing upon receipt of Carried Interest funds; and 3) pay the Carried Interest funds to Gluck as per the Parkmerced Agreement.

Gluck's counterclaim sufficiently alleges all of the elements of a breach of contract claim. In relevant part, Gluck alleges that: (1) there was a Parkmerced Agreement between Rosania and Gluck; (2) Gluck fulfilled his obligations under the agreement by relinquishing his rights to participate in the "income, profits and appreciation of Parkmerced" post-recapitalization; (3) Rosania did not fulfill his

contractual obligations of notification and payment of funds; and (4) because of Rosania's breach, Gluck suffered damages in that he received neither documents pertaining to Parkmerced nor any Carried Interest. I therefore deny Rosania's motion to dismiss Gluck's breach of contract counterclaim relating to the Parkmerced Agreement.

Gluck also alleges that Rosania "breached the implied covenant of good faith and fair dealing by diminishing the value of his Carried Interest in Parkmerced" by maintaining a second unit at Parkmerced for his own personal use, rather than for business purposes, thereby depriving Gluck of the capitalized value of rent for that unit.

Every contract contains an implied covenant of good faith and fair dealing. *Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dept. 1999). There is a breach of the covenant where "a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Id.* To state a claim for breach of the implied covenant of good faith and fair dealing, "the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Id.*

First, the claim for breach of implied covenant of good faith and fair dealing in this case is not duplicative of the breach of contract claim. The former claim rests on Rosania's actions with respect to a rental unit, whereas the latter claim rests upon allegations that Rosania breached express provisions in the Parkmerced Agreement. *See Credit Agricole Corporate v. BDC Finance, LLC*, 135 A.D.3d 561 (1st Dept. 2016)

(holding that causes of action for breach of the implied covenant of good faith and fair dealing and breach of contract were not duplicative because they were based on "sufficiently distinct" allegations).

Second, Gluck has sufficiently plead the claim for breach of implied covenant of good faith and fair dealing by alleging that Rosania's actions, in misappropriating a second rental unit in the Parkmerced property, reduced the amount of Carried Interest to which Gluck was entitled if the unit was rented. The First Department recently held that denial of a motion to dismiss a claim for breach of the implied covenant of good faith and fair dealing was properly denied by the lower court because "[w]hile the [parties'] agreement granted defendant the discretion to decide how to market and promote the [journals], defendant did not have the right to exercise that discretion in such a way as to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of its journals, or benefit itself at a plaintiff's expense." *Pleiades Publishing, Inc. v. Springer Science + Business Media LLC*, 117 A.D.3d 636, 637 (1st Dept. 2014). Similarly, her Gluck alleges that Rosania's decision to keep a second rental unit for his personal use frustrated Gluck's right to receive Carried Interest under the Parkmerced Agreement. I therefore deny Rosania's motion to dismiss the breach of covenant of good faith and fair dealing counterclaim.

2. The Larkspur Agreement

Gluck maintains that Rosania breached the Larkspur Agreement by failing to: 1) deliver to Gluck copies of all written agreements between Rosania and Rockpoint relating

to Larkspur; 2) promptly notify Gluck in writing upon receipt of Carried Interest funds; and 3) pay the Carried Interest funds to Gluck as per the Larkspur Agreement.

Gluck's Larkspur counterclaim also sufficiently alleges each element of a breach of contract claim. Defendant alleges that: (1) there was a Larkspur Agreement between Rosania and Gluck; (2) Gluck fulfilled his obligations under the agreement by relinquishing his rights to participate in the "income, profits and appreciation of Larkspur" post-recapitalization; (3) Rosania did not fulfill his contractual obligations of notification and payment of funds; and (4) because of Rosania's breach, Gluck suffered damages in that he received neither documents pertaining to Larkspur nor any Carried Interest.

In opposition, Plaintiff argues that Defendant's counterclaims should be dismissed because he has "submitted an affidavit that directly negates any contention that the Parkmerced and Larkspur Agreements were breached." Affidavits submitted by a party as evidence to rebut the sufficiency of a pleading, "will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action." *Rovello*, 40 N.Y.2d at 636. And, "if defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D. 3d 128, 135 (1st Dept. 2014).

Here, instead of "conclusively" establishing a defense to Defendant's counterclaims as a matter of law, Plaintiff's affidavit, which does not contain any exhibits, simply argues that Gluck's allegations are inaccurate. Because the facts in

Plaintiff's affidavit neither "demonstrate the absence of any dispute nor completely refute the allegations" against Gluck, Rosania has failed to show entitlement to dismissal pursuant to CPLR § 3211 (a) (7).

In accordance with the foregoing, it is

ORDERED that the motion by Plaintiff Rosania to dismiss Defendant Gluck's First Amended Verified Second Counterclaim for breach of contract regarding the Parkmerced Agreement and for breach of the implied covenant of good faith and fair dealing is denied; and it is further

ORDERED that the motion by Plaintiff Rosania to dismiss Defendant Gluck's First Amended Verified Third Counterclaim for breach of contract regarding the Larkspur Agreement is denied; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208 on JUNE 15 2016 at 2:15pm.

This constitutes the decision and order of the Court.

DATE : 5/18/16

SALIANN SCARPULLA, JSC