309 Fifth Owners LLC v MEPT 309 Fifth Ave. LLC
2016 NY Slip Op 31476(U)
July 29, 2016
Supreme Court, New York County
Docket Number: 652383/15
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMM. DIV. PART 39

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309 FIFTH OWNERS LLC,

Plaintiff,

- against -

MEPT 309 FIFTH AVENUE LLC,

Defendant.

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Index No. 652383/15
DECISION & ORDER
(Motion Seq. 001)

SALIANN SCARPULLA, J.:

Defendant MEPT Fifth Avenue LLC moves for an order: (a) pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint with prejudice for failure to state a cause of action and based on documentary evidence; and (b) pursuant to CPLR 3124 (b) and Commercial Division Rule 11 (d), staying all discovery pending the determination of the motion.

FACTUAL ALLEGATIONS

On September 12, 2011, plaintiff 309 Fifth Avenue Owners LLC (plaintiff or Seller) sold its property at 309 Fifth Avenue in New York City (the Property) to defendant MEPT 309 Fifth Avenue LLC (defendant or Purchaser), c/o NewTower Trust Company (NewTower), pursuant to a negotiated Purchase and Sale Agreement (Agreement). The sale price had two components. First, at the closing, the Purchaser paid off the existing mortgage loan on the Property, provided that the amount did not exceed $27,944,000. Second, the Seller was entitled to an additional "contingent

additional purchase price" (CAPP) to be determined after the closing and development of the Property. The Agreement provided for the CAPP to be calculated based either on the actual price at which the Purchaser resold the Property to another third-party buyer, or, if such a resale did not occur by a certain date, on the "Assumed Net Sale Proceeds" to be determined by an appraisal commissioned by the Purchaser, but in no event could the CAPP payable to the Seller exceed $75,000,000. The parties agreed that the term "Appraised Value" would be defined as follows:

> "The gross appraised value of the Property as determined by the most recent appraisal prepared on behalf of Purchaser in the ordinary course of Purchaser's business and accepted as final for purposes of Purchaser's portfolio valuation. The Appraised Value established by such appraisal shall be final and binding on Purchaser and Seller for purposes of determine [sic] the Assumed Net Sale Proceeds."

(Agreement, Ex. A thereto at 1).

The sale of the Property closed on November 14, 2011. On May 28, 2015, the Purchaser delivered a letter setting forth its CAPP calculation. According to the letter, the appraised value of the Property as of March 31, 2015 was $135 million, although the letter did not include a copy of the appraisal or any information supporting the appraisal. Applying the formula set forth in the Agreement, Purchaser calculated that $4,006,963 was to be distributed to the Seller. There is no dispute that the timing and calculation of the CAPP distribution is correct; by this action Seller challenges only the $135 million appraised value as "shockingly low" (Cmplt., ¶ 22). The Seller alleges that $135 million "is so far below market that no appraiser performing an appraisal based on the criteria set forth in the Agreement's definition of 'Appraised Value,' or any other

commercially reasonable criteria, could arrive at it in good faith, much less consistently with the Agreement" (Cmplt., ¶ 22). The following facts allegedly demonstrate that the Purchaser's appraisal is "far off market" and not compatible with the Agreement (*id.*, ¶ 23). First, the Seller contends that the appraisal's 5% capitalization rate[1] is far out of line with "the hot midtown real estate market of 2015," and that, based on actual sales of comparable properties, capitalization rates between 3% and 3.5% were prevailing. Applying those rates to the Property's $7 million net operating income, would yield a market value of between $200 and $230 million (*id.*). Second, the Seller alleges that it received a "serious offer" to purchase the Property for $185 million in December 2013; that another "credible buyer" offered $187 million in October 2013; and a third prospective buyer was prepared to consider a capitalization rate of 3% or lower in September 2014 (*id.*, ¶ 24). Third, the Seller alleges that the Purchaser explored the possibility of selling the Property in the Spring of 2015 and, on information and belief, received offers and/or expressions of interest well in excess of $135 million, information which was not provided to the appraiser (*id.*, ¶¶ 26-28). The Seller also alleges that the Purchaser's refusal to provide it with a copy of the appraisal demonstrates the Purchaser's lack of good faith (*id.*, ¶ 30).

The Seller commenced this action on July 6, 2015, contending that the Purchaser breached the Agreement by using an appraisal to calculate a CAPP that does not reflect the fair market value of the Property and, thus, was contrary to the requirements of the

[1] A property's capitalization rate is its net operating income divided by its valuation.

Agreement. The second cause of action purports to state a cause of action for unjust enrichment.

In support of its motion to dismiss the complaint, the Purchaser submits an affidavit from Brent Palmer, the Senior Vice President and Valuation Officer of NewTower. Mr. Palmer avers that NewTower serves as the trustee and investment advisor of the NewTower Trust Company Multi-Employer Property Trust (the Fund) and manager of its subsidiary, MEPT Edgemoor LP (Edgemoor), who is the parent company of the Purchaser. The Fund is a bank collective fund established in 1982 that invests in real estate and real estate-related investments, with a portfolio of 92 properties as of December 31, 2014. Edgemoor is a Delaware limited partnership that invests in institutional-quality real estate assets in the United States, and has approximately 73 properties (Palmer aff, ¶¶ 1, 7-8).

According to Palmer, on or about January 15, 2014, NewTower engaged The Weitzman Group, Inc. (Weitzman) to prepare a series of annual and quarterly appraisal reports in 2014, including appraisals of the Property. The appraisal firm's retainer letter states that the "purpose of the appraisal is to estimate the market value(s) of the real estate as of the date(s) specified" (Palmer aff, Ex. D). On September 3, 2014, Weitzman allegedly delivered a 76-page initial restricted self-contained annual appraisal report, plus a 62-page addenda (the Initial Appraisal). The Initial Appraisal estimated that the market value of the Property, as of September 30, 2014, was $129 million. Attached to the Palmer affidavit as exhibit E is a copy of the Initial Appraisal transmittal letter, and selected portions of the appraisal, including its "Summary and Conclusions" section, the

"Certification of the Appraisers" section and the qualifications of the appraisers. The letter of transmittal states that Weitzman derived the market value of the Property using the income capitalization, sales comparison, and cost approaches, but the final valuation was based on income capitalization.

NewTower thereafter retained The Altus Group U.S. (Altus) to independently review the Initial Appraisal. By letter dated September 30, 2014, Altus confirmed that the Initial Appraisal was "acceptable" for purposes of the Trust's portfolio valuation (Palmer aff, Ex. F). On September 30, 2014, Palmer avers that he, on behalf of the Trust, accepted the Initial Appraisal in the ordinary course of business and submits a signed "Acknowledgement of Receipt and Acceptance" (Palmer aff, Ex. G).

NewTower went through the same process in January of 2015. An updated appraisal of the Property was commissioned by NewTower from Weitzman on January 6, 2015. The retainer letter states that the "purpose of the appraisal is to estimate the market value(s) of the real estate as of the date(s) specified" (Palmer aff, Ex. H). On January 31, 2015, Weitzman allegedly delivered a 35-page appraisal update report, plus a 28-page addenda (the Restricted Appraisal). The Restricted Appraisal estimated that the market value of the Property, as of March 31, 2015, was $135 million. Attached to the Palmer affidavit as Exhibit A is a copy of the Restricted Appraisal transmittal letter, and selected portions of the appraisal including its "Certification," "Limiting Conditions," "Special Assumptions," "Summary and Conclusions" and "Certification of the Appraisers" section as well as the qualifications of the appraisers.

The letter of transmittal states that the report is limited in that the cost approach was not completed, that no physical inspection of the Property was conducted, and all current and financial information was provided by NewTower and assumed to be accurate. Weitzman derived the market value of the Property using the income capitalization and sales comparison approaches, and both approaches reached the same $135 million valuation (Palmer aff, Ex. A at 9). Finally, the transmittal letter indicates that Weitzman considered that the highest and best use of the Property to be "continued use as a mixed-use residential rental building" (*id.*, Ex. A at 4). Altus independently confirmed the market valuation of $135 million by letter dated March 31, 2015 (*id.*, Ex. I). Palmer avers that he, on behalf of the Trust, accepted the Restricted Appraisal in the ordinary course of business on March 31, 2015 and submits a signed "Acknowledgement of Receipt and Acceptance" (Palmer aff, Ex. J).

Based upon the above-discussed documents, the Seller argues that it has shown, as a matter of law, that it complied with its' contractual obligation to value the Property, and that therefore, the complaint should be dismissed.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a), while the court must accept the facts alleged in the complaint as true and accord the plaintiff every favorable inference (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), "factual claims that [are] either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (*Herman v Greenberg*, 221 AD2d 251, 251 [1st Dept 1995], citing *Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]; *see*

also Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). CPLR 3211 (a) (1) provides for dismissal where "a defense is founded upon documentary evidence" if the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]). Because affidavits are not considered documentary evidence under CPLR 3211 (a) (1) (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014]; *Solomons v Douglas Elliman LLC*, 94 AD3d 468, 469-470 [1st Dept 2012]; *Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]), the court considers only the factual allegations that are fully supported by the documentary evidence attached to the Palmer affidavit.

The Seller's claim for breach of the Agreement is dismissed based on the unambiguous terms of the Agreement and the unrefuted documentary evidence that the Purchaser followed its dictates. The gravamen of the complaint is that the appraised value of $135 million was not prepared in compliance with the terms of the Agreement and does not arrive at what the Seller believes is the Property's "fair market value." However, the terms of the Agreement are clear and unambiguous. As long as the appraisal was prepared on behalf of the Purchaser in the ordinary course of the Purchaser's business and accepted as final for purposes of the Purchaser's portfolio valuation, the valuations is final and binding on both sides. The evidence submitted by the Purchases unequivocally shows that the Purchaser followed the unambiguous language of the Agreement in arriving at the CAPP.

Notably the words "fair market value" do not appear in the definition of "Appraised Value," although the evidence is clear that Weitzman was charged with exactly that task. The issue is not whether a "reasonable businessperson" would be satisfied with the Restricted Appraisal (*see* Pls. Mem. of Law in Opp. at 2). The issue is whether the Restricted Appraisal satisfies the Agreement, and because it does, it is "final and binding on Purchaser and Seller for purposes of determine [sic] the Assumed Net Sale Proceeds" (Agreement, Ex. A).

The Seller argues strenuously that the fact that the Purchaser refuses to turn over a full copy of either the Initial or the Restricted Appraisal demonstrates the Purchasers' bad faith. Nothing in the Agreement requires the disclosure of the appraisal reports. If the Purchaser intended that CAPP would be determined by a battle of the parties' separate appraisers, the Agreement should have so provided.

It appears that the real dispute is over whether Weitzman's conclusion that the highest and best use of the Property is as a continued mixed-use residential rental building (*see* Palmer aff, Ex. A at 4), a conclusion that is disclosed by the excerpts of the Restricted Appraisal that the Purchaser offers as evidence on this motion. Counsel for the Seller contends that Weitzman undertook to determine the market value of the building as a rental property, and should have assumed that the highest and best use of the Property is a future conversion to condominium ownership "in keeping with market conditions" (Pls.

Mem. of Law in Opp. at 3; *see also* April 6, 2016 transcript at 20). Again, nothing in the Agreement requires that the appraisal be based on this assumption.[2]

The Seller also pleads a claim for unjust enrichment. To recover on the theory of unjust enrichment, a plaintiff must show that the other party enriched itself at the plaintiff's expense and that "'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], affd 19 NY3d 511 [2012], quoting *Mandarin Trading Ltd. v Wilderstein*, 16 NY3d 173 [2011]). Here, the contract at issue that was negotiated by sophisticated business people represented by counsel, and there is nothing unjust about enforcing it according to its terms. Indeed, it is well settled law that where an express contract governs the subject matter of the plaintiff's claims, it bars a separate cause of action based on unjust enrichment (*Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]; *see also Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 289 [1987]). "[U]njust enrichment is not a catchall cause of action to be used when others fail," but, rather, "[i]t is available only in unusual situations when, though the

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[2] In addition, the evidence submitted shows that all of the Property's residential units are currently rent-regulated pursuant to section 421-a of the New York Real Property Tax Law (Palmer reply aff, Ex. A) and conversion to condominium ownership would be subject to the tenants maintaining their statutory protections under the Martin Act, General Business Law §§ 352 *et seq*.

defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello*, 18 NY3d at 790).

For these reasons, the complaint is dismissed pursuant to CPLR 3211 (a) (1) and (7) based on documentary evidence and failure to state a cause of action.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed with prejudice with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 29, 2016

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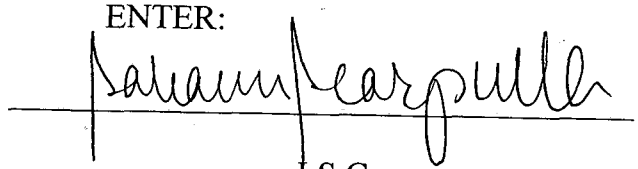

J.S.C.

HON. SALIANN SCARPULLA