Modern Art Servs. LLC v Financial Guar. Ins. Co.
2016 NY Slip Op 31929(U)
October 11, 2016
Supreme Court, New York County
Docket Number: 651115/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45
--X
MODERN ART SERVICES LLC,

Plaintiff,

-against-

FINANCIAL GUARANTY INSURANCE CO.,

Defendant.
--X

DECISION AND ORDER

Index No. 651115/2016

Mot. Seq. No. 001

HON. ANIL C. SINGH, J.:

Defendant Financial Guarantee Insurance Company moves for an order, pursuant to CPLR 3211(a)(7), dismissing plaintiff Modern Art Service LLC's causes of action for breach of contract and/or warranty, breach of implied covenant of good faith and fair dealing, and quantum meruit/unjust enrichment, and each of them and each part thereof, in plaintiff's Complaint with prejudice.

FACTS

Modern Art Service LLC ("plaintiff") alleges that Financial Guarantee Insurance Company ("FGIC" or "defendant") failed to abide by its written agreement ("Agreement") to compensate plaintiff for its role as a stalking horse lender for FGIC in the City of Detroit ("City" or "Detroit") bankruptcy, and that FDIC utilized plaintiff's loan proposals to increase FGIC's recovery as a creditor in that proceeding.

[* 2]

In or about 2005, the City started to fall behind on its statutory and constitutional obligations to make pension payments to its General Retirement System and Police and Fire Retirement System. To meet its funding obligations to the Retirement Systems, the City entered into a series of financial transitions that resulted in the issuance to investors of instrument known as certificates of participation ("COPs"). FGIC issued policies guaranteeing the scheduled payment of principal and interest on certain of the COPs (the "FGIC-Insured COPs").

The City's financial condition continued to deteriorate and it stopped making payments to COP Holders in 2013. FGIC was forced to pay and continues to make payments in respect of amounts that were due and owing in connection with the FGIC-Insured COPs. Detroit followed its COP defaults with the filing of a chapter 9 bankruptcy petition for relief in the United States Bankruptcy Court in Detroit (the "Bankruptcy Court") in July 2013. FGIC filed proofs of claim against the City and became one of the largest creditors in the City's bankruptcy. Plaintiff alleges that FGIC's "COP Claim" was over $1.2 billion for all of the principal and interest FGIC had or would be required to pay holders of FGIC-Insured COPs, as well as fees and expenses incurred.

At the time the City filed for bankruptcy protection, the Detroit Institute of Arts ("DIA") housed approximately 65,000 pieces of art (the "DIA Collection). As the Bankruptcy Court noted, "[o]ne of the most contentious issues" in the bankruptcy became "the extent to which the bankruptcy code requires the City to sell or otherwise monetize the art at the DIA to pay creditors." In re City of Detroit, 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014).

FGIC engaged the financial advisory firm of Houlihan Lokey ("Houlihan") to conduct an independent assessment of "potential alternative market transactions" involving the DIA Collection and to "develop a greater understanding of the potential value of the art collection as a whole." Compl. Exh. A, P1. In March 2014, Houlihan invited interested parties to submit indications of interest in acquiring or monetizing all or part of the art. Houlihan received four proposals, one of which was a non-binding proposal from plaintiff (the "Art Capital Term Sheet") to provide the City an "Exit Facility" loan of up to $2 billion secured by the entire DIA Collection.

On May 5, 2014, the City filed the Fourth Amended Plan of Adjustments of Debts (the "Fourth Amended Plan") which incorporated a "Grand Bargain" that the City announced in January 2014. Under the "Grand Bargain", the City was to transfer the DIA Collection to a charitable trust for approximately $816 million to be paid from multiple sources over twenty years. Plaintiff alleges that FGIC believed that the Bankruptcy Court would probably confirm the City's plan which proposed to "cram- down" the terms of the plan over FGIC's objections. According to the Complaint, under the manner of payment provided in the Fourth Amended Plan, the amount of recovery FGIC would receive would have a present value of only $65 million.

Plaintiff and defendant then entered into the Agreement dated July 7, 2014. Plaintiff had the contractual obligation to present to FGIC a proposal for an Exit Facility contained in the Art Capital Term Sheet, and to work to modify the proposal set forth therein as required or appropriate. Plaintiff was also obligated to introduce Victor Weiner Associates, LLC ("VWA") to FGIC, who subsequently designated VWA as a testifying expert in the bankruptcy proceeding in support of its objection to the Fourth Amended Plan. FGIC submitted VWA's report about the DIA Collection to the City. In that report, VWA valued the DIA Collection to be worth more than $8 billion.

On or about August 1, 2014, plaintiff submitted a revised Exit Facility proposal that is not contingent on any appraisal. Among other things, the revised proposal increased the amount of the facility from $2 billion to $4 billion. Plaintiff asserts that FGIC used the proposals in connection with FGIC's objections to the Fourth Amended Plan.

Plaintiff also alleges that the proposals were solicited and used by FGIC for the express purpose of competing with the "Grand Bargain" financing plan proposed by the City in its plan of reorganization, and that VWA's report was used to establish that the DIA Collection was worth far more than the $455 million (present value) the City proposed to obtain under the Fourth Amended Plan.

Under the Agreement, defendant agreed it would pay plaintiff a nonrefundable deposit of $50,000 to cover a portion of the reasonable out-of-pocket expenses of Art Capital. Compl. Exh. A, Article 3.a. It is not disputed that FGIC paid and plaintiff received this amount. The Agreement also contemplated that if the net present value of the total aggregate amount of recoveries received or to be received with respect to the FGIC-Insured COP Claims (the "Total Recovery Amount") increased, plaintiff would be entitled to an additional fee ("Additional Fee") equal to 3% of the amount by which the Total Recovery Amount exceeds $65 million, provided that certain other conditions were met. The current dispute between the parties arose out of this Additional Fee.

In mid-October, FGIC and the City reached an agreement (the "FGIC Settlement") to settle FGIC's COP claims, the COP litigation, and FGIC's related objections to the Fourth Amended Plan. Under the FGIC Settlement, FGIC withdrew its objections to confirmation and consented to approval of the Eighth Amended Plan of Adjustments of Debts (the "Eighth Amended Plan"), received an allowed COP claim in Class 9, received an additional allowed claim in Class 14, and received a "Development Agreement" from the City, which gave FGIC the option to acquire and develop certain land and improvements. It is alleged by the plaintiff that FGIC has received or will receive a total recovery amount of far more than $65 million (net present value) under the Eighth Amended Plan, and that FGIC owes plaintiff an additional fee which could reach as high as $16 million or more.

Plaintiff has asserted a cause of action for breach of contract and/or warranty. As alternative causes of action, plaintiff alleges that FGIC breached the implied covenant of good faith and fair dealing, and/or that FGIC is liable under principles of unjust enrichment. Defendant moves for an order dismissing plaintiffs' claims pursuant to CPLR 3211(a)(7). (Mot. Seq. 001).

Statement of Law

When deciding a motion to dismiss under CPLR § 3211(a) (7), the Court must construe the allegations in the complaint liberally, accept the facts alleged to be true, and accord the plaintiff the benefit of every possible favorable inference. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151-152 (2002). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). A complaint must be dismissed as a matter of law if the facts alleged do not adequately state a cause of action or "fit within any cognizable legal theory." Sokol v. Leader, 904 N.Y.2d 153, 155 (2d Dept 2010); Lindine v. Iasenza, 15 N.S.3d 248, 250 (3d Dept 2015). However, if the [C]ourt determines that the plaintiff would be entitled to relief on any reasonable view of the facts stated in the pleading, dismissal must be denied. Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

Documentary evidence submitted with a motion must "utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v Mutual Life Ins. Co. of NY, 98 N.Y.2d 314, 326 (2002). Dismissal on the basis of "documentary evidence" is inappropriate if the documents do not "definitively dispose of the claim." Devlin v. Video Servs. Acquisition, 188 A.D.2d 370, 370 (1st Dept 1992). Documents which do no more than raise questions concerning "whether there is evidentiary support for the complaint" cannot support dismissal under Rule 3211(a)(1) or (a)(7). Tsimerman v. Janoff, 40 A.D.3d 242, 242 (1st Dept 2007).

Analysis

Whether the Complaint Adequately Pleads a Breach of Contract Claim

In determining a breach of contract claim, the court's role "is to ascertain the intention of the parties at the time they entered into the contract." Evans v. Famous Music Corp., 1 N.Y.3d 452, 458 (2004). "The intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations." Goldman Sachs Group, Inc. v. Almah LLC, 85 A.D.3d 424, 427 (1st Dept 2011). The words of the contract are to be given their plain and ordinary meaning. Fesseha v. TD Waterhouse Inv. Servs., 305 A.D.2d 268 (1st Dept 2003). The court must not "view sentences or clauses in isolation." Int'l KlafterCo. V. Cont'l Cas. Co., 869 F.2d 96, 99 (2d Cir. 1989); see also Rosenblum v. New York State Workers' Compensation Bd., 309 A.D.2d 120, 125 (1st Dept 2003). The plain meaning of the agreement "should be enforced without regard to consideration of extrinsic evidence of the parties' understanding or intent." Goldman v. White Plains Ctr. For Nursing Care, LLC, 840 N.Y.2d 788, 789 (1st Dept 2007).

The court "should examine the entire contract" in light of "the surrounding circumstances or the apparent purpose which the parties sought to accomplish." Matter of Stravinsky v. Schott Musik Int'l GmbH & Co., 4 A.D.3d 75, 81 (1st Dept 2003). Words, phrases, or clauses in a contract should not be taken out of context or overemphasized. Matter of Friedman, 64 A.D.2d 70, 81 (2d Dept 1978); see also South Rd. Assoc., LLC v. Int'l Bus. Machs. Corp., 4 N.Y.3d 272, 277 (2005). A contract "which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits." Ronnen v. Ajax Elect. Motor Corp., 88 N.Y.2d 582, 590 (1996).

Manner Different Provision

Plaintiff's allegation that Section 3b(x) of the Agreement is met because the receipt of the Art Proceeds is effected differently in the Eighth Amended Plan is without merit. Section 3b(x) of the Agreement requires that the City's "receipt of the Art Proceeds is effected through one or more provisions of the Plan relating to use or value of the DIA Collection or any portion thereof in a *manner different* than that contemplated in the Fourth Amended Plan." (emphasis added).

Plaintiff's argument that (1) FGIC does not define what it thinks "manner" means in the context of the Agreement; and (2) that it makes no practical sense to interpret the "manner different" clause to require an elimination of or fundamental changes to the Grand Bargain before FGIC would be obligated to pay a fee is unavailing. The provisions in the Eighth Amended Plan "relating to the use of the DIA Collection" in the Agreement, are not different than the process contemplated in the Fourth Amended Plan. Both plans contemplated that the Art Proceeds would be received in the exact same manner, i.e. as a result of the funding commitments of those contributing to the Grand Bargain. The differences between the Fourth and Eighth Amended Plans cited by plaintiff have nothing to do with the use of the DIA Collection or the manner by which the City received the Art Proceeds.[1]

[1] Both plans provide that on the effective date, the City shall irrevocably transfer the DIA Assets to the DIA Corp., as trustee, to be held in perpetual charitable trust, for the primary benefit of the residents of the City and the Counties and the citizens of the State. See Soto Aff., Ex. D, Article IV.F.2; Soto Aff., Ex. E, Article IV.E.2. Both plans provide that the DIA Settlement will be funded from: (a) irrevocable commitments of at least $366 million by the Foundations, and (b) an irrevocable commitment of $100 million, the payment of which is guaranteed by the DIA Corp. See Soto Aff., Ex. D, Article IV.F.1; Soto Aff., Ex. E, Article IV.E.1. Both plans provide for materially

Plaintiff does not dispute these facts, but rather argues that under the Fourth Amended Plan in which the receipt of the Art Proceeds would be effected was to force the terms of the Grand Bargain over the objections of the FGIC, whereas under the Eighth Amended Plan, FGIC withdrew its objections and accepted the Grand Bargain. See Compl. ¶84. Regardless of plaintiff's argument regarding the cram-down provision, the Bankruptcy Court twice avers that the Eighth Amended Plan "does not materially and adversely affect or change the treatment of any Claim against the City under the Fourth Amended Plan." Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit, Case No. 13-53846, at 5 (Bankr. E.D. Mich. Nov. 12, 2014); see also Id. at 27. As such, the plaintiff has not adequately alleged that the mode of acceptance equals a material change from the Eighth Amended Plan to the Fourth Amended Plan.

In order to trigger any Additional Fee, the City's receipt of the Art Proceeds in the Eighth Amended Plan is required to be related to the use of the DIA Collection

identical conditions to the DIA Funding Parties' participation in the DIA Settlement, including that the DIA Settlement is contingent on the agreement of the State to provide the State Contribution. See Soto Aff., Ex. D, Article IV.F.3; Soto Aff., Ex. E, Article IV. E.3. Both plans provide that the funding contributions under the DIA Settlement will be earmarked towards the recoveries of the pension claims. See Soto Aff., Ex. D., Article IV, F.3; Soto Aff. Ex. E., Article IV.E.3. Both plans provide that the State Contribution under the State Contribution Agreement will be the net present value of $350 million payable over 20 years, using a discount rate of 6.75%, payable to the Retirement Systems for the benefit of the pensioners. See Soto Aff., Ex. D, Article IV.E.1; Soto Aff., Ex. E, Article IV.D.1. Both plans provide that the State Contribution is contingent on the funding of the DIA Settlement, but provide for no other conditions on the State Contribution relating to the DIA Settlement or the DIA Collection. See Soto Aff., Ex. D, Article IV.E.3; Soto Aff., Ex. E, Article IV.D.3.

that differs from the use contemplated in the Fourth Amended Plan. The manner in which FGIC consented to the Eighth Amended Plan did not affect the use of the DIA Collection nor the City's receipt of the Art Proceeds. Even taking all of the facts as alleged as truthful, plaintiff has not adequately stated a cause of action related to how the use of the DIA Collection contemplated in the Eighth Amended Plan differed from the use contemplated in the Fourth Amended Plan. Similarly, plaintiff's arguments that the State's extension of the funding requirement satisfies the Use of the Art Condition and that the Use of the Art Condition is satisfied because the State added two conditions to funding the State Contribution also fails. These claims do not relate to the use of the DIA Collection of the City's receipt of the Art Proceeds through provisions relating to the use of the DIA Collection. See Compl. ¶85.

Art Proceeds Directly for Additional Recoveries on the COP Condition

Plaintiff alleges that the Agreement provides that defendant is obligated to pay a three percent fee no matter how the defendant structured a recovery above $65 million. Under section 3b(y) of the Agreement,

> [T]he Art Proceeds are used to provide recoveries under the Plan with respect to the FGIC-Insured COP Claims, either directly or indirectly, including by making additional General Fund revenue available to provide additional recoveries under the Plan with respect to the FGIC-Insured COP Claims, and, as a result, the net present value of the total aggregate amount of recoveries received or to be received under the

> Plan with respect to the FGIC-Insured COP Claims (the "Total Recovery Amount") exceeds $65 million.

Agreement §3b(y). The term Art Proceeds is defined in the Agreement to include,

> [A]ny cash, notes, certificates of participation, funding commitments or other proceeds directly or indirectly attributable to a sale, disposition or transfer of the DIA Collection or any portion thereof, a financing secured by or otherwise based on the value of the DIA Collection or any portion thereof, or otherwise derived from the use or value of the DIA Collection or any portion thereof.

Agreement §3b(w). Therefore, the Additional Recoveries from Art Proceeds is satisfied only if FGIC's increased recovery is funded directly from a transaction involving the art collection or indirectly from the City's use of the DIA Collection under the Grand Bargain. In addition, FGIC's recovery must be increased "as a result" of the Art Proceeds. Plaintiff alleges that this condition was satisfied because defendant's withdrawal of its objection constituted a change in the utilization of the DIA Collection, and, as a result, the consideration FGIC received in exchange for withdrawing its objection was indirectly provided by the Art Proceeds.

Plaintiff broadly reads Agreement §3b(y) to argue that they are entitled to recovery when the art is used for any leverage. However, the bankruptcy order bars the use of "the DIA Collection or some portion thereof as collateral for a loan to pay creditors." See Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit at 32. Moreover, the order finds it impracticable for the

City to liquidate the DIA Collection in an attempt to maximize creditor recoveries. Id. The order goes on to list other efforts by the City to monetize assets with the exception of the DIA Collection. Id. at 33. If the DIA Collection expressly could not be monetized to be used as collateral or for sale under the order, it would be counterintuitive to find it used as leverage.

Furthermore, Art Proceeds were not used to provide recoveries to the FGIC-Insured COP Claims. See In re City of Detroit, 524 B.R. 147 (Bankr. E.D. Mich. 2014). Instead, holders of FGIC-Insured COP Claims were entitled to receive New B Notes, New C Notes, and settlement credits. Id. As part of the settlement under the Eighth Amended Plan, defendant's received "$74.2 million in New B Notes, $67.2 million in New C Notes and $19.75 million in class 9 settlement credits", which represented "13% of FGIC's class 9 claims." Id. Separate and distinct from the Class 9 recovery, defendant and the City entered into an agreement in which FGIC and the COPs Holders were given the option to acquire and develop certain City owned property, which was "separate and distinct from, and constitute[] no part of, the treatment under the plan of Class 9 COP Claims." Id.

Under the Eighth Amended Plan, as under the Fourth Amended Plan, the Art Proceeds are paid solely to the Retirement Systems. See n. 1, *supra*. Plaintiff argues that this finding by the bankruptcy court does not conclusively refute their claim that the Development Agreement or other additional recoveries should be included in the definition of Total Recovery Amount for the purposes of calculating the fee due by FGIC under the Agreement. Plaintiff contends instead that the finding was directed as to whether or not the Development Agreement should be disregarded for the purposes of determining whether the Plan complies with section 1123(a)(4) of the Bankruptcy Code and does not determine whether the value of the Development Agreement should be included within the broad definition of Total Recovery Amount under the Agreement. However, even if there were a reason to find differently than the bankruptcy court about the relation of the Development Agreement to the COP claims, the option to acquire and develop certain City owned property was neither derived from the Art Proceeds directly nor indirectly. See *infra*.

The Net Present Value of Art Proceeds/Fee Cap Condition

Finally, plaintiff alleges that section 3b of the Agreement sets forth a cap on the total amount of the Additional Fee which would otherwise be due to plaintiff by defendant. In pertinent part the Agreement states, "the Additional Fee shall not exceed the amount by which (x) the net present value of the *Art Proceeds* (using a 6.75 percent discount rate) exceeds (y) $455 million." Agreement §3b. (emphasis added). As discussed *supra*, Art Proceeds include "any case…funding commitments or other proceeds…indirectly attributable to a sale, disposition, or transfer of the DIA Collection…or otherwise derived from the use or value of the DIA Collection."

Agreement § 3b(y). Therefore, any Art Proceed must relate to the use or value of the DIA Collection.

Plaintiff argues that the proceeds from an Annuity Savings Fund settlement is an Art Proceed. The ASF Settlement regarded an alleged $387 million additional payout in excess interest that pensioners were credited through the Annuity Savings Fund accounts. In re City of Detroit, 524 B.R. at 182. The City was allowed to recoup from each retiree the amount of excess interest that was credited over a ten-year period between 2003 and 2013. Id. Plaintiff argues that the Bankruptcy Court, in their Supplemental Opinion stated the "ASF recoupment settlement is a part of the global pension settlement and therefore a part of the Grand Bargain." Id. As a result, because the increase in funds is "indirectly attributable" or "otherwise derived from the use" of the DIA collection, plaintiff alleges it is included in the meaning of "Art Proceeds." However, Art Proceeds does not naturally include all new revenue that was gained through the settlement as plaintiff suggests. Thus, the ASF settlement is not an Art Proceed under the agreement.

Plaintiff also alleges that the proceeds received by the City under the Development Agreement are indirectly attributable to the disposition of the DIA Collection, and are therefore a Net Present Value. As discussed *supra*, under the Development Agreement, an entity controlled by FGIC and the COPs Holders have the option to acquire and develop the land upon which Joe Louis Arena and its garage are located. In re City of Detroit, 524 B.R. at 196. This Development Agreement was given in consideration for the withdrawal of FGIC's objections to the bankruptcy plan and waiving any claims it had related to the COPs. The Development Agreement is "solely for the benefit of FGIC and the COPs Holders" See Soto Aff., Ex. E. Simply put, the Development Agreement does not provide the City with any proceeds associated with the use or value of the DIA Collection and therefore, is not a part of the Art Proceeds.

Whether the Complaint Adequately Pleads A Claim for Breach of the FGIC Warranty

Defendant's motion to dismiss plaintiff's claim for breach of the FGIC warranty is granted. A claim for breach of warranty is "complete upon proof of the warranty as part of a contract and proof of its breach." Ainger v. Michigan Gen. Corp., 476 F. Supp. 1209, 1225 (S.D.N.Y. 1979). "A warranty is a kind of insurance, entitling the beneficiary of the warranty to be held harmless against the event insured against." Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 648 (7th Cir. 2002).

Plaintiff alleges that the purpose of the FGIC Warranty was to assure plaintiff that it would receive a fee for an increased recovery no matter how FGIC wound up receiving an additional recovery from the bankruptcy. See Agreement § 3(b). However, the Agreement's language states that plaintiff is only entitled to a fee if

FGIC "benefit[s] by virtue of a modification of terms of the Fourth Amended Plan relating to a sale, disposition, transfer, financing or other utilization of the DIA Collection to generate proceeds to the City." Id. Here, there has not been any modification to the terms of the Fourth Amended Plan relating to the sale, disposition, transfer, financing or other utilization of the DIA Collection to generate proceeds to the City as required under the Agreement[2]. As there hasn't been any modification, the warranty provision is inapplicable. Therefore, defendant's motion to dismiss is granted.

Whether Plaintiff's Allegations Adequately Pleads a Claim for Breach of the "True-Up Duty"

Defendant's motion to dismiss based upon plaintiff's failure to adequately plead a claim for breach of the true-up duty is denied. Under Section 3(b) of the Agreement, FGIC is obligated to,

> consult with Art Capital and calculate the Total Recovery Amount on a mutually agreeable basis (i) to include any recoveries then already received under the Plan with respect to the FGIC Insured COP Claims, (ii) using the same discount rate that was used to estimate that the net present value of projected recoveries with respect to the FGIC-Insured COP Claims under the Fourth Amended Plan is $65 million to value recoveries in the form of cash or deferred-cash obligations of the City, including notes or funding commitments of the City and (iii) using the market value, as determined by the bankruptcy court or other court of competent jurisdiction, of any recoveries in the form of assets other than cash or deferred-cash obligations of the City.

[2] See n. 1.

Defendant argues that there was no obligation to consult with plaintiff because there wasn't any value associated with the FGIC-Insured COP claims. Even if defendant's claim is true, the duty to consult in the Agreement, is one of the freely contracted provisions that defendants are obligated to comply with. Defendant has not informed plaintiff about their settlement negotiations with the City, nor have they consulted plaintiff regarding the settlement, as required by the Agreement.

Defendant alternatively argues that the e-mail sent to plaintiff on November 18, 2014 stating that defendant owed no additional fee amounted to sufficient consultation. Although plaintiff failed to respond to that e-mail, plaintiff contends that "consult" implies more than one, unilateral e-mail essentially saying that defendant was not going to consult because they owed no additional fee. Since there is a dispute over the meaning, the court first looks to determine if there is ambiguity about the definition of the term. The Agreement fails to define consult. An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v Paul, 66 NY2d 570, 573 (1986). Ambiguity should be left to the determination of a fact finder. China Privatization Fund (Del), L.P. v. Galaxy Entertainment Group Ltd., 95 AD3d 769, 770 (1st Dept 2012). Thus, with regards to the term "consult", the contract is ambiguous, and the meaning should not be decided on a motion to dismiss.

Therefore, defendant's motion to dismiss based upon plaintiff's allegation of a breach of the true-up duty is denied.

Whether Plaintiff's Complaint Adequately Pleads a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendant's motion to dismiss Plaintiff's claim for breach of implied covenant of good faith and fair dealing is denied. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance," which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 511 W. 232 Owners Corp. v. Jennifer Realty Co., 746 N.Y.2d 144, 153 (2002). "Such a covenant is violated when a party promises commissions or profits and then does not act in good faith to permit such commissions or profits to be earned, thereby depriving the other party of the benefit of the bargain." Wagner v. JP Morgan Chase Bank, 2011 WL 856262, at *3 (S.D.N.Y. March 8, 2011).

Where a claim for breach of the implied duty of good faith and fair dealing "arise from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." Mill Fin., LLC v. Gillett, 992 N.Y.S.2d 20, 25 (1st Dept 2014). A claim for the breach of good faith and fair dealing is duplicative and "cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" Board of Mgrs. Of Soho N. 267

W. 124th St. Condo v. NY 124 LLC, 984 N.Y.S.2d 17, 19 (1st Dept 2014). Additionally, the duty of good faith and fair dealing is not without limits, and no obligation can be implied that "would be inconsistent with other terms of the contractual relationship." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995).

Plaintiff's claim for a breach of the implied duty of good faith and fair dealing is not duplicative with its breach of contract claim as both claims do not arise from the same sets of facts, although the claims are "intrinsically tied to the damages allegedly resulting from a breach of the contract." Board of Mgrs., 984 N.Y.S.2d at 19 (1st Dept 2014). In both their cause of action for breach of contract and breach of the implied duty of good faith and fair dealing, plaintiff seeks damages related to defendant's failure to pay the Additional Fee. Specifically, in paragraph 105 of the Complaint, plaintiff states "FGIC breached the duty of good faith and fair dealing by structuring the FGIC Settlement on terms which would avoid payment of the Additional Fee to Plaintiff...It would equally be a breach of such a duty if FGIC avoided paying an Additional Fee by structuring some parts of the FGIC Settlement to be 'separate' from payments on the FGIC COP claims." Id.

However, plaintiff's claim for breach of the implied duty of good faith and fair dealing survives because it is based on separate facts as its claim for breach of contract. FGIC's conduct in performing the Agreement in inducing plaintiff to continue to make loan proposals and structuring its settlement with the City to avoid paying plaintiff a fee is separate from FGIC's refusal to pay the Additional Fee. For similar reasons, plaintiff, at this stage of the proceedings, has alleged sufficient facts showing that FGIC may have structured its settlement with the City to relieve itself from its obligation to pay plaintiff a fee under the Agreement. Therefore, Defendant's motion to dismiss for breach of implied duty of good faith and fair dealing is denied.

Whether the Complaint Adequately Pleads a Claim for Unjust Enrichment

Plaintiff's complaint does not adequately plead a claim for unjust enrichment and defendant's motion to dismiss is granted. "The theory of unjust enrichment lies in a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 572 (2005). There can be no unjust enrichment if the matter is controlled by contract, since "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Id. (internal citations omitted). A plaintiff may state alternative causes of action for breach of contract and unjust enrichment that are predicated on the same facts only where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue. 143 Bergen St. LLC v. Ruderman, 39 Misc. 3d 1203(A) (Sup. Ct. Kings Cnty. Mar. 22, 2013). Here, both parties agree that there is a contract that governs the issues in dispute. Therefore, defendant's motion to dismiss is granted.

Accordingly it is,

ORDERED that defendant's motion to dismiss plaintiff's claim for breach of contract is granted; and it is further

ORDERED that defendant's motion to dismiss plaintiff's claim for breach of the FGIC warranty is granted; and it is further

ORDERED that defendant's motion to dismiss plaintiff's claim for breach of the "true-up" duty is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's claim for breach of the implied covenant of good faith and fair dealing is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's claim for unjust enrichment is granted.

Date: October 11, 2016
New York, New York

Anil C. Singh