Veneto Hotel & Casino, S.A. v German Am. Capital Corp.
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Supreme Court, New York County
Docket Number: 651888/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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VENETO HOTEL & CASINO, S.A. and SE LEISURE MANAGEMENT LLC,

Plaintiffs,

-against-

GERMAN AMERICAN CAPITAL CORPORATION,

Defendant.

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Index No.: 651888/2015

Mtn Seq. No. 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Defendant, German American Capital Corporation ("GACC"), moves, pursuant to CPLR 3016(b), 3211(a)(1) and (7), for an order dismissing the complaint.

Factual Background

Plaintiff Veneto Hotel & Casino, S.A. ("Veneto") is a Panamanian corporation which owns the Veneto Hotel & Casino in Panama City (the "Hotel") (Am. Compl., ¶¶ 1, 6-7). Plaintiff SE Leisure Management LLC ("SE Leisure") provides advisory and consultation services to the Hotel's management pursuant to an Asset Management Agreement between Veneto and SE Leisure (Am. Compl., ¶ 45).

On or about June 14, 2007, GACC and Veneto entered into a Loan and Security Agreement (the "Loan Agreement") pursuant to

which GACC made a $60 million loan to Veneto (the "Loan" or "Consolidated Note") (Loan Agreement, Am. Compl., Ex. 1).

The parties subsequently modified the Loan Agreement on June 8, 2009 (the "First Amendment"), March 19, 2010 (the "Second Amendment"), and August 22, 2012 (the "Third Amendment") (collectively, the "Amendments") (Am. Compl., ¶ 12). Pursuant to the Loan Agreement and the Amendments, Veneto established a Holding Account into which the revenues from the Hotel's operations were deposited each day by the Account Trustee, HSBC Bank (the "Account Trustee") (Third Amendment at § 2(b)(i), Am. Compl., Ex. 4). As long as no event of default had occurred or was continuing, these funds were to be distributed in a pre-determined order to certain other accounts (Loan Agreement at § 3.1.7[a][i]-[ix], Am. Compl., Ex. 1; Am. Compl., ¶ 15[a]). After the first four accounts were funded -- i.e., funds for any taxes, insurance, interest payments on the Loan, and franchise fees -- funds sufficient to meet the Hotel's operating expenses for the next month were to be deposited in Veneto's account and any funds remaining were to go to Veneto (Loan Agreement at § 3.1.7[a][i]-[ix], Am. Compl., Ex. 1). In the event of a default, additional accounts were to be funded before any remaining funds would reach Veneto (Id. at 3.1.7[a][vi]-[vii])). In the Second Amendment,

section 3.1.7(a)(v) was amended such that Veneto's operating expenses were to be included in the accounts funded from the Holding Account only after an event of default (Second Amendment at 2(b)(iii), Am. Compl., Ex. 3).

In or around April 2014, GACC engaged DebtX, a loan-sale advisor, to market the Consolidated Note (Am. Compl., ¶¶ 20-21). DebtX then sent email "blasts" informing the Panamanian community at large that GACC was seeking a buyer for the Consolidated Note (Am. Compl., ¶¶ 20-21). DebtX also circulated flyers disclosing critical terms of the Loan Agreement and Amendments, as well as details about the performance history of the Hotel (Am. Compl., ¶¶ 20-21). Plaintiffs maintain that these actions created the impression that the Hotel was financially distressed which led to resignations among staff and management, and negatively affected the performance of the Hotel to the point that it was operating at a loss in mid-2014 (Am. Compl., ¶¶ 22-26, 28).

By letter dated January 14, 2015, GACC notified Veneto that it had defaulted on its obligations (the "Default Notice") (Am. Compl., ¶ 29). Subsequently, by letter dated January 30, 2015, GACC notified Veneto that it had accelerated the Loan, and, as such, the full outstanding balance on the Loan was immediately due and payable (the "Acceleration Notice").

On January 30, 2015, GACC instructed the Account Trustee to stop providing Veneto with funds from the Holding Account (Am. Compl., ¶ 31). Veneto claims that, as a result, it has been unable to pay its operating expenses, including wages and taxes, which led to the suspension of its gambling license (Am. Compl., ¶¶ 38-39).

Plaintiffs commenced this action on June 1, 2015, asserting claims for: (1) a declaratory judgment that GACC was obligated to fund the Hotel's post-default operations; (2) breach of the Loan Agreement and the Amendments; (3) rescission of the Second and Third Amendments due to mutual mistake; (4) fraud as to Veneto; (5) breach of the covenant of good faith and fair dealing implied in the Loan Agreement and Amendments; (6) breach of GACC's fiduciary duty to Veneto; (7) permanent equitable relief ordering GACC to withdraw the Default Notice and Acceleration Notice and to perform its obligations under the Loan Agreement; (8) breach of the Subordination of Management Agreement between Veneto and SE Leisure; and (9) breach of the covenant of good faith and fair dealing implied in the Subordination of Management Agreement.

Discussion

A. Veneto

1. Declaratory Judgment

Veneto seeks a declaratory judgment that GACC was obligated, post-default, to fund the Hotel's operating expenses (Am. Compl., ¶¶ 54, 56-58). In support of their claim, Veneto relies on section 3.1.7(a)(v) of the Loan Agreement which, as modified by section 2(b)(iii) of the Second Amendment, provides, in relevant part, that: "(a) Account Trustee shall, at the direction of Lender, provided no Event of Default shall have occurred and be continuing, transfer [funds] from the Holding Account .. in the following order of priority: ... (v) from and after the occurrence of an Event of Default [transfer funds from the Holding Account to Borrower's Account] until an amount equal to the Approved Operating Expenses with respect to the immediately following month have been" transferred (Loan Agreement at § 3.1.7(a)(v), Am. Compl., Ex. 1 [emphasis added]; Second Amendment at 2(b)(iii), Am. Compl., Ex. 3).

Defendant responds that section 3.1.11(a) of the Loan Agreement gives it the discretion to direct the Account Trustee not to make such a transfer. Section 3.1.11(a) provides that "Notwithstanding anything to the contrary contained herein, upon the occurrence and during the continuance of an Event of Default ... (i) Lender may ... cause Account Trustee to make any and all withdrawals from, and transfers between and among, the Collateral

Accounts [including the Holding Account] as Lender shall determine in its sole and absolute discretion to pay any Obligations" (Loan Agreement at § 3.1.11[a], Am. Compl., Ex. 1 [emphasis added]). GACC argues that because the Loan Agreement defined "Obligations" as "all indebtedness, obligations and liabilities" Veneto owed GACC under the Loan Agreement (Loan Agreement at p. 13, Am. Compl., Ex. 1), section 3.1.11 allows it to, upon an event of default, override the standard flow of funds prescribed in section 3.1.7(a) and instead retain these funds for itself.

In response, Veneto argues that section 3.1.11(a)'s "notwithstanding" language does not apply to 3.1.7(a)(v) because that provision was modified in the Second Amendment, and the "notwithstanding" language does not apply to modifications by subsequent Amendments.

Veneto's arguments are unavailing. Contrary to Veneto's position, the Second Amendment specifically recognizes that "[e]xcept as amended by this Second Amendment, the Loan Agreement and each of the other Loan Documents shall continue to remain in full force and effect." (Second Amendment at § 5, Compl., Ex. 3). As the Loan Agreement contemplated that GACC could alter or ignore the pre-determined waterfall distribution post-default if

there were unpaid obligations, the amendment of section 3.1.7(a)(v) to move it from one category to another does not change section 3.1.11's dominance. Under these circumstances, GACC's refusal to fund Veneto's operating expenses post-default was an appropriate exercise of its authority under the Loan Agreement.

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

2. Breach of Contract

Veneto alleges that GACC has materially breached the Loan Agreement and the Amendments by failing to: (1) transfer funds to pay for the Hotel's operating expenses; or (2) comply with the confidentiality provisions in Section 11.2.9 of the Loan Agreement (Am. Compl., ¶ 48-49). As discussed, supra, GACC's refusal to fund Veneto's operating expenses from the Holding Account was not a breach of the Loan Agreement or its Amendments.

Veneto's claim that GACC breached section 11.2.9 of the Loan Agreement, which required GACC to preserve the confidentiality of information furnished by Veneto by "[causing or permitting] Veneto's confidential information to be disseminated throughout the Panamanian community" without any effective means of safeguarding this information (Am. Compl., ¶ 22) is barred by

paragraph 12 of the January 14, 2015 Pre-Negotiation Agreement, in which Veneto "certif[ied]" that it "has no offsets or claims under the [Loan Agreement and related documents]" (Pre-Negotiation Agreement at ¶ 12, Frank Affirm. Ex. C) (Orchard Hotel, LLC v. D.A.B. Gr., LLC, 106 AD3d 628, 629 [1st Dept 2013]).

Veneto, nonetheless, responds by arguing that the parties' removal of paragraph 5 of the Agreement, in which Veneto represented that it had no claims against GACC, implicitly repeals paragraph 12. The language of paragraph 12 is clear and unambiguous, however, and to construe the deletion of paragraph 5 to invalidate paragraph 12 would be an impermissible distortion of its plain meaning by means of implication (Petracca v Petracca, 302 AD2d 576, 577 [2d Dept 2003] [a contract should not be interpreted "to leave one of its provisions substantially without force or effect"]).

Accordingly, that branch of defendant's motion to dismiss this claim is granted, and it is dismissed.

3. Mutual Mistake

Unable to plead a breach of contract, Veneto resorts to arguing that the Second Amendment is not binding because of a

mutual mistake and seeks, inter alia, rescission of the Second and Third Amendments (Am. Compl., ¶ 74).

To state a claim for rescission based on mutual mistake, Veneto must allege, with particularity, that the parties "reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (HSH Nordbank AG v Goldman Sachs Group, Inc., 43 Misc 3d 1225(A) [NY Sup 2013]; CPLR 3016[b]).

In support of this claim, Veneto merely alleges that "[w]hen the Second Amendment was executed, both parties understood that Section 2(b)(iii) of the Second Amendment would ... [make] GACC's post-default funding of the Veneto Hotel & Casino's operating expenses mandatory, that this understanding was "a material fact on which the parties relied in agreeing to enter into the Second Amendment" and, therefore, "[i]f Section 2(b)(iii) of the Second Amendment does not actually ... make GACC's post-default funding of the Veneto Hotel & Casino's operating expenses mandatory ... then the parties entered into the Second Amendment under a mutual mistake of material fact (Am. Compl., ¶¶ 71-73). These allegations are entirely conclusory and lack the particularity sufficient to state a claim for mutual mistake (Zion v Kurtz, 50 NY2d 92, 105 [1980]).

Accordingly, defendant's motion to dismiss this claim is granted, and it is hereby dismissed.

4. Fraud

To state a claim for fraud, Veneto must plead with particularity that GACC: (1) made a material misrepresentation or a material omission of fact which was false and which GACC knew to be false for the purpose of inducing the plaintiff to rely upon it; (2) Veneto's justifiable reliance on this misrepresentation or material omission; and (3) injury as a result of this reliance (FNF Touring LLC v Transform Am. Corp., 111 AD3d 401, 402 [1st Dept 2013]).

Here, Veneto merely alleges that: (1) GACC failed to inform Veneto, prior to the execution of the Second Amendment, that section 2(b)(iii) of the Second Amendment would not make GACC's post-default funding of Hotel's operating expenses mandatory; (2) this omission was made with the intent that Veneto would rely on it; (3) Veneto reasonably relied on this omission; and (4) Veneto would not have agreed to enter into the Second Amendment had it been made aware of GACC's interpretation of this provision (Am. Compl., ¶¶ 79-81).

Even accepting that GACC failed to volunteer this information, Veneto has not pleaded facts "sufficient to permit a

reasonable inference that the statement was made with fraudulent intent to induce plaintiff's reliance to its detriment" (FNF Touring LLC v Transform Am. Corp., 111 AD3d 401, 402 [1st Dept 2013]). Moreover, "absent a confidential or fiduciary relationship [such as in this case], there is no duty to disclose, and [defendant's] mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud" (Id. [internal quotations omitted]). Finally, any purported reliance by Veneto on this nondisclosure was unreasonable in light of the plain language of section 3.1.11 of the Loan Agreement, which gave GACC ultimate authority to determine the distribution of money from the Holding Account post-default (McMorrow v Dime Sav. Bank of Williamsburgh, 48 AD3d 646, 648 [2d Dept 2008] [fraud claim dismissed where plaintiff's reliance on alleged omissions of fact about prepayment penalty was unreasonable in light of clear written provision in the mortgage agreement stating amount of prepayment penalty]).

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

5. Good Faith & Fair Dealing

Veneto argues in the alternative that even if GACC did have the discretion to direct the Account Trustee to stop distributing

the Holding Account's funds GACC's exercise of that discretion breached the Loan Agreement's implied covenant of good faith and fair dealing because "[a] reasonable person in plaintiffs' position would be justified in believing that Section 2(b)(iii) of the Second Agreement embodied a promise that the [Hotel's] operations would not be jeopardized" after a default (Am. Compl., ¶¶ 89-90).

The fundamental flaw in this argument is that the Loan Agreement and the Amendments expressly gave GACC the right to divert the funds in the Holding Account to satisfy amounts due to GACC (Fesseha v TD Waterhouse Inv'r Servs., Inc., 305 AD2d 268, 268 [1st Dept 2003 [implied covenant of good faith and fair dealing "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"]).

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

6. Breach of Fiduciary Duty

Veneto maintains that as GACC became Veneto's attorney-in-fact after Veneto's default GACC breached its fiduciary duty as attorney-in-fact by failing to fund the Hotel's operating expenses after Veneto's default (Am. Compl., ¶¶ 99-102). This

argument is unavailing. The power of attorney accorded GACC under the agreement is expressly coupled with an interest, namely, that GACC is permitted to act as Veneto's attorney-in-fact to take such actions "which [GACC] may deem necessary or desirable to more fully vest in Lender the rights and remedies provided for" in the Loan Agreement, including "to execute, acknowledge and deliver any instruments and to exercise and enforce every right, power, remedy, option and privilege of Borrower with respect to the Account Collateral" (Loan Agreement at § 3.1.11[b], Am. Compl. Ex. 1). Where the recipient of the power is acting in its own interest, as here, as well as that of the grantor, no fiduciary duty arises (330 Acquisition Co., LLC. v Regency Sav. Bank, F.S.B., 306 AD2d 154, 155 [1st Dept 2003]; Model Service, LLC v. MC2 Models Management, LLC, 2015 WL 5474258 [Sup Ct 2015]; Wilhelmina Artist Mgt., LLC v Knowles, 8 Misc 3d 1012(A) [Sup Ct 2005]).

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

7. Equitable Relief

Veneto seeks an injunction ordering GACC to withdraw the Notices and to perform its obligations under the Loan Agreement (Am. Compl., ¶ 117). As Veneto has no substantive cause of

action remaining, injunctive relief is unavailable (Weinreb v. 37 Apartments Corp., 97 AD3d 54, 58-59 [1st Dept 2012]).

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

B. SE Leisure

On June 14, 2007, Veneto and SE Leisure entered into a Consent and Subordination of Asset Management Agreement (the "Subordination Agreement"), wherein Veneto assigned its interest in the Asset Management Agreement (but not its obligations thereunder) to GACC (Subordination Agreement at ¶ 2, Frank Affirm., Ex. D).

SE Leisure alleges that it continued to manage the Hotel, without objection from GACC, from the date of Veneto's default in early January 2015 until April 27, 2015, but that GACC failed to pay SE Leisure for its work during this period (Am. Compl., ¶¶ 48-49). As a result, SE Leisure brings claims for breach of the Subordination Agreement as well as breach of the Subordination Agreement's implied covenant of good faith and fair dealing (Am. Compl., ¶¶ 107, 113).

GACC argues that the payment of SE Leisure's fee under the Asset Management Agreement is Veneto's responsibility. The Subordination Agreement supports this position. Section 6(c) of

the Subordination Agreement provides that "Asset Manager shall not look to, or make any claim against [GACC] for payment of any accrued but unpaid fee" (Subordination Agreement at § 6[c], Frank Affirm. Ex. D). Section 4(a) of the Subordination Agreement, in turn, provides that, "nothing in this Agreement shall impose upon Lender, and Lender shall not have, any obligation for payment or performance in favor of Asset Manager with respect to the Asset Management Agreement or the Property" except as provided in section 4 (Subordination Agreement at § 4[a]). Notably, the only affirmative obligation on the part of GACC set forth in section 4 is the requirement in subsection (b) that if the Hotel was transferred to GACC after Veneto's default and GACC requested that SE Leisure continue to perform under the Asset Management Agreement GACC would be obligated to pay SE Leisure a reasonable asset management fee after the foreclosure (Subordination Agreement at § 4[b], Frank Affirm., Ex. D). Given this circumstance has not arisen here, the obligation to pay SE Leisure remains with Veneto rather than GACC.

Nonetheless, SE Leisure points to the concluding sentence in section 4(b) of the Subordination Agreement which provides that "[n]otwithstanding the foregoing, to the extent that Lender requests or permits Asset Manager to continue performance under

this Section, Asset Manager shall be entitled to receive and will be paid the asset management fee described in the Asset Management Agreement" (Subordination Agreement at § 4(b), Frank Affirm., Ex. D [emphasis added]) and argues that this provision obligates GACC to pay the asset management fee. This is incorrect.

As the parties were clearly capable of indicating when GACC was expressly obligated to pay SE Leisure -- as demonstrated by another provision in section 4(b), discussed supra, requiring GACC to pay SE Leisure after a post-default transfer of the Hotel to GACC -- their failure to do so in this provision indicates that the obligation to pay the asset management fee is not GACC's obligation. This conclusion is further supported by the fact that this provision references the Asset Management Agreement, to which only Veneto and SE Leisure are parties.

Finally, even assuming that this language requires GACC to pay the asset management fee, GACC is not a party to the Subordination Agreement and therefore its failure to obey its purported obligations thereunder is not a breach (Black Car and Livery Ins., Inc. v H & W Brokerage, Inc., 28 AD3d 595, 595 [2d Dept 2006]; Blank v Noumair, 239 AD2d 534 [2d Dept 1997]).

Accordingly, that branch of GACC's motion to dismiss this claim is granted, and it is hereby dismissed.

As to SE Leisure's implied covenant claim, it is unsupported by any allegations beyond those supporting SE Leisure's breach of contract claim and must therefore be dismissed as duplicative (Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 AD3d 548, 549 [1st Dept 2015]).

Accordingly, that branch of GACC's motion to dismiss these claims is granted, and it is hereby dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted, and it is hereby dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly upon service of a copy of this order with notice of entry.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/17/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.