SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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87 MEZZ MEMBER LLC and 87 LEONARD DEVELOPMENT LLC,

Plaintiffs,

-against-

GERMAN AMERICAN CAPITAL CORPORATION,

Defendant.

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DECISION AND ORDER

Index No. 654279/2016

HON. ANIL C. SINGH, J.:

In this action sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion, the defendants move to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose.

In March 2011, German American Capital Corporation ("GACC" and "lender") made a mortgage loan and a mezzanine loan to plaintiffs 87 Mezz Member LLC and 87 Leonard Development LLC (collectively "borrowers") to fund a condominium development project. Under the Mezzanine Loan Agreement (the "Loan Agreement") the borrowers were required to complete construction of the condominium units by June 30, 2012 and repay the loan when it matured in April 2013. The borrowers neither repaid the loans nor completed the condominium units

by the deadline. GACC then calculated that the borrowers owed $33,957,081, including interest, pursuant to a liquidated damages provision of the Additional Interest Agreement ("AIA"). When the borrowers did not make this payment, GACC conducted a UCC foreclosure sale of 87 Mezz's membership interests in the property.

Thereafter, plaintiff commenced this action alleging that GACC breached the "mezzanine loan agreement in an unlawful scheme to usurp plaintiffs' valuable, but unfinished luxury real estate development project through a UCC foreclosure sale." Verified Complaint at ¶ 1.

Discussion

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), "a party may move for judgment dismissing one or more causes of action asserted against [her/]him on the ground that: a defense is founded upon documentary evidence." CPLR 3211(a)(1). A motion to dismiss a complaint based upon CPLR 3211 (a) (1) may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002). "In order for evidence to qualify as `documentary,' it must be unambiguous, authentic and undeniable." Granada Condominium III Assn. v Palomino, 78 A.D.3d 996, 996-997 (2010).

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, if, from the pleadings four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration. Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Breach of Contract

Plaintiffs contend that the lender deliberately misinterpreted an "Event of Default" under Article 4 of the AIA. Plaintiffs argue that an event of default under the Loan Agreement does not constitute an "Event of Default" under the AIA. Plaintiffs state that since they did not breach the AIA, GACC was not entitled to a "Liquidated Amount" under §4.2 of the AIA. Alternatively, plaintiffs maintain that

there is an ambiguity as to whether GACC is entitled to a Liquidated Amount.

§4.1 of the AIA states in plain language "[a]n Event of Default hereunder *and* under the Loan Agreement shall exist if Borrower breaches *any* of its obligations hereunder, including, without limitation, Borrower's failure to make any payment of Additional Interest when due." (emphasis added).

This provision is unambiguous. The fact that the plaintiffs urge an interpretation inapposite to that of the plain language does not mean the text is ambiguous. Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61 (1st Dept 2008). See also, Rudman v. Deane, 138 A.D.3d 537, 538 (1st Dept 2016) (stating that language in a written agreement is deemed to be "clear and unambiguous" where it is reasonably susceptible to only one meaning or interpretation.)

"Event of Default" is capitalized and therefore a defined term in both §4.1 and 4.2. §1.1 of the AIA states that "[a]ll capitalized terms used herein and not otherwise defined shall have the meanings assigned to such terms in the Loan Agreement." The AIA does not define an "Event of Default." The Loan Agreement provides that an "Event of Default has the meaning set forth in §8.1(a) hereof." §8.1 of the Loan Agreement states that an Event of Default is triggered "[i]f any portion of the debt is not paid on or before the date the same is due and payable after giving effect to any applicable notice and cure periods." §8.1(a)(i). It is undisputed that the loans

were not repaid. Therefore, under the unambiguous language of the Loan Agreement, an Event of Default was triggered under the AIA.

Next, plaintiffs contend that the lender was not entitled to liquidated damages because at the time of the default there were no completed, legally salable condominiums at the time of the calculation.

§4.2 of the AIA, states in relevant part, that:

> [. . .] Lender shall have the right, at its sole option, to demand that Borrower pay, and borrower shall pay immediately on demand, an amount (the "Liquidated Amount") equal to the aggregate Additional Interest that *would have* been paid in connection with the sale of each Unit which was unsold at the time of such Event of Default. (emphasis added).

Plaintiff maintains that the Loan Agreements define a "Condominium Unit" as a legally salable unit (Loan Agreement at ¶18 which states that a Unit "shall mean each individual condominium unit [...] created by the submission of the property for the provisions of the Condominium Act in accordance with the Condominium Documents").

This argument ignores the definition of "Additional Interest." The AIA provides that Additional Interest is an amount "equal to fifty percent (50%) of all Revenues, including without limitation, the Net Sales Proceeds from each Sale of any or one or more Units and/or from the Sale of the Property." §2.1(a) of the AIA.

In order for the plaintiff's interpretation to be correct, the court would have to read the term 'Unit' to mean legally saleable units. §2.1(a) places no such limitation.

See e.g., Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 N.Y.2d 173, 182 (N.Y. 1995) ("[t]he court's role is limited to interpretation [...] of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert").

Furthermore, plaintiffs fail to explain how the lender would have exercised its right in the event of a default, if not through sale of the units or property. The lender would not have entered into an agreement that would have kept it from exercising its right to bargained-for interest in the event that the condominium units were not completed at the time of default. Luver Plumbing and Heating, Inc. v. Mo's Plumbing and Heating, 144 A.D.3d 587, 588 (1st Dept 2016) ("[a] contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties").

Plaintiffs also contend that the calculation of additional interest was not the result of a unit-by-unit appraisal. The allegation is utterly refuted by the documentary evidence. Pages 84 and 85 of the appraisal completed by Cushman & Wakefield, show that a unit-by-unit valuation was conducted.

					SF BREAKDOWN							PRICING CONCLUSION/SF			
Unit No.	Floor	Beds	Baths	Outdoor SF	Above Grade	Cellar	Sub cellar	Mezzanine	SF	Offering Price	Offering Price/SF	Above Grade	Cellar	Sub cellar	Mezzanine
1A*	Triplex (1st Floor, Cellar and Mezzanine)	3	2.5		1,933	1,785		974	4,692	$3,728,317	$795	$1,200	$800		$300
1B*	Quadriplex (1st Floor, Cellar and Subcellar and Mezzanine)	2	3.5	597	1,949	2,281	2,018	753	7,001	$6,750,000	$964	$1,250	$800	$500	$300
2	Floor Through	4	4.5		4,458				4,458	$6,950,000	$1,559	$1,550			
3	Floor Through	3	4.5		4,458				4,458	$7,150,000	$1,604	$1,600			
4	Floor Through	3	4.5		4,458				4,458	$7,395,000	$1,659	$1,650			
5A	Duplex (Floor 5 and 6)	3	4.5	910	4,027				4,027	$7,750,000	$1,925	$1,900			
5B	Duplex (Floor 5 and 6)	3	4.5	535	3,425				3,425	$6,995,000	$2,042	$2,050			
	Total/Average	2,042			24,708	4,066	2,018	1,727	32,519	$46,718,317	$1,437				

Ex. 7 to Todres Affirmation at 84-85. The chart from the appraisal plainly shows separate valuations for each unit.

Plaintiffs also contend that the adjustment to the payoff calculation was inconsistent with the plain language of the AIA. The AIA, however, states that the equally shared revenue will be in the form of additional interest calculated from the sale of the unit and/or property. In order for the lender to determine what would have been the shared revenue, it enlisted the expertise of Cushman & Wakefield. Based on an in-depth market analysis and unit-by-unit valuation, Cushman & Wakefield provided the lender with estimated amounts at which the units would have sold. Ex. 7. Utilizing this analysis, the lender subtracted costs from would-be sales, and divided the profit in half. This is consistent with the language of the AIA and reflects no deliberate miscalculation.

Plaintiffs also maintain that if the liquidated damages provision is interpreted as the lender maintains, it is void and unenforceable as it would amount to a disproportionate 200% penalty of Additional Interest to be received by defendant.

First, the borrowers acknowledge in the AIA "that payment of the Liquidated Amount is a liquidated damages and not a penalty." §4.2 of the AIA. Second, §2.1(a) of the AIA provides for Additional Interest "equal to fifty percent (50%) of all the revenues, including, without limitation, the net sales proceeds from each of

sale of any one or more Units [...]." Third, there is no allegation that GACC ever demanded or received a 200% penalty payment.

Breach of the Implied Covenant of Good Faith and Fair Dealing

A claim of the implied duty of good faith and fair dealing cannot create new duties under a contract or substitute for an insufficient contract claim. Triton Partners LLC v. Prudential Sec. Inc., 301 A.D.2d 411, 411 (1st Dept.2003). It merely brings to light implicit duties to act in good faith already contained, although not necessarily specified in the contract. Duration Mun. Fund, L.P. v. J.P. Morgan Securities Inc., 2009 WL 2999201, at 7 (Sup. Crt. NY Cnty, September 16, 2009), aff'd 77 A.D.3d 474 (1st Dept 2010). This covenant cannot be construed so broadly as effectively to nullify other express terms of the contract, or to create independent contractual rights." Fasseha v. TD Waterhouse Inv'r Servs., Inc., 305 A.D. 2d 268 (1st Dept 2006).

Here, after the borrowers failed to make a payment by the deadline, the parties entered into a Prenegotiation Agreement. As part of that agreement the parties made clear that "[n]o party shall have any obligation either to commence any Negotiations or, once and if commenced, to continue with such Negotiations, and any Party, in such Party's sole and absolute discretion, may terminate the Negotiations at any time and for any reason or no reason, with or without cause or notice." Ex. 1 to Todres Supp., at ¶ 6. Plaintiffs maintain that while defendant had the discretion not to

negotiate an extension, it arbitrarily refused to exercise its discretion to consider plaintiffs' offers to repay the loans and delay the UCC sale.

Both parties explicitly agreed that they could renegotiate, never commence renegotiation, or commence and cease at any time and for any reason. Therefore, plaintiffs could not have had an expectation that defendants would renegotiate terms. A cause of action for breach of the implied covenant of good faith and fair dealing is not stated.

Conversion

"Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102 (N.Y. 1927).

Here, breach of contract and conversion is based on the same conduct—namely the lender's exercise of its contractual rights. As such, an action for conversion cannot be validly maintained. Fesseha v. TD Waterhouse Investor Services, Inc., 305 A.D.2d 268 (1st Dept 2003).

ORDERED that defendant's motion to dismiss plaintiffs' Complaint is granted without leave to replead.

Date: May 24, 2017
New York, New York

Anil C. ~~Singh~~