

**Vasani v CIBC, Inc.**

2017 NY Slip Op 31414(U)

June 20, 2017

Supreme Court, New York County

Docket Number: 656680/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN  
*Justice*

PART 58

-----X  
ABHIJIT VASANI, SUNBURST HOTELS LLC, BUCKEYE  
LODGING LLC

INDEX NO. 656680/2016

Plaintiff,

MOTION DATE 2/1/2017

- v -

MOTION SEQ. NO. 001

CIBC, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17,  
19, 20

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Decided that the motion to dismiss is granted and this action is dismissed. On December 21,  
2016 plaintiffs filed the instant complaint alleging two causes of action in connection with a loan  
application submitted to defendant. The Complaint alleges that plaintiffs engaged the services of  
a broker to secure financing for the purchase of a hotel. Plaintiffs' intent was to refinance its  
capital position in two hotels it owned. One such hotel, a Red Roof Inn, was an exterior corridor  
hotel. Plaintiffs' broker alleges that it had conversations with defendant regarding the difficulty  
of obtaining refinancing on favorable terms due to the fact the hotel was an exterior corridor  
hotel and that "b-buyers" would not have interest. The Complaint alleges that defendant, after  
discussing the issue with the broker, indicated that "it had interest from "b-buyers" and the

interested “b-buyers” were aware the Red Roof Inn Plus was an exterior corridor hotel.” The Complaint further alleges that someone at defendant stated that it had a “b-buyer” lined up. On September 29, 2014, plaintiff submitted a letter application to defendant in connection with the attempted refinancing. Plaintiff paid a \$40,000 good faith deposit fee and \$5,000 processing fee. The application contained a paragraph stating:

Applicant understands and agrees that neither the CIBC nor any Lender is obligated to make the Loan contemplated hereby unless and until (A) it has accepted this Application by obtaining Lender’s Loan Committee approval and issuance of a separate commitment letter (the “Commitment”), (B) such Commitment is accepted by Applicant, and (C) the Closing Deposit to be paid by Applicant is paid. Such Commitment may contain additional and/or different terms and conditions than those set forth herein. Without limiting the foregoing Applicant acknowledges and agrees that notwithstanding any assistance CIBC, Lender, or its advisors, may have provided of this Application, this Application is not an offer, a contract, a binder, a memorandum of contract, a commitment or a promise by Lender or CIBC to make the Loan, or an agreement to issue any such commitment. CIBC and/or Lender may, at any time prior to the issuance of a Commitment, reject this Application and have no further obligations hereunder other than to apply the Good Faith Deposit as set forth herein. If Lender accepts this Application by issuing the Commitment, and such Commitment is accepted by the Applicant and the Closing Deposit required thereunder has been paid, then Lender agrees to make the Loan upon and subject to the provisions thereof.

Eventually, the deal did not close as defendant was unable to secure a “b-buyer.” On January 20, 2015, defendant sent plaintiff letter stating that plaintiff had withdrawn its application and sought \$1,361.62 to cover the shortfall in expenses not covered by the good faith deposit.

On January 4, 2016, plaintiffs commenced an action (the “First Action”) alleging substantially similar facts and four causes of action; (1) breach of implied covenant of good faith and fair dealing; (2) promissory estoppel; (3) fraudulent inducement; and (4) violation of General Business Law 349. Defendant moved to dismiss the action. On September 14, 2016, after oral

arguments Justice Coin dismissed all four causes of action. In dismissing the breach of covenant of good faith and the promissory estoppel claim, Justice Coin ruled:

On its face the application letter stated that defendant was not obligated to make the loan unless it had obtained its loan committee's approval and issued a separate commitment letter. Indeed, the letter expressly states, "This application is not an offer, a contract, a binder, a memorandum of contract, a commitment, or a promise by CIBC to make the loan, or an agreement to issue any such commitment. CIBC may, at any time prior to the issuance of the commitment, reject this application and have no further obligations hereunder other than to apply the good faith deposit".

A cause of action based upon a breach of covenant of good faith and fair dealing requires a contractual obligation between the parties. I cite here *Duration Municipal Fund versus JP Morgan Securities, Inc.*, 77 AD 3d 474. Here there was no contract at all between the limited liability companies and the defendant, and the application letter expressly stated that it was not a contract or commitment to make a loan. Thus, none of the plaintiffs have a claim for breach of the implied covenant of the good faith and fair dealing.

Similarly, plaintiff's claim for promissory estoppel falls, as the application letter expressly provided that defendant would not be obligated to make the loan until approval of its loan commitment and issuance of a separate commitment letter. Nothing in the complaint reflects that this condition was waived. This precludes the element of detrimental reliance required for a claim of promissory estoppel. Here I cite *Prospect Street Venture I versus Elipsys Solution Corp.*, 23 AD 3d 213.

Following Justice Coin's decision, plaintiff filed a Notice of Appeal of that decision.

Then, plaintiff filed the instant action and alleged two causes of action; (1) promissory estoppel; and (2) negligence based upon defendant's breach of its duty to process the letter application in good faith when it knew or should have known that it could not find a "b-buyer" to securitize the loan. Defendant filed a pre-answer motion to dismiss. Following the filing of defendant's motion, plaintiff withdrew its Appeal of Justice Coin's order.

Defendant's motion to dismiss is granted. Plaintiff's first cause of action is for promissory estoppel. The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3)

injury caused by the reliance (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836 [1st Dept 2011]). As clearly articulated by Justice Coin, in this matter, the documentary evidence - the letter application - clearly stated that plaintiff knew that defendant was under no obligation to make the loan and that the final commitment may be under different terms than those set forth in the application and term sheet. Similarly, under the letter application, which plaintiff executed after the alleged representations were made (but which contained no such representation), plaintiff acknowledged that the loan application not only was subject to a later Commitment but could be rejected by defendant or any lender at any time prior to the issuance of a Commitment. Based upon the documentary evidence, plaintiff cannot state a claim that there was a clear and unambiguous promise, nor can it state claim that it justifiably relied on any alleged discussions.

Further, this cause of action must be dismissed under the doctrine *res judicata*. Following defendant's filing of this motion seeking dismissal based upon collateral estoppel, plaintiff withdrew its appeal of Justice Coin's decision and order, rendering said decision final. Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. "As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 347 [1999]). In determining the effect of a CPLR 3211 dismissal on the doctrine of *res judicata*, the Court of Appeals wrote that a Court needs to determine whether the dismissal was without prejudice or whether the merits of a party's claim was addressed (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8 [2008]; *see also Hock v. Cohen*,

125 AD3d 722 [2d Dept 2015][dismissal of plaintiffs' prior action was not on merits, precluding dismissal of this suit on *res judicata* grounds]).

Plaintiff argues that the case was dismissed “without prejudice” and not on the merits. However, unlike the fraud portion of the dismissal for insufficiency of pleadings, Justice Coin expressly dismissed the promissory estoppel claim upon the letter application documentary evidence, and was thus, on the merits. The fact that Justice Coin did not say the words “with prejudice” or on the merits is not significant when the Court can understand that from a simple reading (see *McBride v Mariah Boats, Inc.*, 288 AD2d 359 [2d Dept 2001])[CPLR 5013 does not require that the exact words “on the merits” be used for a judgment to be given *res judicata* effect. It is sufficient that it is apparent from the judgment that the dismissal was on the merits]). As the promissory estoppel claim by plaintiffs were dismissed, that cause of action must be dismissed here as well.<sup>1</sup> Plaintiff also argues that its promissory estoppel claim seeks relief for a different reliance by plaintiff, namely plaintiff’s reliance on defendant’s statements relating to “b-buyers” and discussion about the Red Roof Inn being an exterior corridor hotel. Plaintiff’s argument is without merit. In the initial complaint, plaintiff discussed these very issues in alleging defendant’s knowledge of the exterior corridor condition and that the loan was not finalized due to lack of “b-buyers” so *res judicata* precludes raising the issues again at this time.

Plaintiff’s claim for negligence is also dismissed. Plaintiff and defendant were engaged in an arms-length transaction. Defendant did not represent plaintiff and owed no fiduciary or similar duty to plaintiff prior to submission of the letter application. Hence, actions between the parties prior to that could not give rise to a cause of action that requires a duty or breach of a

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<sup>1</sup> Plaintiff also points to the bottom of the “grey sheet” where the non-final disposition box is checked as “proof” that the denial was without prejudice. First, both final and non-final are checked and second, the bottom of a grey sheet is a clerical entry area used as a tool by the clerks.

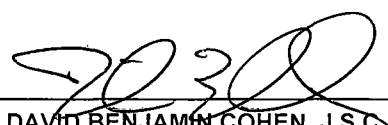
duty. Plaintiffs argue that defendant had a duty to plaintiffs following submission of the letter application to process the Letter and Application in good faith and failed to do so (Plaintiff's Opp, Page 11, "Rather, plaintiff's claims are premised on CIBC's failure to properly process Plaintiffs Letter and Application"). However, the Complaint does not state any facts about the processing or make any allegations that the processing of the application was not done properly. Indeed, the lack of good faith alleged in both the Complaint and opposition discuss that defendant "knew or should have known it could not securitize the loan," actions which have nothing to do with the processing of the application but instead have to do with the previously dismissed causes of action.

Finally, as previously ruled by Justice Coin and conceded in plaintiffs' opposition, the matter is also dismissed as to plaintiffs Sunburst and Buckeye for a lack of standing. Neither party submitted an application for financing and the documentary evidence only shows that plaintiff personally submitted the application.

Accordingly, for the above reasons it is therefore

ORDERED, that defendant's motion to dismiss is granted and this action is dismissed in its entirety.

6/20/2017  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

OTHER

APPLICATION:

GRANTED

GRANTED IN PART

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE