

Bath & Twenty, LLC v Federal Sav. Bank
2017 NY Slip Op 32546(U)
December 4, 2017
Supreme Court, Kings County
Docket Number: 514138/2017
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of December, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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BATH & TWENTY, LLC, 8629 BAY
PARKWAY LLC, and 85-93 66 AVENUE, LLC,

DECISION AND ORDER
Mot. Seq. # 1, 2, & 3

Plaintiff(s),
- against -

Index # 514138/2017

THE FEDERAL SAVINGS BANK
and DENNIS RAICO,

Defendant(s).
-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1,4,6</u>
Opposing Affidavits (Affirmations) _____	<u>2,3,5,7</u>
Reply Affidavits (Affirmations) _____	<u>8</u>

After oral argument and upon the foregoing papers, Defendants' first motion to dismiss (motion sequence #1) is DENIED as moot, however, Defendants' second motion to dismiss (motion sequence #2) is GRANTED and Defendants' motion seeking to admit Melissa A. Anderson, Esq. pro hac vice (motion sequence #3) is hereby DENIED as moot.

Procedural History

On July 21, 2017, Bath & Twenty LLC, 8629 Bay Parkway LLC, and 85-93 66 Avenue LLC (hereinafter "Plaintiffs") commenced the above-captioned action by filing a summons and verified complaint. The summons and complaint demanded a judgment awarding Plaintiffs: (1)

compensatory damages in an amount to be determined at trial of this action for breach of contract; (2) compensatory, consequential, and punitive damages in an amount to be determined at trial for fraudulent inducement; and (3) compensatory, consequential, and punitive damages in an amount to be determined at trial, but not less than \$78,750.00 against Dennis Raico (hereinafter "Raico") for fraudulent inducement.

On August 9, 2017, The Federal Savings Bank and Dennis Raico (hereinafter "Defendants") were served with the summons and verified complaint.

On August 29, 2017, Defendants filed a notice of motion (Motion Sequence #1) seeking an order dismissing Plaintiffs' verified complaint with prejudice.

On September 15, 2017, Plaintiffs filed an amended complaint seeking additional compensatory damages for breach of the implied covenant of good faith and fair dealings.

On October 4, 2017, Plaintiffs filed an affirmation in opposition to Defendants' motion to dismiss and a memorandum of law. On October 5, 2017, Defendants filed a notice of motion (Motion Sequence #2) seeking to dismiss Plaintiffs' amended verified complaint.

On October 12, 2017, Plaintiffs filed their memorandum of law in opposition to Defendants' motion to dismiss. On October 18, 2017, Defendants filed a notice of motion (Motion Sequence #3) seeking an order admitting Melissa A. Anderson, Esq. pro hac vice to the Supreme Court of New York to argue and try the above-captioned action. On October 25, 2017, Plaintiffs filed an amended memorandum of law. On October 31, 2017, Defendants filed their memorandum of law in support of their motion to dismiss.

Statement of Facts

Prior to August 4, 2016, Plaintiffs, through their managing member Pyotr Yadgarov (hereinafter "Yadgarov"), began negotiating the terms of a loan with Defendants whereby The Federal Savings Bank would provide them with a loan in the amount of \$2,625,000.00. The parties prepared and signed a loan agreement, a tax law section 255 affidavit, promissory note, and a mortgage and security agreement. The loan agreement and mortgage and security agreement were both signed on August 4, 2016, while the tax law section 255 affidavit was signed on August 8, 2016. The loan agreement states in pertinent part:

to collateralize the above stated obligation to lender, the Borrower and Pyotr Yadgarov will pledge the real property (land and buildings) known as 79 Maple Road, Inwood, New York and 8724 Bay Parkway, 4086 Ocean Avenue & 727 Ocean View Avenue, Unit D3 and 8746 20th Avenue Brooklyn, New York which mortgage is a first mortgage on 79 Maple Road, Inwood, New York, 4086 Ocean Avenue, 8746 20th Avenue Brooklyn, New York and a second (2nd) mortgage on 8629 Bay Parkway and 727 Ocean Avenue, Unit D3, Brooklyn, New York in the total principal sum of \$2,625,000.00.

The mortgage and security agreement states in pertinent part that "the mortgagor(s) hereby mortgages to the mortgagee(s)... premises known as: 8724 20th Avenue, 8629 Bay Parkway, 4086 Ocean Avenue & 727 Ocean View Avenue, Unit D3, Brooklyn, New York and 79 Maple Road, Inwood, New York". The tax law section 255 affidavit states in pertinent part that:

The premises are situated at 79 Maple Road, Inwood, New York... The aforesated Mortgage is a blanket mortgage covering the subject premises as well as the four following properties in kings county:

- a. 4086 Ocean Avenue, Brooklyn, NY (Block 8731, Lot 37)
- b. 8746 20th Avenue, Brooklyn, NY (Block 6408, Lot 44)
- c. 8629 Bay Parkway, Brooklyn, NY (Block 6381, Lot 27)
- d. 727 Ocean Avenue, Unit D3, Brooklyn, NY (Block 8668, Lot 1116)

These three agreements state that a mortgage will be entered on 5 properties as collateral for money given to Plaintiffs. Furthermore, section 27 of the mortgage and security agreement state that “[t]his mortgage may not be changed or terminated orally”.

The mortgage and security agreement, tax law section 255 affidavit, and loan agreement each contain a clause that states that a mortgage will be placed on the following properties: (1) 8629 Bay Parkway, Brooklyn, NY; (2) 8746 20th Avenue, Brooklyn, NY; (3) 4086 Ocean Avenue, Brooklyn, NY; (4) 727 Ocean View Avenue, Unit D3, Brooklyn, NY; and (5) 79 Maple Road, Inwood, NY. Plaintiffs, however, contend that the parties orally agreed, and Defendants assured Plaintiffs, that there would only be a mortgage recorded on the property located at 4086 Ocean Avenue, Brooklyn, NY, due to the fact that Plaintiffs had a first mortgage on 8629 Bay Parkway and were prohibited from encumbering said property with a subsequent mortgage. It is undisputed that Defendants recorded their mortgage on all five properties.

Defendants’ Motion to Dismiss

With the instant motion, Defendants move to dismiss all causes of action contained in Plaintiffs’ amended verified complaint pursuant to: (1) CPLR 3211 (a)(5), based on the statute of frauds; (2) CPLR 3211(a)(1), based on documentary evidence; and (3) CPLR 3211(a)(7), based on a failure to state a cause of action.

Defendants argue that Plaintiffs’ claims are barred by the statute of frauds because the contract at issue is one in which the period of performance extends beyond a year and one in which an interest in real estate was created. Specifically, Defendants argue that the alleged oral agreement would have a duration of thirteen months because the parties entered into the contract on August 4, 2016 with a completion date of September 1, 2017. Defendants also argue that the alleged oral

agreement was one not to record a mortgage on a property that was subject to a mortgage, which, therefore created an interest in land.

Defendants also argue that Plaintiffs' claims should be dismissed based on the language contained in paragraph 27 of the mortgage and security agreement, which states "[t]his mortgage may not be changed or terminated orally." Defendants argue that none of the written agreements contain a clause to forbear on recording the mortgage, and therefore, any agreement to do so must have been oral and should be barred pursuant to the previously-quoted clause in the mortgage and security agreement.

Defendants further argue that Plaintiffs' claims for fraudulent inducement and breach of the implied covenant of good faith and fair dealing should be dismissed because they are duplicative of the breach of contract claim because the facts underlying the claims and the damages sought, mirror those made in support of Plaintiffs' breach of contract claims. Defendants further argue that the fraudulent inducement claim should be dismissed because the alleged representation to not record the mortgage was unreasonable.

In opposition to Defendants' motion to dismiss, Plaintiffs argue that New York General Obligations Law § 5-701(b)(3)(a) provides an exception to the statute of frauds whereby an agreement is enforceable without a writing if there is evidence of the electronic communication such as the recording of a telephone call. Plaintiffs proffer a transcript of a recorded telephone conversation between Yadgarov and Raico where Raico allegedly states: "[w]e don't place a lien on anything except for the subject property. There will be a lien placed on the two-family (the Ocean Avenue Property), that's it." Plaintiffs state that they relied on several statements to the same effect, which ultimately induced them to sign the contract.

Plaintiffs also argue that the oral agreement was not a modification of the contract but, rather, a condition precedent. Plaintiffs claim that the agreement not to record was made prior to the execution of the loan and the mortgage as evidenced by the recorded telephone conversation between Yadgarov and Raico. Plaintiffs claim that the contract was formed on the condition that the mortgages not be recorded on certain properties because Defendants had knowledge that Plaintiffs would be in technical default of a prior commitment if there was another mortgage on one of the subject properties.

Plaintiffs further argue that the damages sought in the breach of the implied covenant of good faith and fair dealing are different from the breach of contract claim, which therefore make the claims distinct and not duplicative.

Discussion

On a motion to dismiss a plaintiff's claim pursuant to CPLR §3211[a][7] for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]). Rather, the court is required to afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Kamchi v Weissman*, 125 AD3d 142, 150 [2d Dept 2014]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "A motion to dismiss pursuant to CPLR 3211[a][1] will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fontanetta v John Doe I*, 73 AD3d 78, 83-84 [2d Dept 2010]) [*quoting Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]].

“[P]arties should be free to chart their own contractual course” unless public policy is offended”. *Vil. Taxi Corp. v Beltre*, 91 AD3d 92, 99 [2d Dept 2011]. It is a well established principle that “written agreements are construed in accordance with the parties’ intent and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing” (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013][*citation omitted*]). “As such, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Id.*). “Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing” (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). This rule imparts “stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses, infirmity of memory [and] the fear that the jury will improperly evaluate the extrinsic evidence” (*Id. citing* Fisch, *New York Evidence* §42, at 22 [2d ed]).

“The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]). Where “an express provision in the written contract contradicts the claimed oral representations in a meaningful fashion..., the conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter” (*Bango v Naughton*, 184 AD2d 961, 963 [3d Dept 1992]).

A breach of the implied covenant of good faith claim can survive a motion to dismiss “only if it is based on allegations different than those underlying the accompanying breach of contract

claim” (Siradas v. Chase Lincoln First Bank, N.A., 1999 WL 787658 at * 6 [SD N.Y.1999]). When the relief sought by the plaintiff in the claim for a breach of the implied covenant of good faith is “intrinsicly tied to the damages allegedly resulting from [the] breach of contract,” there is no separate and distinct wrong that would give rise to an independent claim. (*MBIA Ins. Corp. v Royal Bank of Can.*, 28 Misc 3d 1225(A) [2010]).

With these principles in mind, the court holds that Plaintiffs’ breach of contract claim fails as a matter of law. The four loan documents are complete, clear, and unambiguous on their face and should therefore be enforced according to the plain meaning of its terms. Evidence outside the four corners of these agreements as to what was really intended but unstated or misstated should be deemed inadmissible to add to or vary the contract, especially where the alleged oral agreement directly contravenes the terms of the written agreement, as is the case herein. This court finds that Plaintiffs’ breach of contract claim fails based on the documentary evidence.

With regards to Plaintiffs’ fraudulent inducement claim, this court finds that this claim also fails because Plaintiffs’ reliance on Raico’s alleged promise was not justifiable. This court reasons similar to the court in *In re Dean Witter Managed Futures Ltd. Partnership Litig.* to find that “such disclosures in the written offering materials rendered any reliance on alleged contradictory oral representations unjustifiable as a matter of law”. (*In re Dean Witter Managed Futures Ltd. Partnership Litig.*, 282 AD2d 271, 271 [2001]). Plaintiffs signed several contracts, all of which were clear regarding the issue of the mortgage being filed on all five properties. Furthermore, the mortgage and security agreement specifically states that the contract will not be changed or terminated orally. Therefore, this court finds Plaintiffs’ reliance on the prior oral agreement to be unjustifiable given the clear language of the several contracts signed in August of 2016.

As it relates to Plaintiffs' claim regarding the implied covenant of good faith and fair dealings, the court finds that Plaintiffs' claims for the breach of the implied covenant of good faith and fair dealings are intrinsically tied to their claim for breach of contract because they arise out of the same facts alleged in the breach of contract claim. Furthermore, there are no allegations of independent breaches of tort duties such as fiduciary duties owed to Plaintiffs from Defendants, which would support a breach of fiduciary duty claim or other tort claim. Therefore, Plaintiffs' claims for breach of the implied covenant of good faith and fair dealings are dismissed as duplicative.

On a final note, the evidence indicates that the intent behind the alleged oral agreement was to deprive the first mortgagee of notice of Defendants' subsequent mortgage on 8629 Bay Parkway, so as to conceal Plaintiffs' default under that particular loan contract. As a matter of public policy, this court would not be willing to enforce the terms of an oral agreement that was made with the intent of purposely hiding a breach of a previous binding agreement with a third party. Thus, this court also finds the oral agreement void.

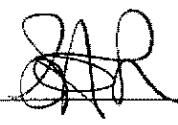
In conclusion, it is hereby

ORDERED that Defendants' motion to dismiss is GRANTED; it is further

ORDERED that Defendants' Motion Sequence #1 is denied as moot; it is further

ORDERED that Defendants' Motion Sequence #3 is denied as moot.

E N T E R,



SYLVIA G. ASH, J.S.C.