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| Skyline Capital Group, LLC v Wolinetz |
| 2017 NY Slip Op 33365(U) |
| November 22, 2017 |
| Supreme Court, Kings County |
| Docket Number: Index No. 500778/2017 |
| Judge: Carl J. Landicino |
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of November, 2017.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
SKYLINE CAPITAL GROUP, LLC.

Plaintiff,

- against -

HARVEY WOLINETZ and BERKELEY ACQUISITIONS, LLC.

Defendants.
-----X

Index No.: 500778/2017

DECISION AND ORDER

Motions Sequence #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | <u>Papers Numbered</u> |
|--|------------------------|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..... | 1/2. |
| Opposing Affidavits (Affirmations)..... | 3. |
| Reply Affidavits (Affirmations)..... | 4 |

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a fee dispute wherein Plaintiff Skyline Capital Group, LLC. (hereinafter "the Plaintiff") alleges in its Complaint that it was employed by the Defendant Harvey Wolinetz (hereinafter "Defendant Wolinetz") and Defendant Berkeley Acquisitions, LLC (hereinafter "Defendant Berkeley") (collectively hereinafter "the Defendants") to procure a commercial mortgage loan and that the Defendants agreed to pay the Plaintiff a mortgage broker fee in the amount of \$50,000.00.

The Defendants now move (motion sequence #1) for an order pursuant to CPLR §§ 3211(a)(1),(5) and (7) to dismiss the action on the grounds that the pleading fails to state a cause

of action, there is a defense founded upon documentary evidence, and because the cause of action may not be maintained because of collateral estoppel, release, res judicata, statute of limitations and statute of frauds.

The Defendants argue that the Fee Agreement for Mortgage Broker Services (hereinafter “the Agreement”) that the Plaintiff relies upon cannot be enforced because it violates the Statute of Frauds. Specifically, the Defendants argue that the Agreement was not signed by the Plaintiff and was only signed by Defendant Harvey Wolinetz as Partner for Defendant Berkeley Acquisitions. The Defendants argue that without a signature by the Plaintiff the agreement is void under the Statute of Frauds and the instant action must be dismissed. In the alternative, the Defendants argue that even assuming, *arguendo*, that the Agreement was valid, it was not entered into with Defendant Wolinetz individually, but rather with Defendant Wolinetz in his capacity as a representative of Defendant Berkely and therefore the action must be dismissed as against Defendant Wolinetz individually. Also, the Defendants argue that the proceeding should be dismissed because the Agreement was contingent upon a commitment from the lender and no commitment was ever issued. Finally, the Defendants argue that the action must be dismissed given that the Agreement was not exclusive and that the Defendants were free to obtain financing from others.

The Plaintiff opposes the instant motion and argues that it should be denied. The Plaintiff argues that the motion should be denied because it fails to meet the standard for dismissal since the instant Complaint states a cause of action and as a result meets the liberal pleading standard permitted by the CPLR and applicable case law. The Plaintiff also argues that the proceeding should not be dismissed based upon documentary evidence given that the documentary evidence presented by the Defendants is not conclusive and accordingly factual issues remain. What is more, the Plaintiff argues that the Complaint should not be dismissed as the underlying Agreement is not void and is not violative the Statute of Frauds given that the Agreement was

signed by Defendant Wolinetz and therefore enforceable against the signer. As to the argument that the Complaint should be dismissed as to Defendant Wolinetz in his individual capacity, the Plaintiff argues that it should not because Defendant Wolinetz signed the Agreement, where his name is listed, as an individual. The Plaintiff also argues that even though the Agreement is silent on the issue of exclusivity the parties had an oral agreement that the Agreement would be exclusive. Finally, the Plaintiff contends that the matter is not barred by the statute of limitations since it was commenced within the requisite six year period.

As an initial matter, the instant motion also seeks dismissal of the Plaintiff's complaint pursuant to CPLR 3211(a)(7). In order to prevail on a motion to dismiss pursuant to CPLR §3211(a)(7), "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2nd Dept]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65; 248 N.Y.S.2d 121. A review of the allegations made by the Defendants leads to this Court to conclude that the instant pleading does state a cause of action and as such, subject to the holding herein, the Defendants applications made pursuant to CPLR 3211(a)(7) are denied.

A motion to dismiss pursuant to CPLR §3211(a)(1) will only be granted if the documentary evidence provided in the motion "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fontanetta v. Doe*, 73 A.D.3d 78 (2nd Dept. 2010) cited by *Greenberg v. Spitzer*, N.Y. Slip. Op. 06432 (2017) and *Fox Paine & Company, LLC., v. Houston Casualty Company*, 153 A.D.3d 673 (2nd Dept. 2017). In order to be considered "documentary" the evidence submitted must be "unambiguous and of undisputed authenticity." *Fontanetta v. Doe*, 73 A.D.3d 78 (2nd Dept. 2010); *Greenberg v. Spitzer*, N.Y. Slip. Op. 06432 (2017); *Gawrych v. Astoria Federal Savings & Loan*, 48 N.Y.S.3d 450 (2017); *Cives Corp. v. George A. Fuller Company, Inc.*, 948 N.Y.S.2d 658 (2012).

Turning to the merits of the Defendants application made pursuant to CPLR §3211(a)(1), this Court finds that the application is granted as to the application made in relation to Defendant Harvey Wolinetz individually. A review of the Agreement shows that Defendant Wolinetz signed as “Managing Partner for Defendant Berkeley Acquisitions, LLC.,” and not as an individual. “A corporation has a separate legal identity from its owners, and, as a general matter, the owners are not personally liable for the obligations of the corporation.” *Open Door Foods, LLC v. Pasta Machines, Inc.*, 136 A.D.3d 1002, 1003, 25 N.Y.S.3d 357, 359 [2nd Dept, 2016]; *E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2009), *aff’d*, 16 N.Y.3d 775, 944 N.E.2d 1135 [2nd Dept, 2011]. Corporate officers who execute contracts in their capacity as agent are not liable for breach unless there is a clear intention that the agent sought to bind himself or herself personally. *See GMS Batching, Inc. v. TADCO Const. Corp.*, 120 A.D.3d 549, 992 N.Y.S.2d 264 [2nd Dept, 2014]; *see also L’Aquila Realty, LLC v. Jalyng Food Corp.*, 103 A.D.3d 692, 692, 959 N.Y.S.2d 724, 725 [2nd Dept, 2013]. Samuel Kahan, managing member of Plaintiff, in his affirmation, acknowledges that the nature of the contractual relationship was “memorialized” in the Agreement (See Plaintiff’s Opposition, Exhibit “B”). As such the authenticity of the Agreement is not in question.

However, the Defendants’ application is denied as it relates to Defendant Berkeley Acquisitions. The Defendants argue that the complaint should be dismissed against it pursuant to CPLR §3211(a)(1) because the Plaintiff failed to allege in the Complaint that a mortgage commitment was issued and because the Agreement is not an exclusive Fee Agreement. However, both of these arguments are factual in nature and are not resolved exclusively by the documentary evidence provided as required pursuant to CPLR §3211(a)(1). Here, “the purported documentary evidence failed to utterly refute the plaintiff’s allegations.” *Rabos v. R & R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 851, 955 N.Y.S.2d 109, 112 (2012), *as amended* [2nd Dept, 2013]. Therefore, Defendant’s motion to dismiss pursuant to CPLR §3211(a)(1) is granted solely

to the extent that it relates to Defendant Wolinetz and denied in as much as it relates to Defendant Berkeley Acquisitions. As such the action is dismissed as against Defendant Wolinetz.

Turning to the merits of the Defendant's motion made pursuant to CPLR §3211(a)(5), the Court finds that insufficient evidence has been provided to grant this application. Defendants' motion to dismiss pursuant to CPLR §3211(a)(5) asserts that Plaintiff is barred from bringing this lawsuit under the principles of "collateral estoppel, release, res judicata, statute of limitations and/or statute of frauds." There is no documentary evidence provided or indicated by either party to signify a release under CPLR §3211(a)(5). "Where a release contains clear and unambiguous language, the signing of it is 'a jural act binding on the parties.'" *Desiderio v. Geico Gen. Ins. Co.*, 107 A.D.3d 662, 662–63, 967 N.Y.S.2d 392, 394 [2nd Dept, 2013], quoting *Booth v. 3669 Delaware, Inc.*, 92 N.Y.2d 934, 703 N.E.2d 757 [1998]. However, a motion made pursuant to CPLR 3211(a)(5) should be denied if it cannot be shown that the scope of the release was intended to cover the allegations in the complaint. *Storman v. Storman*, 90 A.D.3d 895, 898, 935 N.Y.S.2d 63, 66 [2nd Dept, 2011]; *Zichron Acheinu Levy, Inc. v. Ilowitz*, 31 A.D.3d 756, 820 N.Y.S.2d 601 [2nd Dept, 2006]. There is no such release proffered, accordingly this basis for dismissal is unfounded.

Under a motion to dismiss due to *res judicata* or *collateral estoppel* doctrine, the movant must establish that the identical issue was "necessarily decided in the prior action and the previously decided issue is determinative in the present action." *Mahler v. Campagna*, 876 N.Y.S.2d 143 (2nd Dept. 2009); *Leung v. Suffolk Plate Glass Co., Inc.*, 911 N.Y.S.2d 376 (2nd Dept. 2010). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action." *Sherwyn Toppin Mktg. Consultants, Inc. v. New York State Liquor Auth.*, 103 A.D.3d 648, 650, 958 N.Y.S.2d 794, 798 [2nd Dept, 2013], quoting *City of New York v. Coll. Point Sports Ass'n, Inc.*, 61 A.D.3d 33, 876 N.Y.S.2d 409 [2nd Dept, 2009]. In the instant proceeding,

there is no indication of a prior decision, holding or action. Accordingly, the Defendants application for dismissal based upon *collateral estoppel* or *res judicata* made pursuant to CPLR §3211(a)(5) is denied.

Turning to the merits of the Defendants' application to dismiss the complaint on the grounds that it is barred by the statute of limitations, the Court finds that insufficient evidence has been provided to support this application. Both parties concede that the statute of limitations would at the earliest have begun running "on or about May 10, 2011", the date of the agreement. The Summons and Complaint was filed on January 12, 2017, which is approximately 5 years and 8 months from the May 10, 2011 date. The statute of limitations for breach of contract is six years pursuant to CPLR §213. Defendant, acknowledging that the subject period is less than six years, raises laches. However, it is well settled that in relation to "an action at law to recover damages for breach of contract brought within the applicable Statute of Limitations, the equitable defense of laches is not available to bar the plaintiff's claim." *Gonzalez v. Chalpin*, 159 A.D.2d 553, 555, 552 N.Y.S.2d 419, 420, *aff'd*, 77 N.Y.2d 74, 565 N.E.2d 1253 [2nd Dept, 1990]; *see also Roth v. Black Star Publ.*, 302 AD2d 442 [2nd Dept, 2003]. Accordingly, the Defendant's motion to dismiss based upon the statute of limitations is denied.

As to the Defendants' application that the instant matter should be dismissed pursuant to CPLR §3211(a)(5) because the agreement does not comply with the Statute of Frauds, that application is denied. The Statute of Frauds generally provides that certain agreements must be in writing. Specifically, the General Obligations Law §5-701(a)(10) states in pertinent part that the statute is applicable to

"a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest."

The Defendant asserts that the “New York Fee Agreement for Mortgage Broker Services” (hereinafter “Fee Agreement”) (Defendant’s Exhibit C) is not duly signed by the Plaintiff and that the Fee Agreement only appears on the Plaintiff’s letterhead and that it is therefore not an agreement. Plaintiff, in opposition to this argument asserts that General Obligations Law Section 5-701, provides that every agreement required to be in writing must be “subscribed by the party to be charged therewith, or by his lawful agent.” Plaintiff contends that the Agreement is valid since Defendant Wolinetz signed the agreement on behalf of Defendant Berkeley Acquisitions, LLC. Additionally Plaintiff argues that the signature page of the Fee Agreement contains the signature “Samuel Z.” Plaintiff, by affirmation of Samuel Kahan, represents that the signature “Samuel Z” is the signature of Samuel Kahan, the managing member of the Plaintiff. As a result, the Court finds that the Statute of Frauds defense is unfounded for the purposes of dismissal pursuant to this motion.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant’s motion (motion sequence #1) is granted solely in relation to Defendant Harvey Wolinetz, individually, and is otherwise denied.

The foregoing constitutes the Decision and Order of the Court.

Date: November 22, 2017

ENTER:

[Handwritten Signature]
 Carl J. Landicino
 J.S.C.

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2