

Carlton Group, Ltd. v Property Mkts. Group, Inc.
2018 NY Slip Op 30996(U)
May 23, 2018
Supreme Court, New York County
Docket Number: 450044/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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THE CARLTON GROUP, LTD.,

Plaintiff,

Index No.: 450044/2016

- v -

PROPERTY MARKETS GROUP, INC.,
DYNAMIC WORLDWIDE GROUP, LLC, DYNAMIC
HAKIM, LLC, QPS 23-10 DEVELOPMENT, LLC,
PMG AVENTURA HOLDINGS, LLC, PMG AVENTURA,
LLC, PMG AVENTURA MEZZANINE, LLC, PMG
BRICKELL, LLC, PMG BRICKELL DEVELOPMENT
GROUP, LLC, PMG BRICKELL HOLDINGS, LLC,

DECISION AND ORDER

Defendants.

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Saliann Scarpulla, J.

In this action, *inter alia*, to recover damages for breach of contract, defendants QPS 23-10 Development LLC, QPS 23-10 Mezz LLC, Queens Plaza Park Development LLC, Queens Plaza Park Development II LLC, QPT 24th Street Development LLC (collectively referred to as “QPS”), Property Markets Group Inc., PMG Aventura Holdings LLC, PMG Aventura LLC, PMG Aventura Mezzanine, LLC, PMG Brickell LLC, PMG Brickell Development Group, and PMG Brickell Holdings, LLC (collectively referred to as “PMG”) move to dismiss the second, third, and fourth cross-claims set forth in the verified answer dated May 26, 2017 of defendants Dynamic Worldwide Group, LLC and Dynamic Hakim, LLC (“DWG/DH”).

In July 2012, plaintiff The Carlton Group Ltd. (“Carlton”), a commercial real estate debt and equity advisor, entered into an exclusive debt & equity advisory

agreement (“agreement”) with DWG and DH and “any affiliate or assignee thereof.” Defendant Brad Zackson (“Zackson”) executed the agreement on behalf of DWG, and defendant David Small (“Small”) executed the agreement on behalf of DH. Pursuant to the agreement, Carlton was retained as DWG/DH’s exclusive broker to negotiate and obtain acquisition and construction financing for a residential development project in Long Island City. The term of the agreement ran from July 29, 2012 through at least August 29, 2013.

According to Carlton, it recommended that DWG/DH partner with defendant Property Markets Group, Inc. (“PMG”), a real estate acquisition and development company. Defendant Kevin Maloney (“Maloney”) was the founder and principal of PMG. In late 2012, DWG and DH allegedly formed a joint venture with PMG to acquire and develop the Long Island City property. The joint venture was directly controlled by Maloney, Zackson, and Kamran Hakim (“Hakim”).

Carlton also allegedly introduced DWG/DH and PMG to New Valley Realty LLC (“New Valley”) and its principal Howard Lorber (“Lorber”) as a potential equity investor. DWG/DH and PMG subsequently obtained a commitment for joint venture equity from New Valley in the amount of \$8.1 million.

On December 12, 2012, DH, PMG and New Valley LLC executed a term sheet concerning the acquisition and development of the Long Island City property. The term sheet outlined the basic terms and conditions of the proposed transaction to form a joint venture between New Valley, PMG, DH, and other preferred equity investors to acquire and develop the subject property.

According to Hakim, he was managing member of Queens Plaza Sponsor KH, LLC and Queens Plaza Preferred KH, LLC, and in November 2012, Maloney approached him with a proposition for the financing and development of the Long Island City property. Hakim claims that he and Maloney each agreed to invest \$4,425,000 in the project. Hakim further claims that he never owned any interest in Dynamic Hakim, LLC and had no knowledge of this company. Neither Zackson nor Small invested any money in the project, and, according to Hakim, had no interest or ownership in the project. Rather, discussions were had with Small and Zackson about a future possible arrangement whereby they might be entitled to some funds down the road when the project was more developed.¹

Carlton maintains that throughout the term of the exclusive debt & equity advisory agreement, it provided to DWG/DH and PMG lists of protected companies that received a financing memorandum, it engaged in discussions and meetings with certain entities regarding financing for the property, it introduced DWG/DH and PMG to certain companies as prospective lenders, and it accepted commitments from various companies for financing.

The closing on the acquisition of the Long Island City property occurred on or about December 28, 2012. Carlton alleges that it was entitled to commissions pursuant to the exclusive debt & equity advisory agreement, which it claims it never received. In its

¹ Small was Hakim's son-in-law.

second amended complaint, Carlton asserted causes of action for breach of contract, quantum meruit, and tortious interference with contract.

In DWG/DH's answer to the second amended complaint, DWG asserted several cross-claims against QPS.² In the second cross-claim, it alleges breach of contract and breach of fiduciary duty. DWG/DH claims that it performed all the planning, site control, and development for Long Island City property, and obtained the initial financing.

According to the term sheet, DH and PMG were partners in the project, the partnership was the "sponsor" of the project, and the management of the partnership consisted of Maloney, Hakim, Zackson and certain other preferred equity investors. DWG alleges that even though the term sheet set forth the rights and benefits of the sponsor of the project, including rights to equity ownership and to distributions of monies and profits, the QPS entities and PMG breached the terms and conditions of the partnership and DWG/DH was refused and denied its rights and benefits. DWG alleges that the breaches were part of a plan by PMG, Maloney and their counsel Frank Kaiman ("Kaiman") to separate DWG/DH from the project, and have "plausible deniability" to deprive Carlton of its compensation.

DWG further alleges that an organizational structure chart dated December 18, 2012, provides that DH was entitled to 31.25% equity in the real estate project, and that such equity ownership was both preferred equity and sponsor equity. DWG/DH alleges

² DWG alleges that all of DH's rights were assigned in writing to DWG on May 20, 2017.

that between December 12, 2012 and December 27, 2012, QPS and PMG committed certain wrongful acts to remove DWG/DH from the transaction. Specifically: (1) a third amendment to the contract was entered into at or just prior to closing identifying the purchaser as “QPS 23-10 Development, LLC, by QPS Holdings, LLC, by QPS 23-10 Ventures, LLC, by QPS Developer LLC, by PMG 23-10 QPS, LLC, which were a series of entities combined to try and imitate the true purchaser 23-10 QPS, LLC; (2) neither Zackson or Small executed that third amendment; (3) on December 27, 2012, an assignment and assumption of purchase and sale agreement was entered into to assign the contract of sale from 23-10 QPS, LLC, the true purchaser, to QPS 23-10 Development LLC, the new purchaser, but both assignor and assignee were Maloney; (4) neither Zackson or Small executed that document; and (5) that document falsely described 23-10 QPS, LLC as “predecessor-in-interest” to QPS 23-10 Development, LLC.

As a result of the foregoing, the real estate and project were acquired by QPS 23-10 Development, LLC, instead of 23-10 QPS, LLC, and in a new organizational chart dated December 27, 2012, DH was not included.

DWG alleges that DWG/DH’s right to equity and ownership in the project was acknowledged in open court during settlement proceedings in *Atelier Consulting LLC et al. v. Zackson et al.*, New York Supreme Court, Index No. 651453/2013 (“Atelier”) on or about May 9, 2013. In that case, Zackson’s former partner Atelier Consulting LLC commenced an action against DWG, DH, Zackson, Small, DH, QPS 23-10 Development LLC and others, seeking, *inter alia*, to obtain a constructive trust over the interest that Zackson and DH allegedly had in the QPS project. DWG claimed that during those court

proceedings, it was acknowledged that DWG and/or Zackson could be entitled to distributions from the QPS project.

In addition, DWG refers to certain other documents to support its contention that QPS and PMG acknowledged that DWG/DH was entitled to an interest in the project and a right to distributions. First, Maloney and Zackson entered into a Master Loan Agreement and Pledge Agreement on June 30, 2016, in which Maloney purported to take a security interest in Zackson's rights to distributions and other monies due to him "in connection with the real estate development projects involving the property located at...23-10 Queens Plaza South..."

Second, in the affirmation of Daniel Blumenstein, prior counsel to the Dynamic defendants, he averred that he was assured by Joseph Tuchman Esq., counsel to voting members of the QPS defendants, that the Dynamic entities were entitled to an equity position in the project. Finally, on December 5, 2012, Maloney signed a term letter from 40 North Properties, an entity considering loaning funds to the development project, which included a statement that the \$27 million loan to acquire QPS real estate was for "an entity owned and controlled by Kevin Maloney, Kamran Hakim, and Brad Zackson."

Based on these allegations, the third cross-claim seeks an accounting from the QPS entities and PMG, alleging that the original budget grew from the approved cost of \$146 million to \$240 million and the construction was delayed and off schedule.

The fourth cross-claim alleges that the QPS entities "acquired the real estate and project in such circumstances that they may not in good conscience retain the beneficial interest without including DWG in such ownership." DWG/DH was supposed to have an

ownership interest but the QPS entities acquired the real estate and retained all benefits to the exclusion of DWG/DH, which originated and created the project. DWG alleges that the QPS entities were unjustly enriched, and it seeks a constructive trust.

QPS and PMG move to dismiss the second, third, and fourth cross-claims. They maintain that DWG/DH had no interest in the Long Island City property or right to distributions therefrom. They argue that the cross-claims must be dismissed because Zackson and Small each represented to this court in the Atelier action that they each had no interest in the QPS Project, and therefore, they are judicially estopped from now asserting otherwise. Specifically, during the May 2013 Atelier settlement hearing, Zackson's attorney Barry Levin stated, "...well, first of all, this is an expectancy interest. There is nothing that exists today. There is no interest by Mr. Zackson in any of these entities." In Levin's affirmation, he also provided "defendant Zackson has no interest in the QPS properties." Zackson and Small also allegedly submitted affidavits in which they stated that they had no interest in the QPS properties. QPS and PMG argue that, because of these admissions, DWG/DH is estopped from asserting that it or its principals had any interest in the project during the time that is the subject of the cross-claims.

QPS and PMG next argue that the cross-claims must be dismissed because DWG does not exist and the purported assignment to it by DH is void. On June 1, 2014, the state of Delaware certified that DWG was no longer in existence due to non-payment of taxes. Therefore, the assignment of all of DH's rights to DWG in May 2017 has no effect because DWG did not exist at the time of the assignment. In any event, even if the

assignment was valid, DWG is not authorized to do business in New York and therefore cannot pursue cross-claims.

In addition, QPS and PMG contend that the second cross-claim fails to state a cause of action for breach of contract because (1) the QPS Entities are not a party to the alleged contract, i.e. the term sheet; (2) the term sheet states on its face that it is not binding, rather it is merely an “unenforceable agreement to agree;” and (3) the alleged contract is unenforceable as it is missing essential terms. Further, the second cross-claim fails to allege a breach of fiduciary duty because there is no fiduciary relationship with the QPS Entities and in any event, the claim is merely duplicative of a breach of contract claim. Moreover, any alleged breach of fiduciary duty is time barred by the three-year statute of limitations.

QPS and PMG further argue that the third cross-claim for an accounting should be dismissed because there was no confidential or fiduciary relationship between DWG/DH and QPS. In any event, neither Zackson nor Small had any interest in the project at the time of the closing, and did not entrust any money or property to the QPS Entities, and therefore, have no valid basis for an accounting.

QPS and PMG also argue that the fourth cross-claim for a constructive trust should be dismissed because there was no fiduciary or confidential relationship between DWG/DH and QPS, and there was no transfer made to QPS in reliance on a promise as DWG/DH concedes that Zackson and Small did not contribute any monies to the QPS Project and they had no interest in the project at the time of the closing.

Finally, QPS and PMG argue that pursuant to CPLR 3211(a)(10), the court should not proceed in the absence of KH Sponsor and KH Preferred (“KH Entities”) which are the real parties in interest. The KH Entities replaced DWG/DH in the organization chart and any expectancy interest by DWG/DH would have had to only come from the KH Entities.

In opposition, DWG/DH first argues that the affidavits from the Atelier action referenced by QPS should not be considered because they asserted facts that are not based on documentary evidence and are not undisputed. Further, the Levin affirmation and Zackson affidavit were rejected by the court in the Atelier action and not filed or included as part of the record. In addition, the affidavit and affirmation only reference Small and Zackson’s interest in the project, and do not reference DWG/DH’s interest in the project.

DWG/DH submits the affidavit of David Taxin, plaintiff’s attorney in the Atelier case. He averred that he never saw a signed version of Levin’s affirmation or Zackson’s affidavit, and in fact, has now been advised by Zackson’s counsel that Zackson did not approve the alleged affidavit.

DWG/DH next provides that DWG has been reinstated in Delaware and authorized to do business in New York. DWG/DH further claims that there is no statute of limitations issue because the cross-claims relate back to the date of the original answer by DWG/DH. In addition, there are no indispensable parties that have been excluded because DWG/DH have not alleged specific wrongdoing of non-parties nor have they sought specific relief from the non-party members of the QPS defendants.

Finally, DWG/DH alleges that the term sheet is an enforceable binding agreement and not merely an agreement to agree. In addition, the parties were joint venturers, which as a matter of law, is sufficient to demonstrate a special relationship with fiduciary duties.

In reply, counsel responds that in the Atelier action, the court did not reject the affidavits, rather, the court merely granted Atelier's request that they not be filed.

Further, even though DWG was reinstated in July 2017, that occurred after the purported assignment in May 2017. In addition, the July 2017 Delaware certificate submitted by DWG/DH in opposition to the motion states that "Dynamic Hakim LLC" was formed on "the fifteenth day of August, A.D. 2014." Therefore, Dynamic-Hakim LLC did not exist when it signed the term sheet that forms the basis of the cross-claims.

Discussion

The cross-claims at issue on this motion are laden with flaws. First, the cross-claim headings indicate that they are only asserted against the QPS Entities, however, QPS was not a party to the term sheet, which forms the basis for most of the allegations in the cross-claims. The allegations within the cross-claims make it clear that the cross-claims are intended to be asserted against QPS as well as PMG, which was a party to the term sheet.

Second, the cross-claims are asserted by DWG, which allegedly was assigned all rights of recovery and rights of action by DH. The assignment occurred in May 2017, at which time DWG was not in existence. DWG was only reinstated as a corporate entity in July 2017. The assignment was signed by Brad Zackson as member and manager of DH, even though Brad Zackson was also allegedly manager and member of DWG.

Third, and most important, the State of Delaware certificate provides that DH was formed on August 15, 2014. The December 12, 2012 term sheet, which forms the basis for most of the allegations asserted in the cross-claims, was therefore supposedly signed by a corporation not in existence at the time. Insofar as the cross-claims are based on an alleged contractual relationship arising from the term sheet, they are dismissed due to the documentary evidence submitted showing that DH was not in existence at that time.

In addition to the contractual basis for the cross-claims, DWG also asserts a fiduciary or confidential relationship as a basis for the remaining claims of breach of fiduciary duty, accounting and constructive trust. However, DWG has failed to allege the source of any alleged fiduciary duty owed by QPS to DH. With regard to PMG, DWG asserts that as co-venturers, PMG owed DH a fiduciary duty. However, as discussed above, DH was not in existence at the time the alleged joint venture relationship was created. DWG/DH has submitted no evidence to refute the documentary evidence providing that they could not have been co-venturers at that time. Notably, the claim for breach of fiduciary duty, which was alleged within the breach of contract cross-claim, would, in any event, be time barred by the three-year statute of limitations. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009).

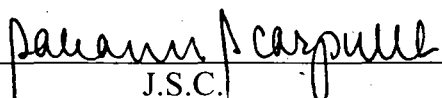
While DWG makes many serious allegations about duplicitous dealings within the Long Island City project, as discussed above, the cross-claims must be dismissed based on the documentary evidence submitted. However, dismissal is granted without prejudice to DWG asserting cross-claims that have an evidentiary basis.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants QPS 23-10 Development LLC, QPS 23-10 Mezz LLC, Queens Plaza Park Development LLC, Queens Plaza Park Development II LLC, QPT 24th Street Development LLC, Property Markets Group Inc., PMG Aventura Holdings LLC, PMG Aventura LLC, PMG Aventura Mezzanine, LLC, PMG Brickell LLC, PMG Brickell Development Group, and PMG Brickell Holdings, LLC's to dismiss the second, third, and fourth cross-claims set forth in the verified answer dated May 26, 2017 of Dynamic Worldwide Group, LLC and Dynamic Hakim, LLC is granted, those cross-claims are dismissed without prejudice, and the remaining claims and cross-claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: May 23, 2018
New York, New York


J.S.C.
HON. SALIANN SCARPULLA