

Capital One Equip. Fin. Corp. v OSG Corp.
2018 NY Slip Op 33888(U)
March 9, 2018
Supreme Court, Nassau County
Docket Number: 600749-17
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

**HON. TIMOTHY S. DRISCOLL
Justice Supreme Court**

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CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

-against-

THE OSG CORP., TRIGLOBAL FINANCIAL SERVICES, INC., SYMON GARBER, VALENTINA ZUBOK, GALINA GARBER-SHEININ, ROMAN SAPINO, RUBEN GIAZOMOZZI, EDWARD ZUBOK, THE EDWARD ZUBOK QUALIFIED PERSONAL RESIDENCE TRUST, EDWARD SHEININ, GEMORA #2, LLC, THE ROMAN SAPINO 2015 QUALIFIED PERSONAL RESIDENCE TRUST, CHICAGO ELITE CAB CORP., MAYA ZUBOK, IRENE GANS, BORIS VOLFMAN, EZVZ FAMILY HOLDINGS #1 LLC, EZVA FAMILY HOLDINGS #2 LLC, EZVZ FAMILY HOLDINGS #3 LLC, EZVZ FAMILY HOLDINGS #4 LLC, GEMORA IN CHICAGO LLC, RACHEL SHEININ, MONICA SHEININ, DANIEL BRATSHPIS, LINA GARBER and 3210 101 WARREN STREET LLC,

Defendants.

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Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Motion.....X**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Plaintiff's Memorandum of Law in Opposition.....X**
- Memorandum of Law in Further Support.....X**
- Reply Memorandum of Law in Further Support.....X**

**TRIAL/IAS PART: 11
NASSAU COUNTY**

**Index No: 600749-17
Motion Seq. Nos. 4 and 5
Submission Date: 1/23/18**

This matter is before the court on 1) the motion by Defendants-Counterclaimants Tri Global Financial Services, Inc., Symon Garber, Valentina Zubok and Galina Garber-Sheinin (“Tri Global Defendants”) filed October 19, 2017, and 2) the motion by Defendant The OSG Corp. (“OSG”) filed October 19, 2017, both of which were submitted January 23, 2018. For the reasons set forth below, the Court denies the motions.

BACKGROUND

A. Relief Sought

Tri Global Defendants move for an Order, pursuant to CPLR § 2221, granting leave to reargue, reconsider and amend the Court’s September 15, 2017 Short Form Order and Decision (“Prior Decision”) (Ex. A to Berman Aff. in Supp.), and deny the prior motion (“Prior Motion”) by Plaintiff Capital One Equipment Finance Corp., formerly known as All Points Capital Corp. and doing business as Capital One Taxi Medallion Finance (“Plaintiff”) as it pertains to the Tri Global Defendants’ second counterclaim for breach of the implied covenant of good faith and fair dealing.

OSG moves, pursuant to CPLR § 2221(d), for leave to reargue that portion of the Prior Decision that granted the Prior Motion to dismiss the second counterclaim asserted in OSG’s April 10, 2017 Counterclaim for breach of the implied covenant of good faith and fair dealing.

Plaintiff opposes the motions.

B. The Parties’ History

The parties’ history is outlined in detail in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, Plaintiff alleges *inter alia* that Defendants are in default of Master Joint Participation Agreements (“MJPA’s”) entered into with Plaintiff. In the Prior Decision, the Court granted Plaintiff’s Prior Motion which sought dismissal of 1) Counterclaims One and Three set forth in the Tri Global Answer and Counterclaim; 2) the breach of contract claim as it relates to the Uber Claims, and the breach of the implied covenant of good faith and fair dealing claim as it relates to both the Uber Claims and Loan Modification Claims set forth in the Tri Global Defendants’ Second Counterclaim; 3) Counterclaim One set forth in the OSG Answer and Counterclaim; and 4) the breach of contract claim as it relates to the Uber Claims, and the breach of the implied covenant of good faith and fair dealing claim as it relates to both the Uber Claims and Loan Modification Claims set forth in the OSG Defendants’ Second Counterclaim. The Court granted the Prior Motion, holding that it was constrained to conclude that, in light of the arms-length

nature of the parties' business dealings, and the absence of language in the relevant agreements imposing restrictions on Plaintiff's ability to engage in business with competitors of Defendants, or imposing a fiduciary duty on Plaintiff, Plaintiff was entitled to the relief sought. The Court concluded that 1) Defendants' allegations regarding their daily interaction with Plaintiff and their reliance on Plaintiff were insufficient to create a fiduciary obligation on Plaintiff; 2) there was nothing in the parties' agreements that limited Plaintiff's ability to pursue a business opportunity with Uber, notwithstanding the fact that Plaintiff's decision to pursue that opportunity arguably created the very default for which Plaintiff seeks relief in this lawsuit, or limited Plaintiff's discretion regarding the approval of loan modifications sought by Defendants at Plaintiff's suggestion; and 3) Plaintiff had not alleged a legal duty independent of the parties' agreement that would support the counterclaim alleging negligence. The Court noted that, while Plaintiff's conduct in pursuing a business opportunity with Uber, or deciding not to approve loan modification efforts sought by Defendants at Plaintiff's behest, may have contributed to Defendants' defaults as alleged herein, the Court could not impose obligations on Plaintiff that the law did not support and, accordingly, it was appropriate to grant the Prior Motion.

The current motions seek a modification of the Prior Decision with respect to its ruling on the Tri Global Defendants' second counterclaim for breach of the implied covenant of good faith and fair dealing, and the second counterclaim asserted in OSG's April 10, 2017 Counterclaim for breach of the implied covenant of good faith and fair dealing. As noted in the Prior Decision, those counterclaims asserted as follows:

OSG's Second Counterclaim

Breach of contract and breach of the implied covenant of good faith and fair dealing based on the allegation that Plaintiff breached the duty of good faith and fair dealing implied in the MJPA by, *inter alia*, a) precipitating, through its partnership with Uber, monetary and maturity defaults across the parties' loan portfolio, thus subjecting OSG to purported loan repurchase obligations under Section 8(c) of the MJPA and loss of its share of debt service payments associated with the non-performing loans; b) precipitating, through its partnership with Uber, the collapse of the taxi medallion industry and related decline in the value of the taxi medallions that secure the loans; and c) failing to timely act and/or act in a commercially reasonable manner with regard to approvals of favorable loan modifications/restructuring proposals that would have mitigated the damages and/or losses sustained by OSG as a result of Plaintiff's bad faith conduct.

Tri Global Defendants' Second Counterclaim

Breach of contract and breach of the implied covenant of good faith and fair dealing based on the allegation that Plaintiff breached the duty of good faith and fair dealing implied in the MJPA by, *inter alia*, a) precipitating, through its partnership with Uber, monetary and maturity defaults across the parties' loan portfolio, thus subjecting Tri Global to purported loan repurchase obligations under Section 8(c) of the MJPA and loss of its share of debt-service payments associated with the non-performing loans; b) precipitating, through its partnership with Uber, the collapse of the taxi medallion industry and related decline in the value of the taxi medallions that secure the loans; and c) failing to timely act and/or act in a commercially reasonable manner with regard to approval of favorable loan modifications/restructuring proposals that would have mitigated the damages and/or losses sustained by Tri Global as a result of Plaintiff's bad faith conduct.

C. The Parties' Positions

Tri Global Defendants submit that the Court, in reaching its decision to dismiss the breach of the implied covenant of good faith and fair dealing counterclaim, overlooked or misapprehended the law by relying on case law that provides little, if any, precedential value because it relies on contractual terms that explicitly permitted the conduct at issue, as well as facts that are materially different from those pleaded here. Thus, Tri Global Defendants contend, those cases, including *Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp.*, 48 N.Y.S.3d 110 (1st Dept. 2017) ("*Transit Funding*"), *CCM Rochester, Inc. v. Federated Investors, Inc.*, 234 F. Supp. 3d 501 (S.D.N.Y. 2017) ("*CCM Rochester*") and *1357 Tarrytown Road Auto, LLC v. Granite Properties, LLC*, 142 A.D.3d 976, 977 (2d Dept. 2016) ("*1357 Tarrytown*"), do not serve as an adequate basis to support the Court's dismissal of the Tri Global Defendants' counterclaim alleging a breach of the implied covenant of good faith and fair dealing. By way of example, Tri Global Defendants submit that the Court's reliance on *Transit Funding* was misplaced because the explicit terms at issue in the loan agreements in *Transit Funding* are materially different than those in the loan agreements in the instant action. Moreover, Tri Global Defendants submit, *Transit Funding* involved a limited issue that was tailored to that case, and is not applicable here, specifically "whether a loan agreement that gives the lender broad authority to deny 'any' funding requests 'in its sole and absolute discretion' and allows the lender to condition its approval 'for any...reason' can be violated, or the covenant of good faith breached, by the lender's rejection during the term of the contract of all further funding requests, for its

own business reasons” (Tri Global Ds’ Memo. of Law in Supp. at 6, quoting *Transit Funding*, 48 N.Y.S.3d at 111). Tri Global Defendants submit that, because there is no express provision in the MJPA that permitted Plaintiff, at its sole and absolute discretion, to do business with direct competitors such as Uber, the limited holding in *Transit Holding* is not applicable here.

OSG also submits that the Court, in the Prior Decision, overlooked the distinguishing factors that exist between the cases on which the Court relied, and the instant action. OSG submits that it has satisfied the pleading standard for a breach of the covenant of good faith and fair dealing through its allegations which include its claims that: OSG never contemplated that Plaintiff would undertake any action to undermine the taxi industry or the value of the parties’ loan portfolio; Plaintiff’s active promotion of Uber’s ride-sharing services effectively precipitated defaults that ultimately deprived OSG of the fruits of its bargain under the MJPA; and Plaintiff’s partnership with Uber had the further consequence of significantly devaluing the price of the taxi medallions that secure the loans in the parties’ joint portfolio. OSG submits that the Court overlooked these critical facts in the Prior Decision, instead relying on cases in which the respective contracts contained language that expressly permitted the defendant to act in the manner in which it acted. OSG also argues that the Court misapprehended certain decisions on which it relied, including *Transit Funding*, by failing to appreciate that those cases involved express contractual language barring the implied covenant claims.

Plaintiff opposes the motions submitting that Defendants are seeking leave to reargue the same issues addressed, and resolved, in the Prior Decision. Plaintiff contends that, although Defendants attempt to distinguish certain cases on which the Court relied for general legal principles, they fail to explain how the Court overlooked or misapprehended those well-established principles. Plaintiff submits that Defendants have ignored the fact that the Court expressly concluded that there was nothing in the parties’ agreement that limited Plaintiff’s ability to pursue a business opportunity with Uber, which is a dispositive factor under these circumstances because the implied covenant of good faith and fair dealing cannot create new legal obligations or impose new terms on sophisticated contract parties, like those in the case at bar. Plaintiff submits that the fact that *CCM Rochester* and *1357 Tarrytown* involved different facts than those at issue here is of no moment because the Court did not state, expressly or implicitly, that its holding in the Prior Decision rested on the factual details of those cases. Rather, the Court applied settled legal principles from those cases and other authorities, including those cited by Plaintiff in support of the Prior Motion, to hold that Defendants’ claims

were insufficient as a matter of law. Plaintiff submits that the Prior Decision is well supported by longstanding New York law, which makes clear that the implied covenant of good faith and fair dealing cannot be used to add terms to a contract or impose additional obligations or limitations on a party that were not negotiated.

RULING OF THE COURT

A. Reargument

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

B. Application of these Principles to the Instant Action

The Court denies the motions. Defendants have not demonstrated that the Court overlooked or misapprehended matters of fact or law in the Prior Decision. Indeed, the essence of Defendants' claim that Plaintiff breached the implied covenant of good faith and fair dealing is the assertion that Plaintiff somehow acted untowardly in forming a commercial relationship with Uber after Plaintiff entered into its agreements at issue here. There is no suggestion in the parties' agreements, much less a contractual provision, that prevents such a relationship. Defendants' counterclaim at issue thus attempts to engraft contractual terms onto the parties' agreements. This goes beyond the implied covenant of good faith and fair dealing, which "operates only in the narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer." *Miller v. HCP & Co.*, C.A. No. 2017-0291-SG, 2018 WL 656378 (Del. Ct. Chanc. Feb. 1, 2018) (citations omitted). Nothing in the parties' agreements here speak to the obligation urged by Defendants; namely, that Plaintiff cannot enter into agreements with competitors in the livery business. None of the cases cited by Defendants compel a different result.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on April 11, 2018 at 11:00 a.m.

ENTER

DATED: Mineola, NY

March 9, 2018



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAR 12 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE