Mesivta & Yeshivah Gedolah of Manhattan Beach v VNB N.Y., LLC
2018 NY Slip Op 34061(U)
July 16, 2018
Supreme Court, Kings County
Docket Number: 511965/2017
Judge: Wavny Toussaint
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At a Part 70 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 16th day of July 2018

PRESENT:
HON. WAVNY TOUSSAINT,
Justice

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MESIVTA AND YESHIVAH GEDOLAH OF MANHATTAN BEACH,

Plaintiff,

-against-

VNB NEW YORK, LLC, as successor in interest to Liberty Pointe Bank

Defendant.

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Index No: 511965/2017

DECISION

The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	1-2
Cross-Motion Affidavits (Affirmations)	3-4
Reply Affidavit (Affirmations)	5-7

Upon the foregoing papers, defendant VNB New York, LLC (hereinafter "VNB") moves this Court for an order dismissing plaintiff's Complaint pursuant to CPLR §§ 3211(a)(1), (5) and (7), based on documentary evidence, waiver, estoppel and failure to state a cause of action. Plaintiff, Mesivta and Yeshiva Gedolah of Manhattan Beach (hereinafter "Mesivta") cross moves for an order granting leave to amend its Complaint and denying defendant's motion in its entirety.

Background

Mesivta is a New York Religious Corporation, which functions as both a school and house of worship. VNB is a New York Limited Liability Company having its principal place of business in New York.

In 2007, Mesivta delivered a Note in the original principal amount of $1,500,000 to LibertyPointe Bank, which was secured by a Mortgage of Mesivta's real property located at 59 West End Avenue, Brooklyn, New York (hereinafter "Mortgaged Property"). In 2009, Mesivta and LibertyPointe Bank entered into a Pledge and Security Agreement, modifying the Mortgage. Pursuant to that agreement, Mesivta deposited with LibertyPointe Bank the pledged funds of $25,000, as collateral for the Mortgage. Mesivta defaulted under the Note and Mortgage, and in 2010, LibertyPointe Bank commenced a foreclosure action.

After commencement of the foreclosure action, the FDIC became Receiver for LibertyPointe Bank. Pursuant to a Purchase and Assumption Agreement between the FDIC and Valley National Bank, the assets of LibertyPointe Bank, including but not limited to, the Note and Mortgage, the Guarantee, the pledged funds, and related loan documentation, were transferred and assigned to Valley National Bank and subsequently assigned to VNB.

VNB, as successor in interest to LibertyPointe, moved for summary judgment and for an Order of Reference. Mesivta and its guarantors cross moved for summary judgment. No claim was made by Mesivta as to the pledged funds. On or about March 12, 2012, an Order of Reference was issued and Mesivta's Cross-Motion for summary judgment was denied. Pursuant to the Order of Reference, a Referee was appointed to compute the amounts due to VNB. Both parties were allowed to submit evidence for the Referee to consider; however, only VNB submitted evidence as to how much it was owed. On or about

May 9, 2012, the Referee submitted a Computation Report. VNB moved to have the Computation Report confirmed. In opposition, Mesivta argued that (1) VNB failed to timely serve notice of entry of the Order of Reference in compliance with said Order; and (2) VNB's application for attorney's fees were improper, excessive and unreasonable.

During the pendency of the foreclosure action, plaintiff defaulted on its obligation under the mortgage, to maintain insurance on the mortgaged property. As a result, VNB force-placed its own insurance to protect its interest, and paid the premiums on the insurance policy. In or about October 2012, the Mortgaged Property was damaged by Hurricane Sandy. VNB submitted an insurance claim and was later paid $83,922.99.

On or about January 16, 2013, the parties settled the Foreclosure Action by entering into a Forbearance and Settlement Agreement (hereinafter "Settlement Agreement"). The Settlement Agreement was negotiated by the parties and their respective counsel. The parties agreed that Mesivta owed a total amount of $1,943,360.01 to VNB and that VNB would accept $900,000 in satisfaction of said debt. The Settlement Agreement was approved by the Board of Directors and Shareholders of Mesivta. The Settlement Agreement provides, in relevant part:

> WHEREAS, to the extent set forth below, Lender has agreed to settle the Foreclosure Action and the Note Action and to forebear from taking any further steps in the Foreclosure Action and the Note Action in exchange for and under the terms and conditions set forth in this Forbearance and Settlement Agreement as follows:
>
> 1. Borrower and Guarantors acknowledge and agree that as of the date of this Forbearance and Settlement Agreement the principal sum of $1,478,325.04 remains due and owing under the Mortgage Note, Mortgage and Guarantees, plus accrued and unpaid interest and other charges and advances due thereunder through April 25, 2012 in the amount of $431,633.21, plus attorney's fees and expenses incurred in the Foreclosure Action through May 23, 2012 in the amount of

$33,401.76, and that they have no defenses, counterclaims or offsets thereto.

2. Borrower and Guarantors acknowledge and agree that they have been duly served with copies of the Summons and Complaint in the Foreclosure Action, that they have no grounds for appeal from any Order entered or Judgment of Foreclosure and Sale to be entered in the Foreclosure Action and have no defenses to or counterclaims in the Foreclosure Action, and that they hereby specifically waive the right to assert any and all defenses and/or counterclaims which an answer might otherwise have contained.

6. Upon execution of this Forbearance and Settlement Agreement, Borrower shall also provide Lender with an original executed Resolution, in a form acceptable to Lender, signed and acknowledged by all current shareholders of Borrower, which authorizes and consents to the execution by Borrower of this Forbearance and Settlement Agreement.

15(b). This Forbearance and Settlement Agreement, and documents given in connection herewith, and documents to be furnished hereunder, constitute the entire agreement between the parties hereto as to the subject matter hereof and supersede any previous agreement, oral or written as to such subject matter. No amendment, modification, termination or waiver of any of the terms and conditions of this Forbearance and Settlement Agreement or other such agreements shall in any event be effective unless the same shall be in writing and signed by Lender and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

15(c). No failure on the part of Lender to exercise (and no delay in exercising) any rights, powers or remedies under this Agreement shall operate as a waiver thereof. The rights provided hereunder and any and all documents to be furnished hereunder are cumulative and not exclusive of any remedies provided by law. No course of dealing between Lender on the one hand and Borrower and Guarantors on the other hand shall operate as a waiver of any of the rights of Lender under this Agreement.

Mesivta complied with the terms of the Settlement Agreement and as a result, VNB filed a "Satisfaction of Judgement," dated October 1, 2015 and a "Satisfaction of Mortgage" dated November 8, 2014.

On or about June 19, 2017, Mesivta commenced the instant action against VNB seeking, amongst other things, damages in the amount of at least $108,922.99, plus interest from the date that the bank received those funds; punitive damages in light of VNB's alleged fraudulent activities; and costs and attorney's fees pursuant to the Pledge and Security Agreement. The Verified Complaint alleges that: (a) defendant breached its obligation to Mesivta when it refused to comply with the terms of the Pledge and Security Agreement which explicitly stated that the pledged funds given by Mesivta to VNB, as well as the resulting interest, was to be held by VNB only as collateral for a mortgage which was ultimately satisfied; (b) VNB breached its contract with Mesivta by failing to forward the insurance proceeds for the mortgaged property to Mesivta despite the fact that Mesivta has satisfied the Mortgage; (c) Mesivta was unjustly enriched when VNB failed to forward the insurance proceeds and when it withheld the pledged funds; (d) in a letter dated December 1, 2014, the Vice President of VNB conveyed to Mesivta knowingly false statements with an intent to deceive Mesivta regarding the application of the pledged funds to the Mortgage in order to "hamper and delay Mesivta's ability to obtain its rightfully owned money." The Verified Complaint sets forth the following ten causes of action: (1) breach of contract; (2) unjust enrichment; (3) conversion; (4) replevin; (5) breach of implied contract; (6) breach of implied covenant of good faith; (7) fraud; (8) constructive fraud; (9) breach of implied bailment duties; and (10) violation of New York State Real Property Law § 254.

VNB moves to dismiss Mesivta's Complaint pursuant to CPLR § 3211(a)(1), (5) and (7), based on documentary evidence, waiver, estoppel and failure to state a cause of action. In support of its motion, VNB submits the following: the Verified Complaint; a signed and notarized copy of the Settlement Agreement. VNB also submits Mesivta's Verified Answer,

Cross-Motion and Opposition, and Reply of Mesivta and its guarantors, filed in the 2010 Foreclosure Action; the Referee's Computation Report, VNB's Deposition Affidavit of David Jaques, filed in the Foreclosure Action; and Mesivta's Affirmation in Opposition to VNB's motion to Confirm, filed in the Foreclosure Action.

Mesivta cross-moves for an order (a) granting leave to amend its Complaint asserting a cause of action alleging fraudulent inducement; (b) denying VNB's Motion in its entirety; and (c) granting such other and further relief as is just and proper under the circumstances. Mesivta alleges that VNB did not present the Court with any admissible factual assertions and thus Mesivta is under no burden to rebut said inadmissible evidence. Mesivta alleges that the Settlement Agreement is not properly before the Court. In support of its assertions, Mesivta submits two documents which it alleges are (1) a letter sent by VNB to Mesivta which shows that Mesivta was charged with paying for the insurance premiums; and (2) a copy of a receipt which proves that Mesivta was on the insurance policy. The letter provided by Mesivta is titled "Statement of Amount Due to Plaintiff (as of April 25, 2012)." The copy of the receipt is a document titled "Sworn Statement in Proof of Loss" and states that the insured are "Valley National Bank & Gedolah School 59 W End Ave., Brooklyn, NY 11235." The document is unsigned and does not appear to be a receipt, but a printout of a fillable form.

In reply and in opposition to Mesivta's Cross-Motion, VNB submits a copy of the Certificate of Resolution of the Board of Directors and Shareholders of Mesivta approving the Settlement Agreement and authorizing Mesivta to enter into said Agreement. Mesivta then submitted an "Affirmation in Reply"/Sur-Reply in support of its Cross-Motion. Therein, Mesivta further argues, amongst other things, that the parties never intended to

settle the pledged funds and insurance proceeds, at the very least, the Settlement Agreement is ambiguous and the ambiguity must be held against the defendant; VNB's assertions that the collateral had been applied to reduce the amount of the balance owed are false and VNB has failed to provide admissible evidence demonstrating that the pledged funds and insurance proceeds were properly applied; and Mesivta purchased the mortgaged property from VNB for market value, therefore, VNB cannot claim it suffered a loss as a result of its settlement agreement with Mesivta.

In its Sur-Reply, VNB alleges that Mesivta's Affirmation in Reply was unauthorized as Sur-replies are not permitted under CPLR § 2214(b), nor under the Court's Part Rules, and Mesivta did not obtain leave to do so. Further, that the Mesivta Sur-Reply contains numerous factual errors. Specifically that no foreclosure sale occurred and Mesivta has continuously held title to the Mortgaged Property since it acquired it in 2003.

Discussion

I. VNB'S MOTION TO DISMISS

A. CPLR § 3211(a)(1)

"Dismissal pursuant to CPLR § 3211(a)(1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff's factual allegations, and conclusively disposes of the plaintiff's claims as a matter of law" (*Pasquaretto v Long Is. Univ.*, 106 AD3d 794 [2d Dept 2013]; *see also* *Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724 [2d Dept 2016]). A party seeking relief pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*Biro v Roth*, 121 AD3d

733 [2d Dept 2014]). To qualify as documentary evidence, the evidence "must be unambiguous, authentic, and undeniable"(*Pasquaretto*, 106 AD3d at 794; *Granada Condominium III Ass'n v Palomino*, 78 AD3d 996 [2d Dept 2010]). Here, the material submitted by defendant in support of its motion, namely, the Settlement Agreement between the parties, constitutes documentary evidence within the meaning of CPLR § 3211(a)(1).

B. CPLR §3211(a)(5)

CPLR § 3211(a)(5) provides for the dismissal of claim that is governed by a release. As a general rule, a general release which is part of a negotiated settlement bars causes of action alleging fraud based upon misrepresentations predating it (*see Arfa v Zamir*, 17 NY3d 737 [2011]). However, a release may be invalidated for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake (*see Centro Empresarial Cempresa, S.A. v América Móvil S.A.B. de C.V.*, 17 NY3d 269 [2012]; *Farber v. Breslin*, 47 AD3d 873[2d Dept 2008]).

"Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release (*Centro Empresarial Cempresa, S.A.* , 24 NY3d at 276). A plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury (*Global Mins. & Metals Corp. V Holme*, 35 AD3d 93 [1st Dept 2006]).

C. CPLR § 3211(a)(7)

CPLR § 3211(a)(7) provides for dismissal when the pleading fails to state a cause of action. On a motion to dismiss the Complaint, pursuant to CPLR § 3211(a)(7), "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY 2d 83 [1994]). The Court "accept[s] the facts as alleged in the Complaint as true, accord[s] plaintiff the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). "However factual allegations which are flatly contradicted by the record are not presumed to be true and, if the documentary proof disproves an essential allegation of the complaint dismissal pursuant to CPLR § 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Coastal Purch. Group., LLC v JPMCC 2005-CIBC Collins Lodging, LLC*, 120 AD3d 1382, 1385 [2d Dept 2014]); *citing* (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD 3d 914 [2nd Dept 2009]).

i. Breach of contract and violation of NYS RPL § 254

Here, plaintiff's claims for the pledged funds and insurance proceeds are barred by the unambiguous release in the Settlement Agreement of defenses, counterclaims and offsets in the foreclosure action, which states that plaintiff "hereby specifically waive[s] the right to assert any and all defenses and/or counterclaims which an answer might otherwise have contained."

Moreover, although plaintiff argues that it is entitled to the pledged funds and insurance proceeds because "the obligation to return the [pledged funds] was never addressed or absolved by any subsequent agreement" and the "insurance proceeds were never addressed by any subsequent agreement," as noted above, the release explicitly

includes "defenses, counterclaims and offsets." Further, the release bars plaintiff's claim as it states that the Settlement Agreement "constitute[s] the entire agreement between the parties hereto as to the [foreclosure action] and supersedes any previous agreement, oral or written as to such subject matter."

As to the insurance proceeds, a defaulting mortgagor is not entitled to the insurance proceeds of a policy on a premises that is maintained, among other things, for the benefit of the mortgagee (*see* RPL § 254; *Builders Affiliates v North Riv. Ins. Co.*, 91 AD2d 360 [1st Dept 1983]; *see also*, *Grady v Utica Mut. Ins. Co.*, 69 AD2d 668 [2d Dept 2009]). Here, plaintiff defaulted under the note and mortgage. During the pendency of the foreclosure action, plaintiff defaulted on its obligation under the mortgage to maintain insurance on the mortgaged property and as a result, VNB force-placed its own insurance to protect its interest. Therefore, plaintiff does not have legal ownership or an immediate right to possession to the insurance proceeds as it is not entitled to any of the proceeds that were payable under the defendant's insurance policy as a result of the damage to the property in 2012. *Zendler Const. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439 [2d Dept 2009]; *Greater New York Sav. Bank v Sanroman*, 218 AD2d 783 [2d Dept 1995].

Plaintiff's claims that it is entitled to insurance proceeds and the pledged funds are therefore without merit. The documentary evidence conclusively establishes, as a matter of law, a defense to the cause of action alleging breach of contract and violation of RPL § 254; as such, those claims are dismissed.

ii. Fraud

"To establish a cause of action sounding in fraud, a plaintiff must establish: (1) that the defendant made a misrepresentation or a material omission of fact which was false and

which the defendant knew to be false; (2) that the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) that there was justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury" *Matter of Imperato*, 149 AD3d 1072, 1073 [2d Dept 2017].

The law recognizes two kinds of fraud–actual or constructive. "The elements of an actual fraud are (1) material representations that were false, (2) the actor knew the representations were false and made them with the intent to induce reliance by the plaintiff, (3) the plaintiff justifiably relied on the actor's misrepresentations, and (4) the plaintiff was injured as a result of the misrepresentations" (*Betz v. Blatt*, 160 AD3d 696, 700 [2d Dept 2018]. "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the defendant's knowledge of the falsity of his representation, is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances" (*Levin v Kitsis*, 82 AD3D 1051,1054 [2d Dept 2011]; *citing Brown v Lockwood*, 76 AD2d 721 [2d Dept 1980]). The law regards the making of a misrepresentation by a defendant who possesses a position of superiority and influence over the plaintiff by reason of the confidential relationship between them as a breach of duty actionable as constructive fraud (*see Greenfield v Greenfield*, 123 NYS2d 19 [Sup Ct Kings Cty 1953]).

Plaintiff's fraud claim must be dismissed as plaintiff has only alleged conclusory allegations that defendant committed fraud and concealed information. Contrary to plaintiff's contention, the constructive fraud claim must be dismissed as the Complaint

failed to plead facts demonstrating the existence of a special, confidential, or fiduciary relationship. *Baer v Complete Office Supply Warehouse Corp.*, 89 AD3d 877 [2011]. Nor can plaintiff sufficiently allege that defendant owed plaintiff a fiduciary duty during those negotiations, since any fiduciary relationship between the parties had, by the time of the negotiations of the Settlement Agreement, ceased, the parties having become adversaries in litigation. *Eastbrook Caribe, A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296 [1st Dept 2004].

"Furthermore, 'if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he was induced to enter into the transaction by misrepresentations.'" *Orlando v. Kukielka*, 40 AD3d 829, 831 [2007]. As the mortgagor, plaintiff approached negotiations with full knowledge of the financial history between itself and the defendant. As such, plaintiff's allegations of fraud and constructive fraud are without merit and therefore must be dismissed.

iii. Breach of Implied Covenant of Good Faith and Fair Dealing, Breach of Implied Contract, and Breach of Implied Bailment Duties

The breach of implied covenant of good faith and fair dealing, breach of implied contract, and breach of implied bailment duties claims must be dismissed, because as pleaded, the causes of action are duplicative of the breach of contract claim, as all allege that defendant breached the contract in question by refusing to return the pledged funds and insurance proceeds (*see Barker v Time Warner Cable, Inc.*, 83 AD3d 750 [2d Dept 2011];

Deer Park Enters., LLC v Ail Sys., Inc., 57 AD3d 711 [2d Dept 2008]).

iv. Unjust Enrichment

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (*Blanchard v Blanchard*, 201 NY 134 [1911]). A 'quasi-contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]).

Here, it is undisputed that the relationship between the parties was defined by a written contract. Notwithstanding plaintiff's claim that defendant breached the contract, plaintiff chose not to rescind the agreement, but instead to complete performance of the contract and sue to recover damages, which of course was plaintiff's right. Having chosen this course, however, plaintiff is now limited to recovery of damages on the contract, and may not seek recovery based on an alleged quasi contract. *Id.*

v. Conversion

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]. As the Court has determined that Mesivta does not have a right of possession as to the insurance proceeds and pledged funds, its conversion claim is without merit and therefore dismissed.

vi. Replevin

"Replevin occurs when plaintiff owns specified property, or is lawfully entitled to

possess it, and the defendant has unlawfully withheld the property from the plaintiff." *Khoury v Khoury*, 78 AD3d 903 [2d Dept 2010]. As the Court has determined that Mesivta is not lawfully entitled to possess the insurance proceeds and pledged funds, plaintiff's replevin claim is without merit and therefore dismissed.

II. MESIVTA'S CROSS-MOTION TO AMEND

"In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is "palpably insufficient"to state a cause of action or is patently devoid of merit" (*Scofield v DeGroodt*, 54 AD3d 1017, 1018 [2d Dept 2008]; *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). Although plaintiff waited about three months to amend its Complaint, defendant alleged no actual prejudice. and "[m]ere lapse of time, unaccompanied by proof of actual prejudice to the defendant, is not a sufficient ground for denial of such a motion" *Haven Assocs. v. Donro Realty Corp.*, 96 A.D.2d 526 [2d Dept 1983] *citing Brewster v City of New York*, 78 AD2d 667 [2d Dept 1980]. Therefore, the Court will examine plaintiff's Proposed Amended Complaint to determine whether the added claim is sufficient to state a cause of action or meritorious.

i. Fraudulent Inducement

Plaintiff alleges VNB fraudulently failed to accurately reduce the amount owed and thereby fraudulently induced Mesivta to sign the Settlement Agreement. As a result, plaintiff suffered a loss of about $101,000.

To prove fraudulent inducement, plaintiffs must demonstrate that defendants intentionally made a misrepresentation of a material fact to defraud or mislead plaintiffs, and that plaintiffs reasonably relied on the misrepresentation and suffered damages as a

result (*Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 [1st Dept 2016]). Fraudulent inducement claims required to be pled with specificity, including the circumstances of the alleged fraud (*CPLR § 3016[b]*).

The fraudulent inducement claim must be dismissed as: (1) the fraudulent inducement claim is duplicative of the breach of contract claim, for it arises out of the same set of underlying facts and seeks damages identical to the breach of contract claim; (2) the claim fails because the alleged misrepresentations upon which the plaintiff purportedly relied did not concern matters within the peculiar knowledge of the defendant (*see Orlando v Kukielka*, 40 AD3d 829 [2007]; *Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *Ryan v Pascale*, 58 AD3d 711 [2d Dept 2009]; *Rigney v McCabe*, 43 AD3d at 896 [2d Dept 2007]); and (3) Plaintiff did not suffer a loss as it received the full benefit of the bargain as plaintiff was able to keep the subject property and write-off its $1,520,10.29 debt owed to the defendant in exchange for a payment of $900,000, as a result of the Settlement Agreement.

Accordingly, for the foregoing stated reasons, the defendant's motion to dismiss plaintiff's Complaint is granted and plaintiff's cross-motion is denied.

ORDERED Defendant's motion to dismiss the complaint is granted in its entirety.

ORDERED Plaintiff's cross-motion to amend its complaint is denied.

This constitutes the decision and order of the Court.

ENTER

J.S.C
Hon. Wavny Toussaint
J.S.C.

-15-