SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CM REALTY HOLDINGS CORP.,

Plaintiff,

-against-

DAC HOLDINGS LLC, BSBF ACQUISITION GROUP LLC, 116 STREET ASSOCIATES LLC, DONALD A. CAPOCCIA, BRANDON BARON, GREGORY BARON, JOSEPH FERRARA, and PETER FERRARA,

Defendants.

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DECISION AND ORDER
Index No.: 657136/2017

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the following facts are taken from the amended complaint (the Amended Complaint, NYSCEF Doc. No. 25).

Plaintiff CM Realty Holdings Corp (CM or CM Realty) was dissolved by proclamation of the New York Secretary of State in June 2003, but the parties have agreed (by so-ordered stipulation, in a separate case) that CM has retained its rights under the relevant agreement, the July 2000 Memorandum Agreement (the Agreement). Accordingly, CM retains it's standing to bring this action it is alleged.

CM, along with defendants BSBF Acquisition (BSBF) and DAC Holdings (DAC) were the members of defendant 116 Street Associates LLC (116 St). 116 St owns a property located at 70-74 East 116th Street, New York, New York (the Property).

Pursuant to the Agreement, CM, BSBF and DAC agreed that CM Realty would sell its interest in 116 St to BSBF and DAC in exchange for 25% of the net income to DAC, BSBF, or 116 St from the business of 116 St. The Agreement also provided that individual defendants Donald Capoccia (Donald), Brandon Baron (Brandon), Gregory Baron (Gregory), Joseph Ferrara (Joseph), and Peter Ferrara (Peter) would guarantee the obligations of 116 ST, DAC and BSBF under the Agreement.

On about August 1, 2000, DAC, managing agent for 116 St, entered into a master lease for the Property's commercial space for $30,500 /year, plus annual increases, to expire on July 31, 2049. The fair market value of that space is $200-250,000. Both BSBF and DAC consented to the lease.

Plaintiff asserts the following causes of action:

1) Breach of the implied term of good faith and fair dealing in the Agreement against 116 St, DAC, and BSBF for entering into a lease for less than fair market value;

2) Breach of the implied term of good faith and fair dealing in the Agreement against 116 St for its sale of the Property to 74 E LLC for $5.4 million on January 30, 2018, when the Property was worth $16-20 million; and

3) Enforcement of the Personal Guaranty against the individual defendants.

II. ARGUMENTS

A. Defendants' Arguments

Defendants move to dismiss pursuant to CPLR 3211(a)(1), (3), (5), and (7), on five grounds as discussed below:

1. Plaintiff lacks capacity to sue, since it was dissolved fifteen years ago.

CM Realty was dissolved in 2003 and has unlawfully continued to do business (Memo at 1). The allegation in the Amended Complaint that CM is "authorized to do business in the State of New York", is refuted by the allegation that CM was dissolved by proclamation on or about June 25, 2005 (*see* Amended Complaint, ¶ 2). Once dissolved, a corporation cannot carry on doing business, but must wind up its affairs, and may only bring suit for that purpose (Memo at 2-3 NYSCEF Doc. No. 11, citing BCL section 1005 and 1006). What constitutes a reasonable amount of time for an entity to wind up affairs is a question of law (*id.* at 3). As far a plaintiff argues that the defendants agreed in the Settlement that the Agreement continued in full force and effect, plaintiff did not disclose, at the time of the Settlement, that CM Realty had already been dissolved.

2. The first two causes of action fail to state a claim for which relief can be granted

Section four of the Agreement provides that CM Realty is to receive 25% of the net income "actually received" by the entity defendants. No minimum amount was set. Plaintiff did not bargain for a percentage of the "fair market value" of the rent, and the entity defendants were not obligated to do so, under the Agreement. The court should not write such a term into the parties' agreement (*id.* at 8). As far as plaintiff brings the first two claims against 116 St, those claims

should fail, because they are based on the Agreement to which 116 St is not a party. Accordingly, 116 St cannot have breached that Agreement, and should be dismissed from this action.

3. The third cause of action fails to state a claim for which relief can be granted.

Defendants argue that the individual defendants agreed to guarantee "all of the obligations of the DAC, BSBF and 116 [St]," but the amended complaint does not allege that any of those entities breached the Agreement. Accordingly, this claim should also be dismissed (Memo at 11).

4. Plaintiff's claims from August 1, 2000 through January 3, 2013, are barred by a settlement.

In the prior action (*Scheiner v DAC Holdings*, Index No. 602295/2002), CM Realty and other plaintiffs sought "25% of the net income from the LLC" (Memo at 11, citing Third Amended Complaint in the Prior Action, NYSCEF Doc. No. 32). That case was settled on the record before now retired Justice Bransten on January 3, 2013 (*see* Transcript from Prior Action, NYSCEF Doc. No. 34). The settlement resolved all payments due to that date (*id.*, p 5, 11-2). Accordingly, any claims predating January 3, 2013, should be dismissed as barred by the settlement.

5. Claims before November 28, 2011 are time-barred

The statute of limitations for claims alleging breach of the implied covenant of good faith and fair dealing is 6 years. This action was filed on November 29, 2017, more than six years later. Accordingly, the claims are time barred.

B. Plaintiff's Arguments

Plaintiff contends that there is no claim in the Prior Action based on the breach of the covenant of good faith and fair dealing in the Agreement (Opp at 2). In the Settlement, the parties noted that the Agreement "continue[d] in full force and effect," despite the dissolution of CM Realty (*id.* at 3, quoting Transcript at p.4, l.13). Further, plaintiffs "certainly reserve[d] [their] rights under the Memorandum Agreement" (*id.* at 3, quoting Transcript at p.4, l.21-22). Plaintiff argues this qualifies as continued standing for the plaintiff to sue to enforce the Agreement in this action.

As to the first two claims, plaintiff argues that leasing the Property for dramatically sub-market rent is a breach of the covenant of good faith and fair dealing (*id.* at 6). Plaintiff also notes that 116 St sold the Property on January 30, 2018 (during the pendency of this action), for $5.4M,

when it was worth about $18.4M, which plaintiff also argues is a breach of that covenant (*id.* at 7).

Plaintiff claims the Settlement outlined in the Transcript does not include a complete release, since the Transcript is ambiguous, and it is unclear whether the release is a complete release or applies only as to the developer's fee (Opp at 7). Plaintiff argues the latter. It was not plaintiff's intention to waive such claims (*id.* at 9). Discovery is needed to determine why defendants leased and sold the Property so far under market prices.

C. Defendants' Reply

Defendants reply that only the legislature, not litigants, can decide what the rules are for whether a corporation is authorized to sue (Reply at 2). Plaintiff can cure the defect by paying back taxes and being reinstated (*id.*).

As far as plaintiff claims the Transcript, and thus the Settlement, are ambiguous, the Transcript does not limit anything to just the developer's fee. It does note that "Agreement only settles payments up until today's date" (*id.* at 5, quoting p. 5, l.2).

III. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73

AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Agreement and the Transcript. These are undisputedly authentic and constitute proper documentary evidence.

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]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). 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 [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). 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]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

First, the transcript from the prior litigation, dated January 3, 2013, clearly releases all claims as of the date of that settlement. In item three, on page 3, 116 St agrees to pay CM a sum of money related to a share of a developer's fee. In item four, on page 4, "plaintiffs agree that they are not entitled to any other sum or benefit from any defendant, which is owed or accrued or claimed to be owed or accrued to date." Accordingly, claims that accrued prior to January 3, 2013, have been released, and must be dismissed pursuant to CPLR 3211(a)(5) ("the cause of action may not be maintained because of arbitration and award [or] release").

Second, the first two claims, for breach of the implied covenant of good faith and fair dealing, fail against 116 St. 116 St is not a party to the Agreement (attached as Exhibit D to Schneider aff, NYSCEF Doc. No. 33). No contract between CM Realty and 116th St has been alleged. Accordingly, the claims for breach of the implied covenant of good faith and fair dealing fail as against 116 St.

Third, it is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promise would be justified in understanding were included (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). However, the obligations imposed by the implied covenant are limited to those which further the explicit terms of the parties' agreement (*Trump on Ocean, LLC v State*, 79 AD3d 1325 [3d Dept 2010]). The covenant is not so broad as to nullify the express terms of a contract or create independent contractual rights (*Phoenix Capital Investments LLC v Ellington Management Group, L.L.C.*, 51 AD3d 549 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [1st Dept 2004]).

Plaintiff effectively argues that the covenant of good faith and fair dealing implies that the parties to the Agreement are committed to maximize the lease fees and sale price of the Property. To contemplate that defendants could lease out, or even sell, the Property for a nominal amount, as long as they pay CM Realty its quarter, would certainly deprive CM Realty of its benefit from the agreement, although it is not expressly forbidden. Because the documentary evidence does not "utterly refute" the first two claims, as against DAC, and BSBF, such claims survive.

Finally, as to the issue of standing, CM Realty was dissolved by proclamation of the New York Secretary of State on or about June 25, 2003 (Amended Complaint, ¶ 2). The court notes that the Agreement is dated July 2000 and that thereunder CM is entitled to inspect the books and records of 116 St.). A dissolved corporation. . . may continue to function for the purpose of

winding up the affairs of the corporation in the same manner as if the dissolution had not taken place . . . [including that t] he corporation may sue or be sued in all courts and participate in actions and proceedings" (Business Corporation Law § 1006[a]). Further, "[t]he dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution" (*id.*, § 1006[b]).

Plaintiff argues that defendants consented to CM Realty's right to enforce the Agreement by this litigation when they entered into the Settlement in the prior action and acknowledged CM Realty's right to enforce the Agreement, despite its dissolution (Opp at 3). While defendants argue they were not aware of the dissolution, that is an issue of fact. While BCL 1006 allows for a dissolved corporation to wind up its affairs, "the winding up of affairs cannot continue indefinitely. Business Corporation Law § 1006 does not include any time limit for winding up the dissolved corporation's affairs. When a statute is silent, the courts will imply a reasonable period of time" (*Lance Intern., Inc. v First Nat. City Bank*, 86 AD3d 479, 480 [1st Dept 2011]).

It has now been over 15 years since CM Realty was dissolved and there is no indication that CM intended to wind up its affairs within a reasonable time after the dissolution in 2003. Instead, it simply continued to collect its share of the rental income indefinitely, possibly until expiration of the master lease in 2049, and to receive a share of any eventual share of the proceeds of a sale. Because CM Realty has failed to show that it is still winding up its affairs, it lacks standing to sue. The complaint shall be dismissed with leave to replead after CM Realty cures the standing problem by obtaining reinstatement or otherwise.

Accordingly, it is hereby

ORDERED that the branch of the motion seeking to dismiss the Amended Complaint for lack of standing is GRANTED with leave to re-plead following reinstatement.

This constitutes the decision and order of the court.

DATED: April 10, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.