57th & 60th St. Lender LLC v State Bank of Texas
2019 NY Slip Op 32044(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 654007/2018
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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57TH AND 60TH STREET LENDER LLC,

Plaintiff,

- v -

STATE BANK OF TEXAS, SUSHIL PATEL, CHANDRAKANT PATEL, TIC CAPITAL III, LLC, JOHN DOE, ABC CORP,

Defendants.

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INDEX NO. 654007/2018

MOTION DATE 5/20/2019

MOTION SEQ. NO. 001, 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34; (Motion 002) 30, 31, 32, 33, 41, 43, 44

were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence 001, pursuant to CPLR 3211(a)(1) and (7), defendants State Bank of Texas (SBT), Sushil C. Patel (S. Patel) and Chandrakant B. Patel (C. Patel) move for dismissal of the complaint. In motion sequence 002, defendant TIC Capital II, LLC (TIC) moves for dismissal on the same grounds and plaintiff cross-moves for leave to amend the complaint.

Background

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded liberal construction and the facts as alleged are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

On June 28, 2018, plaintiff entered into a Mortgage(s) Loan Sale Agreement (Dkt. 2 [the LSA]) with SBT to acquire two commercial loans (Loans) on a discounted basis (Dkt. 1 [Complaint] ¶¶ 1, 12). The Loans were known as the "Roll 60 Loan" (Roll 60) and

the "RML Loan" (RML) (¶ 16). Plaintiff negotiated primarily with SBT's president S. Patel (*see* ¶ 5). Plaintiff alleges that the loan documents it contracted to acquire were instead assigned to third-parties, including TIC, an entity owned by C. Patel who was the Chairman of SBT and the father of S. Patel (¶ 1).

LSA

Pursuant to the LSA, plaintiff agreed to pay $8,599,552.81 to acquire the Loans and paid the required $500,000 deposit (¶¶ 14-15). Section 2.7(b) of the LSA makes clear that it was plaintiff's intention to "close on either both Loans or neither Loans" (Dkt. 2 at 5).

Article 4 of the LSA contained SBT's representations and warranties "as of the effective date of the agreement" and "as of the Closing Date" (*id.* at 7). SBT represented that as of the agreement date it was the sole owner and beneficiary under the loan documents and that it had not "assigned, pledged, promised, encumbered or otherwise transferred any interest in the Loan(s) or any of the Loan Documents" (*id.* at 8 § 4.1[e]). It further represented and warranted that it "has not demanded or agreed to accept payment of any less than the full obligation due" (*id.* [second § 4.1(e)]). The LSA, moreover, required SBT to "promptly advise [plaintiff] in writing if [SBT] obtain[ed] Actual Knowledge of any information following the Effective Date which would make any of [SBT's] representations and warranties set forth in this Article 4 untrue in any material respect" (*id.* at 9 § 4.2).

Section 6.7 of the LSA provides:

> Loan Payments. Payment of principal and/or interest payable pursuant to the Loan(s) or any of the Loan Documents received by [SBT] and which accrued prior to the Closing Date shall be the property of [SBT] and shall not be

> prorated as between [plaintiff] and [SBT] if received by [SBT] on or before the Closing Date. [Plaintiff] shall be entitled to any principal or interest paid prior to the Closing Date and attributable to the period after the Closing Date. **If the Loan(s) are repaid in full on or before the Closing Date . . . the Deposit shall be returned to Buyer, and this Agreement shall terminate.** . . .The provisions of this Section 6.7 shall survive Closing." (*id.* at 13 [emphasis added]).

Article 9 of the LSA addresses remedies arising from a breach of the agreement. Section 9.1 provides that in the event SBT breaches and plaintiff does not close the transactions, then plaintiff,

> "shall have the right, as its sole and exclusive remedy, to either: (a) commence an appropriate action for specific performance of [SBT's] obligations under this Agreement within sixty (60) days after the scheduled Closing Date, and diligently prosecute the same; or (b) terminate this Agreement by giving written notice of the termination to [SBT] within five (5) Business Days after the scheduled Closing Date, whereupon neither party shall have further rights or obligations under this Agreement (except for those which expressly survive termination of this Agreement), and Escrow Holder shall . . . deliver the Deposit to [plaintiff], free of any claims by [SBT]. [Plaintiff] hereby waives any and all rights it may have at law or in equity to record a notice of pendency of action or similar notice on the title of the Collateral. [Plaintiff] shall only be entitled to seek its actual damages and may not recover any consequential, exemplary, incidental, special or punitive damages resulting from [SBT's] breach of this Agreement" (*id.* at 16).

Section 11.16 further provides that with respect to confidentiality:

> "In no event shall either party to this Agreement issue any press release of any media of general circulation regarding this Agreement or the transactions contemplated hereby (other than a press release providing that [plaintiff] has acquired the Loan(s), which shall not disclose the terms of the acquisition) or otherwise disclose the terms and conditions of this Agreement; provided however, that nothing herein shall be deemed to limit or impair in any way any party's ability to disclose the details of the transaction contemplated hereby to its employees, partners, or legal and financial advisors or as may be necessary pursuant to any court or governmental order or applicable law or in litigation, nor shall anything contained herein be deemed to limit or impair [SBT's] notification of the proposed transaction or details thereof to

> other servicers, [SBT], certificate holders or other parties relating to the servicing of the Loan(s). Notwithstanding the foregoing, no party hereunder shall have any liability by reason of the details of the transaction contemplated hereby becoming known by means beyond the reasonable control of such party." (*id.* at 18).

Roll 60 Loan

The Roll 60 Loan was evidenced by a promissory note given by Roll 60 Street Inc. (Roll 60 Note) in the principal amount of $4,700,000 (Complaint ¶ 18). The Roll 60 Note was secured by two properties (Roll Property 1 and Roll Property 2) (collectively Roll 60 Mortgages) (¶ 19).

On July 12, 2018, Roll 60 Street Inc. executed a Deed for the Roll Property 1 mortgaged premises, transferring ownership to Vertu ROC LLC (Vertu) for an undisclosed amount (¶ 61; *see* Dkt. 4).

Additionally, on July 12, 2018, without making any disclosure to plaintiff, SBT assigned the Roll Property 1 mortgage to TIC for $10 (*see* Dkt. 5). The Assignment of Mortgage transferred "the promissory note and all other obligations now or hereafter secured by the Mortgage" including unpaid principal balance of $3,954,275.93 due to TIC (Complaint ¶¶ 48, 52, 63, 67; *see* Dkt. 5 at 5). No new note or restated note was attached to the parties' submissions.

On that same day, TIC entered into a Mortgage and Agreement of Assumption and Modification of Mortgage Agreement with Vertu whereby TIC affirmed that it was the holder of the existing mortgage and note evidencing a debt with an aggregate principal balance of $3,954,275.93 (Complaint ¶ 69; *see* Dkt. 6 at 5, 11). The document explicitly states that TIC and Vertu desire to "modify and extend the Existing Note and Existing

Mortgages, by substituting and replacing the Existing Note with a Restated Note . . . and by modifying and extending the Existing Mortgage into a mortgage securing the aggregate principal amount of $3,954,275.93 and by modifying and extending the Existing Mortgage" (*see* Dkt. 5 at 2). No restated note was attached to the parties' submissions.

Also, without stating the consideration, SBT executed two Releases of Mortgaged Premises releasing both of its mortgage liens securing the Roll 60 Loan (Complaint ¶¶ 76-77; *see* Dkts. 7, 8). Plaintiff was not informed of the releases (Complaint ¶¶ 77-79).

Plaintiff urges, among other things, that SBT breached the LSA by not informing it of these transactions. It further alleges that SBT's actions rendered its remedies illusory. Moreover, plaintiff argues that these transactions indicate that rather than the Loan being repaid, it was merely sold and assigned for more consideration.

RML Loan

The RML Loan was evidenced by a Consolidated Amended and Restated Promissory Note (RML Note) in the principal amount of $4,700,000 (Complaint ¶ 20). The RML Note was secured by a Mortgage and Agreement of Consolidation, Extension and Modification of Mortgage (RML Mortgage) (¶¶ 20-21).

On July 12, 2018, S. Patel contacted plaintiff stating that SBT had received a term sheet from the borrower to pay off the RML Loan (¶ 42).

Plaintiff alleges that SBT sold the RML Loan to W Financial Fund, LP (W Financial) for more consideration than plaintiff was obligated to pay under the LSA as evidenced by an Assignment of Mortgage (¶¶ 82-84; *see* Dkt. 9). The Assignment of

Mortgage provides that the principal balance remaining is $4,651,562.20. Plaintiff was not informed of the assignment (Complaint ¶ 90).

This Action

By letter dated July 25, 2018, SBT informed plaintiff that "Borrower repaid the Loan(s) in full" and that SBT was terminating the LSA pursuant to § 6.7 (Complaint ¶ 66; *see* Dkt. 3). It attached copies of wire transfers merely showing money transfers (*id.* at Dkt. 3). There was no concrete evidence of payoff.

Plaintiff reiterates that SBT "purposely and intentionally orchestrated a scheme to sell the Loans to third-parties for more money" and that, among other things, SBT's actions in selling and assigning the Roll 60 Loan to TIC constitutes a breach of the LSA (Complaint ¶¶ 58-59, 75). It further alleges that by releasing the liens and transferring the Roll 60 properties without notice, defendants made the remedy of specific performance an impossibility. Plaintiff commenced this action for: (1) breach of contract against SBT; (2) breach of the implied covenant of good faith and fair dealing against SBT; (3) tortious interference with contract against S. Patel, C. Patel, and TIC; (4) civil conspiracy against SBT, S. Patel, C. Patel, and TIC; and (5) breach of confidentiality against SBT, S. Patel, and C. Patel. As the measure of actual damages, plaintiff seeks $1,658,648.52 plus per diem interest of $5,733.04 from August 3, 2018.

SBT, S. Patel, and C. Patel move for dismissal urging that all the above stated transactions were permissible under its interpretation of the LSA and were contemplated risks accounted for in § 6.7. In other words, they argue that the transactions were permitted and therefore there was no breach of the agreement and that plaintiff has no remedy under

the LSA. TIC contends that the pleading is inadequate and that, in any event, because there was no breach of the agreement there could not be any tortious interference. Plaintiff cross-moves for leave to amend.

Analysis

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded liberal construction and the facts as alleged are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiffs are afforded the benefit of every possible inference and the court only determines whether the facts as alleged fit within any cognizable legal theory (*id.*). A CPLR 3211(a)(1) dismissal is only warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In assessing a motion under CPLR 3211(a)(7), the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*).

Breach of Contract

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records, Inc.*, 98 N.Y.2d 562, 569 [2002]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*id.*). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.*)

"Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). "To be found ambiguous, a contract must be susceptible of more than one commercially

reasonable interpretation" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017]). "The existence of ambiguity must be determined by examining the 'entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,' with the wording to be considered 'in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*id.*). On a motion to dismiss, if two reasonable interpretations of the agreement are proffered, the court may not decide which interpretation is superior (*see N.Y. Univ. v Pfizer Inc.*, 151 AD3d 42, 44 [1st Dept 2017]). Rather, the parties must be permitted to take discovery of extrinsic evidence of their intent (*see Kolbe v Tibbetts*, 22 NY3d 344, 355 [2013]). Indeed, even after discovery, the meaning of the contract raises a question of fact unless the extrinsic evidence leaves no reasonable doubt about the intended meaning (*Chiusano v Chiusano*, 55 AD3d 425, 426 [1st Dept 2008]).

The motion to dismiss the breach of contract claim is denied. The parties interpret Section 6.7 of the LSA differently. Neither proffered interpretation is unreasonable.

Plaintiff argues that in order for SBT to be "repaid," the Loans had to be satisfied and the note and mortgage extinguished, not transferred or sold to another buyer. Plaintiff further contends that when it entered into the LSA, its reasonable expectation was that either it would own the Loans on the closing date or that no one else would because of the borrowers' repayment (*see* Dkt. 28 at 2-3).

SBT argues that the Loans were "repaid," pointing to the wire transfers as evidence, and explains that nothing in the LSA specified how the Loans were to be repaid or by whom, indicating that it was a contemplated risk of the LSA. It concludes that because it

was "repaid" there was no breach of contract and the LSA terminated by its terms (*see* Dkt. 24 at 8).

The contract is ambiguous because the four corners of the LSA do not specify or define repayment. Regardless, even if defendants' interpretation of the LSA is ultimately deemed correct, it has nonetheless failed, on this motion, to establish that it was "repaid" and that it no longer holds the notes on the Loans. Despite submissions showing that money was transferred to SBT, there is no documentary evidence that SBT in fact extinguished the Loans. SBT explains that the "Borrowers repaid the Loans in full prior to the Closing Date through a sale of the Roll 60 Mortgaged Premises to [Vertu] – a third-party who arranged for independent financing with [TIC] – and through a refinance of the [RML Mortgage] with non-party [W Financial]" (Dkt. 24 at 7). However, the documentary evidence does not conclusively support defendants' account (*see GEM Holdco, LLC v Changing World Techs., L.P*, 127 AD3d 598, 599 [1st Dept 2015]).[1] Significantly, an assignment or mortgage is simply insufficient to make a showing of repayment and the extinguishing of a loan (*see Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361-62 [2015] [note is dispositive instrument]).

Ultimately, SBT has not established, through documentary evidence or otherwise, the status of the debt. SBT has not submitted any evidence that the Loans were satisfied

[1] In support of its motion, SBT submits the affidavit of S. Patel (Dkt. 15) to attest that the Loans were extinguished despite lacking documentary evidence to this effect. However, on a motion to dismiss, an affidavit may only be used to introduce documentary evidence; it cannot be used to introduce facts that contradict the allegations in the complaint (*GEM*, 127 AD3d at 599; *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n 4 [1st Dept 2014]).

and discharged as opposed to sold and assigned. SBT did not submit evidence of any satisfaction of mortgage documents or a newly filed note. Neither at oral argument nor in its submissions did defendant establish how its handling of the Loans with third parties was materially different than the bargained for deal that was supposed to be sold to plaintiff.

Defendants also contend that pursuant to Section 9.1 of the LSA, even if it is found to have breached the LSA, plaintiff's cause of action fails because it has no remedy since the liens were released, eliminating the possibility of specific performance, and because the deposit was returned.

Plaintiff urges that it is not limited to the remedy of specific performance. Rather, because SBT allegedly breached the agreement, plaintiff contends it is entitled to actual damages (*see* Dkt. 28 at 3).[2] Plaintiff further contends that even if contractually it is not entitled to actual damages, it nonetheless should be compensated because SBT destroyed its ability to obtain specific performance by not informing it of its Loan transfers and releases of collateral.

Under defendants' interpretation of Section 9.1, plaintiff is limited to the remedies in the LSA and has no remedy under the agreement because the Loans were transferred and the collateral released. Defendants fail to explain how this is permissible without providing plaintiff notice, which would allow plaintiff the opportunity to dispute the transactions and enforce its rights before its remedies were abrogated. "New York law has

[2] Section 9.1 provides an exception to the remedies clause for rights and obligations "which expressly survive termination of this Agreement" (Dkt. 2 at 17). It is unclear from the parties' submissions which rights and obligations survive and what effect it may have on plaintiff's remedies.

long held that contracting parties are generally free to limit their remedies . . . . Therefore, by the terms of the 'sole remedy' clause, the agreements limited plaintiffs to seeking an order of specific performance . . . an equitable remedy" (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 106 [1st Dept 2015]). "[W]here the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy' . . .to hold otherwise would create a 'perverse' incentive . . ." (*id.*). Here, the remedies clause is ambiguous and, even if it has the meaning suggested by defendants, it is far from clear that plaintiff is nonetheless barred from recovering monetary damages under the circumstances.

Accordingly, the motion to dismiss the breach of contract cause of action is denied.

Implied Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is "[i]mplicit in all contracts" and includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). "This covenant embraces a pledge that neither party shall do anything which 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. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

SBT urges dismissal of the claim for breach of the implied covenant of good faith and fair dealing because plaintiff received the full benefit of its bargain (*see* Dkt. 24 at 8-11). Defendants urge that based on their arguments that the Loans were repaid, there can

be no cause of action for a breach of the covenant of good faith and fair dealing as repayment was a contemplated risk.

Plaintiff contends that SBT, by relaying to plaintiff that it was preparing payoff letters and title reports so that the parties could close on the LSA, while actually pursing a higher bidder and assigning the Loans to other entities, breached the covenant of good faith and fair dealing by frustrating the purpose of the LSA (*see* Dkt. 28 at 18-19).

Plaintiff's allegations sufficiently state a claim for breach of the implied covenant and are not duplicative of the breach of contract cause of action (*see New WTC Retail Owner LLC v Pachanga, Inc.*, 160 AD3d 584 [1st Dept 2018] [allegation that (defendant) knew before executing the contract at issue that the premises would not be delivered on time due to a dispute sufficiently supported the claim for the purpose of withstanding a CPLR 3211 dismissal motion]). The LSA does not squarely address whether defendants' conduct was permissible, and plaintiff plausibly alleges that such conduct undermined the very purpose of the agreement.

Tortious Interference with Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

Plaintiff alleges an agreement between itself and SBT and that S. Patel and C. Patel knew of the agreement and that by virtue of C. Patel's knowledge, TIC obtained knowledge

of the agreement. Plaintiff further alleges that the Patels, using this knowledge, worked with TIC and others to procure a better deal for SBT. To the extent there are deficiencies in the allegation, in its cross-motion plaintiff moves for leave to amend the complaint.

Defendants argue that because there was no breach of contract there can be no tortious interference. But since it has not been established that there was no breach of contract, the tortious interference claim is sufficiently stated and viable and the motion to dismiss is denied. To the extent that the claim has any deficiency, plaintiff's cross-motion for leave to amend the complaint is granted.

Civil Conspiracy

Plaintiff's cause of action for conspiracy is dismissed because "conspiracy to commit a tort is not a cause of action" (*Johnson v Law Office of Schwartz*, 145 AD3d 608, 611 [1st Dept 2016]).[3]

Breach of Confidentiality

SBT, S. Patel, and C. Patel urge that this cause of action should be dismissed because disclosing terms was necessary and permissible pursuant to § 11.16 of the LSA in connection with servicing the Loans. Defendants further contend that even if plaintiff "is correct that the confidentiality clause was breached, there was no advantage given to any of the parties involved because the Borrowers repaid the Loans in full, and the Borrower's payoff amount is neither confidential nor relevant to the monetary terms of the Sales Agreement" (Dkt. 24 at 13).

[3] Conspiracy would, in any event, be duplicative of the tortious interference claim.

Defendants have failed to establish that the Loans were repaid and that any information given to third parties was in connection with "servicing" the Loans. In addition, plaintiff alleges throughout the complaint that defendants breached the agreement in order to receive more compensation for the Loans than had already been agreed to in the LSA. The motion to dismiss this claim is therefore denied (*RXR WWP Owner LLC v WWP Sponsor,* LLC, 132 AD3d 467 [1st Dept 2015] [plaintiff plausibly alleged that breach of the confidentiality agreement caused it to lose its deal]; *see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993] ["Nominal damages are always available in breach of contract actions"]). Accordingly, it is

ORDERED that the motion by SBT, S. Patel, and C. Patel to dismiss the complaint is granted in part only to the extent that the cause of action for civil conspiracy is dismissed, and the motion is otherwise denied; and it is further

ORDERED that TIC's motion to dismiss is denied; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint is granted, and plaintiff shall file an amended complaint consistent with this decision within two weeks.

7/8/2019
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE