

Fortress Inv. Group LLC v Proprietes & Co
2019 NY Slip Op 32338(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 651098/2019
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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FORTRESS INVESTMENT GROUP LLC,

Plaintiff,

-against-

PROPRIETES & CO,

Defendant.

**DECISION AND ORDER
Index No.: 651098/2019**

Motion Sequence No.: 001

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O. PETER SHERWOOD, J.:

I. FACTS

This is a case about the alleged breach of a confidentiality agreement.

Plaintiff Fortress Investment Group (with its UK affiliate, FIG) is a diversified global investment manager, including identifying real estate investment opportunities. Defendant Proprietes & Co (PC) is a European investor and real estate developer.

In 2018, FIG began considering a real estate development project at a seaside resort in Marina di Pisa, Italy (the Marina Project). The owners had filed for Italian bankruptcy protection and the property was for sale. FIG researched the Marina Project and looked for partners. In mid-March, FIG was introduced to PC. The parties signed a confidentiality agreement (the Agreement) regarding the Marina Project. The Confidentiality Agreement included obligations for PC not to reveal information shared by FIG and prohibiting PC from participating in comparable or competing transactions.

After signing the Agreement, FIG provided PC with confidential information about the Marina Project and allowed PC to attend confidential meetings. In April 2018, PC presented a business plan for the Marina Project which was not in line with FIG’s goals. FIG started looking for another partner. FIG claims PC then violated the Agreement by pursuing a bid on its own, using FIG’s confidential information and work. PC asked FIG for permission to pursue the Marina Project on its own. FIG declined. PC asked again and FIG declined again in May 2018.

On August 17, 2018, PC emailed FIG and “renounced” all of its obligations under the Agreement. FIG continued work on its bid for the Marina Project. PC submitted its own bid to purchase the property at issue for 27M Euro. The Italian bankruptcy court accepted PC’s bid in

November 2018. PC would not have had access to the opportunity without FIG and its confidential information.

Plaintiff asserts a single cause of action for breach of the confidentiality and non-competition terms of the Agreement.

II. ARGUMENTS

Defendant moves to dismiss pursuant to CPLR 3211(a)(1), based on documentary evidence, specifically, the Agreement. PC argues the Agreement is unenforceable because it does not provide any consideration, either direct consideration or in the way of requiring action or forbearance on the part of FIG. In fact, FIG is explicitly not even obligated to provide confidential information or disclose anything it does not wish to disclose (Memo at 3, quoting Agreement, attached as Exhibit A to Complaint, ¶ 8). To the extent FIG provided confidential information, that does not constitute consideration, as FIG was not obligated nor induced to do so by the Agreement (Memo at 7-9).

Defendant argues that amendment of the complaint would be futile, as this is not a failure of pleading, but a matter of the terms of the Agreement, so any request to amend should be denied.

Plaintiff opposes the motion and argues this is a common and commonly enforced kind of agreement. FIG provided confidential and proprietary information in reliance on the promises in the Agreement and received the benefit of getting to partner with PC in a bid on the Marina Project. PC gave up the right to pursue the Marina Project with someone else, got to work on the bid with FIG, and FIG put its confidential information at risk (Opp at 1, 6). Providing confidential information is sufficient consideration to make an enforceable contract (*id.* at 6, collecting cases).

Further, the Agreement does place obligations on FIG. The first paragraph states “[a]s a condition to receiving such Confidential Information” PC will keep the information confidential (*id.* at 7, quoting Agreement). While the Agreement provides that FIG is not required to share any particular piece of confidential information, and may choose what it wishes to disclose, the Agreement is premised on FIG doing just that. Second, FIG relied on PC’s promise of confidentiality when FIG disclosed confidential information. Even if the Agreement was a unilateral promise, FIG’s performance is sufficient to make it binding (Opp at 9, citing cases). There was no performance in reliance on the promises in the cases cited by PC (*id.* at 10).

Defendant argues there is no clause in the Agreement which obligates FIG to provide PC with any information at all and FIG could have opted to share nothing (Reply at 1-5). The obligations are all one-sided and unenforceable. As far as FIG did provide confidential information, that does not constitute consideration (*id.* at 5). Under NY law, performance is not consideration unless the performance is induced by the agreement (*id.*). Defendant claim FIG's provision of confidential information was not induced by the Agreement (*id.* at 6). As far as plaintiff cites cases about unilateral contracts, the terms of those contracts were clear that the action was going to serve as acceptance and performance was needed to accept the terms (*id.* at 7). Here, PC made no offer FIG could accept by performing (*id.* at 7).

III. DISCUSSION

The claim asserted is for breach of contract. To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *aff'd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Defendant argues the Agreement is not an enforceable contract because it lacks consideration and is not a promise in exchange for a promise. The Agreement provides: "[t]his agreement and the provision of Confidential Information shall not be construed as creating any obligation of Fortress to provide any Confidential Information or other information, and Fortress shall not be obligated to disclose any information that, in its sole discretion, it determines not to disclose" (Agreement, ¶ 8). However, the Agreement is a unilateral contract, which does not become binding until it is acted on by the offeree (*see Papa v New York Tel. Co.*, 72 NY2d 879,

880 [1988]). PC's promise of confidentiality became binding after FIG acted on the promise. Defendant admits that "many of [PC's] obligations under the NDA could be performed by [PC] only in the event [FIG] first provided confidential information" (Reply at 7). Accordingly, plaintiff has alleged an enforceable contract and the motion to dismiss is DENIED.

This constitutes the decision and order of the court.

DATED: July 31, 2019

ENTER,


O. P. Sherwood

O. PETER SHERWOOD J.S.C.