

Divine Capital, L.L.C. v Legado Inv. Group, L.L.C.

2019 NY Slip Op 32802(U)

September 23, 2019

Supreme Court, New York County

Docket Number: 650535/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 650535/2018

DIVINE CAPITAL, L.L.C., KB CAPITAL, L.L.C.,

MOTION DATE N/A, N/A

Plaintiff,

MOTION SEQ. NO. 005 006

- v -

LEGADO INVESTMENT GROUP, L.L.C., ROD SIMON, DOES 1-100 XXX

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 295, 296, 297, 298, 299, 300, 301, 302, 303

were read on this motion to/for DISCOVERY

Upon the foregoing documents and for the reasons set forth on the record (9/20/2019), (1) Divine Capital, LLC (Divine) and KB Capital, LLC (collectively, the Plaintiffs)'s motion for partial summary judgment (Mtn. Seq. 005) on their first cause of action is denied, (2) Legado Investment Group, LLC (Legado), Rod Simon, and Does 1-100 (collectively, the Defendants)'s motion to compel (Mtn. Seq. 006) is granted, and (3) the Plaintiffs' cross-motion to stay discovery is denied as moot.

The Relevant Facts and Circumstances

Reference is made to the Project Equity Reserve Agreement (the **PERA**), dated May 26, 2017, by and between Divine Capital, LLC and Legado Investment Group, LLC, pursuant to which Divine provided Legado with \$4,000,000 to be held as an equity reserve fund for the construction of an assisted living project in New Windsor, New York (NYSCEF Doc. No. 169). The initial term of the PERA was 60 months and it also provided that:

This PERA and the provisions hereof shall be considered null and void if LIG or any of its assigns, for any reason, does not close any form of financing including but not limited to a Senior Secured Loan for the construction of the project named New Windsor (*id.*, at 3; hereinafter, the **Null and Void Provision**).

Divine commenced this action on February 2, 2018 for recovery of the \$4,000,000. Divine now moves for partial summary judgment on its first cause of action for breach of contract (Mtn. Seq. 005). The Defendants also move to compel certain individuals to appear for deposition and the plaintiffs cross-move for a stay of discovery pending their motion for summary judgment (Mtn. Seq. 006).

Motion Sequence 005 (Plaintiffs' Motion for Partial Summary Judgment)

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The Plaintiffs argue that they are entitled to summary judgment for breach of the PERA because (i) the PERA governs the \$4,000,000 in dispute, (ii) the Defendants breached the PERA by failing to close on financing such that the PERA is null and void, and (iii) the PERA is an integrated contract that unambiguously mandates the return of \$4,000,000 to Divine. In opposition, the Defendants argue that there remain material issues of fact concerning the interpretation of the Null and Void Provision of the PERA and the disposition of the \$4,000,000 at issue. The court agrees.

Although the PERA states that it becomes “null and void if [Legado] ... does not close any form of financing,” the PERA does not specify what will happen to the \$4,000,000 under such circumstances. Further, the PERA does not contain a merger clause. Thus, the court must determine if the PERA is integrated by reading said contract “in light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing” (*Braten v Bankers Trust Co.*, 60 NY2d 155, 162 [1983], citing *Ball v Grady*, 267 NY 470, 472 [1935]). In other words, the court may consider extrinsic evidence “to supply the terms that the parties intended to incorporate into their agreement” (*Saxon Capital Corp. v Wilvin Assoc.*, 195 AD2d 429, 430 [1st Dept 1993]).

In opposition to the motion, the Defendants adduced an email, dated March 3, 2017, from Thomas J. Huchinson to Cliff Bream, Dennis Shen, and William King stating that:

My understanding is that these are the remaining issues on the subject PERA:

Legado guarantee of Divine equity investor money: Dennis was concerned that he thought TJ was saying that if New Windsor project goes south, Divine investors lose their money. Bill spoke with TJ and clarified that was not the case [my understanding: a basic

factor in our project deals with Legado is that our equity investor funds are not put at risk, don't get deployed to the developer, are kept in the Merrill account, and it is Legado money at risk if the project goes south]. ***So if New Windsor blows up, Divine investors still get their money out after 5 years.*** Let's please re-confirm on this for Dennis.

This is correct. However Dennis' concerns as per my conversation with him were not this exactly. So here are the terms.

- Divine Capital's \$4 Million will be held for 5 years or for as long as New Windsor has a loan balance. Whichever is longer.

- If Divine Capital's \$4 million is replace [sic] by \$4 million EB-5, the \$4 million of EB5 will be held for 5 years or as long as there is a loan balance. Whichever is longer.

- If the deal has any issues with repayment of the loan, Legado will foreclose and whichever entity's money is attached to New Windsor (in this case) will be held for the term of 60 months and then returned.

- Either way under any circumstances all deposits will be held for 60 months. If Divine's \$4mil is replaced by EB5, it will no longer be attached to the New Windsor project, but it will still be in the Legado system for the term of 60 months in order to receive the benefit of a 6% return and principal protection in it's investments. It will be able to move from deal to deal within the Legado system. [emphasis added] (NYSCEF Doc. No. 195, at 1).

The above email was sent to Mr. Shen, a principal of Divine, and the record indicates that he neither confirmed nor denied the understanding outlined by Mr. Hutchinson. In his affidavit, Mr. Shen explains that the Null and Void Provision was added to ensure that Divine would receive return of its money if Legado did not close any financing (NYSCEF Doc. No. 291, ¶¶ 14-17). However, Rodney Simon, principal of Legado, asserts that the Null and Void Provision was never intended to mean that the Plaintiffs would receive their money before the 60-month time frame, but that those funds would attach to another project (NYCEF Doc. No. 192, ¶ 35). In light of the contradictory documentary and affidavit evidence adduced in this motion, there exist material issues of fact regarding the interpretation of the unintegrated PERA and the disposition of Divine's \$4,000,000. Accordingly, the Plaintiffs' motion for partial summary judgment is denied.

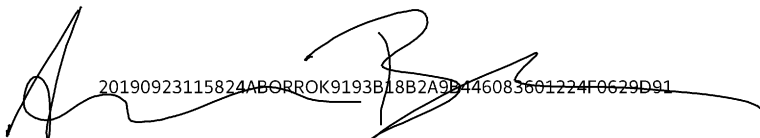
Motion Sequence 006 (Defendants' Motion to Compel)

In light of the foregoing, the Defendants' motion to compel certain individuals for deposition is granted and the Plaintiff's cross-motion to stay discovery is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment (Mtn. Seq. 005) is denied; and it is further

ORDERED that defendants' motion to compel (Mtn. Seq. 006) is granted and the plaintiffs' cross-motion for a stay is denied.



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9/23/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE