

NRE Capital Partners, LLC v Harker
2020 NY Slip Op 30108(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 651792/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NRE CAPITAL PARTNERS, LLC,

Plaintiff,

Index No. 651792/2018
Motion Seq. No. 001

- against -

JOSEPH HARKER and ARIAM PARTNERS, LLC,

Defendant.

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MELISSA CRANE, J.S.C.:

This is a pre-answer motion to dismiss the complaint sounding in breach of contract. For the reasons set forth below, the motion is granted without prejudice.

Plaintiff New Capital Partners, LLC (plaintiff), a commercial real estate lender, is a New York limited liability company with a principal place of business in Nassau County, New York (NYSCEF Doc No. 15, plaintiff’s memorandum of law in opposition at 1; Doc No. 1, complaint, ¶ 1). Defendant Joseph Harker (Harker) is a Georgia resident and CEO of codefendant Ariam Partners, LLC (Ariam), a Georgia limited liability corporation (NYSCEF Doc No. 1, ¶¶ 2-3).

On about May 2, 2017, the parties entered into negotiations concerning defendants’ pursuit of a bridge loan financed by plaintiff, in connection with commercial real estate property in which Ariam had an interest (see NYSCEF Doc No. 6, Harker affidavit in support, ¶ 3). Over the next several days, the parties exchanged various emails and materials concerning the property (see NYSCEF Doc No. 7, email correspondence, May 2-15, 2017). On May 10, 2017, plaintiff emailed Harker a Letter of Interest (LOI), drafted by plaintiff. The email stated that, after review, but not verification of, the information defendants had provided, plaintiff was “interest[ed] in pursuing your application ... based on and subject to the terms and conditions

contained in this Letter of Interest” (*see* NYSCEF Doc No. 6, ¶ 4; Doc No. 17, LOI at 1). On May 15, 2017, plaintiff and defendants executed the LOI (*see* NYSCEF Doc No. 17 at 14). Among the terms agreed upon is that defendants would pay a “break-up fee” in the amount of \$56,000 if they sought or obtained alternative financing within 21 days following the date of the agreement (*see* NYSCEF Doc No. 17, Letter of Interest at 9 [“Go Shop/Break-Up Fee”]).

The loan never took place. On June 1, 2017, defendants notified plaintiff orally that they had secured alternative financing and would therefore not close on the loan (*see* NYSCEF Doc No. 1, ¶ 13). Plaintiff immediately emailed, requesting payment of the \$56,000 break-up fee; it made a second request on June 13, 2017 (*see* NYSCEF Doc No. 1, ¶¶ 14-15). Defendants have not paid any portion of the break-up fee (*see* NYSCEF Doc No. 1, ¶ 16).

Plaintiff commenced this action on April 13, 2018. Its complaint alleges two causes of action: breach of the LOI and entitlement to the legal costs and fees incurred as a result of enforcement of the terms of the LOI (*see* NYSCEF Doc No. 1 ¶¶ 18-19).¹

The LOI

The 15-page LOI, including one exhibit, is dated May 10, 2017. By its terms, the effective date of the agreement “is the date which is the later of (1) receipt by all parties of the executed Letter of Intent and (2) receipt of the Application and Processing Fee and Expense Deposit by [plaintiff] as required herein” (NYSCEF Doc No. 17 at 14). The document’s first page indicates in bold-faced capitalized type that the LOI “shall expire at 12 PM EST on Friday, May 12, 2017 (the ‘Expiration Date’), if not agreed to and accepted as set forth herein by both parties prior to such time” (NYSCEF Doc No. 17 at 1).

¹ The LOI states that it is governed by New York law, and venue is restricted to any court located within the City of New York (*see* NYSCEF Doc No. 17 at 11-12 [“Governing Law; Jurisdiction; Venue”]).

The LOI describes the parties and the property at issue, the purpose of the loan, the maximum amount of the loan and its term (*see* NYSCEF Doc No. 17 at 1- 4). It recites plaintiff's understanding that defendants desired to complete the loan transaction by May 31, 2017, and that plaintiff would attempt to meet this date, "if [the LOI] is executed and funded no later than the [e]xpiration [d]ate," but could not guarantee a closing by that date or that a commitment or closing would actually occur (*see* NYSCEF Doc No. 17 at 6 [Estimated Closing Date]). In turn, defendants acknowledged that the closing was subject to acceptance by the parties of the LOI prior to the Expiration Date, and defendants' satisfaction of the LOI's terms and conditions including a due diligence review (*see* NYSCEF Doc No. 17 at 6 [Estimated Closing Date]). "Any offer, commitment, or obligation of lender or sponsors [i.e., defendants' representatives] will only arise upon the execution and delivery of the definitive loan documents or a written commitment letter or approval letter duly signed" (NYSCEF Doc No. 17 at 13 [bold-faced type and capitalization omitted]).

As stated in the closing paragraph, the "provisional terms" for the "contemplated loan" were "merely an outline and framework for a contemplated transaction," and "not intended" to be a loan commitment, nor to "be deemed or construed [as] a binding obligation of any party to negotiate or execute any loan or financing" (NYSCEF Doc No. 17 at 12 [bold-face type and capitalization omitted]). Plaintiff's willingness to proceed with the contemplated financing was subject to its "satisfactory completion of its legal, financial, market, business and operational due diligence analysis, ... and in its sole and absolute discretion" (NYSCEF Doc No. 17 at 12). Plaintiff had the right "to not proceed with a closing or to close the loan for any reason or no reason whatsoever" (NYSCEF Doc No. 17 at 13 [bold-faced type and capitalization omitted]). Defendants acknowledged and agreed that plaintiff had not and could not "in any way guarantee,

... or warrant that a commitment for the contemplated Loan ... [would] be ... issued under the parameters set forth in this [LOI]" (NYSCEF Doc No. 17 at 12).

The break-up fee provision, mentioned above, sets forth in salient part defendants' express acknowledgement that plaintiff would devote "its personnel and financial resources to the consideration of this Loan," that in plaintiff's industry, "business opportunities are limited, and extremely competitive," and that by taking on the underwriting and analysis of defendants' project, plaintiff could "not commit resources to other potential transactions and may be deprived of business opportunities thereby" if defendants did not complete the proposed transaction or obtained financing from a competitor (NYSCEF Doc No. 17 at 9 ["Go Shop"/Break-Up Fee]). Therefore, if defendants either obtained financing or communicated or negotiated with any other source of financing at any time from the "Effective Date" of the LOI until either the date defendants received a final determination from plaintiff that the loan was not approved, or 21 days "following the date of this Letter of Interest (the 'Go Shop Period')," then plaintiff would have earned an immediately collectible break-up fee of \$56,000, an amount "constitute[ing] a reasonable estimate of the Lender's damages and ... constitute[ing] liquidated damages" (NYSCEF Doc No. 17, at 9 ["Go Shop/Break-Up Fee"]).

The LOI also contained certain binding provisions that would "survive any termination of this [LOI] or any [c]losing, as set forth in the LOI's final paragraph; in addition to "the provisions of the introduction paragraphs [and] this paragraph," 20 specific provisions were listed, among them the "Go-Shop"/Break Up Fee provision; the Application and Processing Fee;

the Entire Agreement, Amendments, No Waiver provision; the Miscellaneous provision, and the Governing Law, Jurisdiction, Venue provision (NYSCEF Doc No.17 at 12).²

The Motion to Dismiss

Defendants' motion

Defendants argue that the complaint must be dismissed on two grounds. The first is that the parties failed to execute the agreement by “12 PM EST on Friday, May 12, 2017,” as the LOI required. Instead the parties executed the LOI on May 15, 2017, three days after the expiration date, defendant’s claim this renders the agreement void by its own terms (*see* NYSCEF Doc No. 5, at 3, citing Doc No. 17 at 1).

Next, defendant argues the LOI is only a “non-binding agreement to agree,” rather than an enforceable contract (NYSCEF Doc No. 5 at 3). They point to the description in the LOI’s final paragraph of its terms as “provisional,” “merely an outline and framework,” and not intended to be construed as a loan commitment (Doc No. 5 at 5, citing Doc No. 17 at 12). Defendants argue that pursuant to *UrbanAmerica, LP II v Carl Williams Grp., LLC* (95 AD3d 642, 644 [1st Dept 2012]), a letter of intent stating that it is non-binding, is not an enforceable agreement and creates no legal relationship between the parties (NYSCEF Doc No. 5 at 5-6).

Plaintiff's opposition

Plaintiff argues that “[i]f defendants actually believed that the [LOI] expired on May 12, 2017, then they would not have signed it, sent it back to the plaintiff on May 15, 2017, and behaved and acted in accordance with its terms for the next two (2) weeks up through and including the point when they told the plaintiff they had other financing on June 1, 2017”

² Included in the Miscellaneous provision was that “any provision hereof that is prohibited or unenforceable shall not invalidate the remaining provisions hereof” (NYSCEF Doc No. 17 at 11 [Miscellaneous]).

(NYSCEF Doc No. 15, plaintiff memorandum in opposition at 4).³ Plaintiff contends there “is no other way to explain” defendants’ actions from May 15, 2017 through June 1, 2017 (NYSCEF Doc No. 15 at 4).

It is well settled that a contracting party may waive a term or provision by actions or deeds, including by partial performance (*see Matthew Adam Props, Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599 [1st Dept 2015]; *Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409 [1st Dept 2017]). An offer may be accepted by conduct (*John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227, 232 [1st Dept 1984]; *Trinity Assocs., Inc. v Telesector Res. Grp., Inc.*, 54 AD3d 280, 281 [1st Dept 2008]). Here, Harker admits that the LOI was emailed to him on May 10, 2017 and that he signed and returned it to plaintiff on May 15, 2017 (NYSCEF Doc No. 15 at 3, citing Doc No. 6, Harkin affidavit, ¶ 5). This, along with the allegations in the complaint reciting activities defendants undertook subsequent to signing, shows a manifest acceptance of the terms and waiver of the expiration date. Therefore, the court denies dismissal on the ground that the LOI never took effect, because it was signed after the expiration date.

Discussion

Contract and “agreement to agree”

To allege a breach of contract, the plaintiff must allege “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*US Bank N.A. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]). There must be alleged a binding agreement between the parties and that its breached by the defendant resulted

³ According to the complaint, defendants subsequently “exchanged documents and information and engaged in the underwriting, loan documentation, and approval process as set forth in the LOI” (*see* NYSCEF Doc No. 16, ¶ 12).

in plaintiff's damage (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). “[T]here must be a meeting of the minds ... such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms” (*Stonehill Capital Mgt.* at 448 [internal quotation marks and citations omitted]).

To assess whether the parties intended to enter into a contract, the court will “look to the ‘objective manifestations of the intent of the parties as gathered by their expressed words and deeds’” (*Stonehill Capital Mgt.* at 448-449, quoting *Brown Bros. Elec. Contractors v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]). “If a contract provision is clear and unambiguous, the court will construe and discern that intent from the document itself as a matter of law” (*Frederick v Clark*, 150 AD2d 981, 982 [3d Dept 1989]). The court will look at the totality of acts, phrases or expressions, “given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain” (*Stonehill Capital Mgt.* at 449 [internal quotation marks and citation omitted] *see also Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 106 [2018], quoting *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 398 [1977]).

Notably, a contract is not necessarily without effect “merely because it expresses the idea that something is left to the future agreement” (*Conopco, Inc. v Wathne Ltd.*, 190 Ad2d 587, 588 [1st Dept 1993] [internal quotation marks and citation omitted]). “The terms of a contract do not need to be fixed with absolute certainty to give rise to an enforceable agreement” (*Kolchins*, 31 NY3d at 107 [internal quotation marks, punctuation and citation omitted]).

In contrast, an “‘agreement to agree,’ that is expressly conditioned on the execution of a definitive agreement satisfactory in form and substance to both parties, does not give rise to an enforceable contract (*DCR Mtge. VI Sub I, LLC v Peoples United Fin., Inc.*, 148 AD3d at 987-988, citing *New York Military Academy v NewOpen Group*, 142 AD3d at 490; *Prospect St.*

Ventures I, LLC v Eclipsys Solutions Corp., 23 AD3d 213; *Aksman v Xiongwei Ju*, 21 AD3d 260 [1st Dept 2005]).

Further, the LOI is a valid and enforceable agreement under New York Law (*see* NYSCEF Doc No. 15 at 5). It contains the terms and conditions of the defendants' request for a loan, and the respective obligations of the plaintiff and the defendant regarding the loan application and review process (NYSCEF Doc No. 15 at 5). The LOI designates the "Go-Shop"/Break-Up Fee" provision as one of several binding provisions of the agreement, requiring defendants to pay plaintiff the break-up fee if defendants sought or obtained alternative financing within 21 days of the date of the LOI (Doc No. 15, plaintiff's memorandum in opposition at 1, citing Doc No. 17 at 9 ["Go-Shop"/Break-Up Fee], 12).

The binding terms contained in the letter of intent have force. It is basic contract law that the courts should not interpret a provision in a manner that results in that provision being without effect (*see, e.g., Laba v Carey*, 29 NY2d 302, 308 [1971]; *Spaulding v Benenati*, 57 NY2d 418 [1982]). The *White Winston Select Asset Funds, LLC v Intercloud Sys., Inc.*, 619 Fed Appx 157 (3d Cir. 2015), although not binding on this court, offers a plausible explanation for the existence of a break-up fee provision. It is to protect the plaintiff, who may have provided significant services, from receiving nothing (*see also L-3 Communs. Corp. v OSI Sys.*, 283 Fed Appx 830, 832 [2d Cir 2008] [noting without comment that the letter of intent was explicitly non-binding, with two exceptions that were binding: to negotiate in good faith and that "neither party could cooperate with any third party to submit a bid for the ... business or act alone to submit a separate bid for the business unless the price exceeded \$ 85 million and [the defendant] did not desire to contribute half of the purchase price"]).

Thus, the reason for the existence of the break up fee is to disincentivize defendants from attempting to find better terms from another investor, which is what allegedly occurred here.

Nonetheless, the complaint does not allege what acts plaintiff took to implement the terms of the letter of intent, a required element of alleging a claim sounding in breach of contract (see *US Bank N.A. v Lieberman*, 98 AD3d at 423). The complaint refers to various actions that defendants undertook, in order to give effect to the terms of the letter of intent, but not what plaintiff did. On this basis, the complaint must be dismissed, although in these circumstances, dismissal is without prejudice to the filing of an amended complaint that sufficiently alleges plaintiff's own acts during the time period in question.

Accordingly, it is

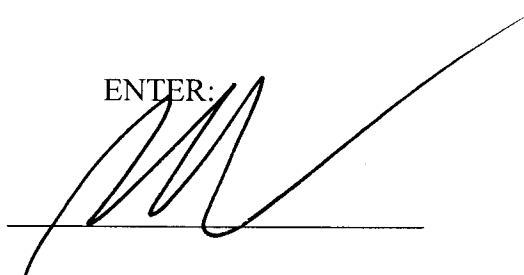
ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed without prejudice to the filing of an amended complaint subject to this decision within 20 days of the date of notice of entry; and otherwise the complaint will be dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that should plaintiff fail to file an amended complaint in timely fashion, defendants are to move again for dismissal which will be granted.

New York, New York

January 6, 2020

ENTER:

A handwritten signature in black ink, appearing to be 'M. Crane', written over a horizontal line.

HON. MELISSA A. CRANE
J.S.C.