SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

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TLA ACQUISITION CORP.

Plaintiff,

- v -

CORTLAND CAPITAL MARKET SERVICES, LLC,

Defendant.

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INDEX NO. 656274/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 24

were read on this motion to/for DISMISSAL.

Plaintiff TLA Acquisition Corp. (TLA) brings this action against defendant Cortland Capital Market Services, LLC (Cortland) asserting claims for breach of contract, money had and received, and unjust enrichment. According to the Amended Complaint (NYSCEF Doc. No. 8), TLA's predecessors in interest, the borrowers, and Cortland, as Administrative Agent, entered into a financing agreement dated December 31, 2012 (the Agreement). TLA argues the Agreement provided for an annual Administrative Fee of .24% of the balance of the loan, which was $38,215,939 during the relevant period, but Cortland charged the borrowers four times the allotted amount, resulting in overpaying itself almost $900,000. TLA seeks the return of the overcharged amount with interest.

Arguments

Cortland moves to dismiss based on the existence of contrary documentary evidence, on a release, and because the pleading fails to state a cause of action. First, Cortland argues that TLA's predecessors, namely Christals Acquisition LLC, Peekay Acquisition LLC (Peekay), and certain Peekay subsidiaries (together, Borrower), which entered into the Agreement, signed ten separate releases, releasing any claims against Cortland before their claims were assigned to TLA (Memo, NYSCEF Doc. No. 17, at 7). Cortland contends these releases are unambiguous and constitute a complete bar to the claims brought here. Eight of those releases were given in exchange for amendments to the credit agreement. Further, Cortland argues that documentary

evidence shows Borrowers received notices of and paid Cortland's fee every quarter for thirteen consecutive quarters, accepting Cortland's calculations as correct (*id.* at 9). Nor do the lenders have any claim against Cortland for the fee (*id.* at 12). The Agreement makes the Borrower liable for that fee, and the Borrower paid the fee without complaint.

TLA argues it was discovered in March 2016 that Cortland charged the Borrower four times what Cortland was supposed to charge, and the lenders and Borrowers have a superior right to the overcharged funds because Cortland received them by breaching its obligations to act with due care (Opp, NYSCEF Doc. No. 21, at 1). According to TLA, Cortland owed the lenders a contractual duty to charge proper fees under the Agreement, which it breached, giving the lenders a right to sue here (*id.* at 9). TLA also argues Cortland was the lenders' agent, breached the agency, and cannot be allowed to profit pursuant to the faithless servant doctrine, so all of the collected fees should be disgorged (*id.* at 10, 13). Further, the overcharged amount should go to the lenders to offset their losses in Borrower's bankruptcy proceeding (*id.*). While Cortland disputes the existence of an agency or fiduciary relationship, that is a mixed question of law and fact, so this motion should be denied, and under either theory, the fees are recoverable (*id.* at 11, 13).

TLA contends the documentary evidence shows Cortland deliberately overcharged the Borrower, and that issues of fact exist about the Borrower's intent to release these claims, since the releases were granted in exchange for consideration that had nothing to do with these claims (*id.* at 2). Releases may not be read to cover issues which they were not intended to cover and there is an issue of fact as to whether Borrower intended them to cover this dispute. Further, Cortland overcharged its fees twice after the last amendment to the Agreement, so those fees are not covered by the releases (*id.* at 15). TLA also disputes whether the documentary evidence presented by Cortland is dispositive (*id.* at 16). Finally, TLA argues the unjust enrichment claim should survive because there is a dispute whether there is an enforceable contract between Cortland and the lenders (*id.* at 17).

Cortland replies that any claims by the Borrower are barred by the releases. The first eight releases, given in exchange for the amendment of the Agreement, were broad. As far as TLA argues the last two releases did not cover willful misconduct, allowing claims for fees charged after the eighth release on December 2, 2015, Cortland contends TLA has not alleged willful misconduct here, only an error in computation, so the omission in the last two releases

does not permit these claims (Reply, NYSCEF Doc. No. 24, at 5). Cortland consulted the origination agent on how the fee should be charged and acted in accordance with the origination agent's instructions (*id.*). The Agreement states Cortland was entitled to rely on those instructions (*id.* at 5-6).

Cortland reiterates that the lenders have no right to complain about the computation of the fees under the Agreement and the lenders suffered no injury from any miscomputation, if there was one. The Borrower's bankruptcy filings do not change the lenders' nonexistent contractual rights (*id.* at 7). Nor can the agency allegations survive, as the Agreement unambiguously disclaims any agency or fiduciary relationship (*id.* citing Agreement, attached as Exhibit A to Gordon Aff, NYSCEF Doc. No. 11, § 10.13). Cortland also repeats that the unjust enrichment claim must fail because the dispute is covered by the Agreement.

Discussion

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]).

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, the releases (attached as Exhibits D and E to the Gordon aff, NYSCEF Docs. No. 14-15), and the fee invoices (attached as Exhibit C to Gordon aff, NYSCEF Doc. No. 13). Plaintiff does not dispute the authenticity of any of those documents.

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], *affd* 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]).

As far as plaintiff claims to speak on behalf of the lenders, the breach of contract claim fails. Plaintiff has not alleged the purported overcharging for the fee injured the lender. The

lender did not pay that fee. Instead, plaintiff contends Cortland should be required to disgorge the allegedly overcharged fee pursuant to the faithless servant doctrine.

Under the faithless servant doctrine, "an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits [and forfeit] his right to compensation" (*Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY County 2013] [internal quotation marks omitted]; *see also Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 [1977] ["One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"]).

The Agreement disclaims such a relationship. It provides:

> "[Cortland] shall have no duties or responsibilities except those expressly set forth in this Agreement or in the other Loan Documents. The duties of [Cortland] shall be mechanical and administrative in nature. [Cortland] shall not have by reason of this Agreement or any other Loan Document a fiduciary relationship in respect of any Lender. Nothing in this Agreement or any other Loan Document, express or implied, is intended to or shall be construed to impose [Cortland] any obligations in respect of this Agreement or any other Loan Document except as expressly set forth herein or therein"

(Agreement, §10.02). The Agreement also explicitly disclaims the existence of a fiduciary relationship or "other implied (or express) obligations arising under agency doctrine of any applicable law" (*id.*, § 10.13). Accordingly, any claim based on a fiduciary or agency relationship also fails.

As far as plaintiff asserts the breach of contract claim on behalf of the Borrower, plaintiff has asserted all of the required elements. Cortland relies on the ten releases and the Borrower's actions in paying the requested fees. The two later releases specify that they do not release claims based on fraud or willful misconduct (see Interim Order and Final Order, attached as Exhibit E to the Gordon Aff, each at G[ii]). Fraud has not been alleged. "Willful misconduct" is "[m]isconduct committed voluntarily and intentionally" (MISCONDUCT, Black's Law Dictionary [11th ed. 2019]). Cortland argues this claim must fail because it sought the opinion of the origination agent, pursuant to section 10.04 of the Agreement, which provides:

> "Each Agent shall be entitled to rely upon any written notices, statements, certificates, orders or other documents or any telephone message believed by it in good faith to be genuine and correct and to have been signed, sent or made by the proper Person, and with respect to all matters pertaining to this Agreement or any of the other Loan Documents and its duties hereunder or thereunder, upon advice of counsel selected by it."

It is undisputed Cortland emailed the Originating Agent to ask about the proper method for calculating the fee and received the answer that the rate should be calculated quarterly rather than per annum (see Podolyako email dated January 11, 2013, attached as Exhibit B to Gordon aff, NYSCEF Doc. No. 12). TLA argues section 10.04 of the Agreement only "allows Cortland to conclude the email is authentic" (Opp at 16). That is not what the Agreement says. It is undisputed Cortland believed the Pololyako email to be authentic. Therefore, Cortland is permitted to rely on the instruction in it and doing so cannot be "willful misconduct."

The claim for unjust enrichment is brought on behalf of the Borrower (see Amended Complaint, NYSCEF Doc. No. 8, ¶¶ 1, 30). "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal quotations omitted]). It is undisputed that there was an enforceable contract between Cortland and Borrower, therefore the unjust enrichment claim fails. As far as TLA now asserts the claim on behalf of the lenders, they were also a party to the Agreement, which governs this subject, so this aspect of the claim is also precluded.

Defendant Cortland moved to dismiss the Amended Complaint in its entirety but did not specifically discuss the second cause of action, for money had and received. TLA claims, in a footnote, that Cortland did not seek dismissal of that claim (Opp, n. 1). Cortland replies, in a footnote, that Cortland received money belonging to the Borrower, and the Borrower released any such claim against Cortland (Reply, n. 6). "A cause of action for money had and received is one of quasi-contract or of contract implied-in-law" (*Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128 [1991]; *Goel v Ramachandran*, 111 AD3d 783 [2d Dept 2013]; *see Parsa v State*, 64 NY2d 143 [1984]). Further, the essential elements of a cause

of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money (*Torrance Const., Inc. v Jaques*, 127 AD3d 1261 [3d Dept 2015]; *Goel*, 111 AD3d 783; *see Matter of Estate of Witbeck*, 245 AD2d 848 [3d Dept 1997]). A showing of malice is not required (*Litvinoff v Wright*, 150 AD3d 714, 54 NYS3d 22 [2d Dept 2017]). Since, as discussed above, it is undisputed that there was an enforceable contract between Cortland and Borrower, and since the Borrower released claims against Cortland, and since Cortland is not alleged to have received money belonging to the lenders, this claim also fails.

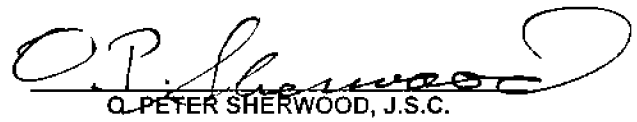
Accordingly, it is hereby

ORDERED that the motion to dismiss the amended complaint is GRANTED and this case dismissed with costs and attorneys' fees awarded to the defendant; and it is further

ORDERED that the issue of the amount of reasonable attorney's fees defendant may recover is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.



3/4/2020
DATE

O. PETER SHERWOOD, J.S.C.

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

1 Copies are available in Room 119 M at 60 Centre Street and on the Court's website at www.nyvcourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.