

**HH Mark Twain LP v Acres Capital Servicing LLC**

2020 NY Slip Op 31737(U)

June 2, 2020

Supreme Court, New York County

Docket Number: 656280/2019

Judge: Barry Ostrager

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER. PART IAS MOTION 61EFM

*Justice*

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INDEX NO. 656280/2019

HH Mark Twain LP, Hudson KC Real Estate  
Manager LLC, Andrew Greenbaum, Steven  
Michael,

Plaintiff,

**DECISION & ORDER  
on Motion 001**

- v -

Acres Capital Servicing LLC, DW Commercial  
Finance, LLC

Defendant.

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OSTRAGER, J.

This case arises from two real estate redevelopment projects in Kansas City and Cincinnati. Hudson Holdings, LLC, (“Hudson Holdings”) is a specialized real estate development firm that preserves and enhances certain historic real estate located in various U.S. cities. Plaintiffs Andrew Greenbaum and Steven Michael (“Guarantors”) are the founding principals of Hudson Holdings. Hudson Holdings established plaintiff HH Mark Twain LP and non-parties HH Cincinnati Textile L.P. and HH KC Mark Twain L.P. (collectively, “Borrowers”) to own and obtain financing in connection with Hudson Holdings’ development projects for the two historic properties. In early 2016, Hudson Holdings, through its affiliated Borrowers, sought a loan to initiate financing for the redevelopment projects at the Mark Twain Tower and Textile Building. On February 29, 2016, the Borrowers and defendant DW Commercial Finance, LLC (“Lender”) and defendant Acres Capital Service LLC (“Agent”) entered into a loan agreement (the “Loan Agreement”).

Borrowers subsequently defaulted on the loan and Lender and Agent (collectively, “defendants”) initiated a UCC sale of the properties. In 2018, plaintiffs, through their affiliated Borrower entities, filed suit against defendants seeking a preliminary injunction in an action titled *HH Cincinnati Textile L.P., HH KC Mark Twain, L.P., HH Mark Twain LP, Hudson KC Real Estate Manager LLC, Andrew Greenbaum, Steven Michael v. Acres Capital Servicing LLC, DW Commercial Finance, LLC Help 652871/2018*. Following a brief temporary order restraining the UCC sale, plaintiffs’ request for a preliminary injunction was ultimately denied. *See HH Cincinnati Textile L.P. v. Acres Capital Servicing LLC*, No. 652871/2018, 2018 WL 3056919 (N.Y. Sup. Ct. June 20, 2018).

Plaintiffs now brings a Complaint alleging that the UCC sale has taken place and in conducting the sale of the collateral securing the loan (the partnership interests in the borrowing entities, which, in turn, owned two pieces of historic real estate) defendants acted in a commercially unreasonable manner. Plaintiffs allege that this resulted in the potential loss of valuable historic tax credits and an absence of bidders at the sale, which permitted the Lender to submit credit bids to acquire control of the properties at issue for allegedly millions of dollars below their actual value, exposing plaintiffs to millions of dollars in “deficiency.” Plaintiffs further allege that defendants violated this Court’s Temporary Restraining Order (“TRO”) by rescheduling the foreclosure sale during the pendency of that Order. Plaintiffs also allege that Lender’s purported right to sell certain security interests under the contracts at issue also vitiated Plaintiffs’ right to equitable redemption in violation of long standing New York public policy and that plaintiffs suffered monetary damages as a result of the decreased value of the underlying properties. Plaintiff brings four causes of action: (1) for a declaration that the Loan Agreements are null and void because they violate the Borrowers’ and Guarantors’ equitable right of

redemption; (2) violation of UCC § 9-610 (UCC sale was unreasonable); (3) breach of implied covenant of good faith and fair dealing; (4) breach of “duty.”

Presently before the Court is defendants’ motion (001) to dismiss the Complaint pursuant to CPLR 3211 (a) (1) based on documentary evidence and (a) (7) for failure to state a claim. For the reasons set forth below, defendants’ motion is granted in part and denied in part.

On a motion to dismiss pursuant to CPLR 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, “the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law ....” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

Defendants move to dismiss plaintiffs’ first cause of on the basis that plaintiffs’ “clogging” claim was previously rejected by the Court in in June 2018 and there is no reason to depart from this prior conclusion. Defendants also argue that now that the UCC Sale has been completed plaintiffs’ clogging claim is moot, since the equity interests were transferred, and there is no more redemption right. In opposition, plaintiffs argue that the Court has not ruled on the merits of plaintiffs clogging claim; instead, it decided only plaintiffs’ motion for a preliminary injunction, determining that plaintiffs’ claims were adequately remedied by money damages. Plaintiffs are correct. The Court has not ruled on the merits of plaintiffs’ clogging claim. *See Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 596, 789 (2nd Dept. 2005) (holding that “a preliminary injunction is a provisional remedy and a decision concerning a preliminary injunction does not become the law of the case, nor would it constitute an adjudication on the merits so as to preclude reconsideration of that issue at a trial on the merits”)

(citations omitted). Accordingly, this portion of defendants' motion is denied, and plaintiffs' first cause of action will proceed.

Plaintiffs' second cause of action for violation of UCC § 9-610 alleges that defendants' sale of the two historical properties was commercially unreasonable under the UCC. The Complaint alleges that the UCC sale was commercially unreasonable for a number of reasons, including the notice, location, and scheduling of the sale, along with the price ultimately garnered for the partnership interests. Each of defendants' arguments in support of dismissing this cause of action are directed at the merits of plaintiffs' allegations. As noted above, on a motion to dismiss, plaintiffs' allegations must be accepted as true. Whether the UCC sale was commercially unreasonable is a question of fact which cannot be determined on a motion to dismiss. As such, this portion of defendants' motion to dismiss is denied and plaintiffs' second cause of action will proceed.

In support of their argument to dismiss plaintiffs' third cause of action for breach of the duty of good faith and fair dealing, defendants argue that the claim cannot stand because defendants were "merely exercising their contractual rights." In opposition, plaintiffs argue that defendants breached the covenant of good faith and fair dealing by eliminating the tax incentives integral to the inherent value of the Properties and depriving Borrowers of the right to meaningfully participate in the UCC sale. It is undisputed that the parties' rights and obligations with respect to the properties are memorialized in the Loan Agreement and related Pledge Agreement. Since "a breach of the implied duty of good faith and fair dealing is merely a breach of the underlying contract, New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled. A breaching party's bad faith in connection with a breach

of contract does not provide an independent basis for recovery.” *Lohnes v. Liberty Mut. Ins. Co.*, No. 8:19-CV-00068, 2019 WL 4451363, at 4 (N.D.N.Y. Sept. 17, 2019). Because plaintiffs’ first cause of action for a declaratory judgment and plaintiffs’ second cause of action for violation of UCC § 9-610 sound in breach of contract, and seek the same relief – nullifying the Loan Agreement - plaintiff’s third cause of action for breach of the implied duty of good faith and fair dealing is dismissed as duplicative. *See Tillage Commodities Fund, L.P. v. SS&C Techs., Inc.*, 151 A.D.3d 607, 608, (1st Dept. 2017) (noting that courts routinely dismiss claims for breach of the implied covenant when they are “based on the same allegations and seek the same damages” as breach of contract claims). Therefore, this portion of defendants’ motion is granted, and plaintiffs’ third cause of action is dismissed.

Plaintiffs’ final cause of action is for “breach of duty.” The Complaint alleges that by taking an interest in the Borrowers/properties, Lender stepped outside of the ordinary arms-length lender-borrower relationship and thus owed a duty to plaintiffs in connection the Loan transaction. In support of their motion to dismiss, defendants argue that this claim is defectively vague and that the Loan Documents explicitly, and repeatedly, disclaimed any fiduciary duty or special relationship. In opposition, plaintiffs argue that Lender inserted itself into and exercised control over Borrowers’ business affairs and thus went beyond the lender-borrower relationship. Breach fiduciary duty claims are precluded where “fiduciary claims are substantially identical to the breach of contract claims.” *Kagan v. HMC-N.Y, Inc.*, 94 A.D.3d 67, 72 (1st Dept. 2012). Here, the Court finds that the allegations in the “breach of duty” claim are substantially related to the Loan Agreements and thus are duplicative of the first and second cause of action which sound in contract. Accordingly, this portion of defendants’ motion to dismiss is granted and plaintiffs’ fourth cause of action for breach of duty is dismissed.

Accordingly, it is hereby


ORDERED that defendants' motion to dismiss the first and second causes of action in the Complaint is denied; and it is further

ORDERED that defendants' motion to dismiss the third and fourth causes of action in the Complaint is granted and the Clerk is directed to sever and dismiss those claims; and it is further

ORDERED that the parties confer and agree upon reasonable discovery deadlines, complete and efile the Preliminary Conference Order form available on the Part 61 website, with a Note of Issue due 22 months after the date of this Order and a compliance conference set for September 22, 2020 at 9:30 a.m.

[http://ww2.nycourts.gov/courts/comdiv/ny/newyork\\_judges\\_links.shtml#ostrager](http://ww2.nycourts.gov/courts/comdiv/ny/newyork_judges_links.shtml#ostrager)).

Dated: June 2, 2020

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE