

TDG-Tregny, LLC v North Ocean Mgt. LLC
2021 NY Slip Op 32850(U)
December 22, 2021
Supreme Court, Kings County
Docket Number: Index No. 502041/2021
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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TDG-TREGNY, LLC d/b/a MNS,

Index No.: 502041/2021
Motion Seq. No.: 01

Plaintiff,

DECISION AND ORDER

- against -

NORTH OCEAN MANAGEMENT LLC and
BENTLEY ZHAO,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants’ motion to dismiss the complaint.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 3-11, 13, 16, 27, 29-40, and 43-47 were read on this motion for dismissal of the complaint.

The plaintiff, TDG-Tregny, LLC d/b/a MNS (hereinafter TDG), obtained a temporary restraining order against the defendants on January 28, 2021 (Hon. Kathy Levine). Thereafter, on February 10, 2021, the defendants, North Ocean Management, LLC (hereinafter North Ocean) and Bentley Zhao (hereinafter Zhao), cross-moved for an order vacating the Court’s temporary restraining order of January 28, 2021; dismissing the underlying action brought by plaintiff, pursuant to CPLR §§ 3211(a)(1), (a)(7) and (a) (10); awarding defendant its costs and expenses, inclusive of attorneys’ fees, pursuant to the contract between the parties; or, alternatively, requiring the plaintiff to post a bond in connection with the T.R.O., as required under CPLR § 6313(c), in the amount of no less than \$10,000,000.00. After a hearing, this Court vacated the temporary restraining order, and the balance of the defendants’ cross motion was adjourned to allow opposing counsel an opportunity to respond. After oral argument on December 22, 2021, the balance of the cross motion is decided as set forth below.

This action was commenced by plaintiff TDG, a real-estate brokerage firm, allegedly to prevent imminent, irreparable, and intentional harm to its business and rights under an exclusive sales agreement with respect to a new condominium project sponsored by defendant, North Ocean, located at 222 East 21st Street, Brooklyn, New York, a/k/a 563-571 Ocean Avenue (the project). The plaintiff’s claims stem from an exclusive sales agreement (the Agreement) entered into between the parties in 2017 while the project was under construction, which entitled the plaintiff to act as exclusive sales agent for the project once it was developed and entered into the market. The plaintiff claims that now that the project is developed and on the market, the defendants have failed to perform their own obligations under the Agreement, wrongfully

interfering with the activities of the plaintiff, and wrongfully sought to terminate the Agreement, allegedly to prevent the plaintiff from earning its bargained-for commissions.

The defendant, North Ocean, is the sponsor of the project: a condominium development of more than 100 units which the defendant began to construct in 2017 for the purpose of selling the individual units. The plaintiff is the operator of a real-estate brokerage house hired by the defendant in 2017 to act as exclusive sales and marketing agent for the project while it was under development, pursuant to the Agreement between the parties. The terms were set forth in the Agreement of August 3, 2017, which was amended on June 17, 2020.

The exclusive sales rights granted to plaintiff under the Agreement extended to 70% of the units of the project, with defendant to hold the remaining 30% of the project's units (the excluded units) for marketing and sale to certain international buyers, outside of the New York market, abroad in Asia. The plaintiff's compensation under the Agreement centered around its rights to receive commissions from sales of the units once the Project was developed and entered the market. The Agreement only authorized the defendant to terminate the Agreement prior to expiration "for cause", with "cause" specifically limited to certain enumerated events, and without any authority to early termination of the Agreement without cause.

The defendants allege that the plaintiff has breached the September 18, 2017 Agreement, and that the plaintiff was terminated for cause by improperly asserting rights to market and sell certain excluded units, by marketing and listing the excluded units, and then rejecting North Ocean's notice to cure such breach. Defendants assert that the plaintiff interfered with the defendants' absolute right to market and sell the excluded units.

The complaint asserts four causes of action. The first cause of action is for breach of contract for alleged nonperformance of its obligations under the Agreement; the second cause of action is for breach of the implied duty of good faith and fair dealing for alleged misconduct against the plaintiff; the third cause of action is for fraud alleging that the defendant induced the plaintiff to enter into, modify and continue the Agreement based upon intentional misrepresentations made by defendant, Zhao, to the plaintiff's chief executive officer, Andrew Barrocas (hereinafter Barrocas); and the fourth cause of action is a claim for declaratory judgment seeking a declaration as to the parties' legal and contractual rights.

The defendants argue that the plaintiff's breach of contract claim should be dismissed based on CPLR § 3211(a)(1), because the plaintiff admitted to its breach of the Agreement in paragraph 42 of its complaint by conceding that it rejected defendants' November 24, 2020 notice to cure letter in violation of the Agreement, which "in and of itself constitutes willful misconduct and material breach." The defendants contend that this conclusory allegation is sufficient to support dismissal based on documentary evidence.

The defendants seek dismissal of the plaintiff's third cause of action for fraud because it is insufficiently plead, and seek identical relief as that sought under their breach of contract claim. Further, the defendants seek dismissal of the plaintiff's fourth cause of action seeking a declaratory judgment because it is duplicative of the plaintiff's breach of contract claim. Lastly, the defendants do not present any argument in favor of their request for an award of costs and expenses, including attorneys' fees.

Although the defendants' motion seeks dismissal of the complaint, the motion only argues in favor of dismissal of three causes of action, and does not mention or address the second cause of action for breach of the implied duty of good faith and fair dealing. Moreover, the defendants' cross-motion purports to seek dismissal under CPLR 3211(a)(1), (7) and (10), however CPLR § 3211(a)(10) relates to dismissal for failure to include a necessary party, which has no application to the instant case. On the record at oral argument, defense counsel withdrew the prong of the motion based on CPLR § 3211(a)(10). With respect to the branch of the defendants' motion seeking costs and expenses, defense counsel also agreed to withdraw this prong of the motion without prejudice to renew at a later time.

The plaintiff opposes the motion, asserting that the defendants' argument in support of dismissal of the cause of action for breach of contract based on CPLR § 3211(a)(1) fails as a matter of law because it is based solely on the plaintiff's admission in the complaint that it rejected the defendant's notice to cure letter, which defendant asserts constitutes plaintiff's willful misconduct and material breach. The plaintiff also notes that its second cause of action for breach of the implied duty of good faith and fair dealing, should not be dismissed because the defendants failed to make any argument supporting dismissal of this cause of action.

As to the plaintiff's third cause of action for fraud, the plaintiff contends that the allegations are very specific, and are not duplicative of the breach of contract claim. Plaintiff asserts that the claims center around misrepresentations made by defendant Zhao to plaintiff's chief executive officer, Barrocas, regarding defendants' marketing and sale of certain excluded units of the project, which were specifically excluded from the inventory of apartments to be sold by the plaintiff according to the Agreement between the parties. According to the plaintiff, these representations were made to induce the plaintiff to enter into the 2017 and 2020 Agreements. The plaintiff's fourth cause of action seeking a declaratory judgment was withdrawn by plaintiff's counsel on the record at oral argument.

A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*,

65 AD3d 224 (Dept 2009); *see also Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019).

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *see also TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135 (2d Dept 2019). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that a material fact, as claimed by the pleader to be one, is not a fact at all, and unless it can be said that no significant dispute exists regarding it. *See Matter of Valderrama*, 184 AD3d 650 (2d Dept 2020); *MJK Building Corp. v Fayland Realty, Inc.*, 181 AD3d 860 (2d Dept 2020).

In the instant case, the defendants have failed to meet their burden demonstrating their entitlement to dismissal of the plaintiff's first cause of action for breach of contract based on CPLR § 3211(a)(1). The defendants fail to submit documentary evidence that resolves all factual issues as a matter of law, and instead rely solely on the allegations made in the plaintiff's complaint. Further, the defendants fail to set forth any argument in support of their request for dismissal of the plaintiff's second cause of action for breach of the implied duty of good faith and fair dealing. As such, those prongs of the defendants' motion seeking dismissal of the plaintiff's first and second causes of action must be denied.

Furthermore, at this pre-discovery stage of the litigation, the defendants' motion seeking dismissal of the plaintiff's third cause of action based on fraud, pursuant to CPLR § 3211(a)(7), is denied. To state a cause of action for fraud, a plaintiff must allege “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]. Further, the claim must be stated with particularity. *Id.* “[A]ctual knowledge[, however,] need only be pleaded generally, [given], particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind.” *Cohen Brothers Realty Corp. v Mapes*, 181 AD3d 401 (1st Dept 2020), quoting *Oster v Kirschner*, 77 AD3d 51, 55–56 (1st Dept. 2010) (internal quotation marks omitted). According the plaintiff the benefit of every possible favorable inference, that prong of the defendants' motion seeking dismissal of the plaintiff's third cause of action for fraud is denied.

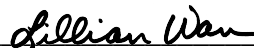
The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants' motion to dismiss is DENIED.

This constitutes the decision and order of the Court.

Dated: December 22, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.