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| K-Land Lex 47th LLC v Lex 47th Prop. Owner LLC |
| 2022 NY Slip Op 30075(U) |
| January 10, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 652634/2021 |
| Judge: Andrew Borrok |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART 53

Justice

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K-LAND LEX 47TH LLC,
Plaintiff,

- v -

LEX 47TH PROPERTY OWNER LLC, LEX 47TH
DEVELOPMENT LLC, FIRST AMERICAN TITLE
INSURANCE CO.

Defendant.

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INDEX NO. 652634/2021
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 36

were read on this motion to/for DISMISS

Lex 47th Property Owner LLC's (the Purchaser) motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) must be denied because K-Land Lex 47th LLC (the Seller)'s well plead complaint alleges that the Purchaser breached the Purchase and Sale Agreement (hereinafter defined) by failing to negotiate in good faith with the EB-5 Provider (hereinafter defined) for financing for the development of the Property (hereinafter defined). Simply put, the Purchaser's arguments that the motion must be granted because either the requirement that it negotiate in good faith is unenforceable or that the documentary evidence provided in connection with this motion conclusively establishes that the Purchaser negotiated in good faith, both fail.

The Relevant Facts and Circumstances

Reference is made herein to a Purchase and Sale Agreement dated December 3, 2019 (the Purchase and Sale Agreement; NYSCEF Doc. No. 9) between the Seller and the Purchaser for

the sale of a parcel of land on East 47th Street in New York, New York (the **Property**).

Pursuant to Section 38(b)(iii) of the Purchase and Sale Agreement, the Purchaser agreed to negotiate in good faith with AAEB5 Fund 6 LLC (the **EB-5 Provider**) to finalize the EB-5 Transaction Documents on substantially similar terms to those set forth in the EB-5 Letter of Intent.

Pursuant to the Purchase and Sale Agreement, the parties agreed that if the Purchaser and EB-5 Provider did not enter into an agreement for financing, the purchase price for the Property would be reduced by \$1,500,000 and that amount would be disbursed to the Purchaser from an escrow account (NYSCEF Doc. No. 9, § 38[b][i]). If, on the other hand, the Purchaser and the EB-5 Provider did enter into an agreement for the financing, depending on the amount of the financing, the purchase price would be adjusted by a formula equal to \$1,500,000 less either \$400,000 or \$750,000 and that amount (i.e., and not the full \$1,500,000) would be disbursed to the Seller from the escrow account (*id.*, § 38[b][ii]). Pursuant to the Purchase and Sale Agreement, the Purchaser further agreed to negotiate in good faith to secure funding from the EB-5 Provider on substantially the same terms that the Seller had secured.

One month after the parties entered into the Purchase and Sale Agreement, the Purchaser sent an email to the EB-5 Provider to begin discussions (NYSCEF Doc. No. 11). The EB-5 Provider provided a draft Operating Agreement, dated March 12, 2020 (NYSCEF Doc. No. 12). It is undisputed that the draft agreement was never executed. By letter dated June 5, 2020, the Purchaser informed the escrow agent that it had not entered into an agreement with the EB-5 Provider and requested the disbursement of the \$1,500,000 (NYSCEF Doc. No. 17). The Seller

sent an objection notice to the escrow agent, asserting that the Purchaser had not negotiated with the EB-5 Provider in good faith (NYSCEF Doc. No. 18).

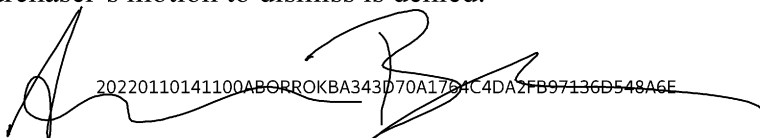
Discussion

Pursuant to CPLR 3211(a)(1) and (a)(7), a party may move to dismiss the complaint based on documentary evidence and for failure to state a cause of action. On a motion to dismiss, the pleadings are afforded a liberal construction, the court must accept the facts as alleged in the complaint as true and afford a plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must only determine whether the facts as alleged fit within any cognizable legal theory (*id.*). To plead a cause of action for breach of contract, a plaintiff must allege the existence of a contract, plaintiff's performance under the contract, defendant's breach, and resulting damages (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]).

As an initial matter, the contractual requirement that the Purchaser negotiate with the EB-5 Provider in good faith is enforceable (*IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 501 [2014]). Although the Purchaser was not compelled to enter into an agreement with the EB-5 Provider and could end negotiations in its discretion, the Purchaser was required to negotiate in good faith (NYSCEF Doc. No. 9, §38[b][iii]). The Complaint alleges that the Purchaser failed to negotiate in good faith by, among other things, never engaging the Seller meaningfully in facilitating the production of transaction documents that conformed with the EB-5 Letter of Intent. The Purchaser's alleged failure to negotiate in good faith was solely to facilitate a

\$1,500,000 deduction in the purchase price. This is sufficient at this stage of the pleadings to allege that the Purchaser breached the Purchase and Sale Agreement’s express requirement that the Purchaser negotiate in good faith. For completeness, whether the Purchaser could have obtained financing from the EB-5 Provider during the COVID-19 pandemic or whether the Purchaser met its obligation to negotiate in good faith is a factual issue that is not properly resolved on a motion to dismiss and the documentary evidence is insufficient to establish as a matter of law that the Purchaser did in fact negotiate in good faith. Stated differently, that the Purchaser sent some emails and received drafts of an Operating Agreement does not conclusively establish that it negotiated in good faith warranting dismissal at this time.

It is accordingly hereby ORDERED that the Purchaser’s motion to dismiss is denied.


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1/10/2022
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