

Unity Capital v 523 Canal St. Dev. Assoc. LLC

2022 NY Slip Op 33367(U)

October 6, 2022

Supreme Court, New York County

Docket Number: Index No. 153769/2019

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**
Justice

-----X
 UNITY CAPITAL, **INDEX NO.** 153769/2019
MOTION DATE 04/19/2022
MOTION SEQ. NO. 001

Plaintiff,
 - v -
 523 CANAL STREET DEVELOPMENT ASSOCIATES, LLC,
 BRAD EIDE **DECISION + ORDER ON MOTION**
 Defendants.
 -----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Plaintiff, Unity Capital (plaintiff), commenced this action for damages for breach of contract and unjust enrichment stemming from a financing agreement between plaintiff and defendant, 523 Canal Street Development Associates, LLC (523 Canal). 523 Canal and co-defendant Brad Eide (Eide) (collectively, defendants), now move pursuant to CPLR 3212 for summary dismissal of the complaint, and pursuant to 22 NYCRR 130-1.1 for attorney’s fees. The motion is opposed. For the following reasons, defendants’ motion is granted in part.

FACTUAL BACKGROUND

On March 8, 2018, plaintiff and defendants agreed to a “term sheet” for financing a transaction in connection with the acquisition of property located at 523 Canal Street, Stamford, Connecticut (the property). The purchase price of the property was \$5,000,000. The parties agree that 523 Canal sought a loan from plaintiff for \$4,000,000, and that the remaining \$1,000,000 would be provided from the guarantors, who were equity owners in 523 Canal. According to the term sheet, the agreement “does not constitute a loan commitment, either express or implied, on behalf of [plaintiff]” (NYSCEF doc. no. 35 at 1). Instead, the term sheet sets the terms agreed to for the loan based off of plaintiff’s “[p]reliminary and non-binding (except as otherwise provided in the paragraphs entitled ‘Disclaimer’ below) evaluation of [523 Canal’s] loan submission” (*id.*). The disclaimer paragraph of the term sheet states that “[t]his [t]erm [s]heet shall be non-binding with the exception of the Due Diligence, Exclusivity and Expenses paragraphs” (*id.* at 2).

According to the due diligence provision of the term sheet, a due diligence deposit in the amount of \$30,000 was to be used by plaintiff “[t]o offset the costs of [plaintiff’s] site inspection, appraisal, underwriting and evaluation procedures” (*id.*). The terms of due diligence provision

were effective upon payment of the \$30,000.00. The exclusivity paragraph of the term sheet states, in relevant part, that:

“[T]he Borrower or an affiliate or controlled entity of the Borrower and/or the Guarantor either (a) obtains financing for the Property from a source other than [plaintiff], or (b) sells, assigns or otherwise conveys the Property, [plaintiff] shall be deemed to have earned a break-up fee, and shall be entitled to be paid the same in the amount of two percent (2%) of the Loan Amount, which breakup fee constitutes a reasonable estimate of [plaintiff's] damages and which break-up fee shall constitute liquidated damages.”

(*id.*).

The exclusivity paragraph further provides that the breakup fee is made “[i]n consideration of [plaintiff] issuing this term sheet and shall be binding upon Borrower or Guarantor regardless of [plaintiff] making a loan offer” (*id.*). According to the term sheet, the exclusivity paragraph, “[s]hall expire one hundred twenty (120) days from the date upon which this term sheet becomes effective” (*id.*). The parties agree that the term sheet became effective on March 8, 2018.

The term sheet also contains a separate paragraph related for “Guarantor(s)” which provides that, “Brad Eide and all entities or individuals having greater than a 10% direct or indirect interest in [523 Canal] shall guaranty all sums due [to plaintiff] in connection with the loan.” According to the parties, plaintiff told Eide that it wanted a personal guarantee from him for this transaction. A review of the term sheet reveals that Eide signed his name above the line indicating “Co-Managing Member” of 523 Canal. However, Eide testified that he was a not a co-managing member of 523 Canal Street, but that non-party One Five Parties was a co-managing member. According to Eide, non-parties One Five Partners and Tiberias were equal owners of 523 Canal, and that Eide was a co-managing member of One Five Partners.

Defendants thereafter paid the due diligence fee and plaintiff began to perform its obligations under the term sheet. According to plaintiff, defendants were obligated to pay costs related to plaintiff's due diligence work regardless of whether a loan was made. In total, plaintiff incurred \$54,025.44 for the due diligence it performed pursuant to the term sheet. Because plaintiff paid a \$30,000.00 due diligence deposit, plaintiff claims the outstanding balance due from defendants under the term sheet for due diligence expenses is \$24,025.44.

On May 30, 2018, the seller of the property sent 523 Canal a notice to terminate the sale of the property. According to plaintiff, after the deal fell through, Eide tried to salvage the deal with new partners and new entities and sought financing for that purchase from lenders other than plaintiff during the exclusivity period set forth in the term sheet. The parties agree that the sale of the property never occurred, and that plaintiff never provided financing pursuant to the term sheet.

Plaintiff thereafter commenced this action for breach of contract and unjust enrichment alleging that defendants breached the provisions of the term sheet concerning due diligence, exclusivity, and expenses. As a result, plaintiff claims it is entitled to fees related to due

diligence in the amount of \$24,025.44 and to a breakup fee pursuant to the exclusivity provision in the amount of \$80,000.00, in the total amount of \$104,025.44.

In support of the branch of their motion for summary dismissal of the complaint, defendants argue that plaintiff failed to perform under the term sheet in that plaintiff did not provide financing in accordance with the term sheet. As a result, defendants argue they were not required to pay the expenses due under the term sheet. Defendants further argue that the term sheet became moot because the seller of the property canceled the sale of the property. Moreover, defendants argue that Eide may not be liable under the term sheet because he signed the agreement as a member of 523 Canal, and not in his individual capacity. Defendants further argue that they did not seek alternate financing within the exclusivity period, which lapsed on July 6, 2018.

In opposition, plaintiff argues that whether plaintiff provided the loan to 523 Canal is irrelevant, since the due diligence, exclusivity, and expenses provisions of the term sheet are binding on all parties whether plaintiff made the loan or not. Plaintiff further argues that defendants fail to demonstrate that the guaranty does not personally obligate Eide for the sums due under the guaranty. Plaintiff also argues that defendants' motion should be denied on the basis that defendants failed to submit a statement of material facts as required by 22 NYCRR 202-8.

DISCUSSION

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding the motion, the Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Slop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med Cr.*, 64 NY2d 851, 853 [1985]).

Breach of contract

To establish a prima facie right to summary judgment on a claim for breach of contract, a party must show: (1) the existence of a contract; (2) the party's performance under the contract; (3) the other party's breach of the contract; and (4) damages as a result of the breach (*see Noise in Attic Prod, Inc. v London Records*, 10 AD3d 303, 306-307 [1st Dept 2004]).

At the outset, defendants fail to demonstrate that plaintiff did not perform under the term sheet by not providing financing, as the term sheet specifically states that it is not a loan commitment and not binding on the parties. In fact, Eide acknowledged as much in his deposition, wherein he agreed that the term sheet states that it is non-binding, with the exception

of the due diligence, exclusivity, and expenses provisions. In any event, as plaintiff correctly argues, whether a loan was made under the term sheet is irrelevant to plaintiff's claims, since the term sheet specifically states that the expenses due, including those under the due diligence, exclusivity, and expenses provisions, were binding on defendants whether plaintiff provided a loan or not.

However, the Court finds that defendants are entitled to summary dismissal on plaintiff's claims concerning the "break-up fee" pursuant to the exclusivity provision, as defendants demonstrate that they did not obtain financing for the purchase of the property from another lender within 120 days of the effective date of the term sheet. According to the exclusivity provision, the exclusivity term was to end 120 days from March 8, 2018, or July 6, 2018. There is no proof demonstrating that defendants obtained financing for the property from other lenders during the exclusivity period. At best, plaintiff demonstrates that defendants were "talking with another handful of lenders for the proposed financing" for the purchase of the property at some point, which is insufficient to trigger the break-up provision (NYSCEF doc. no. 48, pla statement of facts at ¶ 46). Moreover, as the exclusivity period was never extended beyond July 6, 2018, whether defendants or one of the other guarantors had an ownership interest in eventually closing on financing for the property in November 2018 is irrelevant.

As for Eide's individual liability, defendants fail to make a prima facie showing that Eide was not a guarantor under the term sheet. Initially, defendants' argument that the guaranty was only for amounts owed in connection with the loan, thus excluding the due diligence expenses, is without merit. Defendants fail to demonstrate that the work performed pursuant to the due diligence provision was not in connection or in furtherance of the loan. Further, as plaintiff argues, the term sheet does not state that the guarantors, including Eide, only agreed a personal guarantee for when a loan was made.

"It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011]). In order to hold an agent of a company personally liable, "[t]here must be clear and explicit evidence of the agent's "intention to substitute or superadd his personal liability for, or to, that of his principal" (*Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2d Dept 2011] [internal quotation marks and citations omitted]; see *Skylink Travel, Inc. v Jain Holdings LLC*, 189 AD3d 517, 517 [1st Dept 2020]; *Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]). To determine whether an agent signing on behalf of a corporation will nonetheless be found personally liable, the court takes into consideration the presence of the following factors: (1) the length of the contract; (2) the placement of the liability clause relative to the signature line; (3) the appearance of the signatory's name in the agreement itself; (4) the nature of the negotiation that surrounded the contract; and (5) the signatory's role in the company (see *Paribas Prop., Inc. v Benson*, 146 AD2d 522, 525–526 [1st Dept 1989])."

The Court finds that the term sheet specifically identified Eide as a guarantor of the amounts due under the term sheet, in contrast to a boilerplate clause referencing an "officer" or "co-manager" (see *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]; *PNC Cap. Recovery v Mech. Parking Sys., Inc.*, 283 AD2d 268, 270 [1st Dept 2001]; *Paribas*, 146 AD2d at 525;

Yellow Book of NY, LP v DePante, 309 AD2d 859 [2d Dept 2003]). Second, the reference to Eide appears on first page of the term sheet. As the term sheet is only four pages long, excluding the signature pages and exhibits, the reference of Eide as a guarantor at the beginning of the term sheet was not buried in an extensive agreement. Further, as Eide testified that he and his partners (i.e., Tiberias and One Five Partners) negotiated the term sheet, and that prior to signing the agreement he added the title of “Co-Managing Member” below his name, Eide could have at least requested that his name be deleted from the paragraph identifying his as a guarantor. Additionally, it is uncontested that plaintiff told Eide that it wanted a personal guarantee for the term sheet, and that Eide testified that he agreed that personal guarantees were custom in loans like the one contemplated by the term sheet. In sum, “[t]his is not a case in which a single sentence in a lengthy contract created a trap for an unwary agent” (*Paribas*, 146 AD2d at 525). Thus, an issue of fact exists as to whether Eide may be held personally liable as a guarantor of the term sheet.

Unjust enrichment

A cognizable claim for unjust enrichment requires a plaintiff to demonstrate that the other party was enriched, at that party's expense, and “[i]t is against equity and good conscience to permit the [other party] to retain what is sought to be recovered” (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972] [citations omitted]). However, a plaintiff may not recover for unjust enrichment where, as here, they have a valid, enforceable contract that governs the same subject matter as the unjust enrichment claim (see *Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382 [1987]). Here, plaintiff's cause of action for unjust enrichment is duplicative of its cause of action for breach of contract, as plaintiff's claims are based upon defendants' failure to pay the due diligence and other expenses as required by specific terms embodied in the term sheet. Thus, the branch of defendants' motion for summary dismissal of plaintiff's claim for unjust enrichment is granted.

Attorney's fees

22 NYCRR 130-1.1(a) allows for “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct.” Section 130-1.1(c) defines conduct as frivolous if, “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law,” is undertaken to delay or prolong the litigation, or it asserts material factual statements that are false. While plaintiff's arguments were partially unsuccessful, in light of the above determination, plaintiff's commencement of this action was not “so egregious as to constitute ‘frivolous conduct’ within the meaning of 22 NYCRR 130-1.1” (*Carson v Hutch Metro Ctr., LLC*, 110 AD3d 468, 469 [1st Dept 2013]). Accordingly, the branch of defendants' motion seeking attorney's fees is denied.

22 NYCRR 202-8(g)

The Court notes that defendants have not submitted a statement of material facts as required on motions for summary judgment by Section 202.8-g of the Uniform Rules for the Supreme Court. The Court disregards this defect for purposes of the instant motion, as there is no

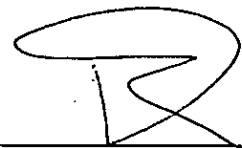
prejudice from defendants' failure to submit a separate statement of material facts since defendants submitted a statement of material facts on reply nearly mirroring the statement of material facts submitted by plaintiff.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 for summary dismissal of the complaint is granted to the extent that the claim for breach of contract concerning the "breakup provision" and plaintiff's claim for unjust enrichment are dismissed, and the balance of the motion is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



10/6/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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