BSPRT CRE Fin., LLC v Lulana Gardens, LLC
2022 NY Slip Op 33802(U)
November 4, 2022
Supreme Court, New York County
Docket Number: Index No. 652321/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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BSPRT CRE FINANCE, LLC, BENEFIT STREET PARTNERS REALTY OPERATING PARTNERSHIP, L.P.,

Plaintiff,

- v -

LULANA GARDENS, LLC, AINA LE'A, INC., ROBERT WESSELS

Defendant.

INDEX NO. 652321/2022

MOTION DATE 10/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISSAL.

Plaintiffs' motion to dismiss defendants' counterclaims is granted.

Background

In September 2021, plaintiffs and defendants entered into a term sheet for a construction loan in the amount of $123 million for a real estate project in Hawaii. Defendants paid a good faith deposit of $250,000. On October 19, 2021, plaintiffs and defendants modified the agreement and increased the loan amount to up to $157 million. The modified agreement required that defendants' third-party financer (non-party Saxon) deposit $8.5 million as additional cash collateral for the loan. The funds were to be released back to Saxon upon the closing of the "first 6 pads." The term sheet indicated that the closing had to occur within 100 days of the signing, or the lender could, at its option, deem the loan as terminated. The agreement also required that if defendants sought alternative financing, they would forfeit the "Good Faith" deposit and pay 1% of the committed loan amount.

On February 12, 2022, plaintiffs advised defendants the loan had credit approval, that they would close shortly, and that nothing was left to complete other than to close. Plaintiffs also requested an additional "Good Faith" deposit of $200,000.00, which defendants paid, bringing the total deposit to $450,000. Shortly thereafter, defendants allege they learned that the plaintiffs still had at least 27 unresolved issues relating to the loan and the loan would not be closed in the short timeframe plaintiffs represented. Defendants allege that plaintiffs also changed a material condition of the agreement - instead of the $8.5 million deposit, plaintiffs requested that defendants deposit $17 million. Saxon declined to agree to this new term and defendants subsequently informed plaintiffs they would be pursuing alternate forms of financing.

Plaintiffs filed a breach of contract action seeking $418,588.81 in damages to recover the remainder of purported expenses paid to third parties in connection with its due diligence process (which is over and above the $450,000 deposit). Defendants allege counterclaims for breach of contract and breach of implied covenant of good faith and fair dealing (pled as a single cause of action) and unjust enrichment. Defendants maintain that plaintiffs concealed expenses and changed material terms of the contract.

Plaintiffs move to dismiss these counterclaims pursuant to CPLR 3211(a)(1), contending that the agreement stated plaintiffs could modify the terms at any time up until the closing of the loan. Furthermore, plaintiffs claim they had no contractual duty to close the loan (that, essentially, the agreement is a non-binding proposal to lend) and was entitled to demand an additional good faith deposit because defendants were required to reimburse plaintiffs for all third-party fees and expenses regardless of whether the loan closed. Plaintiffs also state that they had no obligation to inform defendants of any costs above $30,000.00 if they related to legal expenses. Because the majority of the expenses incurred were a result of legal fees, plaintiffs did

not inform defendants of the costs and such costs went directly to third parties, thus plaintiffs were not unjustly enriched.

In response, defendants contend that plaintiffs changed the terms of the agreement by asking for a $17 million deposit. Defendants argue that they could never comply with the new term because they did not have the power to force its third-party financier to pay the extra deposit amount. Additionally, because the plaintiffs never had an obligation to perform but could modify the terms of the contract, defendants state these circumstances render the contract illusory. Furthermore, defendants claim the plaintiffs misrepresented that the only task left for the loan application was closing on the loan, and plaintiffs never informed defendants how much the “Good Faith” deposit had been depleted when they requested another deposit of $200,000.00.

In reply, plaintiffs assert that defendants did not raise the issue of the $17 million deposit in their initial counterclaims and decline to address the allegation of the term modification. Plaintiffs contend that the agreement, while operating as a non-binding proposal to lend that did not create an obligation to lend, nevertheless contains binding and enforceable provisions, such as defendants’ obligation to pay for expenses accrued during due diligence and plaintiffs’ ability to modify terms of the agreement.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle*

Mexican Grill, Inc., 29 NY3d 137, 141, 53 NYS3d 598 [2017] [citation and internal quotations omitted]).

"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," (*Leonz*, 84 NY2d at 88).

Breach of Contract / Covenant of Good Faith and Fair Dealing

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131 [2002] [internal quotations and citations omitted]).

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contact, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages" *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806, 921 NYS2d 260 [2nd Dept. 2011] [internal quotations and citations omitted].

As an initial matter, the Court observes that defendants did not include an affidavit from any of the defendants in opposition to the motion. Therefore, the Court can only consider the answer when assessing whether defendants have stated a counterclaim for breach of contract and breach of the implied covenant of good faith and fair dealing.

In the answer, defendants allege that plaintiffs breached the term sheet by materially changing the terms and requesting that Saxon (the non-party financer) up their cash collateral to $17 million. Unfortunately for defendants, the term sheet expressly states that the terms and conditions were subject to change at the option of the lender (plaintiffs) up until the time of closing. Put another way, the fact that plaintiffs asked for additional collateral is not a basis to find that *plaintiffs* breached the contract because they were plainly permitted to do so. For the same reason, the additional requested collateral does not establish a basis for the breach of good faith and fair dealing. The instant term sheet allowed plaintiffs to make the changes, and with only the term sheet and the answer, defendants have not presented any indication that could lead to the conclusion that there was a breach of the covenant of good faith and fair dealing.

Defendants also allege this counterclaim on the ground that plaintiffs concealed the "true extent of expenses they were incurring for a loan they continued to modify" (NYSCEF Doc. No. 11, ¶ 65). That fails to state a cognizable counterclaim for breach of contract or breach of the good faith covenant. The fact is that the term sheet specifically provides that defendants will be responsible for reimbursing plaintiffs for the cost of all third-party expenses related to the loan whether or not it actually closes (NYSCEF Doc. No. 16 at 6). It is not a breach of contract to request the money plaintiffs claim that they are entitled to recover. However, to be clear, the Court makes no finding that plaintiffs are entitled to recover anything they seek. Plaintiffs will have to show that the requested amounts were permitted under the term sheet and paid to third parties. But this motion is about defendants' counterclaim which asserts that plaintiffs breached the contract or breached the good faith duty by seeking money that the term sheet, on its face, permits plaintiffs to seek. And the Court observes that because the term sheet does not contain a

notice provision, any allegation about concealment of the expenses does not suggest a breach of any term of the term sheet.

Unjust Enrichment

An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012] [internal quotations and citations omitted]).

With respect to this counterclaim, defendants maintain that plaintiffs received "substantial value and enrichment from defendants" (NYSCEF Doc. No. 11 ¶ 68). The precise nature of that value is not included in the allegations. To the extent that defendants claim that their payment of the good faith deposit supports this counterclaim (although that assertion is not evident in this counterclaim), that argument fails. Plaintiffs only seek to recover (both from the paid deposit and the additional amount they sue for here) to reimburse them for expenses they incurred; they are not seeking anything additional for themselves. Therefore, defendants' counterclaim for unjust enrichment is dismissed.

Summary

The Court recognizes that defendants argue that the contract itself was illusory. The Court makes no ruling on that issue on this motion because it has nothing to do with the counterclaims, which, incidentally, assert a breach of that contract which defendants claim is not really a contract (the term sheet). Assuredly, that issue will likely be decided at a later date.

The Court emphasizes that instant decision is focused solely on the allegations in the counterclaims as defendants did not submit any affidavits to supplement their assertions. The counterclaims simply do not state causes of action against plaintiffs because they complain about actions that were either expressly permitted by the term sheet (such as changing terms) or not required (such as giving notice of expenses incurred). The remaining issue in this case is whether plaintiffs can show that they are entitled to recover the nearly $420,000 in expenses they allegedly incurred over and above the deposit while underwriting the potential loan.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims is granted and those counterclaims are severed and dismissed.

Next Conference: January 23, 2023 at 11:30 a.m.

By January 16, 2023, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that also identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required). The failure to upload anything will result in an adjournment of the conference.

11/4/2022
DATE

ARLENE P. BLUTH, J.S.C.

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