SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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TIMOTHY LEE and LOUIS PFAFF, Index No. 650968/2022

Plaintiffs

- against - DECISION AND ORDER

BENEFIT STREET PARTNERS REALTY OPERATING PARTNERSHIP, L.P., a Delaware limited partnership,

Defendant

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

According to the complaint, plaintiffs were joint venturers intending to purchase real property and attempted to obtain a loan from defendant that did not close. Plaintiffs seek the return of funds transferred to defendant, which plaintiffs allege was an unused deposit for loan fees. Plaintiffs allege eight causes of action: for a declaratory judgment; breach of a contract; breach of trust or fiduciary duty; an accounting; conversion; unjust enrichment; and restitution based on lack of consideration for the contract, duress in execution of the contract, its unconscionability, and, consequently, its unenforceability.

Defendant moves to dismiss the claims against it pursuant to C.P.L.R. §§ 3211(a)(1) and (7), based on documentary evidence and

failure to state a claim for which relief may be granted. Defendant explains that the parties entered multiple agreements related to the same contemplated loan, which plaintiffs were never able to close. According to defendant, plaintiffs faced a deadline of December 26, 2020, to close and asked defendant to extend the deadline to the end of the year and to prioritize the project so plaintiffs could complete the transaction. Defendant alleges that the parties entered an extension agreement requiring plaintiffs to deposit an additional $100,000.00 as an incentive for defendant to keep working through the holiday season, even if once again the deal failed to close. According to the defendant the additional deposit was a non-refundable break-up fee. Plaintiffs transferred $50,000.00 to defendant and never closed the deal. Defendant maintains that it is entitled to keep $100,000.00 pursuant to that agreement, but offers to return an excess of $18,733.97 of plaintiffs' deposited funds above the $100,000.00.

II. DOCUMENTARY EVIDENCE

To succeed on a motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1), the documentary evidence submitted that forms the basis of a defense must "utterly refute[ ] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d

at 175 (quoting Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). See Atsco Footwear Holdings, LLC v. KBG, LLC, 193 A.D.3d 493, 494 (1st Dep't 2021). The court considers the facts alleged in the complaint as true and affords plaintiffs the benefit of every favorable inference. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175. Factual allegations flatly contradicted by documentary evidence, however, as well as claims consisting of bare legal conclusions, are not entitled to any such consideration. Myers v. Schneiderman, 30 N.Y.3d 1, 11 (2017); Array BioPharma, Inc. v. AstraZeneca AB, 184 A.D.3d 463, 464 (1st Dep't 2020). C.P.L.R. § 3211(a)(1) does not explicitly define documentary evidence, but the documents must be unambiguous, of undisputed authority, with contents that are essentially undeniable, to establish a conclusive defense. VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189, 193 (1st Dep't 2019).

Defendant maintains that all the claims fail in the face of defendant's documentary evidence that defendant did not owe a prior obligation to prioritize the loan to plaintiffs and prepare it for closing by December 31, 2020. Instead, plaintiffs agreed to the non-refundable deposit in exchange for that additional consideration, for which plaintiffs' transferred $50,000.00 in December 2020 as part of that non-refundable deposit. Therefore,

according to defendant, it is not required to return the funds.

Defendant first points to plaintiffs' loan application dated November 11, 2020, as documentary evidence. Aff. of Lisa A. Herbert Ex. B, NYSCEF Doc. 15. The loan application gave defendant the exclusive right to negotiate and provide the loan for 120 days from the date of the application, but, if the loan did not close within 45 days, defendant retained the option to terminate the loan application. No documents or allegations indicate defendant actually terminated the loan application before the parties entered the extension agreement. Therefore the loan application does not establish a conclusive defense to the claim that defendant owed a prior obligation to work on plaintiffs' loan after December 26, 2020, as long as defendant did not terminate the loan application.

Next, defendant points to emails from defendant to plaintiffs dated December 17 and 23, 2020, and plaintiffs' transfer of $50,000.00: the first proposing the extension agreement and the second confirming the agreement and acknowledging the transfer of $50,000.00. Herbert Aff. Exs. C-E, NYSCEF Docs. 16-18. The emails and the wire transfer receipt support defendant's position, by explaining its understanding, but do not present an agreement by plaintiffs that is essentially undeniable. Whitestone Constr. Corp. v. F.J. Sciame Constr. Co. Inc., 194 A.D.3d 532, 534 (1st Dep't 2021). Therefore the

documents are not unambiguous or of undisputed authority and so do not establish the conclusive defense required under C.P.L.R. § 3211(a)(1).

Finally, defendant seeks to dismiss plaintiffs' claim for an accounting based on documentary evidence that defendant already provided an accounting. Defendant points to correspondence from Lee Hart of Nelson Mullins law firm dated November 12, 2021, which attaches several invoices. Herbert Aff. Ex. G, NYSCEF Doc. 20. These documents do not utterly refute the need for an accounting, as other documents may show that the accounting was incomplete, and therefore do not establish a conclusive defense to the claim for an accounting.

III. FAILURE TO STATE A CLAIM

Upon a motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court also considers the factual allegations as true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175; Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019). Defendant bears the burden to establish that the complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). Dismissal is warranted only if the complaint fails to allege facts that "fit within any cognizable legal theory." Sassi v. Mobile Life

Support Servs., Inc., 37 N.Y.3d 236, 239 (2021).

A. Declaratory Judgment and Conversion

Defendant moves to dismiss plaintiffs' first claim, for declaratory judgment, and fifth claim, for conversion, as duplicative of the second claim for breach of a contract. The parties do not dispute that the agreement embodied in the loan application is valid and enforceable. The parties dispute only whether they entered the extension agreement and defendant is entitled to keep the $50,000.00 or must return the deposit pursuant to the terms of the loan application. Because plaintiffs have an adequate remedy through their breach of contract claim, the declaratory judgment and conversion claims are duplicative of that claim, are unnecessary, and thus may be dismissed. Moghtaderi v. Apis Cap. Advisors, 205 A.D.3d 504, 506 (1st Dep't 2022); Nationstar Mtge., LLC v. Ocwen Loan Servicing, LLC, 194 A.D.3d 490, 493 (1st Dep't 2021).

B. Breach of Fiduciary Duty

Defendant contends that plaintiffs' third claim, for breach of fiduciary duty, fails because, as a matter of law, there was no fiduciary relationship between the parties. Plaintiffs claim that, because defendant was holding the deposit, it established a trust and a fiduciary relationship. Plaintiffs rely on McKee v. Lamon, 159 U.S. 317, 322 (1895), which states that "where money is placed in the hands of one person, to be delivered to another,

a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law," and Pennsylvania Steel Co. v. New York City Ry. Co., 206 F. 663, 664-65 (2d Cir. 1913), which similarly states that, "where in a transaction between two persons an amount is permitted to be retained by one for payment to a third person, a trust will be created in his favor which he may enforce." Regardless whether the extension agreement is valid and enforceable, plaintiffs do not allege that the funds transferred to defendant were placed in defendant's hands to be delivered back to the plaintiffs. They allege that the funds were delivered to defendant for fees and expenses related to the loan. Therefore no trust in favor of or enforceable by plaintiffs arose. Plaintiffs also cite Matter of Consol. Indem. & Ins. Co., 287 N.Y. 34, 38 (1941), which is distinguishable because it relates to a salvage, not a contractual deposit, and Matter of Kummer, 93 A.D.2d 135, 138 (2d Dep't 1983), which relates to the disposition of benefits from a federal trust fund.

The loan application does not include the elements required to establish a trust: "a designated beneficiary, a designated trustee, a clearly identifiable res, and delivery of the res by the settlor to the trustee with the intent of vesting legal title in the trustee." Orentreich v. Prudential Ins. Co. of Am., 275 A.D.2d 685, 685 (1st Dep't 2000). If instead plaintiffs are alleging a constructive trust, an equitable remedy to prevent

unjust enrichment where a party acquires property but may not, in equity, be allowed to retain it, Homapour v. Harounian, 182 A.D.3d 426, 427 (1st Dep't 2020), the equitable remedy is not available unless the legal remedy of damages based on the breach of contract claim is insufficient to provide plaintiffs relief. Evans v. Winston & Strawn, 303 A.D.2d 331, 333 (1st Dep't 2003). The creation of a constructive trust further requires "a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, or unjust enrichment." ELM Suspension Sys., Inc. v. 45 E. 33rd St. Condominium, 201 A.D.3d 498, 499 (1st Dep't 2022). The contract at issue here covers the exchange of compensation for services, which does not create a confidential or fiduciary relationship. This payment pursuant to the contract, to be used for a particular purpose, without a confidential or fiduciary relationship, does not constitute a constructive trust. Lantau Holdings Ltd. v. General Pac. Group Ltd., 163 A.D.3d 407, 410 (1st Dep't 2018); French v. Kensico Cemetery, 177 Misc. 395, 397 (Sup. Ct. Westchester Co. 1941), aff'd, 264 A.D. 617 (2d Dep't 1942), aff'd, 291 N.Y. 77 (1943). Therefore the court grants defendant's motion to dismiss plaintiffs' third claim.

C. Accounting

Defendant also seeks to dismiss plaintiffs' fourth claim, for an accounting of the deposit, because the parties did not

form a fiduciary relationship. Plaintiffs do not dispute the lack of a fiduciary relationship for the purpose of their accounting claim, but contend that the parties' agreement specifies how the funds were to be handled, making it an escrow agreement. The court interprets this claim to be for specific performance of the "Expense Deposit" term of the loan application. Herbert Aff. Ex. B, NYSCEF Doc. 15, at 6-7. Because that section of the agreement requires defendant to provide a release letter specifying the amount of the deposit used, this claim survives.

D. Restitution Based on Unjust Enrichment

Neither defendant's motion nor plaintiffs' opposition directly addresses plaintiffs' sixth claim for restitution based on unjust enrichment. Plaintiffs complain that because no contract governs their $50,000.00 deposit they lack a legal remedy and thus resort to this equitable claim. The parties do not dispute, however, that a contract governs their relationship. They disagree merely about which agreement applies. Therefore the court dismisses this claim as duplicative of the breach of contract claim. E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 455 (2018); Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC, 205 A.D.3d 551, 552 (1st Dep't 2022); Markov v. Katt, 176 A.D.3d 401, 401 (1st Dep't 2019).

E. Restitution Based on Lack of Consideration for the Extension Agreement

Plaintiffs' seventh claim is for restitution of the break-up fee, pleaded alternatively in the event the court determines that plaintiffs agreed to pay a break-up fee. Plaintiffs complain that any agreement to pay a break-up fee would be unenforceable, due to a lack of mutual consideration. As defendant points out, the alleged extension agreement included the break-up fee, in the event the loan failed to close, in exchange for defendant's promise to prioritize the project to complete it by the end of the year. The addition of a specific deadline may qualify as consideration, even if that consideration is relatively minor or of little additional value. Langbert v. Aconsky, 209 A.D.3d 610, 612 (1st Dep't 2022).

Nevertheless, a factual question remains whether defendant was already under an obligation to keep working in the project, which is unresolvable in the context of this motion, since the loan application does not specify how fast defendant was to work. Therefore this claim for restitution also survives.

F. Rescission of the Extension Agreement and Restitution Based on Duress or Unconscionability

Plaintiffs' eighth claim seeks rescission or voiding of any extension agreement and restitution of the break-up fee based on economic duress in the execution of the extension agreement or its unconscionability and thus its unenforceability. Defendant

moves to dismiss this claim on the grounds that economic duress is not a viable defense when defendant owed no obligation to prioritize the loan and close it by the end of the year, and plaintiffs are sophisticated businesspersons. Defendant emphasizes that the loan was a commercial loan for $26 million, and the email correspondence shows no deceptive or high pressure tactics to support unconscionability. Defendant also challenges plaintiffs' claim that the break-up fee constitutes unenforceable liquidated damages.

As discussed above, the original loan application and agreement is not dispositive whether it required defendant to prioritize and close the loan before the end of the year without the addition of the extension agreement. While the grounds of economic duress and unconscionability may be dubious, defendant's own two emails are not conclusive documentary evidence that defendant never used deceptive or high pressure tactics at any point or that the break-up fee was not grossly disproportionate to defendant's expenditure of resources over the four business days between December 26 and 31, 2020. At minimum, defendant fails to refute all the grounds supporting this claim for rescission and restitution or show that they all are inadequately alleged.

IV. CONCLUSION

For the reasons explained above, the court grants defendant's motion to dismiss the complaint in part and denies defendant's motion in part. C.P.L.R. §§ 3211(a)(1) and (7). The court grants defendant's motion to the extent of dismissing plaintiffs' first claim for a declaratory judgment, third claim for breach of fiduciary duty, fifth claim for conversion, and sixth claim for restitution based on unjust enrichment. Plaintiffs' second claim for breach of a contract, fourth claim for an accounting, seventh claim for restitution, and eighth claim for rescission of the contract and restitution survive. Defendant shall serve an answer to the remaining claims in the complaint within 20 days after entry of this decision and order. C.P.L.R. § 3211(f). The parties shall appear for a Preliminary Conference via Microsoft Teams February 28, 2023, at 11:00 a.m.

DATED: January 31, 2023

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C