SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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STIER 109 LLC,

Plaintiff,

- v -

109 SOUTH 5 PROPERTY LLC, 109 SOUTH 5 HOLDINGS LLC, MEADOW PARTNERS LLC, and HEITMAN CREDIT ACQUISITION XXII, LLC

Defendants.

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INDEX NO. 653204/2022

MOTION DATE 10/11/2022, 10/31/2022

MOTION SEQ. NO. (MS) 002 003

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 26, 27, 32, 34, 35, 36, 37, 38, 39, 41, 42

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 33, 40, 43, 44

were read on this motion to/for DISMISS.

Plaintiff Stier 109 LLC sold a commercial building located at 109 South 5th Street in Brooklyn, New York (the Premises) to defendant 109 South 5 Property LLC (109 Property) in 2015. Plaintiff brings an action for breach of contract, tortious interference with contract, and other claims against 109 Property, its affiliate 109 South 5 Holding, LLC, and their "ultimate parent" entity, Meadow Partners LLC, as well as Heitman Credit Acquisition XXII, [1] LLC (Heitman), a lender turned co-owner of the Premises. In MS 002, Heitman seeks to dismiss the third and fifth causes of action of the verified complaint pursuant to CPLR 3211 (a) (1) and (7). In MS 003, defendant Meadow Partners, LLC (Meadow) moves to dismiss the sixth and seventh causes of action of the verified complaint. Plaintiff opposes both motions and, in cross-moves in MS 002 for leave to amend its complaint to add an eighth cause of action for declaratory relief against Heitman pursuant to CPLR 3025 (b).

Background

By a sales contract dated July 20, 2015, plaintiff agreed to sell the Premises to defendant 109 South 5 Property LLC (109 Property) for $42 million, with $40

[1] Heitman indicates its name is actually Heitman Credit Acquisition XXIII, LLC and that reference to XXII is incorrect.

million paid in cash at closing and the remaining $2 million or an alternative remuneration to be paid after the closing (Post-Closing Obligations) (NYSCEF # 1 - Verified Complaint, ¶'s 4-6; # 2 – Sale Contract). The closing occurred on September 22, 2015. The Post-Closing Obligations provide that if 109 Property or its successors or assigns covert any part the Premises, then plaintiff gets ownership of, or a 99-year lease for, one luxury apartment in the Premises free of charge. If there is no conversion within fifteen years of closing – September 22, 2030, then plaintiff gets $2 million (*id.*, ¶ 7). As security for the Post-Closing Obligations, 109 South 5 Property Holdings LLC (109 Holdings), an affiliate of 109 Property, agreed to admit plaintiff as a non-voting member (*id.*, ¶ 12). And, via an amendment to its operating agreement, 109 Holdings admitted plaintiff as such member (*id.*; NYSCEF # 3 – 109 Holdings Operating Agreement Amendment).

While the Sale Contract requires 109 Property to satisfy the Post-Closing Obligations upon the earlier to occur of a Conversion or the fifteenth anniversary of the closing, the timing can be accelerated by a resale of the Premises (NYSCEF # 1, ¶ 8). Acceleration may be suspended if the successor purchaser agrees in writing to be bound by the applicable provisions of the Sale Contract (*id.*, ¶ 44).

On June 9, 2022, 109 Property sold the Premises to Heitman (*id.*, ¶ 15). Heitman's predecessor-in-interest had lent funds to 109 Property under a Senior Loan Agreement dated October 31, 2017 (NYSCEF #'s 16; 13 – MS002 MOL at 2). Plaintiff asserts that up to the commencement of this case, the Conversion has not occurred, nor has Heitman assumed the Post-Closing Obligations (*id.*, ¶'s 17-18). Thus, the payment of $2 million was accordingly accelerated and became due on June 9, 2022 (*id.*, ¶ 18).

Plaintiff sues 109 Property for breach of contract and breach of the implied covenant of good faith and fair dealing under the first and second causes of action (*id.*, ¶'s 81-93). The third cause of action seeks attorneys' fees against 109 Property, 109 Holdings, and Heitman (*id.*, ¶'s 94-99). The fourth cause of action charges breach of contract against 109 Holdings (*id.*, ¶'s 100-107). And the fifth and sixth causes of action are asserted against Heitman and Meadow, respectively, for tortious interference with contract (*id.*, ¶'s 108-119). Finally, the seventh cause of action seeks to pierce the corporate veil against Meadow (*id.*, ¶'s 120-123). Relevant for plaintiff's cross motion in MS002, plaintiff seeks to add an eighth cause of action for a judgment declaring that Heitman assumed, and is jointly and severally liable with 109 Property for, the Post-Closing Obligations (NYSCEF # 36 – Proposed Verified Amended Complaint, ¶'s 124-135).

Discussion

On a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Whether a plaintiff "can ultimately establish its allegations is not

taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, in "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003]). However, dismissal based on documentary evidence under 3211 (a) (1) may result only when it has been shown that a material fact as claimed by the pleader is "not a fact at all" and "no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]).

Heitman's Motion to Dismiss and Plaintiff's Cross-Motion

In support of its motion to dismiss, Heitman explains that in October 2017, it loaned approximately $41 million to 109 Property, which was secured by a mortgage on the Premises (NYSCEF # 13 at 2). 109 Property failed to pay the principal and interest when it matured in December 2021 (*id.*). Rather than suing 109 Property, Heitman and 109 Property agreed that Heitman would take 109 Property's interest in the Premises through a deed-in-lieu of foreclosure (*id.*). Thus, Heitman questions whether this transaction even qualifies as a resale – a question that is outside this motion to dismiss.

Heitman claims that the tortious interference claim against it can be dismissed under any one of three independent grounds: (i) plaintiff fails to plead with the specificity required by CPLR 3016 (b); (ii) plaintiff does not allege how Heitman intentionally procured 109 Property's alleged breach of contract; and (iii) Heitman's exercise of its secured creditor rights is a complete defense (*id.* at 9).

Plaintiff responds that it did adequately plead tortious interference, denying that it must do so with the particularity required under 3016 (b) (NYSCEF # 38 – MS002 Opp at 12-16). The allegation is that Heitman knew there was a contract between plaintiff and 109 Property, and "knowingly and intentionally interfered with the Sale Contract by acquiring ... the Premises in a manner that has caused [109 Property] to breach its express and implied contractual obligations to Plaintiff" Contract (*id.* at 3 quoting Compl. ¶ 111). Further, Heitman "structured the Resale to transfer the Premises in a manner designed to circumvent Section 2.04 of the Sale (*id.* at 14 quoting Compl. ¶ 73).

Plaintiff also notes the deed-in-lieu (DIL) of foreclosure agreement that Heitman submitted is unsigned and an Assignment of Contracts and Intangibles form (NYSCEF # 18 – DIL Agreement at 50). Plaintiff had not previously seen the DIL Agreement draft, but finds that it supports plaintiff's claims that Heitman assumed, and is jointly and severally liable with, 109 Property for the Post-Closing Obligations (NYSCEF # 38 at 8-9). Plaintiff's cross-motion for leave to amend is based on this putative assumption (*id.*, at 9, 22).

Finally, addressing Heitman's claim that the DIL Agreement came about because Heitman, as a secured creditor, was protecting its rights, plaintiff asserts

that Heitman's economic interest defense is inapplicable because the allegation is for interference with an existing contract rather than a prospective relationship (*id.* at 19). In any event, plaintiff posits that Heitman's invocation of this defense is based on a flawed premise – that Heitman's mortgage interest is superior to plaintiff's interest (*id.* at 20). Plaintiff reiterated that "Heitman had knowledge of the Sales Contract, which created an interest in the Premises in favor of Heitman (*i.e.*, the Post-Closing Obligations)" (*id.*).

Heitman points out that absent any allegations on how Heitman's acquisition of the Premises thwarted plaintiff's collection of payment from 109 Property and how Heitman procured a breach of contract, let alone doing so without justification, plaintiff has not plead the tortious interference claim as required by CPLR 3016 (NYSCEF # 39 – MS002 Reply at 1-2). Heitman also points out that plaintiff misstates the economic interest defense as inapplicable to a tortious interference with contract claim (*id.* at 2 citing *White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 [2007] [holding that the economic interest defense applies where "the tortfeasor has a preexisting legal or financial relationship with the breaching party"]). As to plaintiff's reliance on the less particularized pleading standard under CPLR 3013, Heitman maintains that CPLR 3016 (b) is the applicable standard, but asserts that even under CPLR 3013, plaintiff's allegations, which are bare and conclusory, are nonetheless insufficient (*id.* at 3). Finally, Heitman argues that plaintiff should be denied leave to amend it complaint based on plaintiff's new theory that Heitman assumed the Post-Closing Obligations because it would be futile (*id.* at 11-13).

A claim for tortious interference requires "the existence of a valid contract between the plaintiff and [a third party], [defendant's] knowledge of that contract, and [defendant's] intentional procurement of [the third party's] breach of the contract without justification, actual breach of the contract, and [plaintiff's] damages resulting from the breach" (*Oddo Asset Mgmt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012]). "Specifically, a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct. . . . Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support [the] claim with more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Heitman's motion to dismiss the fifth cause of action is granted. Plaintiff has failed to plead facts indicating that Heitman procured 109 Property's failure to pay the $2,000,000 allegedly due. Plaintiff states that 109 Property's failure to make the payment (the asserted breach of contract) was caused by Heitman structuring its acquisition of the Premises "in a manner designed to circumvent" the Post-Closing Obligations (NYSCEF # 38 at 13-14). This is insufficient, whether under CPLR 3013 or CPLR 3016 (b), as plaintiff merely asserts, in a conclusory manner and without the support of relevant factual allegations, that Heitman's actions caused 109 Property to breach the Sale Contract (*see e.g. Kimso Apartments, LLC v Rivera*, 180

AD3d 1033, 1035 [2d Dept 2020] [mandating dismissal of tortious interference claim where "complaint failed to sufficiently allege specific conduct by the defendants intended to induce a breach of the underlying" contract and failed to plead but-for causation]; *see also Kind Operations Inc. v AUA Priv. Equity Partners, LLC*, 195 AD3d 446, 447 [1st Dept 2021] [finding complaint failed to plead procurement where breaching party was free to ignore the alleged direction involved in the breach]). And contrary to plaintiff's arguments, this rejection of plaintiff's prima facie case is not based on plaintiff needing to show wrongful interfering conduct or, at this juncture, evidentiary proof (NYSCEF # 38 at 13).

Plaintiff's cross-motion to amend its complaint is granted. "Motions for leave to amend pleadings should be freely granted (CPLR 3025 [b]), absent prejudice or surprise resulting therefrom . . . unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499 [1st Dept 2010]). Heitman does not raise prejudice or surprise.

Plaintiff argues that Heitman assumed the Sale Contract because the DIL Agreement provides for an assignment to Heitman of 109 Property's contracts relating to the Premises, and the Sale Contract was a contract relating to the Premises. Reviewing the DIL Agreement, the basis for plaintiff's argument is sufficient given the broad definition of "Contracts" in the DIL Agreement.[2] Further, Heitman has not adequately explained why 109 Property's representation in the DIL Agreement under Section 8.1 (w) as to "the list of Contracts set forth in Schedule 2" would supersede the DIL Agreement's definition of the term "Contracts" (NYSCEF 18 at 17). Nor does Heitman show that Heitman's assumption of liabilities under Section 10 of the DIL Agreement is limited to the Contracts disclosed by Schedule 2.

Meadow's Motion to Dismiss

In support of its motion to dismiss plaintiff's sixth cause of action for tortious interference with contract, Meadow argues, *inter alia*, that tortious interference liability may not be imposed as Meadow is an affiliate (the ultimate parent) to 109 Property and knew about the Sale Contract (NYSCEF # 31 – MS003 MOL at 2). As for the seventh cause of action to pierce the corporate veil, Meadow posits that the complaint insufficiently pleads supporting facts for the claim, which claim New York law does not sustain independent of other causes of action (*id.* at 3).

In opposition, plaintiff disagrees that Meadow has an unqualified right to interfere as parent; rather Meadow's qualified privilege to interfere—also called the economic interest defense—is unavailing if Meadow used illegal means or was motivated by malice toward plaintiff (NYSCEF # 43 – MS003 Opp at 11-12).

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[2] The DIL Agreement provides: " 'Contracts' shall mean all written agreements and understandings of any type or nature entered into by Borrower (or by Borrower's agent on behalf of Borrower), including without limitation ... all other understandings, agreements and commitments of any type or nature whatsoever which relate in any manner or to any extent to the Property or any part thereof or interest therein." NYSCEF # 18 at 4.

Plaintiff asserts that the complaint adequately alleges facts to vitiate the qualified privilege (*id.* at 12). As for veil-piercing, plaintiff contends that New York courts do recognize the claim, which plaintiff posits is fact-laden and accordingly cannot be determined on a pleadings-based motion (*id.* at 14).

Meadow disagrees with plaintiff's argument that the asserted defense cannot be determined at this stage (NYSCEF # 44 at 6). Meadow explains that under the economic interest doctrine, "only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract" (*id.* quoting *Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990]). Meadow agrees that even as a parent entity, Meadow could not be shielded by the economic interest defense if it acted through illegal means or was motivated by malice. But the complaint is bare of such allegations against Meadow, except for a bald conclusion that Meadow's actions were "wanton, willful and malicious" (NYSCEF # 44 at 7 quoting ¶ 6 of the complaint).

"In a contract interference case," upon plaintiff's' prima facie case, "defendant may raise the economic interest defense—that it acted to protect its own legal or financial stake in the breaching party's business. The defense has been applied . . . where defendant and the breaching party had a parent-subsidiary relationship" (*White Plains Coat & Apron Co.*, 8 NY3d at 426). In the parent-subsidiary context, "imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other" (*WMW Mach. Co. v Koerber AG*, 240 AD2d 400, 401 [2d Dept 1997]; *see MTI/The Image Grp., Inc. v Fox Studios E., Inc.*, 262 AD2d 20, 23 [1st Dept 1999]).

Meadow's motion to dismiss the sixth cause of action is granted. Plaintiff has failed to adequately plead malice or fraudulent or illegal means, and "bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule" (*Rather v CBS Corp.*, 68 AD3d 49, 60 [1st Dept 2009]). Plaintiff's claim that the economic justification defense cannot be determined on a pre-answer motion to dismiss is incorrect—although "economic interest is cast as a defense, courts routinely dismiss tortious interference claims at the pleading stage when it is evident, on the face of the complaint, that the doctrine applies" (*Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, 72 Misc 3d 1218(A) [Sup Ct, NY County 2021] [collecting cases]).

Plaintiff's reliance on *Wells Fargo Bank, N.A. v ADF Operating Corp.* (50 AD3d 280, 281 [1st Dept 2008]) is unavailing; that case is distinguishable in that the defendants were found to have sold their interest in an LLC to profit themselves to the detriment of the LLC, which circumstances are not pled here.

With the dismissal of the sixth cause of action, the only remaining claim against Meadow is the seventh cause of action to pierce the corporate veil. Meadow's motion to dismiss this claim is granted as a veil piercing claim may not be maintained as an independent cause of action (*Chiomenti Studio Legale, L.L.C. v Prodos Cap. Mgmt. LLC*, 140 AD3d 635, 636 [1st Dept 2016]). Plaintiff's reliance on

Shisgal v Brown (21 AD3d 845, 848 [1st Dept 2005]) is flawed; that court did not sustain a veil-piercing claim as an independent cause of action.

Conclusion

In light of the foregoing, it is

ORDERED that the motion of defendant Heitman Credit Acquisition to dismiss the third and fifth causes of action of the verified complaint (motion sequence 002) is granted; and it is further

ORDERED that the cross-motion of plaintiff Stier 109 LLC for leave to amend its complaint to add an eighth cause of action for declaratory relief against Heitman is granted to the extent that plaintiff shall be permitted to amend its complaint consistent with this Decision and Order; and it is further

ORDERED that the motion of defendant Meadow Partners, LLC (motion sequence 003) to dismiss the sixth and seventh causes of action is granted;[3] and it is further

ORDERED that a preliminary conference shall be held on May 4, 2023 at 10:30 a.m. via Microsoft Teams (or such time that the parties shall determine with the court's law clerk); and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten (10) days; and it is further

ORDERED that within 20 days of entry of this order, plaintiff shall serve defendants with and e-file an amended complaint consistent with this Decision and Order; and it is further

ORDERED that Heitman shall answer the amended complaint's new cause of action for declaratory judgment, or otherwise respond thereto, within 20 days of the amended complaint being served upon Heitman.

03/21/2023
DATE

MARGARET CHAN, J.S.C.

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

[3] Plaintiff's request in a footnote to replead the seventh cause of action should this court finds a pleading deficient (NYSCEF # 43 at 18, n 11) is rejected.