Myzak v Rosania
2023 NY Slip Op 33780(U)
October 24, 2023
Supreme Court, New York County
Docket Number: Index No. 654542/2022
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER,** **PART IAS MOTION 61EFM**

Justice

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MATTHEW MYZAK,

Plaintiff,

- v -

ROBERT ROSANIA,

Defendant.

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INDEX NO.	654542/2022
MOTION DATE	
MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Pending before the Court is plaintiff's Motion Sequence 003 for partial summary judgment on the First Cause of Action for breach of contract and Second Cause of Action for breach of a personal guaranty. The facts underlying this action are as follows. Plaintiff Matthew Myzak is a former employee of non-party Maximus Real Estate Partners Ltd. ("Maximus"), an investment and development company that is majority-owned and solely controlled by defendant Robert Rosania. During his employment with Maximus, plaintiff worked on a large development called Parkmerced (the "Parkmerced Project"). At the time plaintiff's employment ended in April of 2021, plaintiff owned an interest in the Parkmerced Project.

On February 4, 2022, plaintiff was allegedly approached by defendant to consent to a transaction related to the Parkmerced Project (the "Oak Hill Transaction"). The Oak Hill Transaction would purportedly allow lenders and investors to commit over $320 million of new capital to the Parkmerced Project but would result in a dilution and subordination of plaintiff's interests in Parkmerced. In order for the Oak Hill Transaction to move forward, defendant required plaintiff to sign certain documents. To encourage plaintiff's agreement to the Oak Hill

Transaction, defendant allegedly offered to allow plaintiff to redeem his shares in the Parkmerced Project in exchange for $6 million dollars, among other things.

The parties negotiated the terms of the agreement via email. NYSCEF Doc. No. 3. The parties "agreed to agree on a binding deal, to be documented immediately post-closing due to timing constraints" as memorialized by an email dated February 4, 2022 (timestamp 10:39 a.m. PT). NYSCEF Doc. No. 3. Following the initial email, the parties engaged in some minor back and forth. An e-mail timestamped 11:42 a.m. on February 4, 2022 demonstrated that the parties appeared to be in agreement. Plaintiff indicated he was "signing the [Oak Hill Transaction] documents [defendant] requested now based on the understanding that the email chain below is part of our agreement." NYSCEF Doc. No. 3. Plaintiff then signed the requested documents, which allowed defendant to move forward and close on the Oak Hill Transaction documents, and plaintiff's interests in Parkmerced were diluted and subordinated.

The specific terms of the purported February 4, 2022 Agreement are as follows (NYSCEF Doc. No. 3):

1. Agreeing to agree on a binding deal, to be documented immediately post-closing due to timing constraints. Will start with the form of Blue Mountain MIPA for documentation.
2. Redemption Value for Myzak Class B Shares: $6 Million
3. Time to redeem: 6 months "latest closing date" subject to the earlier to occur of any liquidity events to property, investors or creditors / debt or equity recaps / refis / sale on PM or Cove
4. **Liquidated** Deposit of $300k "immediately" (meaning the day after the actual close), credited against purchase price
5. Tax Efficiency – we will endeavor to distribute the redemption to Myzak as refinance proceeds to provide him tax shelter in whatever manner works as determined post closing. Myzak's tax treatment no less favorable than Rosania's tax treatment.
6. Class A Shares: upon redemption of Class B shares, Myzak will own 0.25% Class A Share (as further diluted by future transactions pro-rata with other Maximus investors in which Myzak is a beneficiary). These Class A shares will have no burden of capital calls.
7. Personal Guaranty from Rosania on his obligations in this redemption agreement, including closing payment, in form comparable to Oak Hill.
8. Confirmation that Rosania can purchase the Class B interests and issue the class A membership interests unilaterally.
9. Myzak consent is required to any subsequent closing or modification of structure on PM if Myzak not being bought out and paid in full. Consent cannot be reasonably withheld.
10. Rob to indemnify Myzak for any pre-existing liabilities/claims relating to his membership interests and to any liabilities/claims arising in connection with this transaction. This last one is because Myzak hasn't read all the documents he's being ask to sign today, seen the closing statement, or had the chance to negotiate anything.

Plaintiff alleges that between February 4, 2022 and October 21, 2022, the parties and their counsel were working on reaching a "final formal membership interest purchase agreement (the MIPA) memorializing the February 4th Agreement," but defendant never executed it. Plaintiff also alleges that defendant breached certain other obligations contained in the February 4, 2022 emails, including defendant's failure to make a $300,000.00 liquidated deposit and failure to pay plaintiff the $6 million for redemption of his Parkmerced shares.

Plaintiff asserts claims for breach of the purported February 4, 2022 Agreement, breach of a personal guaranty by defendant Rosania (also memorialized in the February 4, 2022 emails), a declaratory judgment that the February 4, 2022 Agreement is valid and enforceable, specific performance of the February 4, 2022 Agreement, unjust enrichment, and promissory estoppel. No Note of Issue has been filed in this case and discovery has not yet been completed due, at least in part, to the fact that defendant has retained new counsel in this case at least three times.

Plaintiff's motion for summary judgment was returnable on August 17, 2023 and was marked fully submitted without opposition on that date. The Court scheduled a conference with counsel for all parties on September 6, 2023 to discuss the motion for summary judgment and defendant's failure to oppose that motion. At the September 6, 2023 conference, counsel for defendant did not appear—despite having previously been in contact with the Court and despite repeated attempts by Court personnel and plaintiff's counsel on the day of the conference to reach them. NYSCEF Doc. No. 88. The Court rescheduled the appearance to October 10, 2023 to accommodate counsel for defendant. Once again, counsel for defendant did not appear at the October 10 conference. In the October 10 status conference order, the Court extended the date to oppose the motion for summary judgment to October 12, 2023, thereby handing defendant a final opportunity to address the motion for summary judgment. NYSCEF Doc. No. 98. Despite the

opportunity, defendant did not oppose the motion. Having received no opposition to the motion, the Court must evaluate whether plaintiff has established a prima facie case for entitlement to summary judgment as a matter of law. The motion is resolved as follows based on the papers submitted.

I. First Cause of Action - Breach of Contract

The elements of a breach of contract claim are (1) the existence of a contract, (2), plaintiff's performance, (3) defendant's breach, and (4) resulting damages. *See Park v. Kim*, 205 A.D.3d 429, 430 (1st Dept. 2022). Plaintiff has demonstrated its prima facie entitlement to judgment as a matter of law, and defendant has not raised any questions of fact which would warrant denial of the motion.

A. Existence of a Contract

For a valid contract to exist, there must be an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. *Kasowitz, Benson, Torres & Friedman, LLP v. Reade*, 98 A.D.3d 403, 404 (1st Dept. 2012). "An exchange of emails may constitute an enforceable agreement if the writings include all of the agreement's essential terms…." *See id.*

Plaintiff has met its burden to establish the existence of a contract. Plaintiff laid out the proposed terms of the contract in an email timestamped 10:39 A.M. PT. In a response timestamped 10:43 A.M. PT, defendant agreed to the majority of the terms and highlighted one correction, which change plaintiff accepted in his response timestamped 11:42 A.M. PT. NYSCEF Doc. No. 3. The February 4, 2022 emails demonstrate offer and acceptance.

The element of consideration was also satisfied: in exchange for plaintiff signing requested Oak Hill Transaction documents which diluted and subordinated plaintiff's interest in

the Parkmerced project, defendant agreed to abide by the various obligations listed in the February 4, 2022 emails.

With regards to mutual assent and an intent to be bound, New York law distinguishes between a preliminary agreement not intended to be binding absent any formal documentation, and "a binding agreement that is nevertheless to be further documented," which is enforceable with or without the formal documentation. *See Kowalchuk v. Stroup*, 61 A.D.3d 118, 122–23 (1st Dept. 2009). To be considered an unenforceable preliminary agreement, defendant must have expressly asserted that no contract would be in effect until a full, formal document is completed and executed. See id. Not only did defendant fail to expressly reserve that no contract would be in effect absent a formalized document, defendant's conduct suggests that he fully intended to be bound by the February 4, 2022 emails. Defendant did not dispute plaintiff's characterization that the February 4, 2022 Agreement was a "binding deal, to be documented immediately post-closing due to timing constraints." When plaintiff indicted at 11:42 A.M. PT that he would be "signing the documents [defendant] requested now based on the understanding that the email chain below is part of our agreement," defendant did not object. NYSCEF Doc. No. 3. Further, defendant also appeared to represent to his own counsel during the negotiation process that "the terms of the February 4, 2022 Agreement" will remain in full force and effect regardless in the interim." NYSCEF Doc. No. 73.

The parties' conduct demonstrates that they both intended to be bound by the February 4, 2022 emails. *See, e.g.*, *Twenty 6 Realty Partners Inc. v. GSS N3 LLC*, 192 A.D.3d 463, 464 (1st Dept. 2021). The fact that defendant allegedly sought to renegotiate certain terms of the February 4, 2022 Agreement in the process of formalizing a written agreement is insufficient to establish that defendant did not intend for the emails to be binding. *See Claim Recovery Grp. LLC v.*

Markel Corp., 212 A.D.3d 554, 555 (1st Dept 2023) ("Parties' later renegotiation, addition, or elaboration of certain terms does not negate the fact that those terms were clearly agreed upon.…"). Accordingly, plaintiff has sufficiently demonstrated the existence of a valid contract.

B. Plaintiff's Performance, Defendant's Breach, and Damages

Plaintiff has also demonstrated its performance of the February 4, 2022 Agreement and defendant's breach thereof. As he represented in the email timestamped 11:42 A.M. PT, plaintiff signed the necessary Oak Hill Transaction documents, satisfying his obligations under the February 4, 2022 Agreement. NYSCEF Doc. No. 3, 75. When defendant failed to abide by his obligations under the February 4, 2022 Agreement, plaintiff sent defendant a series of letters notifying defendant that he was in default under the February 4, 2022 Agreement. NYSCEF Doc. Nos. 6, 7. Plaintiff has represented in his affidavit on personal knowledge filed in connection with the motion for summary judgment that defendant "has not paid anything to date." NYSCEF Doc. No. 71. Accordingly, the record sufficiently demonstrates that defendant breached his obligations under the February 4, 2022 Agreement.

Plaintiff has also adequately alleged damages. Plaintiff signed the Oak Hill Transaction documents, which subordinated and diluted his interest in the Parkmerced Project, in exchange for the redemption of his shares in the Parkmerced Project for $6,000,000.00 among other things. Defendant's failure to make good on his end of the bargain indisputably harmed plaintiff.

In light of the above, plaintiff has made a prima facie case for breach of contract and is entitled to summary judgment on the First Cause of Action as a matter of law.

II. Second Cause of Action - Breach of Guaranty

In order to prevail on his Second Cause of Action for breach of the personal guaranty, plaintiff must establish (1) the existence of the guaranty, (2) the obligations therein, and (3) the

failure of the guarantor to make the necessary payments. *Reliance Constr. Ltd. v. Kennelly*, 70 A.D.3d 418, 419 (1st Dept. 2010), *leave to appeal dismissed* 15 N.Y.3d 848 (2010). Submission of an unconditional guaranty along with an affidavit of non-payment is sufficient to warrant entry of judgment in favor of the guaranty's beneficiary. *See Thor Gallery at South Dekalb, LLC v. Reliance Mediaworks (USA) Inc.*, 143 A.D.3d 498 (1st Dept. 2016).

Plaintiff has adequately established the elements of breach of a guaranty. The February 4, 2022 Agreement contains a complete, clear, and unambiguous guaranty which defendant has failed to challenge. Prong 7 of the February 4, 2022 Agreement provides for a "Personal Guaranty from Rosania on his obligations in this redemption agreement, including closing payment, in form comparable to Oak Hill" (hereinafter, the "Rosania Guaranty"). NYSCEF Doc. No. 3. The language of the Rosania Guaranty, adopted from the Oak Hill Guaranty, provides that the Rosania Guaranty is irrevocable and unconditional, and provides for the prompt payment and performance of the Guaranteed Obligations within ten days of demand by plaintiff. NYSCEF Doc. No. 5 (see §§1.2, 1.3). Plaintiff has submitted a letter dated November 11, 2022 which made demand for payment within ten days under section 1.5 of the Rosania Guaranty. NYSCEF Doc. No. 8. Plaintiff's affidavit made on personal knowledge attests to the fact that defendant has failed to pay anything to plaintiff pursuant to the Rosania Guaranty. NYSCEF Doc. No. 71. Accordingly, plaintiff has made a sufficient showing of entitlement to summary judgment as a matter of law on the Second Cause of Action for breach of the Rosania Guaranty.

Accordingly, the motion for summary judgment on the First Cause of Action for breach of the February 4, 2022 Agreement and the Second Cause of Action for breach of the Rosania Guaranty is granted. The Third Cause of Action for a declaration that the February 4, 2022 Agreement is valid, and the Fourth Cause of Action for specific performance, are dismissed as

they are rendered moot by this written decision. The Fifth and Sixth Causes of Action for unjust enrichment and promissory estoppel are dismissed as they are barred by the existence of the written contract and are mooted by this decision. The oral argument scheduled for November 1, 2023 is cancelled.

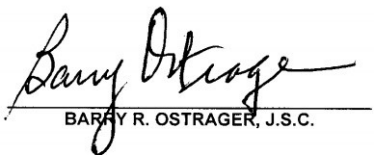
Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the First and Second Causes of action is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Matthew Myzak and against defendant Robert Rosania in the amount of $6,000,000.00, together with interest at the statutory rate of 9% per annum from November 21, 2022 through the date of entry of judgment, in an amount calculated by the Clerk of the Court, upon plaintiff's efiling of a Proposed Judgment directed to the County Clerk; and it is further

ORDERED that the Third, Fourth, Fifth, and Sixth Causes of Action are dismissed.

Dated: October 24, 2023



BARRY R. OSTRAGER, J.S.C.

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