SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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FRITALA LLC

Plaintiff,

- v -

CONTINENTAL GENERAL INSURANCE COMPANY,

Defendant.

INDEX NO. 652928/2020

MOTION DATE 03/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 55
were read on this motion for DISMISSAL.

This action arises out of loans, secured by mortgages on real property, between defendant, Continental General Insurance Company, and plaintiff, Fritala LLC. Having ultimately repaid the loans, plaintiff alleges that defendant engaged in misconduct during the course of the parties' relationship and seeks damages as a result. Defendant now moves, pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7), to dismiss the verified complaint.

On or about August 10, 2018, defendant extended to plaintiff an acquisition loan of $9,818,751.50, and a building loan of $1,131,248.50, to develop condominiums on real property in Brooklyn. Both loans were memorialized by written agreements dated August 10, 2018. Each loan was secured by a separate mortgage and note. The loan agreements required that plaintiff, not later than August 9, 2019, repay the outstanding principal balance of the loans and all accrued and unpaid interest. The parties anticipated that plaintiff would repay the loans based on condominium sales at the property. The acquisition loan agreement thus included a schedule of

minimum release prices at which the condominium units could be sold. The loan agreements, nevertheless, provided that the parties were not acting in a joint venture or partnership relationship.

Under the loan agreements, beginning on October 1, 2018, plaintiff was required to begin making interest payments. As security for that obligation, the acquisition loan agreement provided for $587,000 to be set aside in reserve that defendant would debit each time interest payment was due, until such time as the fund was depleted. The acquisition loan agreement also provided that a portion of the acquisition loan funds advanced to plaintiff be deposited into reserve funds held for plaintiff's benefit to pay tax and insurance costs and fees relating to condominium assessments as such costs and fees arose. In the event of default, defendant was permitted under the terms of the acquisition loan agreement to exercise all of its rights and remedies with respect to the reserve funds, including, if it chose, to apply those funds to the outstanding principal balance of the acquisition loan.

The loan agreements provided that interest would be charged against the outstanding principal balance of the loans, including the amount of the reserve funds. Plaintiff confirmed, in a statement at closing, that the reserve funds had been advanced, and that they were part of the outstanding principal balance.

The loan agreements further provided that an event of default would occur if plaintiff failed to pay outstanding amounts owed on the date due. Upon the occurrence of an event of default, defendant was allowed to charge interest at the default rate and to foreclose upon the property.

In or about April 2019, plaintiff defaulted on its obligations under the loan agreements. The interest reserves had been depleted by in or about March 2019, and, as alleged in the

complaint, plaintiff was unable in April 2019 to begin making the monthly payments itself because plaintiff had not yet closed on any condominium sales. Plaintiff's inability to close such sales was purportedly based, at least in part, on its inability to obtain a tax subdivision of the property from the New York City Department of Finance, due to changes in the DOF's regulations and policies. This tax classification was reportedly necessary to permit the condominium plan to activate and for plaintiff to close on sales of the condominium units. Plaintiff allegedly was thus unable to make the required monthly interest payments and anticipated that it would be unable to repay the loans by August 9, 2019.

Therefore, plaintiff requested, and defendant agreed, that, instead of declaring plaintiff in default, defendant forbear the exercise of its right to foreclose, and, rather, extend plaintiff's time to perform. Plaintiff's request and defendant's agreement were memorialized in a series of three modifications of the loan agreements between July 10, 2019 and October 7, 2019. These modifications collectively extended plaintiff's time to perform until November 16, 2019. In them, plaintiff acknowledged its default and agreed that it had "no right of offset, defense, counterclaims, claims, or objections in favor of Borrower . . . against Lender with respect to the Loan Documents, as amended to date or alternatively, that any and all such rights of offset, defenses, counterclaims, claims, or objections are hereby unconditionally and irrevocably waived and released."

On November 16, 2019, plaintiff once again defaulted -- as it still had not closed on any sales of the condominium units. Defendant this time served plaintiff with a written notice of default. Defendant again, nevertheless, later agreed to forbear in subsequent modification agreements, this time, however, charging the higher default interest rates. Defendant also permitted plaintiff to sell the condominium units at a reduced minimum release price. In each

agreement, plaintiff again acknowledged its default and lack of defenses while waiving all counterclaims and other rights. By June 15, 2020, plaintiff had finally paid off the outstanding principal and other fees.

In its complaint herein, plaintiff claims that defendant acted in breach of the loan agreements, that these loan agreements were superseded by a joint venture agreement, and that defendant breached obligations pursuant to that joint venture agreement. Plaintiff brings eight causes of action: (a) breach of contract and unjust enrichment based upon improper interest charges on the reserve funds; (b) unjust enrichment and possibly breach of contract based upon defendant's allegedly improper charging of default interest in the absence of a default; (c) breach of defendant's duty of good faith and fair dealing arising from the purported "joint venture;" (d) fraud arising from Defendant's alleged failure to disclose that it would use duress to force plaintiff to enter into certain agreements; (e) "duress," based upon allegedly improper (but unspecified) threats; (f) negligence in failing to provide unspecified financial information; (g) tortious interference with prospective business relationships, with defendant allegedly preventing plaintiff from refinancing the loans; and (h) alleged breaches of NY General Business Law § 349, based upon Defendant's purported failure to disclose that it would engage in the improper conduct alleged. Defendant, on this motion, seeks dismissal of each of plaintiff's eight causes of action.

A complaint may be dismissed pursuant to CPLR 3211(a) (1) based upon documentary evidence where that evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Gomez-Jimenez v New York Law School*, 103 AD3d 13, 16 [1st Dept 2012]). Documentary evidence includes agreements signed by the parties and referred to in the complaint (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5-6 [1st

Dept 2004]; *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). Defendant provides as documentary evidence the Acquisition Loan Agreement (NYSCEF doc. no. 11), the Building Loan Agreement (NYSCEF doc. no. 12), the Building Mortgage Agreement (NYSCEF doc. no. 13), the Acquisition Loan Mortgage (NYCEF doc. no. 14), the Building Loan Note (NYSCEF doc. no. 15), Acquisition Loan Note (NYSCEF doc. no. 16), the Mortgage Loan Final Closing Statement (NYSCEF doc. no. 17), Modification of the Loan Agreements (NYSCEF doc. no. 18-20), the Notice of Default (NYSCEF doc. no. 21), Forbearance Agreements (NYSCEF doc. no. 22-25), the Unit Deed (NYSCEF doc. no. 26), Satisfaction of the Mortgage Document (NYSCEF doc. no. 27), and the Mortgage Consolidation and Modification Agreement (NYSCEF doc. no. 28).

Breach of Contract

Defendant submits that plaintiff's claims are barred by documentary evidence, namely, the Agreements between the parties and the seven releases signed by the Plaintiff between July 2019 and May 2020. Given that the releases explicitly reject any claims, counterclaims or objections, defendant argues that plaintiff is barred from bringing any claims related to the deal.

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release (*Allen v Riese Org., Inc.*, 106 AD3d 514, 516 [1st Dept 2013]). "A release will not be treated lightly because it is 'a jural act of high significance without which the settlement of disputes would be rendered all but impossible" (*id.*). Accordingly, a release is binding unless plaintiff seeks rescission based upon a showing "that it was procured by fraud, duress, overreaching, illegality or mutual mistake" (*id.*). Even where a release was improperly procured, if plaintiff subsequently ratified the release, it remains enforceable, and plaintiff's claims are barred (*id.*).

Here, plaintiff fails to allege that the releases were obtained fraudulently or pursuant to duress. Nor does plaintiff seek the rescission of the releases. On this basis alone, plaintiff's breach of contract causes of action are dismissible. Courts are reluctant to declare a release invalid -- especially, where, as here, no cause has been provided to do so.

Furthermore, plaintiff alleges that defendant breached the Loan Agreements by charging interest on the reserve funds and charging interest at the default rate. Though plaintiff concedes it was in default, it alleges that default should be excused due to its failure to obtain the necessary tax subdivision. However, the Loan Agreements explicitly permit the defendant to charge interest on "the reserve funds" (part of the outstanding principal). Pursuant to Section 2.2.1(a) of the August 10, 2018 Acquisition Loan Agreement and Section 2.2.1(a) of the Building Loan Agreement (August 10, 2018), defendant was entitled to charge such interest (NYSCEF doc. no. 11-12).

Finally, plaintiff's breach of contract causes of action simply fail to state the elements of the claim. To sustain a claim for breach of contract, a plaintiff must plead: (a) a valid contract; (b) performance by plaintiff; (c) failure to perform by defendant; and (d) resulting damages (*Noise in the Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]). A breach of contract claim requires pleading the specific contractual language alleged to have been violated. Here, plaintiff fails to do so. Moreover, plaintiff has acknowledged its own default here on multiple occasions and thus has acknowledged its own failure to perform under the terms of the applicable contract -- warranting dismissal of the breach of contract claims.

Unjust enrichment

Under New York law, to "adequately plead [unjust enrichment], 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 [2012]). Unjust enrichment claims are barred where "a written contract exists or [where such contract] covers the subject matter of plaintiff's action" (*Zurakov v Register.Com, Inc.*, 304 AD2d 176, 182 [1st Dept 2003]).

In opposition, plaintiff provides as documentary evidence the affidavit of Donald LaRosa, plaintiff's managing member (NYSCEF doc. no. 37). In that affidavit, LaRosa indicates that in April 2019, defendant began charging interest at the default rate of 20% rather than the nominal rate. LaRosa makes reference to an April 30, 2019 email from Trevian (Trivala's purported agent) indicating to plaintiff that, should it sell seven units of housing stock, the rate would revert from the default to the nominal rate (NYSCEF doc. no. 37).

Plaintiff argues that, based on this purported exchange, it reasonably relied upon the promise to reduce the interest rate when selling the condominium units and that defendant was consequentially unjustly enriched at plaintiff's expense.

Here, there are plainly evident contracts governing the parties' relationship and, thus, unjust enrichment is patently unavailable as a remedy. Despite plaintiff's assertions, the subsequent email does not purport to change any contractual provision related to the charging of interest; rather, it merely confirms that, should plaintiff pay off outstanding interesting amounts through the sale of the seven units, it would no longer be in default and would thus be charged the nominal rate. This email exchange between a party and a nonparty cannot serve to modify the meaning of the various well-negotiated agreements and modification agreements at issue in this dispute. Moreover, plaintiff fails to allege that defendant received benefits not owed to them; indeed, defendant received payments in accordance with the applicable contracts and their subsequent modifications.

Breach of Duty of Good Faith and Fair Dealing

In order sufficiently to plead a claim for breach of the duty of good faith and fair dealing, plaintiff must plead that defendant has "act[ed] in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007]). Such claims are also barred where they are duplicative of breach of contract claims (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]). Here, plaintiff's breach of duty claims mirror the facts underlying its breach of contract claims. They are, therefore, subject to dismissal.

Negligence

To sustain a negligence cause of action, a plaintiff must show (a) defendant owed a duty of care to plaintiff; (b) defendant breached that duty; and (c) resulting damages (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]). Plaintiff avers that defendant owed a duty of care because defendant usurped the traditional role of a lender-borrower by "failing to provide accurate and timely financial data, as well as practices and policies…which it was utilizing in its relationship with Plaintiff." However, neither the loan agreements nor the subsequent modifications require defendant to share financial information, practices, or policies.

To establish a joint venture, moreover, plaintiff must plead "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking . . ., some degree of joint proprietorship and control over the enterprise; and a provision for the sharing of profits and losses" (*Kaufman v Torkan*, 51 AD3d 977, 979 [2d Dept 2008]). A "lender and borrower" relationship does not give rise to a joint venture because the lender is "at no risk of suffering any losses" and "lack[s] control over the purported

enterprise" (*id.*). Plaintiff has not sufficiently pled the elements of a joint venture; the relationship between plaintiff and defendant was that of borrower-lender and nothing in the loan agreements' language gives rise to such a relationship. Indeed, the loan agreements expressly state that the parties were not in a joint venture (NYSCEF doc. no. 413).

Fraud

To sustain a fraud claim, plaintiff must plead, with particularity, "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403 [1st Dept 2008]). A party cannot be held liable for fraud based upon an omission absent a fiduciary duty or other similar duty to disclose (*Swersky v Dreyer & Traub*, 219 AD2d 321, 327 [1st Dept 1996]).

Here, plaintiff fails to plead a material misrepresentation sufficient to sustain such an action; it merely alleges that defendant misrepresented the fact that plaintiff might be subject to additional interest, fees, and penalties upon default (where those penalties were explicit in the governing contracts). Neither does plaintiff otherwise adequately allege a fiduciary duty. Simply pursuing a contractual remedy certainly cannot give rise to fraud.

Breach of GBL 349

A GBL 349 claim requires a showing that the defendant's conduct was part of the "defendant's effort to sell its services . . . to prospective" customers, was "deceptive in a material way," and caused injury to the plaintiff (*Gomez-Jimenez v New York Law School*, 103 AD3d at 16-17 [1st Dept 2012]). Importantly, "section 349 is directed at wrongs against the consuming public," and "[p]rivate contract disputes, unique to the parties . . . [do] not fall within the ambit

of the statute" (*Oswego v Laborers' Local 214 Pension Fund v Marine Midland Bank*, N.A., 85 NY2d 20, 24-25 [1995]).

Plaintiff's allegations here relate solely to the private conduct of contracting parties. The complaint does not allege any public-facing behavior which would be subject to GBL 349. This statute, therefore, is an inappropriate basis for plaintiff's claim.

Duress

Plaintiff alleges that defendant improperly applied economic duress to force their acceptance of the subsequent agreements. However, the court notes that the subsequent agreements were made due to plaintiff's breach and only served to help plaintiff avoid breach. A claim for economic duress requires plaintiff to plead that defendant made a "wrongful threat" precluding plaintiff's "free will" (*Bethlehem Steel Corp. v Solow*, 63 AD2d 611, 611- 12 [1st Dept 1978]). "[F]inancial pressures" and a lack of "equal bargaining power" are "insufficient . . . to constitute economic duress" (*Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 256 [1st Dept 1989]). Plaintiff offers only the scantest of allegations, claiming defendant made demands beyond its legal rights, but fails to state what those demands were. Seeking enforcement of a contractual remedy itself certainly does not rise to the level of duress.

Tortious Interference with Prospective Business Relations

In order to plead a claim for tortious interference with prospective business relationships, a plaintiff must allege "deliberate interference" with a prospective business relationship "amount[ing] to a crime or an independent tort" (*Carvel Corp. v Noonan*, 3 NY3d 187, 189-90 [2004]). Mere "economic pressure" does not rise to that level unless it is "extreme and unfair" (*id.* at 192-93). Plaintiff must also plead that the conduct in question was "directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*id.* at

192). Plaintiff here fails to state the alleged misconduct and does not state the business relationship allegedly interfered with.

Plaintiff's Cross Motion to Amend

CPLR §3025 (b) provides that "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court [...]. Leave shall be freely given upon such terms as may be just."

The proposed amendments purport to provide more specificity as to plaintiff's allegations (NYSCEF doc. no. 50). It adds facts related to the April 2019 email exchange between Trevian and plaintiff. It further adds that, after plaintiff sold ten units, it was delivered a thirty-day extension Second Forbearance wherein defendant refused to negotiate as to any terms proposed and plaintiff would otherwise be found in default and threatened with foreclosure should the company not sign. Plaintiff cites to the timing of the delivery of the Second Forbearance Agreement to support its argument that defendant engaged in duress or otherwise inappropriately pressured plaintiff to sign. Plaintiff alleges that defendant engaged in the same behavior prior to the signing of the Third Forbearance Agreement. Plaintiff now alleges that the damages stemming from this coercion amount to $1 million (NYSCEF doc. no. 50).

Plaintiff's proposed amendments do not remedy the legal grounds for dismissal. The additional information supplied does not provide any additional evidence or facts establishing fraud, duress, violations of duties, breach of contract, or the other causes of action pleaded. Rather, the email appears to merely confirm the rights and responsibilities of the respective parties under the contracts. Although leave to amend pleadings should be "freely given" (CPLR 3025[b]; *see Boakye–Yiadom v Roosevelt Union Free School Dist.*, 57 AD3d 929, 931), a court should deny such a motion when the proposed amendment is palpably insufficient or patently

without merit (*Nanomedicon, LLC v Rsch. Found. of State Univ. of New York*, 129 AD3d 684, 685, [2d Dept 2015]). Plaintiff's cross-motion is denied as futile.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint (motion seq. no. 001) is granted; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is denied as futile; and it is therefore

ORDERED that the complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

01/02/2024
DATE

ROBERT R. REED, 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