WeWork Cos. LLC v
Parkmerced Holdings Subsidiary LLC

2024 NY Slip Op 32506(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 651708/2020

Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

WEWORK COMPANIES LLC, AS SUCCESSOR IN INTEREST TO WEWORK COMPANIES INC.,

Plaintiff,

- v -

PARKMERCED HOLDINGS SUBSIDIARY LLC, PARKMERCED INVESTORS, LLC, and JOHN DOES 1 THROUGH 10,

Defendants.

----------X

INDEX NO. 651708/2020

MOTION DATE _____

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 188, 190, 193, 195, 197

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 179, 189, 191, 194, 196, 198

were read on this motion to/for JUDGMENT - SUMMARY.

In motion seq. no. 003, plaintiff WeWork Companies LLC (WeWork) moves, pursuant to CPLR 3212, for summary judgment on its claim for breach of contract. In motion seq. no. 004, defendants Parkmerced Holdings Subsidiary LLC and Parkmerced Investors, LLC (together, Parkmerced) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

This action involves a residential rental project in the Parkmerced neighborhood in San Francisco, California. (NYSCEF 29, Amended Verified Complaint ¶ 1.) This

action is related to *Parkmerced Investors, LLC v WeWork Companies LLC*, Index No. 652094/2020 (Parkmerced Action).[1]

On September 18, 2018, the parties executed a term sheet regarding WeWork's proposed investment in the project. (NYSCEF 74, Term Sheet.) The term sheet was a "non-binding indication of terms for a preferred equity investment (the 'Preferred Investment')" of $450 million. (*Id.*) The term sheet was "non-binding," except for the paragraphs captioned "Costs and Expenses", "Confidentiality," "Attorney's Fees," "Exclusivity," "Miscellaneous," and "Closing Date," which were binding. (*Id.* at 9 [Non-Binding Provision].) For the right to participate in the redevelopment project, WeWork paid a $20 million nonrefundable exclusivity fee. (*Id*. at 7-8 [Exclusivity Provision.) The Exclusivity Provision provides,

> "[i]n consideration of the time and expense to be expended by WeWork … in connection with undertaking due diligence, the preparation of documents and other matters, Maximus[2] agrees, that until the earlier of (i) [October 31, 2018], and (ii) the date when WeWork has declined to Maximus to pursue the Preferred Investment in accordance with this term sheet: from and after the date of this term sheet, neither Maximus, nor its affiliates, agents or representatives, will enter into any agreement, make or accept any offer or otherwise discuss or negotiate terms relating to the recapitalization or sale of Parkmerced or any direct or indirect ownership interest therein, with any person or entity other than WeWork and GMF; Maximus will terminate all discussions pursuant to any such agreements that may already exist (except for discussions regarding the termination of such agreements), use commercially reasonable efforts to terminate any

---

[1] On January 18, 2022, the court dismissed the Parkmerced Action. The Appellate Division, First Department affirmed the court's decision as discussed in more detail infra. (*Parkmerced Invs., LLC v WeWork Cos. LLC*, 217 AD3d 531 [1st Dept 2023].)

[2] The Term Sheet states: "We are pleased to submit the following non-binding indication of terms for a preferred equity investment (the 'Preferred Investment') by affiliates of WeWork Companies Inc. ('WeWork') and GMF Capital ('GMF') in the property known as Parkmerced in San Francisco, California through a Delaware limited liability company (the 'Company') controlled by Robert Rosania and his affiliates ('Maximus')." (NYSCEF 74, Term Sheet at 1.) Rosania executed the Term Sheet as President of Parkmerced Investors LLC. (*Id*. at 12.)

such existing agreements, but in all events Maximus shall be solely responsible for all costs, expenses and liabilities that may arise under any such existing agreements. The foregoing shall not prohibit Maximus from negotiating with existing or proposed mortgage and/or mezzanine lenders.

In consideration of Maximus agreeing to work exclusively with WeWork and GMF from and after the date of this term sheet to consummate the Preferred Investment and for Maximus terminating as of the date of this term sheet all discussions with other potential providers of common or preferred equity for Parkmerced, WeWork shall pay to Maximus a fee of $20 million (the 'Exclusivity Fee'), payable as follows: $7.5 million by wire transfer no later than 12:00 noon (NY time) on September 18, 2018; and $12.5 million balance by wire transfer no later than 3:00 pm (NY time) on September 20, 2018. GMF shall have no obligations in respect of the Exclusivity Fee. If the Preferred Investment closes, the Exclusivity Fee will be applied as a credit at Closing against WeWork's Preferred Equity Amount. The Exclusivity Fee otherwise is nonrefundable, except if:

(i) the Preferred Investment does not close by Outside Date due to Maximus's fraud, gross negligence or willful misconduct;

(ii) Maximus' refusal or willful failure to close if WeWork is ready, willing and able to do so; for these purposes, failure of Maximus to obtain the requisite consent of its constituent members (other than GMF or Gary Fegel) shall be deemed a refusal to close;

(iii) WeWork is ready, willing and able to close the Preferred Investment on or before October 31,2018 but the Natixis Facility fails to close by the October 31, 2018 in accordance with the financial terms, and substantially in accordance with the other terms, of the Natixis Terms; provided, however, that the Exclusivity Fee shall not be refunded if WeWork or GMF requests or seeks changes to Natixis Terms of if WeWork extends the Outside Date beyond October 31,2018 and the Natixis Loan does not close in accordance with the Natixis Terms; or

(iv) the closing of the Preferred Investment is enjoined by a direct or indirect constituent of Parkmerced Investors, LLC or a third party with whom Maximus has an agreement relating to the recapitalization or sale of Parkmerced or any direct or indirect ownership interest therein. Except as set forth in the immediately preceding sentence, if the Preferred Investment fails to close by the Outside Date for any reason, or no reason, or if WeWork fails to timely pay the second installment of the Exclusivity Fee, then Maximus shall be deemed to have earned an amount equal to the entire Exclusivity Fee as liquidated damages, and not as a penalty,

> the parties agreeing that the damage to be incurred by Maximus for the failure of the transaction to proceed or to be consummated by Outside Date would be difficult to compute."

(*Id.*) WeWork wired the fee as required. (NYSCEF 77, Wire Confirmation; NYSCEF 79 Wire Transfer Record [9/18/18]; NYSCEF 83, Wire Transfer Record [9/21/18].)

Pursuant to the Term Sheet's Closing Date Provision, "[t]he Preferred Investment shall be closed and funded no later October 31, 2018." (NYSCEF 74, Term Sheet at 8 [Closing Date Provision].) However, WeWork could extend this date to November 30, 2018, if it provided notice by October 25, 2018 and paid an additional $6 million. (*Id.*) As of October 31, 2018, the deal had yet to be finalized. (NYSCEF 142, October 31, 2018 Email.) On November 1, 2018, WeWork requested the immediate return of the Exclusivity Fee. (NYSCEF 114, November 1, 2018 Letter.)

On March 16, 2020, WeWork commenced this action by a summons with notice. (NYSCEF 1.) On July 15, 2020, WeWork filed its complaint, alleging claims for breach of contract and unjust enrichment. (NYSCEF 5, Verified Complaint.) On July 19, 2019, WeWork filed an amended complaint adding additional allegations regarding Parkmerced's alleged breach of the Exclusivity Provision.[3] (NYSCEF 29, Amended Verified Complaint.) Parkmerced moved to dismiss the amended complaint; the motion was granted, in part, to the extent that the court dismissed the claim for unjust enrichment. (NYSCEF 54, So Ordered Transcript [mot. seq. no. 001]; NYSCEF 58, Decision and Order [mot. seq. no. 001].)

---

[3] In discovery, plaintiff learned that, on September 13, 2018, defendants also executed a term sheet with nonparty Ascend Real Estate Funding, LLC (Ascend), which outlined the terms of a proposed $438 million investment by Ascent in the project. (NYSCEF 85, Ascend Term Sheet.) Plaintiff alleges that the Ascend Term Sheet violates the Exclusivity Provision of its term sheet.

On October 14, 2022, the parties filed these summary judgment motions. The court permitted the parties supplemental briefs to address the Appellate Division, First Department's affirmance of the court's dismissal of the Parkmerced Action. (*Parkmerced Invs., LLC v WeWork Cos. LLC*, 217 AD3d 531 [1st Dept 2023].) In the Parkmerced Action, Parkmerced alleged claims for breach of the term sheet, breach of the covenant of good faith and fair dealing, and promissory estoppel. As to the breach of contract claim, the First Department held that

> "[t]he court correctly dismissed the breach of contract claim. A term sheet that 'sets forth the general intent of the parties to discuss in good faith the terms and conditions' of a deal and states that 'neither party shall be bound until the parties execute a more formal written agreement,' does not constitute an enforceable contract."

(*Id*. [citations omitted].)

In the Parkmerced Action, Parkmerced alleged that WeWork breached the Term Sheet by failing to fund the $450 million Preferred Investment on the Closing Date. (Parkmerced Action, NYSCEF 6, Complaint ¶¶ 2, 3, 46.) The court found that the Term Sheet was nonbinding in so far as WeWork was not bound to consummate the transaction and go through with the closing. (Parkmerced Action, NYSCEF 33, Decision and Order at 5 [mot. seq. no. 001].) The court recognized, however, that there were binding provisions of the Term Sheet. (*Id*. ["Plaintiff attempts to extend the binding nature of the Closing Date to funding the proposed transaction."].) The breach that Parkmerced alleged just did not fall under one of those binding provisions. When the First Department affirmed the court decision, it acknowledged that Parkmerced's alleged breach was the failure to proceed or consummate the proposed transaction.

(*Parkmerced*, 217 AD3d at 532.) The First Department, like this court, held that the Term Sheet was not binding as to that specifically alleged breach. (*Id.*) It did not address any of the binding provisions of the Term Sheet because they were not relevant to the breach at issue. Parkmerced's assertion that the First Department's decision renders the entire Term Sheet non-binding is without merit. In fact, the First Department also agreed with the court that the exclusivity fee provision "did not pertain to attorneys' fees, which were allowed if any party commenced any action against another in connection with the term sheet and prevailed" (*id.* at 532 [citation omitted]), acknowledging that attorneys' fees were recoverable under its respective binding Term Sheet provision. However, the First Department's affirmance did foreclose on Parkmerced's argument that WeWork breached the Term Sheet by not acting in good faith, and thus, cannot establish the element of performance of the contract. (*Id*. at 531 [holding that "[a] term sheet that sets forth the general intent of the parties to discuss in good faith the terms and conditions of a deal and states that neither party shall be bound until the parties execute a more formal written agreement, does not constitute an enforceable contract" (internal quotation marks and citations omitted)].) Thus, the only issue to decide on this motion is whether there was, in fact, a breach of the Exclusivity Provision. (*See generally RDF Agent, LLC v Elec. Red Ventures, LLC*, 227 AD3d 424 [1st Dept 2024] [analyzing exclusivity provision of a term sheet which provides "that it is not binding except for certain paragraphs, including the paragraph entitled 'Exclusivity'"].)

The relevant portion of the Exclusivity Provision states,

> "Maximus will terminate all discussions pursuant to any such agreements that may already exist (except for discussions regarding the termination of

> such agreements), use commercially reasonable efforts to terminate any such existing agreements, but in all events Maximus shall be solely responsible for all costs, expenses and liabilities that may arise under any such existing agreements. The foregoing shall not prohibit Maximus from negotiating with existing or proposed mortgage and/or mezzanine lenders.
>
> In consideration of Maximus agreeing to work exclusively with WeWork and GMF from and after the date of this term sheet to consummate the Preferred Investment and for Maximus terminating as of the date of this term sheet all discussions with other potential providers of common or preferred equity for Parkmerced, WeWork shall pay to Maximus a fee of $20 million (the 'Exclusivity Fee')… ." (NYSCEF 74, Term Sheet at 7-8 [Exclusivity Provision].)

There is no dispute that Parkmerced was negotiating with nonparty Ascend prior to entering into the Term Sheet. (NYSCEF 28, Amended Complaint ¶ 56 ["Just five days before the September 18, 2018 effective date of Defendants' Term Sheet with WeWork, Parkmerced Holdings LLC (a parent or affiliate of Defendants) and Rosania entered into separate term sheet with Ascend, dated September 13, 2018, which provided Ascend with its own exclusivity period through October 31, 2018 to negotiate terms of an approximately $438 million investment in Parkmerced that contained a substantial equity component"]; NYSCEF 75, tr. at 65:18-67:10 [Rosania Depo].)

Pursuant to the Exclusivity Provision, Parkmerced agreed to "terminate all discussions pursuant to any such agreements that may already exist (except for discussions regarding the termination of such agreements), use commercially reasonable efforts to terminate any such existing agreements." (NYSCEF 74, Term Sheet at 7 [Exclusivity Provision].) The Term Sheet was in effect as of September 18, 2018. (*Id.* at 1.) Despite this provision, Parkmerced and Ascend continued to negotiate after September 18, 2018. On October 5, 2018, Joseph

McDonnell, Partner and Co-Chief Investment Officer of Ascend sent Rosania a newly proposed term sheet. (NYSCEF 89, McDonnell email at 4.) In his email, McDonnell states

> "[t]hank you for jumping on the call yesterday and moving this forward in a positive direction for all.
>
> Per our discussion, we hope to resolve this matter quickly and expeditiously move towards a close per the below:
>
> 1. Maxim us/PM pays a break up fee with respect to the LOI dated September 13, 2018 (the "Current Agreement") - Ascend to be paid the ~$4.3M as per term sheet plus $700k to cover other expenses within 5 business days of the date hereof. Counsel to expeditiously draft full releases, etc. within this time frame.
>
> 2. Ascend and Maxim us/PM to enter into an LOI in the form attached hereto concurrent with the releases and amounts described in 1 above.
>
> a. As discussed last night, we have flexibility on proceeds with respect to the Preferred Equity either way for reasonable adjustments in spread. We really hope that the above is achievable/ look forward to swiftly moving to a successful closing of PM and must remind you that this is not binding or admissible in any way until definitive documents are executed and delivered by all parties.
>
> Please let us know when you are available to discuss collectively given the closing timeline as we would like to move forward quickly in order to have counsel start drafting on this ASAP." (*Id.* at 1.)

This conclusively evidences that Parkmerced did not terminate all discussions pursuant to existing agreements. Parkmerced was continuing to try to close a deal with Ascend.

In response, Parkmerced asserts that the evidence actually shows that the discussions with Ascend after September 18, 2018 concerned terminating the Ascend term sheet. Parkmerced cites the McDonnell's deposition testimony where McDonnell was explaining how Ascend would explain to investors why the

Parkmerced deal did not go through. McDonnell explained that it was not great to make a loan to a company who just violated the exclusivity provision of the Ascend term sheet. (NYSCEF 100, tr. at 113:20-24 [McDonnell Depo].) McDonnell then explained that only Ascend and not the investors would have an interest in the break-up fee for that violation. (*Id.* at 115:17-20.) Specifically, he explained, "[y]ou're in a situation where you have to go back to your investors and explain why things broke up. There's only kind of two ways to do that. One is to say, hey, they were a bad guy, violated exclusivity, and so we're pursuing all of our remedies. The other is to sign a deal. Once we decided to go the legal route on the breakup fee, it would be easier to explain away why we didn't want to make the investment, it's a bad borrower trait." (*Id*. at 115:24-116:9.) Contrary to Parkmerced's assertion this testimony does not evidence any discussions Ascend had with Parkmerced to terminate the Ascend term sheet. Rather, it evidences how Ascend would handle its investors if it decided to pursue a remedy for Parkmerced's violation of the Ascend term sheet. Further, McDonnell's testimony that Ascend "was sitting in a gray area" while waiting to hear on the proposed October 5, 2018 term sheet, "hoping [Rosania] would give us some feedback and we could pick a direction" (*id*. at 121:10-17) likewise does not evidence any discussions by Parkmerced to terminate the Ascend term sheet. It evidences that Ascend was waiting to hear back from Parkmerced about the newly proposed term sheet and what options Ascend had.

Further, any discussions Parkmerced had with Ascend regarding their "new partner," allegedly referring to WeWork, is irrelevant. (See NYSCEF 106, 108, 116,

Emails.) Even if Parkmerced informed Ascend that it was working with WeWork and any deal would include WeWork, negotiating with Ascend was a violation of the Exclusivity Provision of the Term Sheet.

While the court agrees that the Exclusivity Provision permitted discussions with Ascend, those discussions were absolutely limited to discussions regarding the termination of the Ascend term sheet, which is not what the evidence shows.

Parkmerced also asserts that there is an issue of fact as to whether the discussions with Ascend were commercially reasonable as required by the Exclusivity Provision. However, the court does not need to reach that issue because the discussions themselves were clear not about terminating the Ascend term sheet. Parkmerced and Ascend were still negotiating a deal. Thus, Parkmerced is in breach of the binding Exclusivity Provision of the Term Sheet.

The next issue is damages. The Exclusivity Provision clearly provides that the Exclusivity Fee is nonrefundable, except in four specific situations. WeWork does not assert that any of the exceptions apply here. Rather, WeWork argues that it should be entitled to the return of the $20 million fee on the equitable theory of restitution. However, the court will not permit WeWork's attempt to invoke an equitable remedy to circumvent the terms of the Term Sheet.

"The settled precedent is that in the absence of fraud, accident, or mistake, a court of equity cannot change or abrogate the terms of a contract. Equitable relief cannot be claimed because a contract is oppressive, improvident, or unprofitable, or because it produces hardship. (*Dunkin' Donuts of Am., Inc. v Middletown Donut Corp.*, 100 NJ 166, 183-184, 495 A2d 66, 75 [1985] [citations

omitted]; *Simon v Burgess*, 71 Misc 300, 304 [Sup Ct, NY County 1911] [finding that "[t]he contingency, on the happening of which the plaintiff was to be paid, seems to be in the nature of a condition precedent, and however ill-judged or foolish it may have been on the part of plaintiff to agree to such a condition, it cannot be abrogated by the court, nor can the contract be changed].)

Here, WeWork, a sophisticated business entity, negotiated a contract that provides for only four situations where the Exclusivity Fee is refundable. It could have negotiated for a fifth situation – where the Exclusivity Provision is breached. The Term Sheet contains no such provision. If the court grants WeWork's request for restitution, it would essentially be adding that fifth situation and rewriting the agreed to terms. While WeWork is not entitled to restitution, it is entitled to attorneys' fees pursuant to the binding Attorneys' Fees Provision, which states:

> "[i]f any party, brings any action or suit against another party in connection with this Term Sheet, then, in such event, the substantially prevailing party, as determined in such action or suit, shall be entitled to have and recover from the other party all costs and expenses of such action or suit, including, without limitation, reasonable attorneys' fees and expenses resulting therefrom, it being understood and agreed that the determination of the substantially prevailing party shall be included in the matters that are the subject of such action or suit." (NYSCEF 74, Term Sheet at 6 [Attorneys' Fees Provision].)

Thus, the issue of attorneys' fees shall be referred to a Special Referee.

Accordingly, it is

ORDERED that defendants Parkmerced Holdings Subsidiary LLC and Parkmerced Investors, LLC's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff WeWork Companies LLC's motion for summary judgment on its claim for breach of contract is granted in accordance with the court's decision above; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:
(1) the issue the amount of costs and expenses of bringing and prosecuting this action, including reasonable attorneys' fees and expenses; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

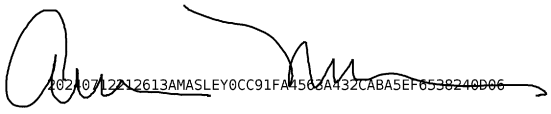
ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses; accordingly, and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.



7/12/2024
DATE

ANDREA MASLEY, J.S.C.

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