Kolodny Group LLC v Grove at Maple Point LLC
2024 NY Slip Op 35407(U)
March 15, 2024
Supreme Court, Albany County
Docket Number: Index No. 908473-23
Judge: Richard M. Platkin

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

THE KOLODNY GROUP LLC,

Plaintiff,

-against-

THE GROVE AT MAPLE POINT LLC,

Defendant.

DECISION & ORDER

Index No.: 908473-23

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

MAGGUILLI LAW FIRM, PLLC
Attorneys for Plaintiff
(Lawrence P. Magguilli, of counsel)
14 Corporate Woods Boulevard
Albany, New York 12211

E. STEWART JONES HACKER MURPHY LLP
Attorneys for Defendant
(Benjamin F. Neidl, of counsel)
200 Harborside Drive, Suite 300
Schenectady, New York 12305

Hon. Richard M. Platkin, A.J.S.C.

The Kolodny Group LLC ("Kolodny") brings this commercial action to collect certain fees allegedly owed to it by The Grove at Maple Point LLC ("Maple Point").

In lieu of answering, Maple Point moves under CPLR 3211 (a) (1), (3) and (7) for dismissal of Kolodny's amended verified complaint (*see* NYSCEF Doc No. 22 ["Complaint"]).

BACKGROUND

Kolodny and Maple Point are limited liability companies headquartered in Albany, New York (*see* Complaint, ¶¶ 1-2). Ronald Kay is a member of both Maple Point and Kolodny.

Maple Point has four members, including Kay, and is governed by an operating agreement executed by the members on August 13, 2021 (*see id.*, ¶¶ 6-7, 9; NYSCEF Doc No. 24 ["Operating Agreement"]).

The same four members signed an addendum to the Operating Agreement later in August 2021, by which Maple Point agreed to pay Kay a developer's fee of $80,000 (*see* Complaint, ¶¶ 5, 8):

> A. Developer's Fee. [Maple Point] shall pay to The Developer, Ronald Kay, a fixed Developer's Fee in the amount of Eighty Thousand dollars (US$80,000.00). The payment dates and amounts shall be agreed to by the Members but shall be paid in full no later than two years from the date the Operating Agreement is executed. The amount of the monthly installments shall be modified from time to time to reflect changes to the Budget and/or cash flow schedule.
>
> Any payments of the Developer's Fee shall be subordinated to debt payment or construction completion payments (NYSCEF Doc No. 23 ["Addendum"]).

On or about July 18, 2023, Kay assigned to Kolodny "all of [his] rights in, under, and to all benefits and privileges accruing to [him] under the [Addendum]" (NYSCEF Doc No. 25 ["Assignment"]). Kolodny, as assignee, alleges that Maple Point "failed, refused, or neglected to make full payment of" the Developer's Fee, as promised in the Addendum (*see* Complaint, ¶¶ 11-13).

Kolodny also entered into a property management agreement with Maple Point on or about August 30, 2021 (*see id.*, ¶¶ 15-17; NYSCEF Doc No. 26 ["PMA"]). Under the PMA, Kolodny agreed to serve as the exclusive property manager of the commercial premises belonging to Maple Point ("Property") (Complaint, ¶ 18). "In exchange, [Maple Point] agreed to pay [Kolodny] 6% of all collected rents and fees for the Property (the 'Management Fee'), plus a flat fee of $3,000.00 for each tenant procured by [Kolodny] (the 'Procurement Fee')" (*id.*, ¶ 19).

Kolodny alleges that, as of July 19, 2023, it "procured three tenants for the [P]roperty, and as such, is due the sum of $9,000.00 from [Maple Point]" (*id.*, ¶ 20). In addition, Kolodny allegedly "collected rents and fees from the tenants, and as such is due 6% of all such collected rents and fees from [Maple Point]" (*id.*, ¶ 21).

Kolodny commenced this commercial action on September 8, 2023 through the filing of a summons and verified complaint (*see* NYSCEF Doc No. 1). As amended,[1] the Complaint alleges claims for: (1) breach of the Addendum, seeking recovery of the Developer's Fee; (2) breach of the PMA, seeking to recover no less than $9,000; (3) unjust enrichment for "property management services"; and (4) quantum meruit, also for property management services (Complaint, ¶¶ 4-37).

Maple Point moves, pre-answer, to dismiss the Complaint in its entirety under CPLR 3211 (a) (1), (3) and (7). Kolodny opposes the motion.

[1] The original complaint also alleged a claim for recovery of $1,402,500 under a construction contract between Kolodny and Maple Point (*see* NYSCEF Doc No. 2). After Maple Point moved to dismiss or stay the construction claim as subject to binding arbitration (*see* NYSCEF Doc No. 11), Kolodny removed the construction claim through the filing of the amended Complaint.

DISCUSSION

"[A] motion pursuant to CPLR 3211 (a) (1) must be granted where the documentary evidence 'conclusively refutes [claimant's] factual allegations' and establishes a defense as a matter of law" (*Doller v Prescott*, 167 AD3d 1298, 1299 [3d Dept 2018], quoting *Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018]).

On a motion to dismiss under CPLR 3211 (a) (7), a court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Finally, dismissal is warranted under CPLR 3211 (a) (3) where "the party asserting the cause of action has not legal capacity to sue."

A. Addendum (First Cause of Action)

Kolodny seeks recovery of the Developer's Fee that Maple Point "agreed to pay Kay" in the Addendum, a right that Kay assigned to Kolodny by written Assignment prior to the commencement of this action (Complaint, ¶¶ 5-13; *see* Assignment).

Maple Point argues that Kolodny's claim under the Addendum must be dismissed because: (1) Kolodny lacks standing to sue, inasmuch as "Kay's Developer's Fee is not assignable to any third party without Maple Point's consent"; and (2) even if assignable, the Developer's Fee is not yet due because it is subordinate to Maple Point's unpaid mortgage debt (NYSCEF Doc No. 44 ["MOL"] at 3-8).

1. Standing

Maple Point bases its standing argument on the principle that contracts "involving a relationship of personal confidence are not assignable by one party unless the other party consents or waives the right to object'" (6A NY Jur 2d Assignments § 11; *see Paige v Faure*, 229 NY 114, 118 [1920] ["The general rule is that rights arising of a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence" (citations omitted)]).

Maple Point points to its Operating Agreement, which makes Kay a co-manager, sets forth Kay's management obligations, including oversight of the construction project, and prohibits the transfer of any portion of, or any interest or rights in, Kay's membership interest (*see* MOL at 4-5; Operating Agreement, §§ 3.10, 9.1). Maple Point further asserts that the Addendum "provides for the payment of the Developer's Fee to *Kay* (as a Maple Point *Member-Manager*) in exchange for these services, subject to the terms and conditions to be agreed upon later" by the members of Maple Point (MOL at 4). From this, Maple Point concludes that "the Developer's Fee covenant is personal to Kay, and is part and parcel of his rights as a Member in Maple Point," and, as such, is not assignable (*id.*).

However, Kay did not assign to Kolodny any performance obligations or other rights or duties under the Operating Agreement. Rather, Kay assigned "all of [his] rights in, under, and to all benefits and privileges" under the Addendum, which merely provides for the payment of "a fixed Developer's Fee" to Kay. Thus, any performance obligations or duties imposed upon Kay by the Operating Agreement remain with Kay following the Assignment.

As an exception to the general rule stated above, "[t]he right to recover money due under a contract may be assigned, even though the contract itself may not be assignable" (6A NY Jur

2d Assignments § 13, citing *Melino v National Grange Mut. Ins. Co.*, 213 AD2d 86, 88 [3d Dept 1995], *appeal dismissed* 87 NY2d 897 [1995]; *see Hecht v Whalen*, 174 Misc 146, 147 [Sup Ct, NY County 1940] [money due under a contract involving personal skill, service or confidence is assignable, even though the contract itself is not assignable; thus, the party who performed such obligations, or contracted to do so, may assign its right to the money earned or to be earned]).

This is essentially the situation here. The Assignment does not purport to assign the Operating Agreement or any of Kay's obligations thereunder; the instrument merely assigns Kay's right to receive payment of the Developer's Fee (*see* Assignment at 1).[2] And there is nothing tying the payment of the Developer's Fee to Kay's management obligations under the Operating Agreement, which are focused primarily on construction (*see* Operating Agreement, § 3.10). Moreover, while the Operating Agreement concerns a development venture, it does not identify Kay as the "Developer," and the management responsibilities assigned therein to Kay also are assigned to Asaf Elkayam (*see id.*), who is not referred to as a "Developer" anywhere in the documents.

The Court therefore concludes that Maple Point has not established that Kolodny lacks standing to sue to collect the Developer's Fee as Kay's assignee.

2. Payment

Under the Addendum, the Developer's Fee "shall be paid in full no later than two years from the date the Operating Agreement is executed." The Operating Agreement was executed on August 13, 2021, thereby obliging payment of the full $80,000 by August 13, 2023.

[2] To be sure, the instrument does refer to the assignment of Kay's "obligations and liabilities . . . under the [Addendum]" (Assignment, § 2), but nothing in the Addendum imposed any such performance obligations or liabilities upon Kay, and Maple Point's moving papers do not identify any such obligation or liability.

Maple Point argues, however, that the Developer's Fee is not yet due because it is "subordinate to Maple Point's unpaid debt" (MOL at 6). In this regard, Maple Point relies on the final sentence of the Addendum, which provides that "[a]ny payments of the Developer's Fee shall be subordinated to debt payment or construction completion payments." Maple Point submits proof that it has an outstanding mortgage from Rhinebeck Bank that was used to finance the Property (*see* NYSCEF Doc Nos. 39-43).

Kolodny does not dispute that the subordination clause in the Addendum is "general" in nature, rather than "inchoate," as the clause is not limited to granting priority with respect to Maple Point's assets (*see Standard Brands v Straile*, 23 AD2d 363, 366 [1st Dept 1965] ["'inchoate' subordination gives the senior creditor priority over the subordinated creditor only with respect to the debtor's assets, and becomes operative only when a voluntary or involuntary distribution of the debtor's assets is made to creditors"]). Instead, Kolodny argues that Maple Point's "analysis of 'general' subordination clauses [is] incomplete" (NYSCEF Doc No. 46 ["Magguilli Aff."], ¶ 31).

Under general subordination clauses, the critical inquiry is not whether senior debt is outstanding, but whether the debtor is in default of the senior obligation (*see Standard Brands*, 23 AD2d at 366 ["If . . . the clause is construed as a 'general' subordination clause, there is no right to payment from the debtor and no action would lie against the debtor, where, as here, the debtor is also in default to the senior creditors"]; *accord Jackson Natl. Life Ins. Co. v Ladish Co., Inc.*, 1993 WL 43373, *8, 1993 US Dist LEXIS 1785, *24 [SD NY, Feb. 18, 1993, 92 Civ 9358 (PKL)]) ["If the subordination contemplated by Article Fifteen is 'complete' subordination, Jackson National is not entitled to payment . . . unless and until Ladish's default on its Senior Debt is cured or waived by the holders of that debt"]; *see Kurtz v American Export Indus.*, 49

AD2d 557, 557 [1st Dept 1975] ["The senior debentures to which those in suit are subordinate are undeniably in default and payment under the junior debentures need not be made in this circumstance"], *affd* 39 NY2d 738 [1976]).

In other words, "absent a default in the senior obligation, nothing in the instrument evidencing such senior obligation shall prohibit the debtor from paying the [junior debt] in accordance with its terms" (*Standard Brands*, 23 AD2d at 366; *cf. J-Bar Reinforcement, Inc. v Crest Hill Capital LLC*, 169 AD3d 499, 499-500 [1st Dept 2019] ["Unlike subordination agreements that merely order the priority of plaintiffs' rights as against other creditors and have no bearing on plaintiffs' rights against defendant, the plain, unambiguous language of the subject Subordination Agreement limited plaintiff's right to demand or sue for payment, or declare a default prior to satisfaction of the senior debt" (internal quotation marks and citations omitted).]).

Here, Maple Point has shown the existence of outstanding senior debt, but it does not allege or submit proof of any default with respect to that senior indebtedness. As such, the subordination clause does not prevent the payment of the subordinated Developer's Fee.

Moreover, Maple Point's interpretation of the subordination clause is inconsistent with the other terms of the Addendum. Under the Addendum, "[t]he payment dates and amounts shall be agreed to by the Members but shall be paid in full no later than two years from the date the Operating Agreement is executed," with the amount of the "monthly installments" being "modified from time to time to reflect changes to the Budget and/or cash flow schedule." It would make no sense to promise a Developer's Fee paid in such a manner, only to make payment unavailable during the prescribed period due to a long-term mortgage indebtedness that plainly was within the contemplation of Maple Point's members when the Addendum was signed (*see*

Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]).[3]

Accordingly, the Court rejects Maple Point's argument that the subordination clause prevented Maple Point's obligation to pay the Developer's Fee from maturing due to the existence of outstanding senior mortgage indebtedness.

B. PMA (Second Cause of Action)

Kolodny seeks to recover no less than $9,000 in fees under the PMA for "procur[ing] three tenants for the Property" and "collect[ing] rents and fees from the tenants" (Complaint, ¶¶ 19-21). Maple Point contends that the claim is barred by Real Property Law ("RPL") § 442-d, arguing that Kolodny essentially is seeking to collect real-estate brokerage fees without being licensed as a broker or salesperson (*see* MOL at 8-10).

RPL § 442-d provides as follows:

> No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, *leasing, renting* or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesperson on the date when the alleged cause of action arose (emphasis added).

Kolodny acknowledges that it is not a licensed real-estate broker or salesperson (*see* Magguilli Aff., ¶ 51), but argues that RPL § 442-d does not apply here because the PMA "contemplates significantly more than a mere agreement to rent real estate on behalf of another" (*id.*, ¶ 54).

---

[3] Maple Point concedes that there is an issue of "what happens if, as here, more than 2 years have elapsed since execution of the Operating Agreement, but [Maple Point] still has outstanding debt to its mortgagee" (MOL at 7). Nevertheless, Maple Point argues that the subordination clause, coming last in the Addendum, should be construed as modifying all of the prior language of the Addendum, including the payment terms, and that any ambiguity should be construed against Kay as the drafter (*see id.* at 8). For the reasons set forth above, both clauses of the Addendum are easily reconcilable, and no ambiguity exists.

In construing RPL § 442-d, the Court must be mindful that the object of the statute is "the protection of the public, as in the case of licensing a lawyer or doctor, not to permit others to take advantage of the violation of the statute to escape their obligations" (*Galbreath-Ruffin Corp. v 40th & 3rd Corp.*, 19 NY2d 354, 362-363 [1967] [internal quotation marks and citation omitted]). Thus, RPL § 442-d is intended to "protect the public from inept, inexperienced, or dishonest persons who might perpetrate or aid in the perpetration of fraud" (*Kavian v Vernah Homes Co.*, 19 AD3d 649, 650 [2d Dept 2005]).

As RPL § 442-d "is penal in nature," the statute "should be strictly construed. Its provisions are not broad enough to cover . . . every transaction in which an interest in real estate may be part of the subject" (*Reiter v Greenberg*, 21 NY2d 388, 391-392 [1968] [internal quotation marks and citations omitted]; *see Kreuter v Tsucalas*, 287 AD2d 50, 55 [2d Dept 2001]). The Court must look to both "the nature of the transaction as well as the purpose of the statute" (*Dodge v Richmond*, 5 AD2d 593, 595 [1st Dept 1958]).

Through the PMA, Maple Point appointed Kolodny as its "Agent to exclusively manage the [P]roperty" (PMA, § 1). Kolodny was given "full authority" over the Property and its management, including the following:

> i. To use diligence in managing the premises and to rent, lease, and operate the premises.
>
> ii. To collect all rents and other monies from Tenant as they become due. Agent does not guarantee tenant obligations. Agent may employ collection agencies, attorneys, or any other reasonable and lawful means to collect from a Tenant. Agent is responsible for suing and recovering, including settlement, for rent and for loss or damage to any part of the property. Agent is not responsible for mortgage payments, taxes, fire or other insurance premiums, or any recurring expenses.

> iii. To render to Owner a monthly accounting of rents received and expenses paid.
> iv. Agent agrees to decorate, to maintain, improve and to repair the property and to hire and to supervise all employees and other needed labor. Agent is not responsible for any damage to premises by Tenants or others.
>
> * * *
>
> v. Agent agrees to advertise for, screen, and select tenants in compliance with all relevant laws and regulations. Agent will set rents that reflect the market conditions, unless otherwise instructed in writing by the Owner (*id.*, § 3).

As Maple Point correctly observes, certain of Kolodny's powers and duties under the PMA pertain to leasing and renting the Property. But the PMA is much broader in scope. In making Kolodny the exclusive managing agent, the PMA obliged Kolodny to (i) provide all of the building management services needed to maintain the Property, (ii) hire and supervise all necessary employees and contractors, (iii) ensure the collection of any monies owed by tenants (whether for rent, loss or damage), and (iv) provide Maple Point with a monthly accounting of rents received and expenses paid. Thus, while procuring tenants was one element of the PMA, Maple Point has not shown that it was the "dominant" element (*Dodge*, 5 AD2d at 595; *see generally Transaction Advisory Servs., LLC v Silver Bar Holding, LLC*, 38 AD3d 241, 241 [1st Dept 2007]; *cf. Kucher v Sohayegh*, 182 AD3d 523, 524 [1st Dept 2020]).

In reaching this conclusion, it is significant that the PMA did not make Kolodny the exclusive rental agent or oblige Kolodny to meet any specified level of occupancy. This is unlike *G.C. Fortune Mgt. Co. v Stockade Mobile Home Park* (246 AD2d 739 [3d Dept 1998]), where the management agreement made the plaintiff-manager the "exclusive . . . rental agent" and obliged the manager to guarantee a 98% occupancy level by a certain date (*id.* at 741). In fact, Kolodny claims to have procured just three tenants under the PMA.

And the fact that Kolodny's management fee is based, in part, on the procurement of those three tenants does not alter the Court's conclusion regarding the inapplicability of RPL § 442-d. Under the PMA, Maple Point agreed to pay Kolodny "6% of all collected rents and fees," plus a "flat fee of $3,000.00 for each tenant [Kolodny] is solely responsible for procuring" (PMA [NYSCEF Doc No. 6], ¶ 5; *see* Complaint, ¶ 19). In the overall context of the PMA, the flat fee promised to Kolodny for procuring tenants, which is in addition to the base percentage of rents and fees collected from all tenants, is more akin to "a bonus" (*Glynos v Dorizas*, 106 AD3d 480, 480 [1st Dept 2013]).

Finally, Maple Point makes no argument that the public interest would be harmed by permitting Kolodny, a construction contractor and commercial property manager who was involved in the development of the Project, to pursue recovery herein.

Based on the foregoing, Maple Point has failed to establish that RPL § 442-d precludes Kolodny's claim under the PMA.

C. Quasi-Contractual Claims (Third and Fourth Causes of Action)

Kolodny seeks recovery for "property management services" under theories of unjust enrichment and quantum meruit (Complaint, ¶¶ 27, 33). These quasi-contractual claims are pleaded in the alternative to the claim for breach of the PMA (*see* Magguilli Aff., ¶¶ 57-58).

Inasmuch as the parties' relationship is governed by the PMA, a valid and enforceable agreement, the quasi-contractual claims seeking the same relief must be dismissed (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]; *White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1348-1349 [3d Dept 2023]; *cf. Villnave Constr. Servs., Inc. v Crossgates Mall Gen. Co. Newco, LLC*, 201 AD3d 1183, 1185 [3d Dept 2022]).

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant's motion to dismiss is granted solely to the extent of dismissing the third and fourth causes of action, and is otherwise denied; and it is further

ORDERED that defendant shall answer plaintiff's Amended Verified Complaint, as limited herein, within **twenty (20) days** from the date of this disposition; and finally it is

ORDERED that a preliminary conference shall be scheduled, and the parties shall confer in advance of such conference as to (1) their willingness to engage in mediation or another form of alternative dispute resolution and (2) a schedule for the expedited completion of disclosure.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, plaintiff's counsel shall promptly serve notice of entry on all other parties entitled thereto.

Dated: Albany, New York
March 15, 2024

RICHARD M. PLATKIN
A.J.S.C.

03/15/2024

Papers Considered:

NYSCEF Doc Nos. 22-26, 36-44, 46-49, 51-52.[4]

[4] The Court takes judicial notice of the prior papers and proceedings herein.