Benten Equity Mgt., LLC v Hart
2013 NY Slip Op 31048(U)
April 1, 2013
Sup Ct, New York County
Docket Number: 653680/2012
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

BENTEN EQUITY MANAGEMENT, LLC and
MATTHEW WILLIAMS,

Plaintiffs,

-against-

KENNETH HART, 35th HARCO LLC and
HARCO CONSTRUCTION LLC,

Defendants.

INDEX NO. 653680/2012

MOTION DATE _____

Motion Seq. No. 001, 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on these motions to dismiss and for a preliminary injunction by Harco / by Benten

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that these motions are decided in accordance with the accompanying decision/order dated April 1, 2013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 1, 2013

J.S.C. MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

BENTEN EQUITY MANAGEMENT, LLC and MATTHEW WILLIAMS,

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Index No.: 653680/2012

DECISION/ORDER

35th HARCO LLC and HARCO CONSTRUCTION LLC,

Plaintiffs,

- against -

BENTEN EQUITY MANAGEMENT, LLC and MATTHEW WILLIAMS,

Defendants.

Index No.: 653889/2012

DECISION/ORDER

The first action (hereafter Benten action) is brought by Benten Equity Management, LLC and its principal, Matthew Williams (collectively Benten), against 35th HARCO LLC, HARCO Construction LLC, and their principal, Kenneth Hart (collectively HARCO). In this action, Benten seeks compensation for services performed in connection with a hotel development project. HARCO moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety for failure to state a cause of action and based on documentary evidence. Benten moves

for a preliminary injunction. The second action is brought by the HARCO entities against the Benton entity and Williams. In this action, HARCO alleges that Benten breached the parties' contract for the services to be performed in connection with the project, and that it has tortiously interfered with HARCO's prospective business relationship with a potential business partner in the project. HARCO also moves for a preliminary injunction.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [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 within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

Benton's first and second causes of action allege breach of contract based on two letter agreements, both dated April 7, 2011. The letter agreements were entered into between "35th HARCO LLC and/or HARCO CONSTRUCTION LLC" and "BENTEN EQUITY

MANAGEMENT." The letter agreements were apparently drafted without the benefit of counsel.

One of the agreements, which will be referred to as the Capital Advisory Services Agreement, provides for the Benten entity to provide capital advisory services for the selection of the "most beneficial hospitality brand" and the arrangement of approximately 35 million dollars in construction financing and 25 million dollars in equity financing for the hotel project. This Agreement contains the following provision with regard to compensation:

> "In consideration for the time and monies associated with arranging and achieving the transaction(s) described herein, [Benten] will be entitled to receive payment and be due and payable at the close of the Financing (the 'Financing Fee')."

After the word "payment," the amount of the Financing Fee that had been specified – 1.25 percent of the aggregate Financing proceeds – was crossed-out by the parties, leaving the Agreement without any provision specifying the amount of such fee. The Agreement further provides that "[u]nless this letter shall have theretofore been terminated, the obligation to pay aforementioned amount to [Benten] at the close of the Financing shall be absolute and unconditional. . . ." The Agreement states that Benten "will serve as your [HARCO's] sole agent" for the arrangement of the services. However, it later refers to an agreement to participate in a partnership, thus stating: "On the behalf of the Borrower and/or Sponsorship [defined as 35th HARCO, LLC and/or HARCO Construction, LLC], Kenneth Hart and Matthew Williams agree to participate as 50%/50% partners in the capital advisory services for the above referenced property, which shall include 50%/50% distributions of payment of the Financing Fee described herein."

The second agreement, which the complaint refers to as the Land Lease Agreement,

provides for the Benten entity to provide the same capital advisory services that are specified in the first agreement, and adds to such services "arrangement of a long term Land Lease." This agreement contains the following provision with regard to compensation:

> "In consideration for the time and monies associated with arranging and achieving the transaction(s) described herein, and as compensation for structuring the brand, Land Lease, debt, equity, franchise, management agreements, and otherwise procuring and consummating the close of the legal documents and transaction described herein, it is understood that Benten Equity Management will hold a five percent (5.0%) equity partnership share in 35th HARCO LLC and the affiliated construction management entity for the subject property."

This Agreement also refers to Benten as HARCO's "sole agent for the arrangement" of the specified services, and contains a provision that the obligation to pay the equity payment shall be absolute and unconditional unless the letter shall have been terminated.

In moving to dismiss the breach of contract causes of action, HARCO contends that Benten is not entitled to compensation – either a percentage of the finance fee or an equity interest in the HARCO entity – because the agreements were terminated before Benten performed the acts that it was required to perform as a condition of entitlement to such compensation. HARCO claims that the agreements were agency agreements that were terminable at will. Benten claims that the agreements were partnership agreements for a specified duration.

In construing the letter agreements, the court is guided by well settled principles of contract interpretation. The determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990].) The court should determine from

contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) "[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." (Id. at 572-573 [internal citation and quotation marks omitted].) Put another way, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (W.W.W. Assocs., 77 NY2d at 163 [internal citation and quotation marks omitted].) In determining whether a contract is ambiguous the "initial question . . . is whether the agreement on its face is reasonably susceptible of more than one interpretation." (Chimart Assocs., 66 NY2d at 573; Nausch v Aon Corp., 283 AD2d 353 [1st Dept 2001].) "All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001][internal quotation marks and citations omitted].)

Applying these precepts, the court finds that the letter agreements which, as noted above, were apparently drafted without benefit of counsel, are ambiguous in numerous respects. Even the relationship between the two agreements is unclear. The Capital Advisory Services Agreement first sets forth a provision that Benten is the "agent" of HARCO for purposes of performance of the various services. It later sets forth a provision, quoted above, that the principals of Benten and HARCO agree to participate as "50%/50% partners in the capital advisory services" with respect to which Benten was identified as HARCO's agent. The court can find no basis on which to reconcile these two provisions. The Land Lease Agreement is

similarly inconsistent. It provides for compensation, consisting of provision to Benten of a five percent equity partnershiop share in the HARCO entities, for "arranging and achieving the transaction(s)." However, it also provides that this compensation is for "structuring" the specified transactions and "otherwise procuring and consummating the close of the legal documents and transaction [singular] described herein." It does not define "structuring" or explain when it is deemed to have been "achieved." While it appears to confer the partnership interest upon or after Benten's performance of certain services, whatever performance may mean, it is not clear how to reconcile this provision with the provision in the Capital Advisory Services Agreement which arguably evidences that Benten and HARCO are already partners entitled to a fifty/fifty distribution of the Financing Fee.

Parol evidence will accordingly be necessary to ascertain the parties' intent as to Benten's status as a partner.[1] In so holding, the court rejects HARCO' s assertion that the letter agreements cannot be found to evidence a partnership because they do not expressly provide for the sharing of profits and losses. HARCO cites substantial authority that an agreement to share both profits and losses is an essential element of a partnership. However, all of the cited cases involve proof of an oral partnership agreement. (See e.g. Moses v Savedoff, 96 AD3d 466 [1st Dept 2012] [and cases cited in HARCO Reply Memo. at 5-7.) These cases do not address proof of the partnership where a written agreement is ambiguous or incomplete as to its terms. Finally,

[1] The court notes that Benten submits some parole evidence on this issue in connection with HARCO's motion for a preliminary injunction. In his affidavit in opposition to that motion, Benten's principal, Matthew Williams, attests that HARCO created a corporate organizational chart listing Benton as a 5% owner. (Williams Aff., ¶ 5; Ex. C – "HARCO 35th LLC – Structure Chart".) He also annexes a "Partner Bio Summary" naming Hart and Williams as partners, and an email to a third-party regarding financing that was copied to Hart and refers to that summary. (See id., ¶ 6, Ex. H.) This evidence, indicating that HARCO was holding Williams out as a partner, is not disputed by HARCO.

to the extent that HARCO asserts that the record is "devoid of evidence" that the parties agreed to share profits and losses (HARCO Reply Memo. at 6), HARCO misapprehends the burdens on this motion. It is HARCO's burden to demonstrate on the face of the pleadings or based on documentary evidence that the cause of action is without merit, and not Benten's burden to raise a triable issue of fact as to the merits.

If parol evidence demonstrates a partnership, there will be a further issue as to whether Benten's services were lawfully terminated. Under settled law, where a contract has for its objective the completion of a specified piece of work, it will presumed that the parties intended the relationship to continue until the objective has been accomplished. (Gelman v Buehler, ___ NY3d ___, 2013 NY Lexis 510, citing Hardin v Robinson, 178 AD 724, 729 [1916], affd 223 NY 651 [1918].) While HARCO points to the provision of the agreements that compensation will be due unless the agreements have been terminated, it does not cite any authority that this provision overrides the presumption or provides a "unilateral right to terminate the agreement." (HARCO Reply Memo. at 9.) Moreover, Benten points to apparently inconsistent language in both agreements that Benten will "represent the best interests of [HARCO] throughout pre-development, transaction closing, and project development." Parole evidence will accordingly also be necessary on the issue of the duration of the agreements.

In view of the need for parole evidence, HARCO's motion to dismiss the first and second causes of action will be denied. The motion will also be denied as to the branch of Benten's third cause of action for an accounting and fourth cause of action for breach of fiduciary duty, both of which require a fiduciary relationship. As partners owe each other a fiduciary duty (Le Bel v Donovan, 96 AD3d 415, 417 [1st Dept 2012]), these causes of action will be maintainable

if parole evidence demonstrates that the letter agreements are partnership agreements. The motion will be denied as to the branch of Benten's third cause of action for a constructive trust, as this cause of action also will be maintainable if the agreements are partnership agreements involving a fiduciary duty, and based on plaintiff's allegations that it has contributed funds for the benefit of HARCO for the acquisition of air rights. (See Complaint, ¶ 40; Quadrozzi v Quadrozzi, 99 AD3d 688 [2d Dept 2012].) Further, the motion will be denied as to the eighth and ninth causes of action for anticipatory breach which will be maintainable if parole evidence demonstrates that the agreements are partnership agreements and if the presumption of duration, discussed above, is found to apply.

The motion to dismiss will be granted as to the fifth cause of action for a declaratory judgment. A declaratory judgment cause of action is not appropriate where, as here, the breach of contract cause of action affords the plaintiff an adequate alternative remedy. (See Artech Info. Sys., L.L.C. v Tee, 280 AD2d 117, 125 [1st Dept 2001]; Apple Records v Capitol Records, 137 AD2d 50 [1st Dept 1988].)

The motion to dismiss will be granted on consent as to the sixth cause of action (quantum meruit), seventh (unjust enrichment) and eleventh (appointment of a receiver).

The motion to dismiss will be denied as to the tenth cause of action for injunctive relief. As discussed further in connection with Benten's motion for a preliminary injunction, the pleading states a cause of action for injunctive relief.

Finally, the branch of motion to dismiss the claims against Hart in his individual capacity will be denied, based on the provision in the Capital Advisory Services Agreement that "[o]n the behalf of the Borrower and/or Sponsorship, Kenneth Hart and Matthew Williams agree to

participate as 50% /50% partners in the capital advisory services for the above referenced property. . . ." While this provision states that both Hart and Williams are acting on behalf of HARCO, it also names them individually as partners, and is therefore ambiguous.

Benten's Motion for a Preliminary Injunction

It is well settled that a preliminary injunction is a drastic remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]. Accord City of New York v 330 Cont. LLC, 60 AD3d 226 [1st Dept 2009].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.)

Here, it is undisputed that HARCO sent Benten a letter dated November 7, 2012, after Benten's commencement of its action on October 22, purporting to confirm the termination of the two agreements as of October 7, 2012. However, Benten pleads, in its eighth and ninth causes of action, that HARCO committed an anticipatory breach of the two agreements based on that allegation that it "repudiated same by freezing plaintiffs out of the Hotel Development Project and informing plaintiffs not to perform any further services thereunder when the services were already materially and substantially completed by plaintiffs." (Complaint, ¶ 51.) More particularly, Benten makes an undisputed showing, and thus demonstrates a likelihood of success on the merits of its claim, that it arranged a land lease for the project that was signed by the owner of the land (id., ¶¶ 36, 40); and that it negotiated an agreement to purchase air rights for

the project, and made a deposit of $40,000 of its own funds in connection with the air rights agreement. (Id., ¶40.) Benten also alleges that it performed numerous other services including procurement of branding/franchising approvals and management term sheets from various hotel groups and financiers (id., ¶¶ 38, 39, 42), but that it was frozen out of the project during final negotiation of the agreements. (Id., ¶ 43-44.)

As discussed above, the agreements are ambiguous in a number of respects, including what transaction or transactions were required to be achieved in order for Benten to be entitled to compensation. However, this factual issue is not a bar to an injunction. Even where factual disputes exist, a preliminary injunction should be granted where necessary to preserve the status quo provided that a showing is made that irreparable harm will result absent the injunction. (See State of New York v City of New York, 275 AD2d 740, 741 [2d Dept 2000]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626, 628 [2d Dept 1988].)

The court holds further that Benten will suffer irreparable injury absent an injunction. An injunction is needed to restrain HARCO from taking action that would prevent Benten from acquiring its asserted equity interest in the ongoing HARCO entities, if Benten is ultimately found entitled to such interest as compensation for its services on the hotel project. (See Escava v Escava, 2005 NY Slip Op 51358[U], * * * 30 [Sup Ct, Kings County 2005].) On the other hand, Benten is not entitled to an injunction restraining disposition of proceeds including financing fees, if any, obtained at a closing, in an amount necessary to satisfy Benten's asserted 50% interest in the fees. Such proceeds are "not specific funds which can rightly be regarded as 'the subject of the action.'" (See Coby Group, LLC v Hasenfeld, 46 AD3d 593, 596 [2d Dept 2007]; see generally Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 [2000].)

HARCO's Motion for a Preliminary Injunction

HARCO seeks an injunction restraining Benten from holding itself out as an agent or partner of HARCO, and from communicating with the owners of the properties on which the hotel project will be developed or with any potential partners of HARCO in the project. HARCO fails to make a showing of likelihood of success on the merits of its claim that Benten has engaged in any wrongful communications. Hart points to alleged contact by Benten with representatives of Marriott International, Inc. as well as the owners of the land. He gives no details as to the dates of the contacts, the persons contacted, or the nature of the communications. (Hart Aff., dated Nov. 12, 2012, ¶ 8.) The only other communications consist of letters by Benten's attorney (Ex. 4 to Sash Aff. In Opp. to HARCO's Motion), to various owners or organizations involved in the development of the project, requesting information as to the date of the financial closing and stating that Benten (Williams) is making a claim to part of the closing funds. Some of the letters also request a litigation hold on documents and emails. The letters fall far short of supporting HARCO's claim of wrongful contacts. HARCO's motion for a preliminary injunction will accordingly be denied.

Joinder of Actions

On the court's own motion, the above-captioned actions are joined for discovery and pre-trial motion practice. The court will entertain a motion at a later juncture regarding joinder for trial.

This constitutes the decision of the court.

Settle order by e-filing. The proposed order and counter order, if any, shall provide for an undertaking and specify the amount. The parties shall confer in an effort to reach agreement on

the amount of the undertaking. If they cannot agree, each proposed order shall be supported by a memorandum of law of no more than five pages, setting forth the basis for the requested amount of the undertaking. The order shall also provide for joinder of the two actions for discovery and pre-trial motion practice and shall provide for the parties' filing of any necessary papers with the appropriate Clerk to effectuate the joinder. The parties shall not provide hard copies of the proposed order(s) to the Clerk of Part 60 until the order(s) have been reviewed by the Commercial Division Motion Support Office.

Dated: New York, New York
April 1, 2013

MARCY S. FRIEDMAN, J.S.C.