A. Michael Tyler Realty Corp. v 9 Barrow Owners Corp.
2018 NY Slip Op 33126(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 651336/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN **PART** IAS MOTION 45

Justice

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A. MICHAEL TYLER REALTY CORP.,

Plaintiff,

- v -

9 BARROW OWNERS CORP., 9 BARROW CONDOMINIUM

Defendants.

INDEX NO. 651336/2018

MOTION DATE 07/23/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 34, 35, 36, 37, 38, 39

were read on this motion to DISMISS.

Upon the foregoing documents:

Plaintiff A. Michael Tyler Realty Corp. ("AMT") is a property management company. Defendants 9 Barrow Owners Corp. is the owner of a residential building located at, not surprisingly, 9 Barrow Street in Manhattan. 9 Barrow Condominium is a condominium owning the land and maintaining the building located at that address. For convenience, the Defendants will be referred to collectively as "9 Barrow" unless otherwise stated.

The 9 Barrow entities entered into separate management agreements ("Agreements") with AMT in June 2015. AMT's complaint asserts causes of action for anticipatory breach of contract, breach of contract, and unjust enrichment, and also includes a separate claim for attorneys' fees under the terms of the management agreements.

The 9 Barrow entities move to dismiss the complaint on the grounds that: (1) there is no viable claim for anticipatory breach because the statements attributed to the President of the 9 Barrow entities do not amount to a repudiation of the contract and in any event AMT itself

terminated the contract before the anticipated breach was to have become effective; (2) there is no viable claim for unjust enrichment because the matter in dispute is governed by a valid and enforceable contract; and (3) the documentary evidence conclusively shows that AMT is not entitled to the additional payments it seeks for its involvement (or lack thereof) in certain capital improvement and financing projects. 9 Barrow further argues that AMT's claim for attorneys' fees should be dismissed because it is not an independent cause of action.

For the following reasons, 9 Barrow's motion to dismiss is granted in part and denied in part.

Legal Analysis

In assessing a motion to dismiss, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017).

If the motion is brought under CPLR §3211(a)(1), as is the case here, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Indeed, "such a motion may be appropriately granted only where the documentary evidence *utterly refutes plaintiff's factual allegations*, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002) (emphasis added).

"To qualify as documentary, the paper's content must be 'essentially undeniable and ..., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based." *Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 432 (1st Dep't 2014) (citation omitted); *see Granada Condo. III Ass'n v*

Palomino, 78 A.D.3d 996, 996-97 (2nd Dep't 2010) ("In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable"). Such evidence can include emails, to the extent they "utterly refute plaintiff's allegations." *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 59 (1st Dep't 2015), *aff'd*, 31 N.Y.3d 100 (2018).

A. **AMT has not stated a viable claim for anticipatory breach of contract**

AMT's claim for anticipatory breach is premised on an email sent by Barry Epstein, the President of the 9 Barrow entities, to 9 Barrow's accountant Darren Newman on May 17, 2017. The email states, *inter alia*: "Please accept this as a Board decision so we can get our 2016 financials completed before we sever all ties to AMT." (NYSCEF 19, Exhibit K). The email appears at the end of a series of emails among Mr. Epstein, Mr. Newman, and Irwin Cohen (the President and CEO of AMT) regarding a window repair project and was, apparently inadvertently, copied to Mr. Cohen.

AMT contends that Mr. Epstein's email constituted "written notice" to AMT that 9 Barrow no longer intended to perform under the terms of the management contracts and thus constituted a repudiation of those agreements. In response, 9 Barrow correctly points out that Mr. Epstein's email did not state, in words or substance, that 9 Barrow intended to "sever all ties" with AMT in a way that would *breach* the agreement. At most, the email states an intention to sever ties at some point after the 2016 financials were complete.

An anticipatory breach of contract is a repudiation of a contractual duty before the time for contractual performance has arrived. *Princes Point LLC v. Muss Dev. LLC*, 30 N.Y.3d 127, 133 (2017) (quoting 10–54 Corbin on Contracts § 54.1 (2017)). As the Court of Appeals has stated, "[f]or an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be 'positive and unequivocal.' *Id.* (citations omitted). Mr.

Epstein's email does not meet that standard. Under the terms of the agreement, 9 Barrow had the right to terminate the management agreement within 30 days of June 30, 2017, meaning that 9 Barrow could have legitimately provided notice of termination 13 days after Mr. Epstein's email (which it did not). In that context, Mr. Epstein's statement about a desire to "sever all ties" is not an unequivocal statement of intent to "repudiate" the agreement before the time of any required contractual performance. Indeed, it was AMT that pulled the plug on the relationship by sending a notice of termination on June 23, 2017, seven days before expiration. In these circumstances, AMT has failed to state a viable claim of anticipatory breach of contract.

B. **AMT has not stated a viable claim for unjust enrichment**

AMT alleges that 9 Barrow breached (or anticipatorily breached) a valid and enforceable written agreement. In those circumstances, it is well established that AMT cannot also assert a claim in quasi-contract for unjust enrichment arising out of the same subject matter. *See, e.g., Goldman v. Met. Life Ins. Co.*, 5 N.Y.3d 561, 687-88 (2005); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987); *Board of Mgrs. Of Honto 88 Condominium v. Red Apple Child Dev. Ctr.*, 160 A.D.3d 580, 581-82 (1st Dep't. 2018); *PKO Television, Ltd. V. Time Life Films, Inc.*, 169 A.D.2d 582, 583 (1st Dep't. 1991).

C. **AMT has stated one viable claim for breach of contract**

AMT asserts a contractual right under the Co-op Management Contract and the Condominium Management Contract to receive commissions of: (i) 4% of the amount of certain "Major Capital Improvement" projects undertaken at the condominium building; and (ii) 1% of two financing projects totaling $11,750,000 (commission of $117,500, for which it was paid $60,000). Only the capital improvement-related claim states a viable cause of action.

With respect to the capital improvement projects, AMT alleges that 9 Barrow instructed it to coordinate the work on the projects through scheduling with architects, obtaining and reviewing bids from contractors, and other related tasks. (NYSCEF 1). 9 Barrow notes that AMT is contractually entitled to commissions on such "major" projects only if its assistance is "requested by the Owner," and it asserts that no such request was made. Further, 9 Barrow asserts that it retained Allen Ross Architecture, LLC (and *not* AMT) to manage the project. In response, AMT alleges that it was asked to assist in coordinating the work on these projects alongside Allen Ross. (NYSCEF 31, 32). Although 9 Barrow's evidence may ultimately prove persuasive, it does not "utterly refute" AMT's allegations so as to warrant dismissal of the claim at this early stage of the case. *See Nomura*, 30 N.Y.3d at 601 (2017) ("The moving party carries a heavy burden in a CPLR 3211(a)(1) claim… Courts should deny motions to dismiss in breach-of-contract claims as premature when factual development may impact their resolution."). [1]

By contrast, the documentary evidence *does* utterly refute AMT's allegation that it is entitled to a 1% commission on the relevant financing projects. The cooperative agreement provides that AMT is entitled to "a fee of one percent (1%) of the loan amount *or by separate written agreement*" (emphasis added) for services in connection with the financing projects. (NYSCEF14). 9 Barrow introduces an email from Irwin Cohen, President and CEO of AMT, confirming specifically that "we have reduced fees to this point by $$6,000 [sic] of which $5,000 will be added to AMT's *agreed to* fee of $55,000, *as we agreed*, bringing the *total fee to AMT to $60,000*." (NYSCEF 19, Exhibit H) (emphasis added). That correspondence, in AMT's own words that unmistakably reference agreement (twice in one sentence), thoroughly refutes AMT's

[1] 9 Barrow points to an email from May 8, 2017, in which it told AMT that it did not request AMT to work on the capital improvement projects. (NYSCEF 19). Although that evidence ultimately may be persuasive, it does not definitively refute AMT's allegation that it was instructed to work on the projects back in August 2015.

allegation that there was no written agreement on the amount of the fee ($60,000, which has already been paid). In those circumstances, the documentary evidence is sufficient to warrant dismissal of the claim pursuant to CPLR §3211(a)(1).

D. **AMT has not stated a viable claim for attorneys' fees**

As 9 Barrow notes, AMT may not bring a separate cause of action for attorneys' fees divorced from its breach of contract cause of action. *Pier 59 Studios L.P. v. Chelsea Piers L.P.*, 27 A.D.3d 217, 218 (1st Dep't 2006) (citing *Burke v. Crosson*, 85 N.Y.2d 10, 17–18 (1995)).

Therefore, it is:

ORDERED that Defendant's motion to dismiss Plaintiff's first cause of action for anticipatory breach of contract is granted; and it is further

ORDERED that that Defendant's motion to dismiss Plaintiff's second cause of action for breach of contract is granted in part and denied in part; and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's third cause of action for unjust enrichment is granted; and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's fourth cause of action for attorneys' fees is granted.

This constitutes the Decision and Order of the Court.

HON. JOEL M. COHEN J.S.C.

12/6/2018
DATE

JOEL M. COHEN, J.S.C.

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