

**Upper W. St. LLC v Upper W. Member LLC**

2004 NY Slip Op 30384(U)

September 17, 2004

Supreme Court, New York County

Docket Number: 103153/04

Judge: Marcy Friedman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

of

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

UPPER WEST ST. LLC,

Index No.: 103153/04

*Plaintiff(s),*

*against*

DECISION/ORDER

UPPER WEST MEMBER LLC, et al.,

*Defendant(s),*

**FILED**

OCT 04 2004

NEW YORK COUNTY CLERK'S OFFICE  
Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

In this action, plaintiff Upper West St. LLC seeks to enjoin the sale of certain real property located in downtown Manhattan or, alternatively, to recover profits allegedly due upon the sale of the property. The amended complaint alleges causes of action for fraud on a creditor, breach of contract, and fraudulent conveyance. Defendants Upper West Member LLC, Abraham Leser, AAL Realty, LLC, 18 West LLC, Lower DAC LLC, SW Realty Holdings LLC, and New 19 West, LLC ("defendants") make this pre-answer motion pursuant to CPLR 3211 to dismiss the amended complaint on various grounds, including documentary evidence and failure to state a cause of action.

The complaint alleges the following: Plaintiff owned a 17 percent interest in real property which consisted of the 14<sup>th</sup> - 35<sup>th</sup> floors of 19 West Street a/k/a 18-20 West Street in Manhattan (the "Property"). On July 19, 2001, plaintiff exchanged its 17 percent interest in the Property for an undiluted 17 percent interest in 18 West LLC, a company formed to own the Property. On the same date, plaintiff sold its 17 percent interest in 18 West LLC to Upper West Member LLC pursuant to the terms of an agreement ("buy-out agreement") which provided that

plaintiff was entitled, in addition to payment of \$1.5 million, to 8.5 percent of any profit made “in connection with the sale of the Property as a whole, or as condominium units.” Also on the same date, 18 West LLC encumbered the Property with an \$11 million mortgage, which was used by defendant Leser to acquire property consisting of the 1<sup>st</sup> - 13<sup>th</sup> floors of 19 West Street a/k/a 18-20 West Street in Manhattan. On January 22, 2004, 18 West LLC agreed to sell the Property to defendant New 19 West LLC for \$27 million, the exact amount due on the two outstanding mortgages on the Property.

As to the first cause of action, for fraud<sup>1</sup>, while the court finds, as discussed below, that plaintiff has stated a claim for breach of contract, plaintiff has not alleged a separate cause of action for fraud. “A fraud claim that only restates a breach of contract claim may not be maintained.” (Orix Credit Alliance v Hable Co., 256 AD2d 114, 115 [1<sup>st</sup> Dept 1998].) “Thus, a viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract.” (Id.)

Here, plaintiff does not allege that it was fraudulently induced to enter into the buy-out agreement at issue but rather that defendants’ encumbrance of the property deprived plaintiff of its ability to make a profit. Nor does plaintiff claim that there was a misrepresentation of present facts collateral to the contract. (See id. Compare Schondorf v Brookville Energy Partners, L.P., 303 AD2d 396 [2d Dept 2003].) The court therefore finds that the complaint does not state a claim for fraud.

---

<sup>1</sup>Although plaintiff denominates its first cause of action as “fraud on a creditor,” its opposition papers make clear that the claim is one for ordinary fraud.

The court does find that plaintiff has stated a breach of contract claim based on the implied covenant of good faith and fair dealing. It is well recognized that “[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. \* \* \*

This embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” (Dalton v Educ. Testing Serv., 87 NY2d 384, 389 [1995][internal citation omitted].) Thus, “even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party’s right to the benefit under the agreement.” (Richbell Info. Servs., Inc. v Jupiter Partners, L.P., 309 AD2d 288, 302 [1<sup>st</sup> Dept 2003].)

In the instant case, plaintiff alleges that defendants encumbered the property so as to deprive plaintiff of its ability to make a profit on the sale of the property. (See Amended Complaint ¶¶ 48-50.) These allegations are sufficient to withstand the motion to dismiss.

In so holding, the court rejects defendants’ apparent argument that the agreement itself demonstrates that there can be no breach of contract claim because plaintiff’s entitlement to a profit under the agreement was contingent, and no profit was realized. This argument neither addresses nor overrides a claim based on the covenant of good faith and fair dealing. This is thus not a case in which documentary evidence on its face demonstrates the absence of a claim as a matter of law.

Nor is the breach of contract claim barred by plaintiff’s consent to the mortgage. Plaintiff’s claim is not that the mortgage was obtained without authorization but that the mortgage was used to acquire property for the benefit of defendants rather than to improve the

value of the Property in which plaintiff had an interest.<sup>2</sup>

As to the third cause of action, defendants argue that no claim for fraudulent conveyance may be made in the absence of an unsatisfied final judgment against the party conveying the property. However, contrary to defendants' argument, a claim for fraudulent conveyance may be asserted even where there is no final judgment. (See Debtor and Creditor Law § 276.)

Accordingly, dismissal of the claim is not required on that basis.

Defendants do not otherwise set forth any basis or cite any legal authority to support dismissal of the cause of action for fraudulent conveyance. Defendants do not address whether there was a conveyance or plaintiff is a creditor within the meaning of the Debtor and Creditor Law. Thus, while there appears to be a serious question as to whether plaintiff has alleged a claim for fraudulent conveyance, defendants have not demonstrated on this record that plaintiff's claim fails as a matter of law.<sup>3</sup>

Accordingly, the motion is granted only to the extent that it is

ORDERED that the first cause of action is severed and dismissed; and it is further

ORDERED that the action shall continue as to the remaining causes of action.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 17, 2004

**FILED**  
OCT 04 2004  
*Marcy Friedman*  
MARCY FRIEDMAN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

<sup>2</sup>While defendants also argue that there can be no breach of contract because there was no sale of the property, they fail to cite any authority that a contract of sale is insufficient to support a breach of contract claim.

<sup>3</sup>The court notes that defendants do not argue on this motion that the claims were not properly asserted against any particular individual defendant, but rather focus generally on the sufficiency of the causes of action.