Square Mile Structured Debt (One) LLC v Swig
2010 NY Slip Op 33922(U)
April 1, 2010
Supreme Court, New York County
Docket Number: 603821/08
Judge: Bernard Fried

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 603821/2008

SQUARE MILE STRUCTURED DEBT

vs.

SWIG, KENT M.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

E-FILE

PART 60

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

RECEIVED
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MOTION SUPPORT OFFICE
SUPREME COURT - CIVIL

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 4/1/2010

HON. BERNARD J. FRIED J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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SQUARE MILE STRUCTURED DEBT (ONE) LLC and SQUARE MILE STRUCTURED DEBT (THREE) LLC, :

Plaintiffs, : Index No. 603821/08

-against- :

KENT M. SWIG, 25 BROAD MEZZ PREFERRED, LLC, 25 BROAD STREET EQUITY I LLC, KMS HOLDINGS, LLC, Y.L. AMSTERDAM LLC, AMSTERDAM 665 LLC, YAIR LEVY, CHARLES DAYAN and DOES 1 through 50, :

Defendants.

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Appearances:

For Plaintiffs:

Greenberg Traurig, LLP
200 Park Avenue
New York, NY 10166
James W. Perkins, Esq.

For Defendants:

Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Robert J. Boller, Esq.

Fried, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This is a fraud and breach of contract action brought by the plaintiffs Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC (together, "Square Mile") against the defendants Kent M. Swig, 25 Broad Mezz Preferred, LLC ("25 Broad"), 25 Broad Street Equity I LLC ("Broad Street Equity"), KMS Holdings, LLC ("KMS") (collectively, the "Swig defendants"); and Y.L. Amsterdam LLC, Amsterdam 665 LLC, Yair Levy and Charles Dayan. Before me is the

Swig defendants' motion for partial summary judgment and dismissal of the plaintiffs' first through seventh causes of action (sequence number 002) and the plaintiffs' motion to dismiss the Swig defendants' amended counterclaims (sequence number 003). For the reasons that follow, I deny the Swig defendants' motion and grant the plaintiffs' motion.

On March 9, 2007, Square Mile and 25 Broad entered into an interim loan agreement (the "25 Broad ILA"), pursuant to which Square Mile extended a loan in the principal amount of $18,403,571.43 to 25 Broad (the "25 Broad Loan"). On the same day, Swig executed a personal guaranty of that loan in favor of Square Mile (the "Swig Guaranty"). In July 2007, Square Mile extended a loan to Swig personally in the amount of $21,150,000 (the "Sheffield Loan"), also pursuant to an interim loan agreement (the "Sheffield ILA"). The terms of both interim loan agreements provided for the conversion of each of the respective loans, upon the satisfaction of certain terms and conditions: the 25 Broad ILA would convert the 25 Broad Loan into a preferred equity investment in 25 Broad, at which time, the Swig Guaranty would terminate; the Sheffield ILA would convert the Sheffield Loan into a preferred equity investment in the Preferred Equity Target (defined in the Sheffield ILA as 322 West 57th LLC, a Delaware limited liability company).

On October 31, 2007, the parties entered into an agreement (the "No-Prejudice Agreement") to begin negotiations concerning the restructuring of the 25 Broad ILA and concerning the method of calculating the amount of the equity investment resulting from the conversion of the 25 Broad Loan.

On December 26, 2007, restructuring agreements were executed for both the Sheffield ILA and the 25 Broad ILA (respectively, the "Sheffield Restructure Agreement" and the "December Agreement"). Pursuant to the Sheffield Restructure Agreement, the Sheffield Loan was extended and

restructured. In the December Agreement, the 25 Broad Loan was modified and converted into a preferred equity investment in 25 Broad (the "Investment"), and Swig purchased a participation interest in the Investment for $3,000,000. Under these two Agreements, the Swig defendants agreed to pledge and assign to Square Mile their interest in the distributions from a real estate development project located at 322 West 57th Street in Manhattan known as the Sheffield Project. (Sheffield Restructure Agmt, § 2.1[a]; December Agmt § 2.1[a]). In each of the two Agreements, Swig made the following representation and warranty with respect to the Sheffield Project's ownership:

> Attached hereto as **Exhibit D** is a true, complete and correct copy of the organizational chart of 322 West 57th Owner LLC, a Delaware limited liability company **("Sheffield Owner")**. Except as shown on **Exhibit D**, no other Person (other that the Senior Lenders (as such term is defined in the Sheffield Loan Agreement)) has any direct or indirect legal or beneficial interest in Sheffield Owner or in the Sheffield Property (as hereinafter defined).

(Sheffield Restructure Agmt, § 2.1[d][i]; December Agmt § 2.1[c][i]).

Exhibit D is an organizational chart (the "Chart") wherein Swig is represented as holding an approximate 30 percent ownership interest in the Sheffield Project and SE West 57 Capital, LLC as owning a 99.98 percent membership interest in SE West 57 Property, LLC.[1] Square Mile alleges that, in April 2008, it learned that Swig's ownership interest was inflated as a result of an undisclosed 70 percent ownership interest in SE West 57 Property, LLC held by an entity unaffiliated with Swig, Shefa 57 LLC ("Shefa"). (*See* Compl, ¶¶ 43-45).

Therefore, Square Mile alleges that the Swig defendants made misrepresentations with

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[1] According to the Chart, four entities share ownership of the Preferred Equity Target, 322 West 57th LLC, two of which were controlled by Swig: (1) SE West 57 Property, LLC, with a 29.99% membership interest, and (2) SE West 57 Management, LLC, with a 0.01% membership interest. The Chart also represents that (a) Swig owns 100% of SE West 57 Management, LLC and (b) SE West 57 Capital, LLC owns a 99.98% membership interest in SE West 57 Property, LLC.

respect to the ownership interest held by Swig and his family in the Sheffield Project. Square Mile asserts that an accurate representation of the Sheffield Project's ownership structure was critical for two reasons. First, the Sheffield Loan was made to Swig to enable his investment in the Sheffield Project. Thus, Square Mile wanted assurances that Swig had the financial interest and control that he claimed to have in the Sheffield Project. Second, upon the conversion of the Sheffield Loan into a preferred equity investment, Square Mile would become a member of the Preferred Equity Target. Thus, Square Mile wanted assurances, based on the identity of others holding an ownership interest in the Preferred Equity Target, that the Target would have the ability to pay Square Mile the preferred equity investment promised.

Square Mile alleges that at no time during the execution of the above loan and restructuring agreements were they informed by the Swig defendants or their counsel that an independent entity owned an interest in SE West 57 Property, LLC or that the Chart was inaccurate.

However, the Swig defendants claim that their counsel made disclosures to Square Mile, in two e-mails, dated December 7, 2007 (the "First E-Mail") and December 14, 2007 (the "Second E-Mail"), indicating SE West 57 Capital, LLC's 29.998 percent ownership interest in SE West 57 Property, LLC. Specifically, the First E-Mail included an attached revised draft of the December Agreement that included the following revised Swig representation and warranty:

> The Sheffield Pledgors own 100% of the membership interests in SE West 57 Capital, LLC, which in turn is the owner of a 29.998% membership interest in SE West 57 Property, LLC, which in turn is the owner of a 29.99% membership interest in 322 West 57th LLC, a Delaware limited liability company.

(Sorin Aff, Exh B, § 3.2[b][iii]). On December 12, 2007, Square Mile's counsel sent an e-mail with an attached further revised draft of the December Agreement that did not include the Swig

defendants' revision as reflected in the First E-Mail's attachment. (*Id.*, Exh C).

Similarly, the Second E-Mail included an attached revised draft of the December Agreement that included the same revised Swig representation and warranty as reflected in the First E-Mail's attachment. (*Id.*, Exh D).[2] The text in the body of the First and Second E-Mails did not reference the specific revisions. On December 16, 2007, Square Mile's counsel sent an e-mail acknowledging the revisions reflected in the First and Second E-Mail attachments. However, that e-mail also stated that such revisions had not been incorporated "without explanation on your side as to why they are necessary" and if "there is a problem with the identity of the pledgors/guarantors, I [do not] believe that it has been communicated to anyone on our side." (*Id.*, Exh E).

Nevertheless, Square Mile contends that the language contained in the alleged disclosures relied upon by the Swig defendants was inaccurate. First, they assert that it was later disclosed by Swig's counsel that the pledgors owned a 76.67 percent interest in SE West 57 Capital, LLC, rather than 100 percent. Second, they assert that it was later revealed in a revised version of the Chart that SE West 57 Capital, LLC's membership interest in SE West 57 Property, LLC was 29.98 percent, rather than 29.998 percent. Third, they assert that the language in the revisions contained no reference to the ownership interest held by Shefa.

Square Mile alleges that several months later, in the Spring of 2008, the Swig defendants sought to further modify the Sheffield Loan and the 25 Broad preferred equity investment. It further alleges that, in return for its consent to the modifications, the Swig defendants were required to

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The Second E-Mail also included an attached revised draft of a document entitled the Pledge and Assignment Agreement, which contained a revision to the same effect as reflected in Section 3.2(b)(iii) above. (*Id.*, Exh D).

deliver pledges of the future distributions they would receive from various real estate projects. However, Square Mile asserts that, on April 13, 2008, it learned of the 70 percent membership interest in SE West 57 Property, LLC held by Shefa, through a disclosure made by Swig during a telephone conversation with Square Mile's principal Craig Solomon.

Square Mile alleges that in order to remedy the error acknowledged by Swig, it required Swig to deliver pledges of distributions from Shefa (the "Shefa Pledge"). A revised copy of the Chart (the "Revised Chart"), e-mailed as an attachment from the Swig defendants' counsel to Square Mile's counsel, indicated SE West 57 Capital, LLC's 29.98 percent ownership interest in SE West 57 Property, LLC rather than the 99.98 percent interest reflected in the original Chart. (Shapiro Aff, Exh B). The Revised Chart also featured the addition of Shefa's 70 percent membership interest. Accordingly, on April 9, 2008, the parties entered into an agreement (the "Second Restructure Agreement") that indicated the following modification to the December Agreement, in which a reference was made to the "inaccuracies" contained in the Chart:

> Exhibit D to the Restructure Agreement is hereby deleted in its entirety and is hereby replaced by **Exhibit M** attached hereto. In consideration of the delivery of the Shefa Pledge and the Shefa Guaranty on the date hereof pursuant to (and as defined in) the 2008 Sheffield Restructure Agreement, [Square Mile] hereby waives any breach or default by Swig under the Restructure Agreement as a result of the inaccuracies contained in the original Exhibit D, and further agrees that [Square Mile] shall not claim or seek any damages of any kind from Swig or any of his Affiliates by reason of such inaccuracies.

(Second Restructure Agmt, § 1.3.[e]).

The Swig Defendants' Motion for Summary Judgment

In the complaint, Square Mile seeks, *inter alia*, rescission of the December Agreement. The first seven of the twelve causes of action allege the following: (1) fraud, (2) breach of the December

Agreement, (3 and 4) money judgment on the 25 Broad Loan (against 25 Broad only), (5) money judgment on the Swig Guaranty (against Swig only), (6) fraud (alternatively for damages against Swig only) and (7) breach of the December Agreement (alternatively for damages against Swig only). By their motion, the Swig defendants seek summary dismissal of these seven causes of action.

When a party moves for summary judgment, it "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Finkelstein v Cornell Univ. Med. Coll.*, 269 AD2d 114, 117 [1st Dep't 2000] quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When the movant on a summary judgment motion demonstrates its entitlement on that motion, the burden then shifts to the opposing party to demonstrate, by admissible evidence, that a material issue of fact remains. (*See* CPLR 3212[b]; *Davenport v County of Nassau*, 279 NY2d 497, 498 [2001]).

The Swig defendants argue that they have tendered sufficient evidence to establish a prima facie entitlement to summary judgment and dismissal of Square Mile's first and sixth causes of action. Specifically, they argue that its counsel's e-mail disclosures provided a "clear and unequivocal" representation of Swig's ownership interest in the Sheffield Project, thus, eliminating any possibility that the Swig defendants intended to deceive Square Mile or that it was justified in relying on Swig's alleged misrepresentation. (Def Br, at 13-14). They further argue that summary judgment should be granted in their favor with respect to Square Mile's second through fifth and seventh causes of action because each of these claims are based on the insufficient fraud claims alleged in the first and sixth causes of action.

To the contrary, Square Mile argues that summary judgment should be denied because the Swig defendants have failed to demonstrate such prima facie entitlement. It argues that the Swig

defendants raise an issue of fact with their argument that, based on the drafts of the December Agreement e-mailed between counsel, Square Mile unjustifiably relied upon the representations and warranties contained in the December Agreement. Thus, Square Mile argues that there remains an issue of fact as to whether it was justified in relying upon express representations and warranties. (*See The Gordon P. Getty Family Trust v Peltz*, 1998 WL 148425, *7 [SDNY 1998]). Square Mile further argues that the purported evidence provided by the Swig defendants in support of their motion is insufficient to support a motion for summary judgment because the only evidentiary submission is that of an affirmation of an attorney with no personal knowledge of the facts. (*See Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 455 [2d Dep't 2006] ["An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance."]).

Indeed, the Swig defendants' sole evidentiary submission is the affirmation of its counsel Robert Sorin, Esq. In his affirmation, Sorin describes the events surrounding the above e-mail disclosures, where e-mails were sent between attorneys from his firm and attorneys from the law firm representing Square Mile. However, the affirmation does not contain Sorin's personal account of taking part in any of those events. Rather, he describes the actions of others within his law firm.

Thus, based on the Swig defendants' insufficient evidentiary submission, they have failed to meet their burden of eliminating any material issues of fact from the case. Accordingly, their motion is denied.

Square Mile's Motion to Dismiss

In their answer, the Swig defendants assert four amended counterclaims: (1) declaratory judgment that certain portions of the December Agreement are void for lack of consideration, (2)

rescission of the Swig defendants' consideration provided in the December Agreement, (3) breach of the 25 Broad ILA and (4) breach of the implied covenant of good faith and fair dealing. By its motion, Square Mile seeks to dismiss the counterclaims on the grounds that dismissal is warranted based on documentary evidence and/or for failure to state a claim.

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the plaintiff is afforded the "benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Id.* at 88). Under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The Swig defendants' first and second amended counterclaims are premised on their argument that they are entitled to partial rescission of the December Agreement because it lacked consideration. Specifically, they argue that Square Mile was under a pre-existing duty to close and terminate the Swig Guaranty, which they allege was to occur in August 2007, but that Square Mile unreasonably delayed this process until December 2007 based on a manufactured dispute over the method of calculating the Investment. Thus, they argue that Swig's payment of $3,000,000 was in return for Square Mile's pre-existing duty to close and terminate the Swig Guaranty.

Square Mile contends that the Swig defendants' argument that they are entitled to partial,[3]

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[3] Partial rescission is not an available remedy, here, because such remedy is available only where only where a contract is divisible. (*See* 22A NY Jur 2d Contracts § 492 [2008]). A contract

or alternatively full, rescission of the December Agreement, based on lack of consideration, is without merit because it is flatly contradicted by the terms of the Agreement.

Square Mile cites to portions the December Agreement that demonstrate that it was supported by consideration. For example, it cites one of the recital paragraphs, which plainly demonstrates that it was the intent of the parties to make mutual promises in exchange for consideration:

> NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows[.]

(December Agmt, at 1). Although contract recitals are not part of the contract, the recitals are relevant in determining the intent of the parties. (*See Estate of Hatch v NYCO Minerals*, 245 AD2d 746, 748 [3d Dep't 1997] ["While a recital is not strictly part of a contract, it may have a material bearing on the construction of the contract."]; *see also Frenchman & Sweet, Inc. v Philco Discount Corp.*, 21 AD2d 180, 182 [4th Dep't 1964] ["Although a recital as to an intention in respect of the future may only indicate a motive and not a promise . . . recitals assist in determining the proper construction of a contract."]).

Square Mile also cites Section 1.3(a) of the December Agreement, which explicitly states the terms and conditions of the consideration supporting the Agreement: "For and in consideration of the sum of $3,000,000 paid to [Square Mile] on the date hereof . . . , Swig hereby purchases . . . the

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is divisible where it is "separable or divisible into a number of elements or transactions, each of which is so far independent of the other that it might stand or fall by itself[.]" (*Id.*; *see also First Sav. and Loan Assn of Jersey City, NJ v American Home Assurance Co.*, 29 NY2d 297, 300 [1971]). This is as opposed to an "entire" contract, that "by its terms, nature and purpose, it contemplates and intends that each and all of its parts and the consideration therefor shall be common each to the other and interdependent." (*First Sav. and Loan Assn of Jersey City, NJ*, 29 NY2d at 299). Because the plain language of the December Agreement indicates that it contains a number of interdependent components that cannot stand alone, it is not a divisible contract. Thus, the Swig defendants are not entitled to partial rescission.

right . . . to receive a portion of the distributions and other amounts [in the Investment]." This demonstrates that, according to the plain language of the December Agreement, it was supported by consideration. Therefore, dismissal of the Swig defendants' first and second amended counterclaims is warranted because they are contradicted by documentary evidence and fail to state a claim.

Square Mile further argues that dismissal of the Swig defendants' third and fourth amended counterclaims, seeking damages for breaches of the 25 Broad ILA and the covenant of good faith and fair dealing, is also warranted because the December Agreement constituted a novation of the 25 Broad ILA. The superseded agreement cannot be sued upon. (*Citigifts, Inc. v Pechnik*, 112 AD2d 832, 834 [1st Dep't 1985] ["Such a novation extinguished the old agreement, thereby reducing the remedy for breach to a suit on the new agreement."] [citations omitted]). In support of this argument, Square Mile cites the merger clause of the December Agreement, which provides:

> **Prior Agreements.** This Agreement contains the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements, understandings and negotiations among or between such parties, whether oral or written, are superseded by the terms of this Agreement.

(December Agmt, § 5.7). Square Mile also cites Section 1.2 of the December Agreement, which provides, in part, that the 25 Broad ILA and the Swig Guaranty "are terminated and of no further force and effect as of the PE Effective Date" and "the Preferred Equity Investment shall be governed by the terms of [25 Broad's operating agreement]."

Under New York law, a novation is the substitution of a new obligation for an old one, with the intent of the parties to extinguish the old one. (*DCA Adver., Inc. v The Fox Group, Inc.*, 2 AD3d 173, 174 [1st Dep't 2003]). The Swig defendants argue that no novation took place here because the December Agreement was an entirely new agreement between different parties concerning new and

unanticipated subject matter. (Def Br, at 17). However, for a novation to occur, it is sufficient that there is a continuation of intent between the interested parties, although identical parties need not execute the new agreement. (*See Matter of Anderson*, 119 Misc 2d 248, 254 [Surr Ct, NY County 1983] ["[T]he express consent of the original debtor to the assumption of his debts by a third party is not essential to a novation. Such consent of the debtor may be implied by conduct."]). Here, the 25 Broad ILA was between Square Mile and 25 Broad. Swig was the signatory on behalf of 25 Broad. The December Agreement was between Square Mile, Swig and Broad Street Equity. Swig was the signatory on behalf of Broad Street Equity. This demonstrates that the conditions for a novation were satisfied.

Therefore, dismissal of the Swig defendants' third and fourth amended counterclaims is warranted because they allege breaches of a superseded agreement.

Accordingly, it is

ORDERED that the Swig defendants' motion for partial summary judgment (Seq. No. 002) is denied; and it is further

ORDERED that Square Mile's motion to dismiss the Swig defendants' amended counterclaims (Seq. No. 003) is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 1, 2010

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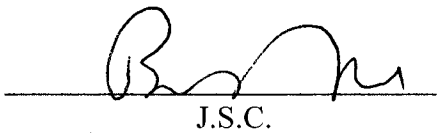

J.S.C.

HON. BERNARD J. FRIED