Levy v Arbor Commercial Funding, LLC
2014 NY Slip Op 33301(U)
December 18, 2014
Supreme Court, New York County
Docket Number: 156336/12
Judge: Ellen M. Coin
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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VICTOR LEVY,

Plaintiff,

Index No.:156336/12
Motion Date:9/11/14
Motion Sequence:001&002

-against-

DECISION AND ORDER

ARBOR COMMERCIAL FUNDING, LLC and
ARBOR COMMERCIAL MORTGAGE, LLC,

Defendants.

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Appearances:

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Papers Considered on the Motion for Summary Judgment and Cross-Motion to Amend the Complaint:

Notice of Motion and Affirm. in Support with Attached Exhs.....1
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Ellen M. COIN, J.:

Defendants Arbor Commercial Funding, LLC and Arbor Commercial Mortgage, LLC (together, Arbor) move for summary judgment dismissing the complaint. Plaintiff Victor Levy (Levy) cross-moves to amend the complaint.

FACTS

In early 2010, Kenneth I. Starr (Starr), manager of Colcave, LLC (Colcave) sought to take as much money as he could from equity in a condominium unit, unit 1C, located at 433 East 74th

Street, New York, N.Y. 10021 (Subject Property). Starr's financial advisor, Jeff Cadan, approached Arbor about making a mortgage loan on the Subject Property. On or about May 2, 2010, Arbor sent Colcave a conditional commitment letter, which included that Colcave was to provide Arbor with a commitment fee of three percent of the final loan amount.

Arbor eventually offered Colcave two loans, each secured by a mortgage on the Subject Property. The first loan (the Senior Loan), for $2 million, was to be secured by a first mortgage. The second loan (the Junior Loan) was also for $2 million, and was secured by a second mortgage. Each loan included a commitment fee, so that upon Colcave's acceptance of the loan terms, Arbor was entitled to a $60,000 fee for each loan, payable at closing.

Both loans closed on May 17, 2010. At the closing, Starr delivered various documents to Arbor, and Colcave paid Arbor $120,000 in commitment fees. At the same time, the second mortgage was assigned to Levy and his wife, and was recorded on November 24, 2010. Mr. and Mrs. Levy and Arbor executed a subordination agreement, which was also recorded. Levy testified at deposition that he never spoke directly with anyone at Arbor. Rather, his investment advisor, Jeff Cadan (Cadan), who first solicited his investment in this mortgage, conducted all the negotiations with Arbor. Levy contends that Cadan told him that

as part of the transaction he would receive the $60,000 commitment fee based upon the Junior Loan. In Levy's opposition papers, his attorney states that Levy offered to invest on certain terms, including that he would be paid an initial $60,000. However, the deposition testimony cited to by Levy's attorney (Levy tr at 20-22) does not support that allegation, and there is no evidence of any such offer.

A few weeks after the two loans and mortgages closed, on June 10, 2010, Starr was indicted on 23 counts of wire fraud, securities fraud, investment advisor fraud and money laundering in the U.S. District Court for the Southern District of New York. That Court entered a "Consent Preliminary Order of Forfeiture" on February 23, 2011, in which the Court ordered the forfeiture to the United States for disposition of all of Starr's right, title and interest in, among other things, the Subject Property. In early April 2011, Arbor filed a petition asserting its legal interest in the Subject Property, and Levy also filed a petition asserting his interest several days later.

The Court so-ordered a stipulation between Arbor and the U.S. Attorney for the Southern District of New York that provided that Arbor's claim would be satisfied in full out of the net proceeds of the sale prior to any other claim to the net proceeds. The Court so-ordered a similar stipulation between Mr. and Mrs. Levy and the U.S. Attorney regarding the Junior Loan.

The Subject Property was sold on or about April 16, 2012 for $5,630,000.00, and both the Senior Loan and the Junior Loan were repaid out of the proceeds. Levy executed and duly acknowledged a satisfaction of mortgage (Satisfaction of Mortgage) dated April 19, 2012.

During the time that both Levy and Arbor were seeking to protect their mortgages, Arbor told Levy's attorney that Arbor was holding Levy's $60,000, but that it did not know whether it could remit it to Levy, because of the government's restraining order freezing all of Starr's assets. After the restraining order was lifted, and the Subject Property was sold, Arbor still did not disburse the $60,000 to Levy.

Levy commenced this action on September 13, 2012, alleging that Arbor agreed to remit the $60,000 commitment fee in connection with the Junior Loan to Levy, and breached that portion of their agreement. This matter has received a trial preference because Levy is 90 years old.

Levy maintains that since he was the lender on the second $2 million loan, and he kept the money on reserve and funded the loan, he was supposed to be paid the commitment fee. Further, Arbor's attorney, David Hoffner, told Levy's attorney, E. Scott Morvillo, that the $60,000 commitment fee was "Victor[Levy]'s money" when he was trying to have Levy agree to use it to convince the occupant of the Subject Property to leave. Levy

argues that the statement constitutes an admission. He further contends that under the principles of quantum meruit he is also entitled to the payment.

Levy avers that the Assignment of Mortgage, dated May 17, 2010, provided that Arbor was to receive consideration of $10 and other good and valuable consideration, and additional consideration of $10 from Levy for the assignment of leases on the Subject Property. Therefore, according to Levy, the agreement provides for the payment of $20 for the mortgage. Levy gave $2 million. Consequently, he argues that he is entitled to a refund of an alleged overpayment of $1,980,000.[1] This argument forms the basis of Levy's cross-motion seeking leave to amend his complaint.

The complaint asserts three causes of action: constructive trust, breach of contract and quantum meruit.

DISCUSSION

Arbor moves for summary judgment dismissing the complaint on the grounds that there was no fiduciary relationship and, therefore, no constructive trust; that there is no contract between the parties in which Arbor agreed to pay Levy the commitment fee of three percent of the loan amount that Colcave paid to Arbor; and that Levy did not render any services to Arbor for which he reasonably expected compensation, so he does not

[1] The arithmetic is clearly wrong.

fulfil the requirements for recovery on the ground of quantum meruit.

Constructive Trust

In order to maintain a cause of action for constructive trust, a party must establish that there was a confidential or fiduciary relationship between the parties, a promise, a transfer made in reliance on that promise, and unjust enrichment. *Wachovia Sec., LLC v Joseph*, 56 AD3d 269 (1st Dept 2008).

Here, no facts are asserted that would support a finding of a confidential or fiduciary relationship between Arbor and Levy. In fact, Levy testified that he never even spoke with anyone from Arbor. Consequently, Levy has failed to allege facts to meet the requirements for imposition of a constructive trust, and the first cause of action is dismissed.

Breach of Contract

Levy does not deny that he personally never made a contract with Arbor. Rather, he relies on the word of his financial advisor, Cadan, who was also a financial advisor for Starr. He further relies on the definition and purpose of a commitment fee, which, he avers, indicates that he, rather than Arbor, is entitled to the fee.

There is no question that Arbor originated and underwrote both the Senior and Junior Loans. It obtained all the required documentation and handled all the details of setting up the

mortgage loans. That does not mean that Arbor and Levy could not have negotiated for the commitment fee to be transferred to Levy, but it does mean that as the originator of the loans, Arbor would be entitled to a commitment fee. *See Gratton v Dido Realty Co.*, 89 Misc 2d 401 (Sup Ct, Queens County 1977), *affd* 63 AD2d 959 (2d Dept 1978).

Levy does not cite any provision of the contract that provides for Levy to receive the commitment fee. Nor does he assert that he made an oral contract with anyone at Arbor. Rather, he states that Cadan informed him of this provision. There is no affidavit from Cadan to support the claim that Arbor ever agreed to such a condition. Nor is there any evidence that Levy had reason to believe that Cadan contacted him about financing a mortgage for Star as either an actual or apparent agent for Arbor. Therefore, any representations that Cadan allegedly made are not attributable to Arbor. *See e.g. Network Mgt. Serv. Group, Inc. v Rosenkrantz Lyon & Ross, Inc.*, 211 AD2d 584, 585 (1st Dept 1995).

In the absence of any evidence that Arbor agreed to transfer the commitment fee to Levy, his claim to that fee must fail. However, Levy maintains that Arbor acknowledged his right to the fee by suggesting, through its counsel, that he use the money to pay off the occupant of the Subject Property so that she would leave and the Subject Property could be sold. Thus, by deferring

to Levy regarding the disposition of that money, and making the statement that it is "Victor's money," Levy claims that defendants acknowledged his right to the money. Further, Arbor's counsel had previously stated that it was holding Levy's $60,000, but did not know whether it was permitted to distribute it to Levy because of the restraining order then in effect.

Arbor contends that under the common interest doctrine, discussions between its attorney and Levy's attorney, when they were working together to protect their interests against the government's attempt to obtain forfeiture of Starr's condominium unit, are privileged and may not be used by either party against the other. Arbor relies on *National Union Fire Ins. Co. of Pittsburgh, Pa. v TransCanada Energy USA, Inc.* (114 AD3d 595, 596 [1st Dept 2014]), for this proposition. However, that decision was recalled and vacated (119 AD3d 492 [1st Dept 2014]) and the First Department held that counsel was primarily engaged in ordinary business activity, which meant that the materials were not privileged.

In addition, Arbor maintains that Morvillo's affidavit violates the best evidence rule because the writings containing the notes of the conversation were not submitted. Levy submitted those notes in reply, and the notes seem to support Morvillo's recollection of the discussion. Further, the content of a conversation can be testified to by anyone who heard it, even if

there is other evidence regarding the content of the conversation. *People v Torres*, 118 AD2d 821 (2d Dept 1986). Therefore, Morvillo's affidavit regarding the conversation does not violate the best evidence rule.

The attorney-client privilege is narrowly construed, and the common-interest privilege, as an outgrowth of the attorney-client privilege, is likewise subject to narrow construction. *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 2014 WL 6803006(1st Dept 2014). The doctrine requires that (1) the communication qualify for protection under the attorney-client privilege, and (2) the communication be made for the purpose of furthering a legal interest or strategy common to the parties. (*Id.* at *2)

Here, the discussion in which the issue of the $60,000 fee arose concerned an issue of common legal concern. Both Arbor and Levy had a shared interest in persuading the United States Attorney's Office of the bona fide nature of both mortgage transactions, as both originated with Arbor. This necessarily involved consideration of how to arrange vacatur of the temporary restraining order and expedite the sale of the apartment in a manner that would avoid significant financial losses to either side. Therefore, the offered exchange between David Hoffner and E. Scott Morvillo is privileged and may not be offered as evidence. As there is no other evidence of an agreement to assign proceeds of the 3% commitment fee to Levy, the breach of

contract cause of action fails.

Quantum Meruit

In order to maintain a cause of action for quantum meruit, a plaintiff must allege that he performed services in good faith, that the services were accepted by the person to whom they were rendered, that there was an expectation of compensation for the services, and the reasonable value of the services. *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 410 (1st Dept 2011), *affd* 19 NY3d 511 (2012). Levy does not allege that he rendered any services to Arbor for which he reasonably expected compensation. Therefore, the cause of action for quantum meruit fails.

Cross-Motion to Amend

Levy seeks to amend the complaint to assert causes of action demanding the return of nearly $2 million because each of the agreements provided for the payment of only $20 and other good and valuable consideration.

Levy does not argue that he ever intended to pay only $20 for the $2 million mortgage and note. He also does not argue that he lost any money in the transaction, since he recovered the full amount of his loan when the Subject Property was sold, and he signed the Satisfaction of Mortgage acknowledging that he recovered the full amount. Further, the assignment of mortgage document, on which he is seeking to obtain recovery of

"overpayment," is not an executory contract, but a writing evidencing a transfer of a property right. Thus, it is unlike *Schron v Troutman Sanders LLP* (20 NY3d 430 [2013]), upon which Levy relies. In *Schron*, the question was whether evidence of a promise to make a loan should be admitted when the options contract at issue did not mention any such loan, instead providing for other adequate consideration. In contrast, here there is no dispute over the fully executed mortgage and loan assignment, for which the money had previously been transferred, pursuant to either an agreement or understanding that was never reduced to writing. While leave to amend is to be freely granted (CPLR 3025 [b]), where, as here, the amendment is palpably without merit, such leave is unwarranted. *Kuslansky v Kuslansky, Robbins, Stechel & Cunningham, LLP*, 50 AD3d 1101 (2d Dept 2008).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the Clerk of Court is directed to enter judgment dismissing the above-captioned matter with prejudice; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint is denied.

Dated: 12/18/14

ENTER:

Ellen M. Coin, A.J.S.C.