

City Natl. Bank v Morelli Ratner, P.C.

2016 NY Slip Op 31578(U)

August 17, 2016

Supreme Court, New York County

Docket Number: 158388/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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CITY NATIONAL BANK,

Plaintiff,

-against-

MORELLI RATNER, P.C., BENEDICT P.
MORELLI, and ARLENE B. MORELLI

Defendants.

Index No.: 158388/2014

Mtn Seq. No. 004

DECISION AND ORDER

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MORELLI RATNER, P.C., BENEDICT P.
MORELLI, and ARLENE B. MORELLI,

Plaintiffs,

-against-

CITY NATIONAL BANK,

Defendant.

Index No.: 652604/2014

Mtn Seq. No. 002

DECISION AND ORDER

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JEFFREY K. OING, J.:

Relief Requested

In both actions, Morelli Ratner, P.C., Benedict P. Morelli, and Arlene B. Morelli (collectively, the "Morelli Parties") move, pursuant to CPLR 3124, to compel City National Bank ("CNB") to produce documents concerning CNB's use of Pre-Negotiation Agreements with other borrowers or customers.

CNB cross-moves, pursuant to CPLR 3211(a)(7), to dismiss the Morelli Parties' General Business Law ("GBL") § 349 claim.

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Factual Background

On July 14, 2011, CNB and Morelli Ratner, P.C., a law firm, entered into a \$10 million revolving term loan (the "Loan") (Compl., ¶ 13)¹. Simultaneously, Benedict Morelli, a partner in that firm, and his wife, Arlene Morelli, executed a written guaranty (the "Guaranty"), in which they agreed to pay CNB for "any and all indebtedness of Morelli Ratner, P.C." (Compl., ¶ 14).

On or about August 30, 2012, CNB and the Morelli Parties agreed to restructure the Loan (Compl., ¶ 17). As part of that agreement, the parties extended the maturity date of the Loan to September 1, 2013 (Compl., ¶ 20). On the maturity date, approximately \$3 million of the Loan remained outstanding. The Morelli Parties maintain that, despite their default, CNB assured them that it would negotiate a forbearance and amendment to the Loan and Guaranty pending the formalization of a payment plan for the outstanding amounts (Compl., ¶¶ 23-24).

¹All citations to the Complaint are to the Verified Complaint in Morelli Ratner, P.C., et al v. City National Bank, Index No. 652604/2014.

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On February 7, 2014, CNB informed the Morellis that Morelli Ratner was in default under the Loan and the Morellis were required to immediately pay the outstanding debt (the "Default Letter") (Compl., ¶ 29). The Morelli Parties maintain that, after they received the Default Letter, the parties reached an oral agreement pursuant to which the Morelli Parties would immediately pay CNB \$250,000 in exchange for its forbearance, and subsequently make monthly payments of \$15,000, along with further amounts paid from future contingency fees received by Morelli Alters, another law firm in which Morelli was a partner (Compl., ¶ 30). The Morelli Parties allege that, relying on CNB's representations that they had reached an agreement, Morelli sent CNB the initial \$250,000 payment on April 25, 2014 (Compl., ¶ 34).

On or about May 12, 2014, CNB circulated a Pre-Negotiation Agreement (the "PNA") among the Morelli Parties which stated, inter alia, that "[w]hile the parties ... may reach an understanding on one or more issues that seek to effect the satisfaction of the obligations of the Borrower and Guarantors under the Loan Documents, no party hereto shall be bound by any

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such understanding or oral agreement, and no rights or liabilities, either express or implied, shall arise on the part of any of the parties hereto with respect to any issues until and unless agreement with respect to such issues has been reduced to a written agreement executed and delivered by all of the parties" (PNA at pg. 2, Weigel Affirm., Ex. R).

The Morelli Parties allege that CNB informed them that, contrary to the language in the PNA, the execution of the PNA was merely a "formality" required by CNB's internal procedures before the prior oral agreement was memorialized (Compl., ¶ 39). The Morelli Parties maintain that it was only as a result of this representation that they executed the PNA on or about June 4, 2014 (Compl., ¶ 39).

On August 22, 2014, the Morelli Parties commenced an action asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent inducement, promissory estoppel, GBL § 349, and declaratory judgment. Four days later, on August 26, 2014, CNB commenced an action pursuant to CPLR 3213, seeking the amounts outstanding under the Loan.

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Discussion

CNB's Cross Motion to Dismiss the GBL § 349 Claim

GBL § 349 bars a business from engaging in deceptive acts or practices. To state a section 349 claim, a plaintiff must allege that: (1) the challenged act or practice was consumer-oriented; (2) the act or practice was misleading in a material way; and (3) the plaintiff suffered injury as a result of the deceptive act (Stutman v Chem. Bank, 95 NY2d 24, 29 [2000]). "Private contract disputes, unique to the parties ... [do] not fall within the ambit of the statute" (Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A., 85 NY2d 20, 25 [1995]). In addition, section 349 is not intended to protect sophisticated parties with the power to negotiate (New York Univ. v Cont. Ins. Co., 87 NY2d 308, 321 [1995]). Accordingly, in determining whether a transaction is a private contract dispute, New York courts consider "the sophistication of the parties and the amount of the transaction at issue -- in other words, whether the parties need the protection of the consumer-protection law" (Berck v Principal Life Ins. Co., 40 Misc 3d 1207(A) [Sup Ct, NY County 2013] [emphasis added]).

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Consideration of these factors demonstrates that this transaction does not fall within the ambit of section 349. The remaining \$3 million owed under the Loan -- let alone the initial \$10 million Loan -- is far from the "modest" transaction section 349 is intended to cover (see e.g., Berck v Principal Life Ins. Co., 40 Misc 3d 1207(A), supra [\$5 million transaction was not "modest"])). Furthermore, the Morelli Parties are sophisticated parties. Morelli is the founding partner of a "preeminent" law firm, and while the Morelli Parties argue that Morelli is a personal injury attorney and not an expert in commercial lending, sophistication rather than expertise is dispositive in this analysis (Denenberg v Rosen, 71 AD3d 187 [1st Dept 2015][commodities trader who invested in individual private pension plan was sophisticated for purposes of GBL § 349 analysis]).

Lastly, the fact that, even after their default, the Morelli Parties had extensive negotiations with CNB and, among other things, requested and received a lower rate of interest demonstrates that they are not the ordinary consumer that section 349 was designed to protect (Compare New York Univ. v Cont. Ins.

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Co., 87 NY2d 308, 321 [1995][defendants' sale of insurance policy to plaintiff was not consumer-oriented conduct where, although the policy contained standard provisions, it was tailored to meet the purchaser's wishes and requirements] with Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A., 85 NY2d 20, 26 [1995][as defendant bank dealt with plaintiffs' representative like any other customer entering the bank to open a savings account, transaction was not covered by GBL § 349]).

Based on the foregoing, this dispute does not fall within the scope of GBL § 349. Accordingly, CNB's cross motion to dismiss the Morelli Parties' GBL § 349 claim is granted, and it is hereby dismissed.

The Morelli Parties' Motion to Compel

The Morelli Parties move to compel CNB to respond to its First Document Request No. 5, seeking communications regarding "any of CNB's pre-negotiation agreement procedures, practices and policies (Conroy Affirm., Ex. 1) and its Second Document Request No. 1, seeking "All Documents and Communications concerning any attempted or completed negotiation or workout of a loan, line of creditor borrowing, whether successful or not, between CNB and

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its customer or their representative or agent in which a pre-negotiation agreement was proposed and/or signed during the Relevant Period" (Conroy Affirm., Ex. 2).

CNB asserts that it has no general procedures, practices or policies regarding the PNAs (Forgette Aff., ¶¶ 4-6). This response leaves only the Morelli Parties' request for all documents concerning PNAs that CNB may have used, or attempted to use, with its other customers.

The Morelli Parties argue that these documents are necessary to their fraudulent inducement claim and defense. The Morelli Parties' fraudulent inducement claim rests on their allegations that, prior to the \$250,000 payment from the Morelli Parties, CNB made false statements of fact to induce the plaintiffs to make such payment, including: (1) that CNB had no present intention to sue plaintiffs; (2) that the parties had reached a deal on their prior oral agreement; (3) that CNB intended to formalize that agreement in a writing once plaintiffs signed the PNA; and (4) that the PNA was a mere "formality" rather than a document CNB intended to rely on to deny the existence and enforceability of the Forbearance and Payment Agreement" (Compl., ¶ 56). As the

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elements of a claim for fraudulent inducement are: (1) a false representation of material fact, (2) known by the utterer to be untrue, (3) made with the intention of inducing reliance and forbearance from further inquiry, (4) that is justifiably relied upon, and 5) results in damages (MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC, 32 Misc 3d 758 [Sup Ct, NY County 2011]), the dispositive issues in this claim are whether CNB in fact made such assurances knowing that they were untrue.

The Morelli Parties take the position that they are entitled to this discovery because they may be able to demonstrate CNB's intent to renege on its oral assurance through evidence of similar acts with other customers (Morelli Memo. of Law at pp. 9-10). This position is entirely speculative given the absence in the present record of any such conduct on CNB's part (Forman v Henkin, 134 AD3d 529, 530 [1st Dept 2015]; Dietz & Assoc., LLC v Essar Shipping Ltd., 306 AD2d 28 [1st Dept 2003]).

Accordingly, it is

ORDERED that the Morelli Parties' motion to compel is denied; and it is further

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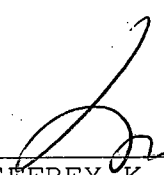
ORDERED that CNB's cross motion to dismiss the Morelli Parties' GBL § 349 claim is granted, and it is dismissed; and it is further

ORDERED that counsel are directed to appear in Part 48 for a status conference on September 28, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

8/17/16



HON. JEFFREY K. OING, J.S.C.