425 Madison Ave. Assoc. v MHP Real Estate Servs.
2016 NY Slip Op 32360(U)
November 29, 2016
Supreme Court, New York County
Docket Number: 155815/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

425 Madison Avenue Associates

-v-

MHP Real Estate Services

INDEX NO. 155815/16

MOTION DATE 9/19/16

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action arising out a proposed real estate transaction, 425 Madison Avenue Associates ("plaintiff") moves pursuant to CPLR § 3212 for summary judgment against MHP Real Estate Services, LLC ("defendant") on plaintiff's first cause of action for breach of contract in the amount of $50,000.00, plus interest and to strike and dismiss defendant's affirmative defenses.

In response, defendant cross moves to dismiss the first cause of action.

Factual Background

Plaintiff alleges that the parties executed a Letter of Intent ("LOI") dated February 16, 2016, by which defendant offered, subject to execution of a Purchase and Sale Agreement (the "Agreement"), to purchase from plaintiff real property located at 425 Madison Avenue, New York, New York (the "property") for $130 million. On May 17, 2016, plaintiff presented defendant with copies of the Agreement executed by plaintiff, and despite defendant's promises to execute the Agreement, and despite plaintiff's good faith negotiations, defendant failed to execute the Agreement. On May 19, 2016, plaintiff terminated negotiations and demanded reimbursement of $50,000 of its legal fees in accordance with paragraph 4 of the LOI. Plaintiff argues that no triable issues of fact as exist as to defendant's breach of its agreement to pay plaintiff $50,000.00 towards legal fees plaintiff incurred in connection with the proposed real estate transaction. Further, defendant's affirmative defenses lack merit.

In response, defendant contends that the LOI cannot be interpreted to mean that defendant is obligated to pay legal fees at any point during negotiations. Instead, the obligation to pay legal fees is triggered upon the conclusion of the negotiations on the ultimate terms the parties

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

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

anticipated negotiating. The LOI was intended to protect plaintiff against the possibility that, after reaching a meeting of the minds regarding the sale terms, defendant would not close the transaction by failing to execute the Agreement. Further, plaintiff continued to negotiate and incur legal fees after its attempt to terminate negotiations.

In reply, plaintiff points out that, *inter alia*, the LOI states that if defendant fails to execute the Agreement, "for whatever reason," defendant will pay $50,000.00 of plaintiff's legal fees.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]).

As to the LOI, it "is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [1st Dept 2004]; *see also Alf Naman Real Estate Advisors, LLC v Cape Sag Developers, LLC*, 113 A.D.3d 525, 978 N.Y.S.2d 844 [1st Dept 2014]). A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Beinstein v Navani*, 131 A.D.3d 401, 14 N.Y.S.3d 362 [1st Dept 2015]).

Whether a contract is ambiguous is, of course, a question of law for a court (*South Road Assocs., LLC v International Bus. Machs. Corp.*, 4 N.Y.3d 272, 278, 793 N.Y.S.2d 835, 826 N.E.2d 806 [2005]). A contract is ambiguous only if "on its face [it] is reasonably susceptible of more than one interpretation" (*Chimart Assocs. v Paul*, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231 [1986]). Only when a contract is found to be ambiguous will a court look to extrinsic evidence to resolve the ambiguity (*Greenfield v Philles Records, Inc.*, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002]). If the contract on its face is "reasonably susceptible to only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Id.* at 569–70, 750 N.Y.S.2d 565, 780 N.E.2d 166 [citations omitted]). In other words, "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [1st Dept 2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1st Dept 1995]; *see also Rotter v Ripka*, 110 A.D.3d 603,

973 N.Y.S.2d 211 [1st Dept 2013]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

Here, the LOI expressly provides, in relevant part, as follows:

> This letter constitutes an offer for the purchase of the 100% fee simple interest in the above captioned property (the "Property") . . . . Although this Letter of Intent (the "LOI") should not be construed as a contract binding upon either party, it does fairly reflect our thinking as it relates to the terms and conditions upon which title to the real estate and personal property would pass from Seller to Buyer.
>
> It is our understanding that:
>
> * * * * *
>
> 2. Closing: Buyer and Seller shall immediately begin negotiation of a Purchase and Sale Agreement (the "Agreement") . . . .
>
> * * * * *
>
> 4. Legal Fees: If the Buyer does not execute the Agreement for whatever reason, Buyer will cover the Sellers legal fees capped at $50,000. . . .
>
> * * * * *
>
> It is expressly understood and agreed that this letter shall not, under any circumstances, whether at law or in equity, be, or be deemed to be, a binding agreement with respect to the purchase and sale of the Property, *that except as provided in Paragraphs 4 and 6 above, which shall be legally binding obligations of Seller and Buyer, as applicable, any party hereto can terminate discussions without any obligation at any time*, and that no such binding agreement shall exist unless and until mutually satisfactory definitive legal agreements are executed and delivered.
> (Emphasis added).

The LOI is clear and unambiguous, and requires the Buyer, in this case, defendant, to pay the Seller, plaintiff herein, plaintiff's legal fees up to $50,000 if the defendant does not execute a Purchase and Sale Agreement for whatever reason. Furthermore, paragraph 4 is binding and either party was at liberty to terminate negotiations without any further obligation at any time.

It is uncontested that after the parties executed the LOI in February 2016, they entered into negotiations. It is also uncontested that on May 17, 2016 plaintiff presented defendant with a draft of the Agreement and that defendant declined to execute it. The parties continued to negotiate, and on May 19, 2016, plaintiff sent an email to defendant attempting to terminate negotiations and requested payment of $50,000 for legal fees plaintiff incurred (*see* Affidavit of

defendant's Senior Managing Director James Tamborlane ("Tamborlane") ¶8). It is also uncontested that defendant has not executed a Purchase and Sale Agreement. Tamborlane's affidavit, dated September 12, 2016, indicates that "On July 18, 2016 . . . [the parties] had another telephone conference in which we discussed and continued to negotiate a final purchase and sale agreement." Plaintiff's complaint was filed on July 13, 2016 and Tamborlane's September 2016 affidavit is silent as to any further negotiations subsequent to July 18, 2016. Thus, the record establishes that to date, the parties have not executed the Agreement and therefore, defendant is obligated pursuant to paragraph 4 of the LOI, to pay plaintiff "Legal Fees" "capped at $50,000" given that defendant did not "execute the Agreement for whatever reason." Therefore, plaintiff made a *prima facie* showing of entitlement to judgment on its first cause of action for breach of contract.

Defendant's interpretation of the LOI is belied by the express terms of the LOI, which permit the recovery of legal fees (up to $50,000) in the event defendant failed to execute the Agreement for whatever reason, and that the parties could terminate the discussions at any time. That the LOI did not set a deadline for when the final agreement was to be executed is inconsequential. The parties were permitted to terminate negotiations and that the plaintiff was provided protection of up to $50,000 in legal fees for the defendant's failure to execute the Agreement. And, even assuming the proposed terms in the LOI, such as the purchase price, remained negotiable, and that defendant had no obligation to execute an agreement containing terms inconsistent with the LOI, the express terms of the LOI found in paragraph 4 were expressly made binding upon the parties. Plaintiff need only establish that the Agreement was not executed after negotiations, and it is undisputed that the parties entered into negotiations and defendant did not execute the Agreement.

Further, plaintiff established that defendant's affirmative defenses alleging (1) failure to mitigation, (2) unclean hands, (3) equitable estoppel, and (4) failure to state a cause of action, lack merit as a matter of law.

As plaintiff asserts, it has no duty under the LOI to mitigate the legal fees it incurred.

The record is devoid of any evidence that plaintiff has "unclean hands" in regard to the negotiations of the LOI or Agreement. "To charge a party with unclean hands, it must be shown that said party was "guilty of immoral or unconscionable conduct directly related to the subject matter" (*Citibank, N.A. v American Banana Co., Inc.*, 50 A.D.3d 593, 856 N.Y.S.2d 600 [1st Dept 2008]). Tamborlane's affidavit indicates that subsequent to the execution of the LOI, the parties negotiated "over the terms of a purchase and sales agreement" (¶5). After defendant declined to sign the proposed Agreement, the parties "continued to negotiate a final agreement by discussing subjects such as the timing of the signing of the contract, terms of the purchase and sale agreement, and the requirements from our proposed lender and equity partner" (¶9). According to Tamborlane, these negotiations continued on June 6 and June 15, 2016, and plaintiff's invoice for legal fees is dated June 15, 2016. A review of defendant's allegations and opposition papers demonstrate that there are no factual allegations giving rise to immoral or unconscionable conduct in relation to the LOI or Agreement to support an affirmative defense of unclean hands.

"The elements of estoppel with respect to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct

will be acted upon by the other party; and (3) knowledge of the real facts. [On the other hand,] [t]he party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position (*Airco Allys Div v Nivra Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 [4th Dept 1980] *Matter of New York State Guernsey Breeders' Co-op. v Noyes*, 260 App Div 240, 248, mod on other grounds 284 NY 197; *see Werking v Amity Estates, supra, p 53*; see, generally, 21 NY Jur, Estoppel, § 21, p 27). Defendant's allegations and opposition papers fail to assert any facts giving rise to this affirmative defense.

And, given that plaintiff's first cause of action adequately alleges facts showing the making of an agreement, the performance by plaintiff, breach by defendant, and resulting damages (see *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006]), the complaint clearly states a cause of action for breach of contract.

Defendant's remaining arguments fail to raise an issue of fact as to its liability under the LOI. As such, and based on the above, defendant's cross-motion to dismiss the first cause of action is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR § 3212 for summary judgment against defendant on plaintiff's first cause of action for breach of contract in the amount of $50,000.00, plus interest, and to strike and dismiss defendant's affirmative defenses is granted in its entirety; and it is further

ORDERED that defendant's cross-motion to dismiss the first cause of action is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated 11/29/16 ENTER:  , J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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