

KNIC LLC v New York City Economic Dev. Corp.

2016 NY Slip Op 32681(U)

December 16, 2016

Supreme Court, Bronx County

Docket Number: 22507/2016E

Judge: Ruben Franco

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.

**NEW YORK SUPREME COURT
COUNTY OF BRONX - IAS PART 26**

KNIC LLC, a Delaware Limited Liability company; and
Knic Properties LP, a Delaware Limited Partnership,

Plaintiffs,

Index No. 22507/2016E

-against-

**MEMORANDUM
DECISION/ORDER**

NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION,

Defendant,

-and-

ZACHARY W. CARTER, in his capacity as
CORPORATION COUNSEL OF THE CITY OF NEW
YORK and Escrow Agent,

Nominal Defendant.

HON. RUBEN FRANCO

It pains me to write this decision, for, as I have told the attorneys for both sides on numerous occasions, a decision by the court in this case, rather than a resolution by agreement of the parties, will almost certainly result in an appeal, which will only serve to further seriously delay the completion of a much-anticipated development project which could greatly benefit the local community.

Plaintiff KNIC LLC (hereinafter, "KNIC") is the developer of the proposed Kingsbridge National Ice Center to be housed in the old Kingsbridge Armory, a facility occupying a 5-acre site in the Kingsbridge section of the Bronx. Plaintiff KNIC Properties LP (hereinafter, "KNIC Properties"), is a general partner in KNIC, and is to become the tenant of the Kingsbridge Armory when the proposed project is completed. It is claimed that upon completion, the Center

will house “the world’s largest indoor ice sports facility” and that the project will support 2700 construction-related jobs and 820 permanent jobs (Correspondence of Mark Messier, KNIC’s CEO, to Deputy Mayor Alicia K. Glen, dated April 18, 2016).

Defendant New York City Economic Development Corporation (“EDC”) is a not-for-profit corporation created to encourage and facilitate economic growth in the City of New York. In furtherance of its mission, EDC acquires, transfers and leases city-owned land and facilities. One such property is the Kingsbridge Armory.

In 2011, Kevin Parker (Parker), plaintiffs’ founder, and his associates, began discussions with EDC for the redevelopment of the Armory as an ice sports facility, and in early 2012, EDC issued a formal request for proposals (RFP) for the redevelopment of the Armory. Several months later, KNIC submitted its proposal in response to the RFP, which called for transforming the Armory into the Kingsbridge National Ice Center, which would contain nine indoor ice rinks, including a center rink with approximately 5,000 seats. It would feature, among other events, ice hockey, figure skating, speed skating, and open skating for recreational skaters. It would also provide free after-school skating and mentoring programs for children from low-income families who reside in the area.

KNIC has also entered into an agreement with a coalition of community groups whereby, in exchange for the groups’ support of the project, KNIC would extend a hiring preference to local workers, and it would provide, design and build, meeting space and offices for community use, as well as \$1 million each year for 99 years of in-kind services and ice time for Bronx residents, primarily children from low-income families who attend public schools in the community.

Phase I of the project would cost \$158 million and will consist of five interior rinks, parking facilities and approximately 50,000 square feet of space dedicated to community uses. The estimated cost of the full project is \$350 million, and was originally scheduled for completion in the summer of 2017, the 100th anniversary of the opening of the Armory, and the 100th anniversary of the founding of the National Hockey League. KNIC claims that upon completion, the Center will draw 2.5 million visitors annually, and that it will have an economic impact on the area of approximately \$2 billion and will create hundreds of jobs. It is indeed a grand project, which could benefit many, including the litigants.

In April, 2013, KNIC (actually, KNIC Partners LLC, KNIC's prior incarnation) and EDC executed a Pre-Development Agreement by which KNIC was designated as the developer for the Kingsbridge Armory project. The Agreement provided that upon the closing for the transaction, KNIC would be assigned a 99-year lease to the premises, along with its supporting documents. Sometime thereafter, the KNIC partners became embroiled in a dispute, resulting in the resignation or termination of three of the partners. These three wrote a letter, dated March 10, 2014, to the President of EDC claiming that Parker lacked authority to act on behalf of any of the KNIC entities, including entering into agreements with EDC. In the letter they also alleged that Parker lacked the "requisite skill and experience to execute a complex project [such as the Kingsbridge National Ice Center] on time and on budget; and...to execute on the complex capital and sourcing structure." This dispute is the subject of a separate lawsuit.

Although the allegations regarding Parker appear to have been unsubstantiated, the statements of his former business partners was apparently sufficient to cause concern among the EDC hierarchy. Thus, they came to insist that the lease and accompanying documents be held in

escrow until KNIC could demonstrate, to EDC's satisfaction, that the funds to carry out the first phase of the project, were in place. Although KNIC objected to having the lease placed in escrow, on October 14, 2014, EDC and KNIC Properties executed an Escrow Agreement. The Agreement provides that the documents will be held in escrow until KNIC Properties is able to present evidence to EDC of financial resources "consisting of (i) a Senior Mortgage loan in the amount of at least Twenty-Five Million Dollars (\$25,000,000), in the form of an executed and binding commitment from a lender and (ii) subordinate mortgage loans ...in the form of one or more executed and binding loan agreements ... and "satisfaction of the Equity Requirement ... of Twenty Million Dollars \$20,000,000), such that the aggregate amount of financial resources evidenced by all of the documentation delivered ... is at least One Hundred Fifty-Eight Million Dollars (\$158,000,000)." (Hereinafter, the "Condition")

On February 4, 2016, plaintiffs notified the Escrow Agent that the Condition for the release of the lease documents had been satisfied, and requested their release. On February 9, 2016, EDC wrote to the Escrow Agent to object to the release of the documents, claiming that the Condition had not been satisfied. The documents were not released and in April 2016, KNIC commenced the instant action asserting causes of action for declaratory judgment, breach of contract, and aiding and abetting the commission of a tort. Defendant EDC moves here to dismiss pursuant to CPLR 3211 (a)(1) and (7), claiming that the declaratory judgment cause of action should be dismissed because documentary evidence conclusively establishes that plaintiffs have not satisfied the conditions necessary to gain release of the escrowed documents, and pursuant to CPLR 3211 § (a)(7), alleging that KNIC has failed to state a cause of action for breach of contract, as well as for tortious interference with contractual and economic relations.

Plaintiff has requested oral argument on the motion, and defendants have opposed. The parties have presented their arguments in connection with this motion in voluminous submissions. They also set forth their positions during a number of settlement sessions conducted by the court, each lasting several hours, as well as in the several letters that each has addressed to the court. The court determines that further oral argument is not necessary (see 22 NYCRR § 202.8[d]).

In its declaratory judgment cause of action, KNIC seeks a declaration that it has satisfied the Condition contained in the Escrow Agreement for release of the lease. KNIC contends, and EDC does not dispute, that it has raised the \$20 million in equity investments. However, here lies the dispute: KNIC also claims that it has obtained the balance of \$138 million for the first phase of the project, in the form of a commitment from the New York Empire State Development Corporation (ESD). To prove that it has satisfied the Condition, KNIC references a document executed by Parker and EDC's Vice President for Loans and Grants, dated December 29, 2015, with the following heading:

Potential ESD Loan for the Development of the Kingsbridge Armory
Summary of Proposed Key Terms & Conditions ("Term Sheet")

A motion to dismiss a Complaint under CPLR § 3211(a)(1), will be granted only if the documentary evidence conclusively disposes of plaintiff's claim and resolves all factual issues (see Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 [2002]; Attias v. Costiera, 120 A.D.3d 1281 [2nd Dept. 2014]; Cives v. George A. Fuller Co., Inc., 97 A.D.3d 713 [2nd Dept. 2012]). The documentary evidence needed to support such a motion must be "unambiguous, authentic, and undeniable" (Attias v. Costiera, *supra*, at 1282, quoting Granada Condominium III

Assn. v. Palomino, 78 A.D.3d 996, 996-997). While “Judicial records, as well as documents reflecting our-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (Attias v. Costiera, *supra*, quoting Fontanetta v. John Doe I, 73 A.D.3d 78, 84-85), neither affidavits, deposition testimony, nor letters, are considered documentary evidence within the meaning of CPLR § 3211(a) (1) (Granada Condominium III Assn. v. Palomino, *supra*, at 997). A connecting link, such as an affidavit, is an appropriate vehicle for authenticating the documentation submitted in support of the motion (see Muhlhahn v. Goldman, 93 A.D.3d 418 [1st Dept. 2012]; Standard Chartered Bank v. D. Chabbott, Inc., 178 A.D.2d 11 [1st Dept. 1991]).

EDC relies on the Escrow Agreement and the Term Sheet, as the documentary evidence to support its request for dismissal of plaintiffs’ declaratory judgment cause of action.

Recitation of a few pertinent principles of contract law are useful here. Our Court of Appeals has long adhered to the “sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language” (Springsteen v. Samson, 32 N.Y. 703, 706 [1865]). This principle was more recently reaffirmed when the Court stated that “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (W.W.W. Assoc. v. Giantontieri, 77 N.Y.2d 157, 162 [1990]; see also, Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 198 [2001]). The Court has also enunciated the principle thusly: a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (see Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 [2002]; R/S Assoc. v. New York Job Dev. Auth., 98 N.Y.2d 29, *rearg. denied* 98 N.Y.2d

693 [2002].

The court finds the language of the Escrow Agreement to be clear and unambiguous, and thus, subject to the application of the plain meaning of its terms. Moreover, the court concludes that the Escrow Agreement and the Term Sheet, construed in *pari materia*, are dispositive of all issues regarding the declaratory judgment cause of action. In considering the documents, the court determines that the Escrow Condition has not been satisfied, thus, this cause of action is dismissed pursuant to CPLR § 3211(a)(1).

Section 2.01 of the Agreement, entitled, “Condition to Release from Escrow”, expressly requires that in order to gain release of the lease documents, KNIC must produce proof of its loans in the form of executed and binding commitments (emphasis added). The proof that KNIC submits, the ESD Term Sheet, does not evince that it has obtained an executed and binding commitment for loans; it is replete with conditional terms. Its heading, with terms such as “Potential ESD Loan” and “Proposed Key Terms & Conditions” (emphasis added on both words), portends for the remainder of its text. It is clearly a document that sets forth the terms under which ESD will lend funds to KNIC, in the event it decides to do so; it is not a commitment to make a loan. In fact, it states “this Term Sheet does not obligate ESD or borrower in any manner whatsoever, and is not enforceable by either party in law or in equity...” It also indicates that “The loan is subject to all required public approvals ... which are a condition to the making of the loan.” And it provides that the loan is contingent upon the availability of funds and “the approval of the ESD Project Review Committee, ESD Board of Directors, and the State Division of the Budget.” Tellingly, it states that the provisions of the Term Sheet “shall not constitute an offer, acceptance, or legally binding agreement. ... Either party may, at its sole and

absolute discretion, terminate discussions at any time for any reason or no reason; it being agreed that none of the parties to this Term Sheet is under any obligation whatsoever to engage in, continue or conclude negotiations.” This reveals that the possible granting of a loan was still being negotiated, a far cry from the existence of a binding commitment to provide funds. The last sentence of the Term Sheet informs that its only “Binding Provisions” are the Sections entitled “Brokerage Commissions” and “Confidentiality.” Thus, it is ineluctable, that none of the other provisions of the Term Sheet are binding, including any promise to lend funds.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court should “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (citations omitted) (Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]).

Plaintiffs cause of action for breach of contract is also dismissed. The allegation here is that on April 23, 2013, the parties executed the Pre-Development Agreement pursuant to which EDC was to deliver to KNIC, at a scheduled closing, the lease to the Kingsbridge Armory upon the satisfaction of certain conditions; that they completed or performed all required contractual obligations and satisfied all of the conditions which were to trigger EDC’s surrender of the lease to KNIC; that EDC breached the Pre-Development Agreement in that it did not tender the lease to KNIC, but, instead, insisted on a material change to the lease and Pre-Development Agreement by demanding that KNIC execute an Escrow Agreement which would require that the lease be held in escrow until KNIC satisfied newly imposed conditions. KNIC also alleges that it satisfied the new conditions under the Escrow Agreement, yet EDC refused to have the lease

surrendered, thus it breached this agreement also.

In attempting to make out this cause of action, KNIC is confronted with two major problems. First, Section 19.01 of the Pre-Development Agreement allows for changes to the Agreement, so long as done in writing, and signed by an authorized representative of the party against whom any purported change is sought to be enforced. Although there was some protest to the proposed changes, KNIC's principal, Kevin Parker, who is a very experienced businessman, and was represented by counsel, signed all documents and consented to the modifications to the Agreement,. Secondly, the court finds, as has been previously stated, that KNIC has not satisfied the conditions under the Escrow Agreement that would warrant release of the lease, thus, no breach is found here either.

KNIC also fails to establish a cause of action for aiding and abetting in the commission of a tort. Here, it is alleged that three of Parker's former colleagues— Richter, Wignell and Spiritos— in essence, tried to steal the Kingsbridge project from KNIC, and that EDC, through its agents, substantially aided the trio in their wrongful conduct. KNIC asserts that Parker's former associates engaged in tortious interference with contractual and business relations between KNIC and EDC (for which redress is sought in a separate action), and that EDC aided and abetted the former associates in the tortious conduct in that they, *inter alia*, "wrongfully delayed the Closing, refused to deliver a fully-executed lease, insisted on an escrow agreement, and adopted an unreasonable, unfair, and bad faith interpretation of the Escrow Agreement, with the intent, purpose, and effect of depriving KNIC of possession of the lease, and wrongfully interfered with and refused to allow Corporation Counsel to deliver the Escrowed Documents to KNIC Properties despite the escrow conditions having been satisfied" (Complaint, ¶ 140). This

cause of action fails for various reasons.

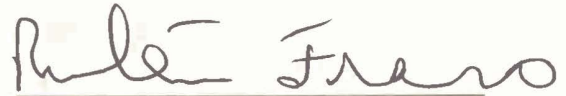
First, the Court of Appeals has made it clear that “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” and that “This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 NY2d 382, 389-390 [1987], citations omitted). KNIC has not alleged a violation of a legal duty independent of the Pre-Development Agreement or the Escrow Agreement, in any of its causes of action. Further, KNIC concedes that no cause of action lies against EDC for tortious interference with a contract to which EDC is a party; that only a stranger to a contract can be liable for the tortious interference of that contract. How, then, can EDC be found to have aided and abetted in the tortious interference of a contract in which it cannot tortiously interfere? KNIC presents no case law to support this proposition. Indeed, it cannot, for no cause of action exists for aiding and abetting a breach of contract (see Pomerance v. McGrath, 124 AD3d 481 [1st Dept 2015]; Purvi Enters, LLC v. City of New York, 62 AD3d 508 [1st Dept 2009]).

Secondly, addressing KNIC’s claim for tortious interference with prospective economic relations: an essential element of this cause of action is the intentional procurement of a breach by the defendant (see Gregoris Motors, Inc. v. Nissan Motors Corp. in U.S.A., 80 AD2d 631 [1981]). It would seem somewhat incongruous to find that EDC has aided and abetted Parker’s former colleagues in intentionally interfering with prospective economic relations, when there has not yet been a determination that the three are culpable of having engaged in such conduct. Nevertheless, to prevail on this cause of action, a plaintiff must demonstrate that defendant’s

interference with its prospective business relations was accomplished by “wrongful means” or that defendants acted for the sole purpose of harming plaintiff (see Snyder v. Sony Music Entertainment, 252 AD2d 294 [1st Dept 1999]). KNIC has failed to convince the court that EDC engaged in “wrongful means” when, with KNIC’s consent, it sought to modify the Pre-Development Agreement, which the Agreement permits, and by otherwise acting to induce KNIC to demonstrate that it has sufficient funding to complete the first phase of the project. Moreover, it can not be argued that EDC acted for the sole purpose of harming KNIC inasmuch as it was KNIC that EDC chose to award the contract to develop the Kingsbridge Armory, and KNIC continues to have the contract and is free to move forward with the development of the project as soon as it obtains the necessary funding.

Defendants’ motion is granted in its entirety, and plaintiff’s Complaint is dismissed.

Dated: December 16, 2016



Ruben Franco, J.S.C.

HON. RUBÉN FRANCO