

**City's 5th Ave. 54th St. LLC v 685 Fifth Ave. Owner
LLC**

2017 NY Slip Op 32197(U)

October 13, 2017

Supreme Court, New York County

Docket Number: 650728/17

Judge: Andrea Masley

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.

650728/17, Mot. Seq. 002

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ANDREA MASLEY
Justice

PART 48

CITY'S 5TH AVENUE 54TH STREET LLC,
Plaintiff,

INDEX NO. 650728/17

- v -

MOTION DATE

685 FIFTH AVENUE OWNER LLC, GGP INC., and
GGP NIMBUS, LP,
Defendants.

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to dismiss the complaint.

Table with 2 columns: Document type and No(s). Rows include Notice of Motion/ Order to Show Cause, Answering Affirmation(s), and Replying Affirmation.

Upon the foregoing papers, it is ordered that this motion is granted because plaintiff has insufficiently pleaded its fraud cause of action in light of documentary evidence, in the form of term sheets, demonstrating that no final loan agreement existed, and that a prospective loan, if any, was conditioned upon on board approval and execution of additional loan documentation.

Defendants GGP INC. (GGP) and GGP NIMBUS, LP (Nimbus) (together, the GGP defendants) move pursuant to CPLR 3211 and 3016 (b) to dismiss the complaint of plaintiff CITY'S 5TH AVENUE 54TH STREET LLC.

By purchase and sale agreement and subsequent amendments1 (together, the Agreement), plaintiff agreed to purchase from defendant-seller 685 FIFTH AVENUE OWNER LLC (Seller) a commercial condominium unit (the Condominium Unit) of the property located at 685 Fifth Avenue in New York for \$150 million, towards which purchase plaintiff put down a \$15 million deposit. According to the complaint, the property is a 20-story mixed-use building, which was to be divided into a "retail unit" and a "commercial condominium unit," the latter of which plaintiff intended to convert into residential condominiums. It is undisputed that Seller is jointly owned, in equal parts, by GGP and a non-party to this action, Thor Equities. Nimbus is a wholly-owned subsidiary of GGP.

1 The initial purchase and sale agreement was executed on March 14, 2016. The five corresponding amendments were executed between April 5, 2016 and May 12, 2016.

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

650728/17, Mot. Seq. 002

According to the complaint, Seller notified plaintiff that the closing would occur on January 9, 2017. Plaintiff alleges that "GGP and [] Nimbus offered to provide [a \$120 million] bridge loan [to plaintiff] in the middle of December 2016" to enable plaintiff to close on the property transaction; per the Agreement, the transaction was to be "all cash," without any contingencies for plaintiff's obtaining financing. Plaintiff also alleges that it was obligated to perform more than \$6 million worth of construction work prior to the scheduled closing date because another tenant would be moving into the "retail unit" at the property. According to the complaint, "on January 9, 2017, [Seller] agreed to reschedule the purported closing," with a new closing date in late January or early February 2017 to be later determined; also on January 9, 2017, "Seller confirmed" that Nimbus would provide a \$120 million bridge loan.

Notably, there is no mention in the complaint of the Term Sheets,² or any specific documents, issued by the GGP defendants to plaintiff regarding the potential bridge loan. Instead, plaintiff alleges in the complaint that, "during the course of the negotiation of the bridge loan, it became clear that [Seller and the GGP defendants] were acting in bad faith and dragging their feet by supplying entirely unusable loan documents." Further, plaintiff asserts that "Defendants were non-committal about a new potential closing date," and were "dilatatory in providing comments and revisions to various loan documents when [plaintiff] raised concerns."

On the first page of both Term Sheets, respectively dated December 22, 2016 and January 9, 2017, appear identical disclaiming paragraphs under the heading "*Summary of Indicative Terms and Conditions*." Those paragraphs state:

"The following is a preliminary summary of the indicative basic terms and conditions for the proposed financing. These indicative terms and conditions reflect the current perception of market conditions by [Nimbus] as they relate to the proposed financing, and are subject to change without notice. This is a preliminary summary and does not define all of the terms and conditions of the proposed financing, but is a framework upon which documentation for this transaction would be structured, and is a basis for further discussion and negotiation of such terms as may be appropriate. Under no circumstance shall the indicative terms and conditions constitute or be deemed to constitute a legally binding commitment on the part of [Nimbus] or any of its affiliates, the Borrower, or any other person, nor shall it be construed as an undertaking by [Nimbus] to issue or arrange a commitment. The credit, if any, shall be subject to the due diligence review and other matters described in the terms sheet, the approval by [Nimbus]'s board of directors and other internal committees, and the execution and delivery of documentation satisfactory in form and substance to [Nimbus]'s legal counsel. No rights, obligations or liabilities of any kind or nature whatsoever shall arise on the part of [Nimbus] or any other person as the result of the provisions of this term sheet."

² The GGP defendants have submitted various documents as exhibits, including two Term Sheets which were sent to plaintiff in December 2016 and January 2017.

Additionally, both Term Sheets indicate, at the top of each page, that the documents are “[f]or discussion purposes only.”

While the Term Sheets state that “[t]he credit, if any, shall be subject to . . . the approval by [Nimbus]’s board of directors and other internal committees,” and the GGP defendants’ exhibits demonstrate that plaintiff’s President, Mehmet Gulay, received the Term Sheets via email, plaintiff alleges in the complaint that “at no point did Defendants ever advise [plaintiff] that the loan was conditioned upon approval by GGP and [] Nimbus’s board.” Plaintiff now acknowledges the existence of the Term Sheets in the April 27, 2017 affidavit of Mr. Gulay, submitted in opposition to this motion. Mr. Gulay states that, “[d]espite the contents of the Term Sheet, the GGP Defendants and Seller repeatedly told and promised me – even after the Term Sheet was distributed – that Nimbus would make the bridge loan as originally agreed.”

In any event, plaintiff alleges in the complaint that the President and Chief Operating Officer of GGP, Shobi Khan, informed plaintiff on January 30, 2017 that “GGP and [] Nimbus’s board rejected the loan, and [plaintiff] was purportedly in default of the [Agreement]” for failing to close on January 9, 2017. In sum, plaintiff alleges in the complaint that Seller and the GGP defendants conspired to deprive plaintiff of its \$15 million deposit, or the opportunity to purchase the Condominium Unit at an abated purchase price, by promising that Nimbus would provide the \$120 million bridge loan, and then—after “voluntarily” adjourning the January 9, 2017 closing date—rescinding the bridge loan and declaring plaintiff in default of the Agreement for its failure to timely close on January 9th.

The GGP defendants’ motion seeks dismissal pursuant to CPLR 3211 of the entire complaint as against GGP and Nimbus, but focuses on the fifth cause of action, alleging fraud, which is the only claim in the complaint that specifies that it is raised against all defendants, rather than Seller alone.³ The GGP defendants argue that the first four causes of action do not pertain to the GGP defendants, and do not allege any wrongdoing on their behalf. Additionally, the GGP defendants ask that the fifth cause of action for fraud be dismissed pursuant to CPLR 3016 (b) and 3211 because the claim is insufficiently pleaded.

Discussion

As an initial matter, plaintiff does not oppose the GGP defendants’ contention that the first four causes of action in the complaint are directed solely at Seller, and must be dismissed as against the GGP defendants. Accordingly, the motion is granted with respect to those causes of action.

³ Plaintiff’s five causes of action in the complaint, seeking: (1) a declaratory judgment that plaintiff did not breach the Agreement with Seller; (2) specific performance of the Agreement at an abated purchase price; (3) an award returning its \$15 million deposit for Seller’s alleged breach of contract; (4) an award of \$6,275,000 for alleged property improvements under the theory that Seller has been unjustly enriched; and (5) fraud.

The court is also compelled to dismiss plaintiff's fraud cause of action as against the GGP defendants. "Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (*Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802).

The elements of fraud consist of "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016] [internal quotation marks and citations omitted] [alteration in original], *rearg denied* 28 NY3d 956). "Where a cause of action or defense is based upon . . . fraud, . . . the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The Court of Appeals has explained:

"[CPLR] 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. . . . Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. On a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems" (*Sargiss v Magarelli*, 12 NY3d 527, 530-531 [2009] [internal quotation marks and citations omitted]).

Specifically, plaintiff alleges in the complaint that Seller and the GGP defendants "represented that they would provide [the \$120 million] bridge loan" to plaintiff on January 9, 2017 (Compl. ¶ 102), and that plaintiff "reasonably relied upon this representation and did not pursue other sources of potential financing" (*id.* ¶ 103). Plaintiff also alleges that "[a]t the time Defendants made that representation, they knew that [it] was false because they had no intention of providing any bridge loan;" "[i]nstead, Defendants coordinated and conspired to commit a fraud against [plaintiff]" by "intentionally string[ing plaintiff] along in bad-faith, all while they were actively marketing the Commercial Unit for sale to third-parties" (*id.* ¶¶ 104-108).

The GGP defendants assert that, "[w]hile Plaintiff has not alleged sufficiently any of the elements of fraud, the Complaint's most obvious flaw" pertains to the reliance element. The GGP defendants contend that plaintiff's reliance on Nimbus's purported oral statement that a bridge loan was forthcoming is unreasonable—and, therefore, inadequately pleaded—in light of the Term Sheets which were delivered to plaintiff. They further argue that plaintiff's allegations are expressly controverted by the identical disclaimers contained in the Term Sheets, which state, among other things, that "[t]he credit, if any, shall be subject to . . . the approval by GGP's board of directors and other internal committees" (1/9/17 Term Sheet, at 2; 12/22/16 Term Sheet, at 2). The GGP defendants also contend that plaintiff failed to allege an existing fact to satisfy the misrepresentation element, and that the complaint inadequately pleads falsity, lacks any allegation or facts supporting the element of scienter, and fails to plead actual damages or causation.

Plaintiff counters that “Seller and GGP Defendants made two affirmative representations of fact: (i) Seller represented that it was voluntarily adjourning the purported January 9 closing to a later date in January or early February; and (ii) the GGP Defendants represented that Nimbus would issue a \$120 million bridge loan.” In short, plaintiff argues that the defendants’ promises to provide a bridge loan and adjourn the closing date were misrepresentations made with the “preconceived intention of declaring [plaintiff] in default and not providing the loan.”

The court agrees with the GGP defendants. The alleged misrepresentation of fact—that the GGP defendants would provide a bridge loan, buttressed by plaintiff’s allegation that it was not advised that a loan was conditioned upon board approval (see Compl. ¶¶ 13, 62, 102, 104)—is belied by the documentary evidence. The court is permitted to consider extrinsic evidence on a CPLR 3211 motion, and, “where the essential facts have been negated beyond substantial question by the . . . evidentiary matter submitted,” a motion to dismiss is properly granted (see *Bondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). As the Term Sheets sent to plaintiff by the GGP defendants demonstrate, the bridge loan negotiations were being conducted at arms length, and each of the Term Sheets contained the same disclaimer on the first page explaining, among other things, that the potential loan, “if any, shall be subject to . . . the approval by [Nimbus’s] board of directors and other internal committees.” The Term Sheet disclaimers are also clear that the Term Sheets themselves are mere negotiation instruments, not offers or agreements to extend a loan. Thus, plaintiff was aware that any bridge loan agreement was conditioned upon various factors, including board approval, as well as the fact that a loan agreement, if any, could be reached only upon the execution of further loan documentation.

Furthermore, the fraud cause of action is not saved by Mr. Gulay’s statement that “[d]espite the contents of the Term Sheet, the GGP Defendants and Seller repeatedly told and promised [Mr. Gulay] -- even after the Term Sheet was distributed [on January 9, 2017] -- that Nimbus would make the bridge loan as originally agreed” (Gulay’s 4/27/17 Aff., ¶ 40). “Where a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party’s promises to proceed with the transaction in the absence of that further written agreement” (*StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012]). Where, as here, the Term Sheets expressly state that the documents do not constitute any commitment to lend, and that no agreement to lend exists until satisfactory loan documents have been executed, plaintiff’s allegation that it “reasonably and detrimentally relied on oral assurances by defendants that they intended to close the financing agreement” are “conclusively refuted” by the documentary evidence (*511 9th LLC v Credit Suisse USA, Inc.*, 69 AD3d 497, 497 [1st Dept 2010] [internal quotation marks omitted]).

Likewise, plaintiff’s conclusory allegations that the GGP defendants and Seller “coordinated and conspired to commit a fraud against [plaintiff],” and the complaint’s mere recitations of the elements of fraud (see e.g. Compl. ¶¶ 104-108), are insufficient to sustain the fraud cause of action against the GGP defendants (see *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]).

Accordingly, it is

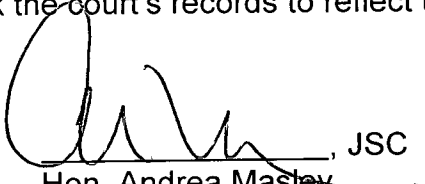
ORDERED that the motion of the GGP defendants to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against GGP and Nimbus, with costs and disbursements to the GGP defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the GGP defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal, and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption.

Dated: 10/13/17
New York, New York


JSC
Hon. Andrea Masley
HON. ANDREA MASLEY

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE