Israel v Signature Bank
2018 NY Slip Op 31370(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 651252/2016
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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MOSDOT SHUVA ISRAEL,

Plaintiff,

- v -

SIGNATURE BANK, SCOTT SHAY, JOSEPH FINGERMAN

Defendant.

INDEX NO. 651252/2016

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 55, 57, 58, 62, 67

were read on this application to/for Dismiss.

HON. SALIANN SCARPULLA:

In this action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, equitable estoppel, and fraudulent inducement, defendants Signature Bank ("Signature"), Scott Shay ("Shay"), and Joseph Fingerman ("Fingerman") (collectively, "Defendants") move to dismiss the First Amended Verified Complaint ("Complaint") in its entirety pursuant to CPLR 3211. Plaintiff Mosdot Shuva Israel ("MSI") opposes the motion.

Background[1]

[1] Unless otherwise specified, all facts are taken from the First Amended Verified Complaint and the exhibits annexed to it and are accepted as true for purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

In March 2009, MSI and Signature entered into three loan agreements, whereby Signature agreed to loan MSI a total of $23,000,000. The first loan was for $3,000,000, which was secured by MSI's money market account with Signature ("$3 Million Loan"). The remaining two loans were for $15,000,000 ("$15 Million Note") and $5,000,000 ("$5 Million Note), which were memorialized in separate notes (collectively, "Notes") and secured by separate mortgages (collectively, "Mortgages") (the Notes and Mortgages are collectively referred to as "Mortgage Loans"). The Notes have a per annum interest rate of 6.5% and matured on March 17, 2014 ("Maturity Date"). Documents reflecting the Mortgage Loans are annexed to the Complaint.

The Notes provided MSI an opportunity to extend each Maturity Date for one additional five-year term ("Extension Option"), provided that MSI complied with various conditions set forth in Notes ¶6, including that MSI "is not in default beyond any applicable grace period under this Note, the Mortgage, or any other documents evidencing, securing or guaranteeing repayment of this Note on the Exercise Date or the Effective Date."[2]

The Extension Option could only be exercised between November 17, 2013 and January 31, 2014. Notes ¶6. If MSI chose to exercise the option, it had to deliver to Signature:

> (i) A notice clearly and explicitly stating that [MSI] is exercising the Extension Option, and (ii) an estoppel certificate stating that (A) to the best of [MSI's] knowledge, there is no Event of Default (as defined in the Mortgage) under the Mortgage or other Loan Documents, and (B) [MSI] has

[2] "Effective Date" is defined as "the first day of the Extension period," and "Exercise Date" is defined as "the date the Extension Option is exercised." Notes ¶6.

> no offsets, defenses or counterclaims with respect to the Debt, this Note, or other Loan Documents.

Notes ¶6.

In early 2013, MSI allegedly approached Shay, Signature's Chairman, and Fingerman, Signature's Group Director of Real Estate and Vice President, about exercising the Extension Option early and about refinancing the Mortgage Loans by lowering the interest rate. Defendants purportedly orally agreed and repeatedly reassured MSI that Signature would extend the terms and lower the interest rate to 4.5% from 6.5% if MSI: (1) made a $1,800,000 balloon payment on the $5 Million Note ("$1.8 Million Payment"); (2) paid the $3 Million Loan in its entirety ("$3 Million Payment"); and (3) made an additional $200,000 payment on the Mortgage Loans ("$200,000 Payment").[3] MSI made a $3 Million Payment on March 1, 2013 and the $200,000 Payment on March 13, 2013. MSI also allegedly sold one of its properties in Israel to raise money for the $1.8 Million Payment.

On March 25, 2013, Defendants sent MSI a Term Sheet which stated that Defendants were "willing to consider [MSI's] request to modify and extend" the terms of the Mortgage Loans based on certain conditions, including a paydown of the Loans' principal amounts. The Term Sheet contains a provision that states that **"[i]t is expressly understood between the parties that this letter is not a commitment by [Signature] or an agreement to approve the subject loan."** (Emphasis supplied.)

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[3] The Extension Option did not contain these conditions.

The Term Sheet provided that the closing on the Extension Option must occur by June 30, 2013 and that it was subject to change if Defendants did not receive the executed Term Sheet and applicable deposits and processing fees by April 22, 2013. A few months later, on or about July 12, 2013, MSI sent Defendants an executed Term Sheet. The closing on the Extension Option never occurred.

After MSI received the Term Sheet, it made the following three payments to Signature: (1) $500,000 on May 10, 2013; (2) $1,000,000 on May 28, 2013; and (3) $300,000 on July 1, 2013. After these payments were made, Defendants allegedly orally stated that the agreement to extend the terms of the Mortgage Loans and lower the interest rate to 4.5% was granted and binding and that they would send over loan documents for MSI to sign. Defendants never sent MSI the loan documents.

Thereafter, Signature sold the Mortgage Loans to non-party 122 East 58th Funding LLC ("58th Funding"). Because MSI failed to make the required payments under the Notes by the Maturity Date, 58th Funding commenced a commercial foreclosure proceeding against MSI in this Court. *See 122 E. 58th Funding, LLC v Mosdot Shuva Israel*, Sup Ct, NY County, Index No. 650973/2014. By order dated December 14, 2017, I granted the parties' joint motion for approval of a forbearance agreement and entry of judgment of foreclosure and sale, and directed a foreclosure sale by public auction be held, in addition to other, related relief.

Meanwhile, MSI commenced this action in March 2016. In its complaint, MSI asserts causes of action for: (1) fraudulent inducement against all Defendants; (2) promissory estoppel against Signature; (3) equitable estoppel against Signature; and (4)

breach of contract and breach of the implied covenant of good faith and fair dealing against Signature.

Defendants collectively move to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (5), & (7). I dismissed the fraudulent inducement and estoppel claims for the reasons set forth on the record on March 7, 2018.

Defendants make three arguments for the remaining claim for breach of contract and breach of the implied covenant of good faith and fair dealing. First, Defendants argue that the alleged oral agreement is unenforceable under the written Mortgage Loan documents and the Statute of Frauds. Next, Defendants argue that the Term Sheet is not an enforceable contract. Finally, Defendants argue that the claim for the breach of the implied covenant of good faith and fair dealing is duplicative of MSI's breach of contract claim.

Discussion

On a CPLR 3211 motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "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." *Leon*, 84 NY2d at 87–88 (internal citations omitted); *see also Hedges v E. Riv. Plaza, LLC*, 126 AD3d 582 (1st Dept 2015). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames,*

LLC v Brody, 1 AD3d 247, 250 (1st Dept 2003) citing *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

To state a cognizable breach of contract claim, a plaintiff must allege: a contract between the parties, performance by the plaintiff, breach by the defendant, and damages resulting from the breach. *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where a written contract "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim." *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004); *see* CPLR 3211(a)(1).[4] "[T]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint." *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 (1st Dept 2001).

Here, MSI's claim for breach of contract is not legally cognizable because, on the facts alleged in the amended complaint, MSI cannot demonstrate the existence of a binding oral contract obligating Signature Bank to extend the Mortgage Loans' maturity dates and to reduce the interest rates. The written Mortgage Loans expressly prohibit oral

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[4] "This rule has 'special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.'" *150 Broadway N.Y. Assocs., L.P.*, 14 AD3d at 6, quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004).

modification of their terms. A written contract, "which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." General Obligations Law ("GOL") § 15-301(1); *see Centaur Props., LLC v Farahdian*, 29 AD3d 468, 469 (1st Dept 2006).

The Notes provide that they "may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of such change or termination is sought. Notes ¶13. The Mortgages contain a provision entitled "No Oral Change" which provides that each "Mortgage may only be modified, amended or changed by an agreement in writing signed by the Mortgagor and the Mortgagee . . . . No waiver of any term, covenant or provision of this Mortgage shall be effective unless given in writing by the Mortgagee . . . ." Mortgages Art. III, ¶12.

Additionally, the alleged oral modification is barred by the statute of frauds applicable to interests in real property, including mortgages. The statute of frauds provides that mortgages and modifications to mortgages may only be "created, granted, assigned, surrendered or declared . . . by a deed or conveyance in writing." GOL § 5-703(1); *see Sleeth v Sampson*, 237 NY 69, 72 (1923); *Charlay v Northeast Sav.*, 178 AD2d 859, 860 (3d Dept 1991). "[A]n agreement to provide mortgage financing is subject to the Statute of Frauds and thus there must be a specific signed writing pursuant to which a bank obligates itself to provide mortgage financing." *Real Estate Economic Resources, Inc. v Armendariz*, 162 AD2d 303, 304 (1st Dept 1990).

Contrary to MSI's contention, the repayment of the $3 Million Loan and partial payment of the $5 Million is not sufficient to show unequivocal part performance of an alleged oral agreement to refinance and extend the terms of the Mortgage Loans. In certain narrow circumstances, part performance by one party of an alleged oral modification to a written agreement may be sufficient to demonstrate an enforceable oral modification, even where the original written agreement contains an express prohibition against such modification. *See Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-44 (1977); *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 (1st Dept 2000). Significantly, however, the part performance must be unequivocally referable to the alleged newly modified agreement. *See Rose*, 42 NY2d at 343; *F. Garofalo Elec. Co.*, 270 AD2d at 80. "It is not sufficient . . . that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement." *Anostario v Vicinanzo*, 59 NY2d 662, 664 (1983) (internal quotation marks and citations omitted).

Here, MSI's tender and Signature's acceptance of the payments of money indisputably owed by MSI under the Mortgage Loans demonstrate, at most, that MSI chose to early pay down the principal amount of the Mortgage Loans to induce MSI to agree to the possible future modification of the Mortgage Loans.[5] Indeed, the Term Sheet, which was executed by both Signature and MSI, provides that "Signature Bank is

[5] Notably, the Notes' terms permit Signature to waive the limitations on MSI's rights to prepay, without waiver, release, or discharge of MSI's remaining payment obligations thereunder. *See* Notes, § 8.

willing **to consider your request** … to modify and extend its above referenced credit facilities **on the following terms**," including, among other, numerous conditions, a paydown of the loans' principal amounts. *See* Term Sheet at 1, 3 (emphasis added). As expressly stated in the Term Sheet, the payments are readily "'explainable as preparatory steps taken with a view toward consummation of an agreement in the future,' [such] that performance is not 'unequivocally referable' to the new contract." *Nassau Beekman LLC v Ann/Nassau Realty LLC*, 105 AD3d 33, 39 (1st Dept 2013), quoting *Anostario*, 59 NY2d at 664.

For these reasons as well, the Term Sheet does not require Signature to extend the repayment periods and reduce the mortgage interest rates, but, by its terms, is simply an agreement to continue negotiating. "[W]hen the parties have clearly expressed an intention not to be bound until their preliminary negotiations have culminated in the execution of a formal contract, they cannot be held until that event has occurred [because] [t]he necessary finality of assent is lacking." *Brause v Goldman*, 10 AD2d 328, 332 (1st Dept 1960), *affd* 9 NY2d 620 (1961).

MSI's contention that the parties agreed to be bound by an oral agreement prior to issuance and execution of the Term Sheet is unavailing and conclusively belied by the documentary evidence. While the Term Sheet does not include a merger clause, its express terms demonstrate that any discussions prior to its execution constituted nothing more than preliminary negotiations regarding the maturity dates and interest rates, rather than a meeting of the minds and an agreement to be bound. "Where a term sheet . . . 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). For the foregoing reasons, that branch of the motion to dismiss the branch of the contract claim for breach of the express provisions is granted, and that branch of the claim is dismissed.

Similarly, that branch of the motion to dismiss the branch of the contract claim for breach of the implied covenants of good faith and fair dealing is granted, and that branch of that claim is dismissed. A claim for "breach of the implied covenant of good faith and fair dealing … may not be used as a substitute for a nonviable claim of breach of contract." *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 (1st Dept 2000) and will be dismissed where such claim merely duplicates the breach of contract claim. *See, e.g.*, *Engelhard Corp. v Research Corp.*, 268 AD2d 358, 358-59 (1st Dept 2000). Here, MSI alleges no facts in addition to those that it contends support the claim for breach of express contractual provisions.

In accordance with the foregoing, it is

ORDERED that Defendants' motion to dismiss the complaint is granted and the complaint is dismissed in its entirety against defendants Signature Bank, Scott A. Shay,

and Joseph Fingerman, and the Clerk is directed to enter judgment accordingly in favor of each defendant.

This constitutes the decision and order of the court.

6/26/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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