SCS Strategic Capital, LLC v Mosaic Real Estate Credit, LLC
2018 NY Slip Op 33079(U)
December 3, 2018
Supreme Court, New York County
Docket Number: 650540/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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SCS STRATEGIC CAPITAL, LLC,

Plaintiff,

-against-

MOSAIC REAL ESTATE CREDIT, LLC, ASSETAVENUE 106, LLC, OMEK CAPITAL LLC, AVI FELDMAN, and CHARLES HARTMAN,

Defendants.

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Index No.: 650540/2016

Mot. Seq. No. 005

MELISSA A. CRANE, J.S.C.:

Plaintiff SCS Strategic Capital, LLC ("SCS") moves, pursuant to CPLR 3212(e), for partial summary judgment on its seventh cause of action for a break-up fee against defendants Omek Capital LLC ("Omek"), Avi Feldman ("Feldman"), and Charles Hartman ("Hartman") (collectively, "the Omek defendants"). The Omek defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against them. It is worth noting that, although the motion and cross motions are for summary judgment, the Preliminary Conference in this case did not take place until after argument on the motion, at which time this court set forth a schedule for the discovery that had not yet occurred.

Background

In December 2014, Omek's mortgage broker, nonparty Berko & Associates ("Berko") introduced SCS to the Omek defendants (Hartman Aff, dated 6/22/17, ¶ 2). On March 31, 2015, SCS and the Omek defendants entered into a letter of interest (the "LOI") regarding a proposed loan to purchase, renovate, and sell a single-family townhouse, located at 18 West 75th Street ("the Property") (Stein Aff, dated 5/17/17, Exh E, LOI at 1-2, 11, 13). The LOI listed SCS as the "Lender," Omek Capital, LLC as the "Applicant," and Hartman and Feldman as the "Principals"

(*id.* at 1-2). The LOI defined the "Borrower" as "[a] newly-formed bankruptcy remote entity acceptable to the Lender in all respects [each "Borrower"] will be formed for each Property" (*id.* at 2). The LOI listed the Omek defendants and the Borrower collectively as the "Sponsors" of the proposed transaction (*id.* at 2). The LOI noted that the "Guarantors" are "each of the Principals, the Applicant and the Borrowers, jointly and severally" (*id.* at 3). However, unclear from the LOI is whether the "Sponsors / Guarantors" were to guarantee the limited binding obligations of the LOI, or rather guarantee the proposed loan itself (*id.* at 3).

The maximum total amount of the loan was the lesser of (1) $14,600,000; (2) 83% of the total transaction costs; or (3) 70% of the total retail value of the renovated Property (*id.* at 2). The LOI entitled SCS to an origination fee of 3% (*id.* at 4). Further, the LOI, as amended, provided for a "Go Shop" period (Stein Aff, Exh F, Amendment to LOI, dated May 2015, ¶ 4). The "Go Shop" period would run from the date of the LOI to either, the earlier of: (1) thirty days from the execution of the amendment; or (2) the closing of the loan with SCS (*id.* at ¶ 4).

If, during that time, the Sponsors obtained financing from another source, sold the Property, or negotiated for, or solicited offers for alternate financing, the Borrower agreed that SCS would have earned a $145,000 break-up fee (LOI at 7). SCS also contemplated, at its sole discretion, "obtain[ing] participants for this contemplated Loan, assign[ing], transfer[ing], syndicat[ing], arrang[ing] or pledg[ing] all or parts of the contemplated loan, at any time, prior to or at any closing of the contemplated loan, to, with, or through third parties" (*id.* at 8). Finally, the Sponsors would have no claims against SCS for "any failure to obtain, provide, approve or finalize the arrangement or approval of the contemplated Loan or any financing of financial accommodation whatsoever" (*id.*).

Hartman, a member of Omek Capital LLC, attended a meeting with Stephen Quinn

("Quinn") from SCS and Michael Korine from Berko on April 16, 2015 (Hartman aff, ¶ 4). Quinn assured Korine and Hartman that SCS could finance the deal. Quinn showed them a bank statement as proof (*id.*, ¶ 5). Thereafter, Quinn told Berko that SCS would not fund the development phase of the loan. Quinn then worked with Berko and Omek Capital LLC to restructure the deal (*id.*, ¶¶ 6-8). During this time, Hartman claims that SCS represented that SCS would fund the deal without co-investors (*id.*, ¶ 9).

Hartman asserts that, on May 10, 2015, SCS informed him that defendant AssetAvenue 106 LLC ("AssetAvenue") would fund the development phase of the loan (*id.*, ¶ 11). AssetAvenue, however, did not attend a meeting at the Property on May 12, 2015 (*id.*). Instead, Hartman met a representative of defendant Mosaic Real Estate Credit LLC ("Mosaic") (*id.*). After the meeting, Quinn informed Berko and Hartman that SCS would no longer fund the loan at all, and that Mosaic would finance the loan itself (*id.*).

Joe Berko, of Berko, told Hartman that questioned whether SCS could have ever, at any point in time, funded the deal. Berko claimed that AssetAvenue had brokered the transaction to Mosaic (*id.*, ¶ 12). Hartman alleges that, subsequent to these conversations, SCS completely abandoned the transaction (*id.*, ¶ 14). SCS argues that, contrary to Hartman's contentions, the Omek defendants purposefully cut SCS out of the deal (Quinn aff dated 5/17/17, ¶¶ 5-7; Quinn reply aff dated 5/1/18, ¶ 9).

Procedural History

SCS commenced this action on February 2, 2016 (NYSCEF Doc. No. 2, verified complaint). SCS later amended its complaint on August 16, 2016 (NYSCEF Doc. No. 39, amended verified complaint). The amended complaint asserts ten causes of action: breach of contract against the Omek defendants (first cause of action); breach of fiduciary

duty against all defendants (second cause of action); breach of a duty of loyalty against Mosaic and AssetAvenue (third cause of action); tortious interference with contract against Mosaic and AssetAvenue (fourth cause of action); quantum meruit against the Omek defendants (fifth cause of action); contractual attorneys' fees against the Omek defendants (sixth cause of action); break-up fee against the Omek defendants (seventh cause of action); account stated against all defendants (eighth cause of action); conversion against AssetAvenue (ninth cause of action); and breach of contract against AssetAvenue (tenth cause of action). The Omek defendants answered the amended complaint and asserted counterclaims for fraud (first counterclaim), breach of contract (second counterclaim), and a declaratory judgment (third counterclaim) (NYSCEF Doc. No. 43).

AssetAvenue and Mosaic made separate motions to dismiss the complaint and amended complaint, respectively. On October 14, 2016, the court (Rakower, J.), granted AssetAvenue's motion and dismissed the complaint against it (NYSCEF Doc. No. 53, decision and order dated 10/14/16). On January 17, 2017, the court (Rakower, J.), granted Mosaic's motion and dismissed the amended complaint against it (NYSCEF Doc. No. 67, decision and order dated 1/17/17). SCS later discontinued the action against AssetAvenue (NYSCEF Doc. No. 83, stipulation of discontinuance dated 6/13/17).

SCS now moves for summary judgment on its seventh cause of action for a break-up fee. The Omek defendants cross-move for summary judgment to dismiss plaintiff's complaint in its entirety.

Discussion

Summary judgment is appropriate where there are no disputed material facts (*Andre v*

Pomeroy, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

SCS's Summary Judgment Motion

For its seventh cause of action, SCS asserts that the Omek defendants owed it a break-up fee because the Sponsors agreed to a break-up fee if they obtained or sought funding somewhere else. In opposition to the motion, the Omek defendants argue that they are not obligated to pay the break-up fee, as only a "hypothetical Borrower" agreed to pay a break-up fee. Moreover, the Omek defendants argue that SCS is not entitled to the break-up fee because SCS abandoned the deal after introducing them to Mosaic. Further, they assert a counterclaim for fraudulent inducement of the LOI. In reply, SCS argues that the Omek defendants were jointly and severally named as guarantors in the LOI, and are thus liable for the break-up fee.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" *(Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The plaintiff must establish "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

It is settled that a court may interpret the unambiguous terms of a contract (*e.g. Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). However, "[i]f a contract is

ambiguous, it cannot be construed as a matter of law" (*Funk v Seligson, Rothman & Rothman, Esqs.*, 165 AD3d 429 [1st Dept, October 4, 2018]). Under the doctrine of contra proferentem, where the terms of a contract are ambiguous, it is proper to construe those terms (*327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581, 582 [1st Dept 2017]).

Often, the point at which to construe against the drafter becomes an issue. In general, courts should only apply the doctrine of contra proferentem as a last resort if the extrinsic evidence is inconclusive (*see Albany Savings Bank, FSB v Halpin,* 117 F.3d 669, 674 [2nd Cir. 1997] ["…New York applies this rule 'only as a matter of last resort after all aids to construction have been employed without a satisfactory result'…the rule does not preclude the admission of parol evidence"]; *see also, Schron v Troutman Sanders LLP,* 97 AD3d 87, 93 [1st Dept 2012], *affd* 20 NY3d 430 [2013]).

Especially, in cases where discovery is not yet complete, or in a summary judgment motion where extrinsic evidence leads to triable issues of fact, courts have refrained from construing ambiguous terms against the drafter. In *Perella Weinberg Partners, LLC v Kramer,* the First Department deemed defendants' reliance on the doctrine of contra proferentem, misplaced because "…it cannot be assumed that all relevant extrinsic evidence has been presented at this stage of the proceeding" (153 AD3d 443, 449 [1st Dept, August 29, 2017]). "The parties conflicting reasonable commercial interpretations to be given to the Election Forms on this *prediscovery motion*, required denial of defendants' motion for summary judgment," and therefore the issue of whether defendants were terminated for cause remains a question for resolution at trial (*id.* at 449) (emphasis added).

Similarly, in *Lantau Holding LTD v General Pacific Group LTD.*, the court denied defendant's post-note of issue motion for summary judgment, finding the Control Agreements at

issue were ambiguous and presented issues of material fact that necessitated a trial (2018 WL 4360936 at *1 [Sup Ct, New York County, September 13, 2018]). "The extrinsic evidence produced during discovery…failed to definitively resolve the ambiguities in the Control Agreement" (*id.* at 1). Prior to the court's decision in *Lantau* denying summary judgment, the same court rendered an earlier Decision & Order denying defendant's pre-answer motion to dismiss (*see NYSCEF* Doc. 242). There, the court noted "[t]the Control Agreements, therefore, are sufficiently ambiguous such that dismissal of the breach of contract claim would be premature on this pre-answer motion to dismiss" (Ostrager, J. *NYSCEF* Doc. 242). The Court referred to several, potentially conflicting, provisions in the Control Agreements that gave rise to ambiguities.

In this case, the break-up fee and guarantor provisions in the LOI are ambiguous. Although the LOI lists all of the Omek defendants as joint and several guarantors, the LOI does not clearly define what the guarantors were supposed to guarantee (LOI at 3). Whether the LOI intended for the Omek defendants to act as guarantors of the eventual loan is ambiguous (LOI at 3).

Moreover, the break-up fee provision does not clearly set forth which party is responsible for paying the break-up fee. Under the provision, only the "Borrower hereby expressly agrees" that, under certain enumerated circumstances, SCS would be entitled to a break-up fee. The provision is written in passive voice and, rather than provide, for example, that a party "shall pay SCS a break-up fee," the provision states only that "[SCS] shall be deemed to have earned a break-up fee" (*id.* at 7). Perhaps the LOI terms provided that the Borrower is the only potential liable entity for the break-up fee and, rather than agreeing to guarantee the LOI, the Omek defendants agreed that, as a term of the eventual loan, they would each act as a guarantor for it.

The court declines to construe these ambiguities against the drafter, plaintiff SCS, at this juncture. The parties did not even have a preliminary conference until after this motion was filed, and the court set December 13, 2018 as the date the parties should complete depositions – a date that has not yet passed. Further, the evidentiary record on plaintiff's motion for summary judgment is replete with issues of fact (*see Lantau Holding LTD v General Pacific Group LTD.*, (2018 WL 4360936 at *5 [Sup Ct, New York County, September 13, 2018]). For example, in plaintiff's opposition papers to defendant's cross-motion, Quinn references emails where defendant allegedly made affirmative misrepresentations about footage approval requirements (*see* Quinn Aff, NYSCEF Doc. No. 101). Quinn states "Again, all of this is verified from numerous emails back and forth with all parties which Plaintiffs will produce in discovery" (*id.*). Clearly, at this stage in the proceedings, the court would err if it were to construe ambiguities against the drafter of the LOI.

Defendants make a somewhat convoluted argument that the defendants are not obligated under the Go Shop provision because only Charles Hartman signed an Amendment, in May 2015, to the LOI. However, the original LOI contains a merger clause stating that any changes must be in writing, while the Amendment states "[e]xcept as otherwise set forth here in to the contrary, the Letter of Interest remains unmodified and continues in full force and effect." Notably, defendants do not argue they were not bound individually under the LOI. Accordingly, any obligations they had continue despite the May 2015 Amendment.

Accordingly, the court denies SCS's motion for summary judgment on the seventh cause of action for a break-up fee. For the same reasons, the court denies that branch of the Omek defendants cross motion for summary judgment dismissing this seventh cause of action.

The Omek Defendants' Cross Motion for Summary Judgment

The Omek defendants cross-move for summary judgment dismissing all causes of action asserted against them. The court has already discussed the seventh cause of action. In its opposition to the cross motion, SCS does not address the Omek defendants' arguments related to the second cause of action for breach of fiduciary duty, fifth cause of action for quantum meruit, or eighth cause of action for an account stated, other than a conclusory and unsupported suggestion that discovery is required to resolve all of its causes of action (*see* Quinn Aff, NYSCEF Doc. No. 101). Accordingly, the court grants those branches of the Omek defendants' cross motion for summary judgment dismissing those causes of action, especially as they duplicate causes of action for breach of contract.

Breach of Contract

Under its first cause of action, SCS asserts breach of contract, that "[d]efendant Sponsors – Omek, Feldman, and Hartman – had an express agreement with Plaintiff to pay Plaintiff an Origination Fee of 3% upon the closing of the loan to fund the acquisition of the Property" (*see* NYSCEF edoc 87, Amended Verified Complaint, ¶ 38).

The Omek defendants argue that SCS is not entitled to an origination fee for a loan that it did not close. Indeed, the Omek defendants closed the loan with Mosaic, not with SCS. In opposition, SCS argues that it is owed the origination fee in its role as a facilitator, having introduced the Omek defendants to Mosaic.

The LOI provides that the origination fee for the loan would be "3% of the Maximum Total Loan Amount, payable at Closing" (LOI at p. 4, "Origination Fee"). It is undisputed that SCS was not the source of funds for the loan. However, nowhere does the LOI define what "Origination Fee" was to cover. Could it possibly encompass plaintiff's role in bringing all the parties together? This question requires discovery for an answer.

Accordingly, the court denies that branch of the Omek defendants' cross motion for summary judgment dismissing the first cause of action. Moreover, because SCS's sixth cause of action seeks contractual attorneys' fees for enforcing the LOI, the court denies that branch of the Omek defendants' cross motion for summary judgment dismissing the sixth cause of action.

Accordingly, it is hereby,

ORDERED that the court denies the motion of plaintiff SCS Strategic Capital LLC, for partial summary judgment on the seventh cause of action; and it is further

ORDERED the court grants the Omek defendants cross motion as to second, fifth, and eighth causes of action, and otherwise denies the motion.

ORDERED that the parties are directed to appear for a status conference on December 4, 2018 at 11:00 am in the courtroom at 71 Thomas Street, Room 304, New York, New York.

The remaining causes of action are severed and shall continue.

Dated: 12-3-2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C