Newton Main LLC v Investors Bank
2018 NY Slip Op 33815(U)
July 11, 2018
Supreme Court, Suffolk County
Docket Number: 603381-2017
Judge: David T. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 603381-2017

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NEWTOWN MAIN LLC, MBE FUNDING LLC, 90-59 SUTPHIN REALTY LLC, 90-57 SUTPHIN REALTY LLC, SUTPHIN HAMPTON REALTY LLC, SUTPHIN TIANA REALTY LLC, MAMARONECK HOLDING LLC, 245-02 MERRICK BLVD. LLC, SUTPHIN HOLLIS REALTY LLC, 74-01 ELIOT AVE. LLC, AND SUTPHIN MORICHES REALTY LLC,

Plaintiffs,

-against-

INVESTORS BANK, DAVID J. HEDGEMAN AND JOSEPH F. GARGIULO,

Defendants.

x

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MOTION DATE:	01/31/18
SUBMITTED:	03/14/18
MOTION SEQ. NO.:	9
MOTION:	MotD

Upon the reading and filing of the following papers in this matter: (1) Defendants' Notice of Motion dated December 15, 2017 and supporting papers; (2) Plaintiff's Affirmation in Opposition dated February 12, 2018; and (3) Defendants' Reply Affirmation dated February 23, 2018 and supporting papers (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that defendants' application for an Order dismissing plaintiffs' action, pursuant to Civil Practice Law and Rules (CPLR) §3211(a)(1),(2),(4),(5),(7) and (8), is determined as set forth below; and it is

ORDERED that the parties are directed to appear before the undersigned at the Courthouse located at One Court Street, Riverhead, on **August 6, 2018** at **9:30** A.M. for a Preliminary Conference (*see* 22 NYCRR § 202.12); and it is

ORDERED that defendants are directed to serve a copy of this Order with notice of entry upon counsel for the plaintiffs and upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order.

Plaintiff commenced this action seeking money damages for causes of action sounding in breach of contract, breach of good faith and fair dealing, tortious interference, counsel fees and violation of 18 USC §§1962,1964. According to the plaintiffs' Amended Complaint, each of the named plaintiffs are limited liability companies owning property in New York and, in the case of Newtown Main, LLC, in the State of Connecticut. As the sole member of each of the plaintiff corporations, Elena Eshaghpour (Eshaghpour) entered into loan agreements with Investor's Bank (the Bank) whereby the Bank was granted a mortgage with respect to each of the properties owned by each plaintiff corporation in exchange for monetary loans. Plaintiffs have collectively over $50 million in loans with the Bank.

Plaintiffs now maintain that prior to the closing on these loans the Bank demanded that $1 million be placed in escrow with the Bank in contravention to previously issued loan commitments. Plaintiffs contend that defendant Joseph F. Gargiulo (Gargiulo), the Director of Special Assets of the Bank, began facing internal pressure from the Bank when it was discovered that Eshaghpour was the sole member of all of the plaintiff corporations thereby making her, in essence, a single debtor of over $50 million for the Bank. It is alleged that in response to the pressure, Gargiulo and defendant David J. Hedgeman (Hedgeman), a Collections Associate in the Loan Collections Department of the Bank, began an aggressive scheme to cause plaintiffs to default on their loan agreements early so that foreclosure actions could be commenced as soon as possible, thereby forcing plaintiffs to obtain other financing for their loans and relieving the Bank of having a sole debtor responsible for $50 million in loans.

Plaintiffs state that as part of the scheme, the Bank locked Eshaghpour out of an Operating Account and Money Market Account which was established for the purpose of allowing Eshaghpour to make payments due to the Bank from funds deposited by the property lessees. As a result of being locked out of these accounts, Eshaghpour was effectively prevented from making timely payments to the Bank. In addition, plaintiffs indicate that the Bank failed to forward tax bills to the individual tenants of the plaintiff properties so that the tax bills were not timely paid, resulting in tax liens and tax lien foreclosure actions against the plaintiffs.

Upon the plaintiffs alleged failure to properly address the mounting debts on the properties, the Bank issued a Demand Letter on March 29, 2017 which stated the plaintiffs had to bring their loans current by March 31, 2017. This two-day notice, plaintiff complains, is in contravention to the fifteen (15) day grace period afforded by the individual loan agreements. These are but a few of the methods, alleged in the Amended Complaint, employed by the Bank and the individual defendants to force the plaintiffs to seek other financing for their loans.

Defendants now move to dismiss the plaintiffs' Amended Complaint on several grounds. First, defendants contend that the Amended Complaint should be dismissed based upon *forum non conveniens,* or in the alternative the individual plaintiffs should be forced to commence separate actions in the counties and states dictated by the individual mortgages' choice of law provisions. In addition, defendants argue that the Amended Complaint should be dismissed because plaintiff failed to seek leave of the Court prior to submitting the Amended Complaint adding the individual defendants in violation of CPLR 3025 and 1003. Defendants further seek dismissal of the Amended Complaint on the ground that it fails to state a cause of action upon which relief can be granted. The plaintiffs have submitted an Affirmation in Opposition to the application and the defendants have filed a Reply Affirmation. The motion is determined as follows.

Initially, it is well established that New York courts are not compelled to retain jurisdiction in any case which has no substantial nexus to New York (***Silver v. Great Am. Ins. Co.***, 29 NY2d 356 [1972]). The burden rests upon the defendant challenging the forum to demonstrate that private or public interests militate against litigation going forward in this State (***Wentzel v. Allen Mach., Inc.***, 277 AD2d 446, 716 NYS2d 699 [2d Dept 2000]). The doctrine of *forum non conveniens* rests upon principles of justice, fairness, and convenience (***Islamic Republic of Iran v. Pahlavi***, 62 NY2d 474 [1984]). Among the factors to be considered in determining whether a New York court should retain jurisdiction are the residency of the parties, the potential hardship to proposed witnesses, the burden on the New York courts, the potential hardship to the defendant and the unavailability of an alternative forum in which plaintiff may bring suit. No one factor is controlling (*see* ***Wentzel v. Allen Mach., Inc.***, supra).

In this case, it is clear that only three (3) of the properties representing the asset of a respective plaintiff are located within Suffolk County. One property is located in the State of Connecticut and the other properties are located within other counties in the State of New York, with five (5) in Queens County and the remaining one in Mamaroneck, Westchester County, NY. Most, but not all of the corporate plaintiffs, are licensed to do business in the State of New York, the exception being Newtown Main, LLC. With respect to defendants, the Bank has approximately forty (40) branch offices in the New York area and it appears that the individual defendants may be domiciled in New Jersey.

Bearing in mind all of the foregoing factors, the Court finds that defendants' motion to dismiss the Amended Complaint on the ground of *forum non conveniens* must be denied. This Court does not agree with defendants when it is argued that these claims should be resolved in ten (10) separate actions in the counties where the properties are situated. In addition, the Court is mindful of CPLR 502 which provides that because where, as here, joinder of claims has created a conflict in the provisions under Article 5 of the CPLR, the Court shall order as the place of trial one proper as to at least one of the claims of the parties. The Court hereby designates Suffolk County as the place of trial.

Next, the Court finds defendants' reliance on CPLR 3025 and 1003 as requiring dismissal of the Amended Complaint to be misplaced. There can be argument that plaintiffs filed the original Complaint, upon demand by defendants, on July 14, 2017 and that defendants filed a pre-answer motion to dismiss on July 31, 2017. Plaintiffs then submitted opposition to defendants' motion to dismiss on August 17, 2017 and filed the Supplemental Summons and Amended Complaint on August 31, 2017.

CPLR 3025 provides that a party may amend his pleading without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. Here, defendants' motion to dismiss the Complaint operated to extend their time to submit an Answer to the Complaint, and by logical perpetuation, extended the time for plaintiffs to amend their Complaint (*see* ***Johnson v. Spence***, 286 AD2d 481, 730 NYS2d 334 [2d Dept 2001]; CPLR 3211[f]). The same analysis is applicable to CPLR 1003 with respect to the time limits as to when the plaintiff can add parties without leave of the Court. Accordingly, defendants' motion to dismiss the Complaint based upon violations of CPLR 3025 and 1003 is denied.

Next, on a motion to dismiss a Complaint under CPLR 3211 (a) (7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2010]). A court must determine whether, accepting the facts as alleged in the Complaint as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170, 175 [2005]).

The Court finds the plaintiffs' cause of action for breach of contract as alleged in count one sufficient to withstand the defendant's motion to dismiss. The common law elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). A fair reading of the Amended Complaint reveals that the loan agreements which form the basis of the breach of contract cause of action are considered collectively, such that an exact recital of each individual provision of the individual agreements are not necessary despite defendants' protestations. When considered cumulatively, the Court finds the essential elements of a breach of contract action to be sufficiently pled.

The Court does agree with defendants, however, in that the second cause of action for breach of an implied obligation of good faith and fair dealing must be dismissed as duplicative of the first cause of action for breach of contract (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]). Similarly, the Court finds that the plaintiffs' third cause of action based upon an alleged violation under the Uniform Commercial Code §1-203 must be dismissed (*see* ***Quail Ridge Assoc. v. Chemical Bank***, 162 AD2d 917, 558 NYS2d 655 [3d Dept 1990]).

With respect to plaintiffs' claims for tortious interference with the loan agreements or contracts, the elements of such a cause of action are a valid contract between the plaintiff and a third party, the defendants' knowledge of that contract, the defendants' intentional inducement of the third party to breach or otherwise render performance impossible, and damages to the plaintiff resulting therefrom (***Pacific Carlton Dev. Corp. v 752 Pac.***, 62 AD3d 677, 878 NYS2d 421 [2009]). Contrary to the defendants' argument, the Complaint sets forth with requisite particularity how the defendant induced the breach, *i.e.*, by not forwarding to the individual plaintiffs' tenants copies of their municipal tax bills to be paid. There can be little doubt that the Bank was aware that plaintiffs' properties were being leased to tenants inasmuch as the Operating Accounts and Money Market Accounts were being funded by rents paid by the lessees. Therefore, it can be argued that defendants, upon receipt of the tax bills, should have immediately forwarded the bills to the individual tenants, rather than ignoring them as plaintiffs allege. "[W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior" (***NBT Bancorp v Fleet/Norstar Fin. Group***, 87 NY2d 614, 621, 641 NYS2d 581, 585 [1996]).

As to that portion of the plaintiffs' Amended Complaint referencing a violation of 18 USC 1962,1964, the Court agrees with defendants and that count is dismissed. Where, as here, it is alleged that the individual defendants acted together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the

corporation do not form an enterprise distinct from the corporation (***Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.***, 30 F3d 339 [2d Cir. 1994]). Accordingly, that count alleging a RICO violation cannot be sustained.

Based upon the sum of the foregoing, the defendants' motion is granted to the limited extent that counts two, three and six of the Amended Complaint are dismissed and is otherwise denied.

This shall constitute the decision and Order of the Court.

Dated: **July 11, 2018**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION