

King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC
2019 NY Slip Op 31899(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 154084/2018
Judge: Andrea Masley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

-----X

INDEX NO. 154084/2018

KING PENGUIN OPPORTUNITY FUND III, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

SPECTRUM GROUP MANAGEMENT LLC A/K/A
SPECTRUM ORIGATION LLC, MISSION CAPITAL
ADVISORS, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

Masley, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46

were read on this motion to/for DISMISS

In motion sequence number 001, defendant Spectrum Origination LLC (Spectrum) moves pursuant to CPLR 3211 (a)(1) and (a)(7) to dismiss the complaint and for sanctions against plaintiff King Penguin Opportunity Fund III, LLC (KP). (NYSCEF Doc. No. 20 [NYSCEF] at 1, 2.)

Background

The following facts are alleged in the complaint, and for purposes of this motion, accepted as true. KP, an investment firm, maintains a portfolio of properties including 428 Forbes Avenue, Pittsburg, Pennsylvania 15219 (428 Forbes). (NYSCEF 23 at ¶¶ 9, 10.) KP received a mortgage on 428 Forbes from nonparty ReadyCap Lending, LLC, the terms of which required a balloon payment of \$6,000,000 on February 1, 2018. (*Id.* at ¶ 11.) Because KP sought to refinance this mortgage, KP negotiated with defendant Mission Capital Advisors, LLC (MCA) to find a reputable lending institution. (*Id.* at ¶ 12.)

Accordingly, KP and MCA entered into a Financing Agency Agreement (Agreement) entitling MCA to a one percent commission for any financing agreement that KP entered into for a certain period of time. (*Id.* at ¶ 14.) Subsequently, MCA connected KP with one particular lender, Spectrum, and negotiations began. (*Id.* at ¶¶ 16, 17.) The negotiations led to “the procurement” of a term sheet (Term Sheet) that outlined the structure of a proposed loan. (*Id.* at ¶18.) The Term Sheet required KP to pay a non-refundable application fee of \$50,000 together with a \$100,000 down payment that specifically applied to the expenses incurred by Spectrum. (*Id.* at ¶ 19.) “After the signing of the Term Sheet,” KP defaulted on the balloon payment due on February 1, 2018 and incurred exorbitant default fees. (*Id.* at ¶ 21.) Spectrum then “radically” altered the Term Sheet by amending the proposed loan amount from \$26,555,698 to \$23,963,284. (*Id.* at ¶¶ 22, 23.) MCA “pressured” KP to accept these changes but KP rejected them. (*Id.* at ¶¶ 26, 28.) KP demanded the return of the \$150,000, but Spectrum indicated that it would not release any of those remaining funds unless KP executed a waiver of claims against Spectrum. (*Id.* at ¶ 30, 31.) On March 16, 2018, KP secured “new” financing, and MCA demanded a commission in the amount of \$65,000. (*Id.* at ¶¶ 32, 33.) KP later commenced this action, specifically alleging the following claims against Spectrum: fraudulent inducement, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, negligent misrepresentation, promissory estoppel, and unjust enrichment. Spectrum now moves to dismiss the complaint in its entirety.

At oral argument, Spectrum argued that the Term Sheet does not constitute an enforceable contract, and that KP fails to allege justifiable reliance. KP opposed, but withdrew its claims against Spectrum for tortious interference with contract and unjust

enrichment. (NYSCEF Doc. No. 46; tr. at 12:17-18, 12:20-21.) The court addresses the remaining claims.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), 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 v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations “that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; see also CPLR 3211 [a] [1].)

Fraudulent Inducement

KP alleges that during its contract negotiations with Spectrum, which resulted in the signing of the Term Sheet, the defendants made certain representations to KP. (NYSCEF 23 at ¶ 37.) These representations allegedly included that the refinancing would close prior to February 1, 2018, the refinancing would be an equity neutral deal, the loan amount would be in excess of \$26,000,000, and KP would not be required to encumber any additional property. (*Id.*) KP allegedly relied on these representations and the provisions in the Term Sheet, and advanced \$150,000 to Spectrum. (*Id.* at ¶ 38.) However, KP alleges that the defendants “had no intention of complying with these representations.” (*Id.* at ¶ 39.)

“A viable claim for fraudulent inducement requires the allegations of a ‘misrepresentation of a material fact, which was known by the [adversary] to be false and intended to be relied on when made, and that there was justifiable reliance and

resulting injury.” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017][internal citation omitted].) “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].)

Here, the Term Sheet explicitly provides that

“[T]his Term Sheet is for discussion purposes only and does not constitute a binding commitment to provide credit. Any such commitment is contingent upon satisfactory completion of Lender’s due diligence and execution of written loan documents. This Term Sheet is not comprehensive. The written loan commitment or loan agreement will contain provisions not included in this Term Sheet.”

(NYSCEF Doc. No. 38 at 9.) The Term Sheet is clear that it is for discussion purposes only and requires the execution of further written agreement. Therefore, KP cannot allege justifiable reliance on the alleged promises made by Spectrum. For these reasons, the fraudulent inducement claim is dismissed.

Negligent Misrepresentation & Promissory Estoppel

“[A] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [1st Dept 2011][internal quotation marks and citations omitted].) Additionally, “[t]he elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3)

injury caused by the reliance.” (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011][citations omitted].) Here, KP’s negligent misrepresentation and promissory estoppel claims are based on the same representations as its fraud claim and therefore, dismissed. (*StarVest Partners II, L.P.*, 101 AD3d at 613 [“The court also properly dismissed Emportal’s tort counterclaim for promissory estoppel [and] negligent misrepresentation”].)

Breach of the Implied Covenant of Good Faith and Fair Dealing

KP alleges that Spectrum engaged in bad faith conduct by completely altering the Term Sheet, for instance, by lowering the funding amount. (NYSCEF Doc No. 23 at ¶ 73.) It reiterates that Spectrum would only release the deposit funds if KP signed a waiver releasing Spectrum from any claims, and therefore, this conduct violates the terms of the Term Sheet. (*Id.* at ¶¶ 76, 77.)

“Within every contract is an implied covenant of good faith and fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff.”

(*Aventine Inv. Mgt., v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513-514, [1st Dept 1999][citations omitted].)

Here, the Term Sheet indicates that there was no enforceable agreement between KP and Spectrum until the satisfactory completion of [KP]’s due diligence and execution of written loan documents. (NYSCEF Doc. No. 38 at 9.) Without an enforceable agreement, there is no implied covenant of good faith and fair dealing that

Spectrum could have breached. (*Keefe v New York Law School*, 71 AD3d 569, [1st Dept 2010][“Absent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing”].) Stated otherwise, “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.’” (*StarVest Partners II, L.P.*, 101 AD3d at 613.) Accordingly, this claim is dismissed.

Sanctions

22 NYCRR Section 130-1.1 (a) empowers courts with discretionary authority to sanction attorneys or parties, in the form of costs and fees, for frivolous conduct. Conduct is frivolous if, “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law.” (22 NYCRR Section 130-1.1[c][1].) “In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place ... and whether or not the conduct was continued when its lack of legal or factual basis ... should have been apparent” (22 NYCRR Section 130-1.1[c].) Here, KP advanced certain arguments in its attempts to flesh out nuances in the jurisprudence on these matters, and Spectrum even notes that these arguments are novel. Therefore, the court is not persuaded that KP’s conduct is frivolous. Although Spectrum makes much of KP’s withdrawal of certain claims, sanctioning KP based on these withdrawals would create a perverse incentive that undermines principles of judicial economy.

Accordingly, it is,

ORDERED that the motion of defendant Spectrum Origination LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said

defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; 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 party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 119) and the General Clerk's office (60 Centre Street, Room 119), who is directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel for the remaining parties are directed to appear for a conference in Room 242, 60 Centre Street, New York, New York, on August 29, 2019 at 11:00 AM.

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE