SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AVERY HALL INVESTMENTS LLC,

Plaintiff,

-against-

CONCORD VILLAGE OWNERS INC. and ROCKROSE DEVELOPMENT CORP.,

Defendants.

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DECISION AND ORDER
Index No.: 655700/2018

Motion Seq. Nos.: 001-002

O. PETER SHERWOOD, J.:

I. FACTS

This is a case about a real estate deal gone bad. As this is a motion to dismiss, the following facts are taken from the Complaint (Dkt. 4), except as noted.

Plaintiff Avery Hall Investments LLC (Avery) purchases and develops real estate in the New York City area. In the fall of 2016, Avery was approached by a firm hired by defendant Concord Village Owners Inc. (Concord) with an opportunity for Avery to purchase two sites owned by Concord in downtown Brooklyn (the Property). Defendant Rockrose Development Company (Rockrose) did not participate in the bidding.

In December 2017, toward the end of the marketing and bidding process, Avery discovered independently that the zoning analysis had an error. The abutting street, Adams Street (the Street), was zoned as "narrow" and not "wide," as stated in Concord's zoning analysis. The designation would heavily impact the development allowed on the Property. Avery informed Concord and asked that all bidders be informed. It is not known if Concord did so.

In February 2018, Avery was told it was one of the three final bidders on the Property (Complaint, ¶ 23). Avery then found another problem- the deed had a "Zoning Floor Area" restriction encumbering the Property (*id.*, ¶ 29). Avery met with the Concord board of directors on May 2, 2018 (*id.*, ¶ 30). In emails sent on May 8, 2018, Concord agreed it would work exclusively with Avery on the sale of the Property (*id.*, ¶ 33). Although not alleged in the complaint, defendant Concord submits an Offer to Purchase apparently negotiated by Avery and Concord and dated April 25, 2018, which is signed by Avery only (April 25 Offer) (NYSCEF Doc.

No. 10). Following the May 8, 2018, agreement, Avery started developing a plan to unencumber the Property (Compl. ¶ 35). Making this plan was time-consuming and expensive.

On August 6, 2018, Avery made Concord a written offer explaining its plan to unencumber and develop the Property (*id.*, ¶ 40). The vice president of development of Rockrose was on the Concord board of directors (*id.*, ¶ 41). After a second meeting, Avery presented an updated written offer for the Property on September 26, 2018 (*id.*, ¶ 46). In October, Concord informed Avery Concord was going to sell the Property to Rockrose (*id.*, ¶¶ 47-49).

Avery has asserted three causes of action:

1) Breach of Contract against Concord for breach of the agreement to proceed exclusively with Avery;
2) Unjust Enrichment against Concord, which received the plans and proposals generated at significant cost by Avery; and
3) Tortious Interference with Business Relations/Prospective Economic Advantage against Rockrose for interfering with Avery's purchase of the Property.

II. ARGUMENTS

Concord and Rockrose move separately to dismiss the action pursuant to CPLR 3211(a)(1), (5), and (7) based on documentary evidence, statute of frauds, and failure to state a claim.

A. Arguments of Concord in Support of Dismissal (001)

Concord argues Avery has failed to allege the existence of a binding exclusivity agreement. It submits the April 25 Offer referenced above, which contain the terms of Avery's proposed exclusivity agreement and provides it would be effective "[u]pon execution of th[e] LOI by both parties" (NYSCEF Doc. No. 10 p. 4) was unambiguous that it was supposed to be signed (*see also id.* at 6 ["If the above terms are acceptable, kindly sign and return this LOA"]). Where the parties contemplate an agreement is to be signed, it is not binding absent that signature, and an oral agreement is insufficient (001 Memo at 7-9).

The alleged oral exclusivity agreement is also barred by the statute of frauds because an interest in real property can only be created, granted, or assigned by a signed writing (*id.* at 10). The agreement relates to real property, and so, without a writing signed by Concord, it is barred by New York General Obligations Law section 5-703 (*id.* at 11). The email referred to by Avery, in which the Concord president confirms a board member's email that Concord wants to move

forward with Avery on an exclusive basis, is not sufficient to satisfy the statute of frauds because it fails to state the essential terms of the agreement (*id.* at 12, NYGOL § 5-703[3]).

Avery also fails to state a claim for unjust enrichment (001 Memo at 14). The claim is disfavored when there is a transaction between sophisticated, well-counseled parties, as here. Further, Avery merely lost out to another bidder. Equity and good conscience do not require Avery to be compensated for not winning the contract (*id.* at 15). The transaction costs of getting to a contract for the Property are a risk of doing business (*id.* at 15-16). Nor has Avery alleged Concord benefitted from the due diligence Avery claims to have performed (*id.* at 17). Avery does not allege Concord used or sold Avery's plans for the Property (*id.* at 17-18). Without a benefit alleged to Concord, this claim should be dismissed.

B. Arguments of Rockrose in favor of Dismissal (002)

Rockrose argues the complaint fails to state a claim for tortious interference with business relations, with prospective economic advantage, or with a contract. As to the former two claims, Avery has failed to allege Rockrose used unlawful means, a required element of those claims. Further, the prospective economic advantage claim requires an allegation that Concord would have sold the Property to Avery "but for" Rockrose's interference (002 Memo at 2).

As to the allegation of tortious interference with a contract, Avery fails to plead a valid contract. The exclusivity agreement was never signed and the complaint fails to state important terms of such an agreement, like the length of the exclusivity period. Plaintiff also fails to plead facts supporting the conclusion that Rockrose intentionally induced Concord's unjustified breach of the agreement, or that a breach occurred, or that Concord would have sold to Avery, if not for Rockrose's interference.

C. Avery's Opposition and Cross-Motion

Avery points to the email confirmation from Peter Backes and Ira Schuman as evidence Concord agreed to the exclusivity agreement (Opp at 3-4). The email chain constitutes a sufficient writing to bind Concord in accordance with the Statute of Frauds. Avery performed pursuant to the agreement, doing research and creating a plan to unencumber the Property. Concord never terminated the exclusivity agreement, but breached it. The documentary evidence does not refute the breach of contract claim because there is a writing, not just an oral agreement. The emails create a valid and enforceable contract (*id.* at 6, collecting cases). Nor can the April 25, 2018,

unsigned offering letter constitute documentary evidence of the requirement of a writing, because it was not signed, was not agreed to, and its terms are not binding (*id.* at 7). The cases where a letter of intent's term requiring a subsequent writing was enforced involved a signed letter of intent, which does not exist here (*id.* at 7-8).

Nor does the statute of frauds bar this claim. First, there is a writing (the emails). Second, this is not an agreement regarding the conveyance of an estate or interest in real property, but an exclusivity agreement, so the statue of frauds does not apply (*id.* at 9-10).

The complaint states a claim for unjust enrichment because of Avery's efforts in researching and planning the unencumbering of the Property, the fruits of which were provided to Concord, and which unlocked the Property's value (*id.* at 11). If the court is not convinced on this point, Avery requests targeted discovery on this issue (*id.* at 13).

The complaint states a claim for tortious interference because Avery claims Rockrose obtained Avery's confidential information through the Rockrose employee on the Concord board and used that information to induce Concord to breach the exclusivity agreement (*id.* at 14). Avery provided information expecting confidentiality, and Concord breached that expectation (*id.*). As discussed above, the exclusivity agreement was valid and enforceable, there was wrongful conduct, and the tortious interference claims should stand (*id.* at 16-17).

D. Concord's Reply

Concord contends that the May 8, 2018, emails do not constitute a complete agreement and the alleged May 2, 2018, oral agreement does not overcome Avery's stated intention to only be bound by a written agreement (001 Reply at 1). The emails are insufficient to constitute a contract because they are vague and do not include most of the material terms of the agreement (*id.* at 2-3).

The language in the April 25 offer requiring a written agreement is binding, not because that document is a contract, but because it expresses Avery's intention not to be bound without a writing and may be considered documentary evidence of that intention and that a binding agreement does not exist (*id.* at 4-6).

The exclusivity agreement is related to the sale of the Property, and thus is subject to the statute of frauds (*id.* at 7). The April 25 Offer is titled "Offer to Purchase" and sets forward the terms of a proposal for the purchase. The exclusivity agreement is part of a negotiation to purchase

real estate (*id.* at 7, citing *Solartech Renewables, LLC v Vitti*, 156 AD3d 995, 998 [3d Dept 2017] ["Plaintiff contends that the contract did not involve an interest in land, but was a personal contract that merely involved an exclusivity period. This argument is belied by plaintiff's offer letter, which contained the subject line "Offer to Purchase Real Estate" and stated in its first sentence that it was an offer to purchase the referenced property, along with the acreage and purchase price. The conditions in defendant's proposed side letter related to the purchase of property and did not mention any exclusivity period. Because the alleged contract concerns a sale of, or interest in, real property, the statute of frauds applies"]). This is not an agreement separate from the purchase of the Property, as in the case cited by Avery, about a real estate brokerage agreement (*id.* at 8). The May 8 emails do not constitute a memorialization of any agreement, as they do not contain any information about the terms of the agreement (*id.*).

E. Rockrose's Reply

Plaintiff has failed to oppose Rockrose's argument that the tortious interference claim lacked the required allegation of "but-for" causation- that, if not for Rockrose's interference, Concord would have sold the Property to Avery (002 Reply at 3). As far as Avery states, in its opposition papers, that "Concord was prepared to perform its obligations under the Exclusivity Agreement 'but for' Rockrose's improper conduct," that is a vague and conclusory statement, and fails to remedy the complaint's defects. It is also not enough that Concord was ready to perform. It must be alleged Concord would have performed, if not for Rockrose's interference.

III. DISCUSSION

A. Standard for Dismissal Based on Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations

consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the April 25 Offer and the May 8 email chain. Both may be considered, although what they prove is disputed.

B. Standard on Motion to Dismiss for Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

C. Breach of Contract against Concord for breach of the exclusivity agreement

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what

parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The parties dispute whether there is an enforceable contract. Plaintiff claims it made a verbal offer on May 2, 2018, at a meeting with Concord's board of directors, and that the offer was accepted at that meeting and the acceptance was reduced to writing in the May 8 email chain[1] (attached as Exhibit C to Carver aff, Dkt. # 11). An email exchange may create an enforceable agreement, if the exchange states the essential terms (*Kasowitz, Benson, Torres & Friedman, LLP v Reade*, 98 AD3d 403, 404 [1st Dept 2012], *affd,* 20 NY3d 1082 [2013] ["An exchange of emails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved"]). These emails include only part of one term, exclusivity. They do not state any of the terms of an offer. Even as to the exclusivity provision, the email chain does not provide for how long the exclusive relationship will last, or that consideration was given. Consideration is required for a valid contract, but none is provided for here (*id.*). Accordingly, the May 8 emails do not constitute a valid contract.

As far as plaintiff claims the oral agreement is the agreement, and the May 8 letter is a writing which confirms it, still no consideration has been alleged, the duration of the exclusivity period is unstated, and the scope of the work is unknown. Accordingly, the allegation of an enforceable contract fails. In any event, the contract at issue here concerns interests in real estate and, under the statute of frauds, a writing signed by the party to be charged is required.

As far as defendants argue the April 25 Offer precludes an oral agreement, it does not constitute documentary evidence plaintiff did not enter into an oral agreement. It only shows plaintiff proposed an agreement which contains terms frequently seen in such offers. It does not

[1] At oral argument, Avery's counsel argued that the May 8 emails and the parties' conduct constitute the agreement. He declined to embrace the April 25 Offer as setting forth the terms of the agreement.

preclude plaintiff's contention that it entered into an oral agreement (apparently having changed its mind) a few weeks later (although this argument is also moot).

D. Unjust Enrichment against Concord

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Plaintiff argues Concord was unjustly enriched by Avery's research and planning to handle the Property's encumbrances (Opp at 11). Avery claims it created this work product for Concord's benefit, and Concord should compensate it (*id.* at 12). Avery relies on two cases-*Chestnut Hill Partners, LLC v Van Raalte* (45 AD3d 434, 435 [1st Dept 2007]) and *Meyers Assoc., L.P. v Conolog Corp.* (19 Misc 3d 1104(A) [Sup Ct 2008], *affd,* 61 AD3d 547 [1st Dept 2009]). In *Chestnut Hill*,

> "[t]he complaint allege[d] that plaintiff entered into a finder's fee agreement with nonparty Lincolnshire Management, Inc. (Lincolnshire) for the acquisition of a target company, Sabre. Lincolnshire decided against acquiring the company and the individual defendants, who were former Lincolnshire employees, subsequently formed Corinthian, which later acquired Sabre. Under the circumstances, the court properly declined to dismiss the complaint as against Corinthian and Sabre since plaintiff adequately pleaded claims for unjust enrichment and in quasi contract. The sequence of events, together with the fact that Corinthian voluntarily tendered a check in the amount of $75,000 to plaintiff after it had closed on its purchase of Sabre, present sufficient facts to infer that defendants benefitted from plaintiff's actions in bringing the deal to the attention of Corinthian's principals"

(Chestnut Hill Partners, 45 AD3d at 435). While there was an eventual sale to another party here, unlike *Chestnut Hill*, no conduct is alleged which would support the conclusion that the defendants made use of plaintiff's research or plans, and defendants have not admitted receiving value. In *Meyers Associates,* there was "evidence that [defendant] has received, retained, and may have used the draft offering documents generated by a law firm at [plaintiff's] expense. Thus, [plaintiff's]

claim for unjust enrichment may be valid to the extent that [plaintiff] has a right to be compensated for the cost of creating the draft documents provided to [defendant] (*Meyers Assoc.*, 19 Misc 3d 1104(A) at *5). Here, there are no allegations, let alone evidence, that Concord retained or used the documents provided by Avery. Plaintiff's allegations that it expended resources and did work is not sufficient. Concord must be alleged to have benefitted, and those allegations are missing.

E. Tortious Interference against Rockrose

Interference with a business relationship or prospective economic advantage, where there is no contract, is actionable if unlawful means are used, or (under the theory of prima facie tort), if lawful means are used to inflict intentional harm, resulting in damage, without either excuse or justification (*Sommer v Kaufman*, 59 AD2d 843, 843-44 [1st Dept 1977]). Wrongful means includes physical violence, threats, fraud, misrepresentation, civil suits and criminal prosecutions, and extreme and unfair economic pressure (72 N.Y. Jur. 2d Interference § 42). Simple persuasion is insufficient (*id.*). Plaintiff has not alleged the type of wrongful means which would make Rockrose liable for tortious interference with a business relationship. As far as plaintiff claims it was wrongful for the Rockrose employee on the Concord board to provide Rockrose with the plans and research Avery provided, the cases plaintiff relies on do not support plaintiff's theory. While, as in *Don Buchwald & Assoc., Inc. v Marber-Rich* (11 AD3d 277, 279 [1st Dept 2004]), a breach of fiduciary duty could be deemed wrongful means, Rockrose is not alleged to owe Avery a fiduciary duty. Nor has plaintiff alleged Rockrose acted to inflict intentional harm on Avery without excuse. Plaintiff has merely alleged Rockrose acted to compete on the purchase of the Property.

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). As discussed above, plaintiff has failed to allege the existence of a valid contract. Nor has it alleged Rockrose was aware of the alleged exclusivity contract or that it procured a breach by a third party.

F. Cross-Motion for Expedited Discovery

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion [to dismiss]" (CPLR 3211[d]). Plaintiff has failed to allege a claim and has not stated how plaintiff thinks discovery will allow it to do so. Plaintiff has not provided affidavits which suggest that such facts exist but cannot be stated. Further, the discovery requested is not targeted at the deficiencies of the complaint, but very broad. The request for leave to re-plead is DENIED.

Accordingly, it is hereby

ORDERED that the motions to dismiss are granted in their entirety and the complaint is DISMISSED; and it is further

ORDERED that judgment be entered against plaintiff Avery Hall Investments LLC, and in favor of defendants Concord Village Owners Inc. and Rockrose Development Corp., and the Clerk of the Court is directed to enter judgment accordingly together with taxation of costs in an amount to be fixed by the Clerk upon presentation of proper bills of costs.

This constitutes the decision and order of the court.

DATED: July 31, 2019

ENTER,

O. PETER SHERWOOD J.S.C.