S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.
2019 NY Slip Op 34205(U)
February 4, 2019
Supreme Court, Westchester County
Docket Number: 59714/2018
Judge: Linda S. Jamieson
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Disp __x___ Dec _____ Seq. No.__1___ Type __dismiss__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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S & J SERVICE CENTER, INC.,

Plaintiff,

-against-

COMMERCE COMMERCIAL GROUP, INC.,

Defendant.

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Index No. 59714/2018

DECISION AND ORDER

The following papers numbered 1 to 6 were read on this motion:

Paper	Number
Notice of Motion, Affirmation, Memorandum of Law and Exhibits	1
Affirmation in Opposition	2
Memorandum of Law in Opposition	3
Supplemental Affirmation and Exhibit[1]	4
Notice of Rejection and Exhibit	5
Reply Memorandum of Law	6

Defendant brings this motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7) (documentary evidence and failure to state a claim) in this breach of contract action. The

[1]While it is true that a party cannot submit multiple sets of opposition papers, plaintiff's second submission merely submitted to the Court a newly-released Appellate Division Decision, and is thus not improper.

facts are simple. Plaintiff ("S&J") was a defendant in an unrelated case involving a company called Apache Oil Company ("Apache"). That case was settled at trial in December 2016. The parties to that action agreed that within six months of that date, S&J (or any corporate entity in which Steven and Joseph Pires were majority owners) would pay Apache $400,000 to buy out Apache's leasehold interest in a particular property. If S&J failed to do so, then Apache would continue to operate at the premises, and S&J would pay Apache $25,000 for legal fees. The $25,000 payment would not be due if S&J paid Apache $400,000 for the lease. S&J did not make the $400,000 payment to Apache.

Thereafter, on May 26, 2017, plaintiff and defendant entered into a document entitled "Letter of Intent." This is the document which plaintiff insists is a binding contract, and which defendant claims is merely an agreement to agree. The document provides, in relevant part, that defendant is the "Intended Lessee," and that the "Apache lease can be Terminated [sic] upon payment in the sum of $400,000." The lease term provision states "10 years plus three 5 year options (total 25 years), commencing on the 1st of the month after Apache vacates the premises." The document further states that "A payment of $400,000 to terminate a [sic] Apache lease to be paid to Apache by CCG on or prior to June 9, 2017." This document contains other details about the purported lease. It is signed by both parties.

About a week and a half later, on June 6, 2017, counsel for plaintiff - the same lawyer who represented plaintiff at the Apache trial - sent an email to a lawyer for America Petroleum LLC ("America") which stated "I've been informed that your firm is representing America Petroleum LLC in connection with the proposed lease of our client's service station in Hartstdale, NY. A $400,000 lump sum payment must be paid by 12/11/17 to the outgoing Tenant, Apache Oil Company, Inc. . . ." The email goes on to state that counsel had sent a proposed lease termination agreement to counsel for Apache. The email further stated that "Our respective clients' letter/memorandum of intent is also attached. It is my understanding that it was executed in the form as annexed, but I do not have a copy of the executed document." A review of this letter of understanding demonstrates that it is the identical document sent to defendant in May, with "America" inserted in every place that defendant's name had been written. The copy of the document submitted to the Court is unsigned. Later on that day, counsel for plaintiff sent a "draft of the proposed lease" to counsel for America. The lease was never signed, and the $400,000 was never paid to Apache. This litigation followed. Notably, the complaint does not mention either the letter of intent or the proposed lease that plaintiff sent to America.

Counsel for plaintiff states in his affirmation in opposition that the proposed lease to America "is at best inconclusive," given his email stating that he did not have a signed copy of the letter of intent between S&J and America. Counsel further states in his affirmation that America "having originally been proposed by the defendant's officers and agents to be the named tenant does not in any manner defeat S & J's allegations relative to CCG [defendant] being thereafter selected by those same individuals (all on the defendant's side of the case) and the undeniable fact that CCG was the contracting party." This statement is illogical and, frankly, factually incorrect. According to the documentary evidence submitted to the Court, plaintiff sent the letter of intent to defendant in **May**, but did not send the letter of intent to America - along with a proposed lease - until **June**. Assuming, arguendo, that counsel's statement that defendant and America have related officers and directors is accurate, the documentary evidence establishes that they first posited that defendant would enter into a lease transaction with plaintiff, yet for whatever reason, changed course and "thereafter selected" **America** to do so instead. The only draft lease is with America, not defendant. Ultimately, neither company signed a lease with plaintiff or paid the $400,000 to Apache.

"At this procedural point in the litigation process, we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. A defense based on documentary evidence will suffice to extinguish an action at this early stage only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Venture Silicones, Inc. v. Gen. Elec. Co.*, 14 A.D.3d 924, 788 N.Y.S.2d 479, 480 (3d Dept. 2005).

Defendant argues that the evidence of plaintiff's negotiations with America demonstrates that there was no "meeting of the minds" between defendant and plaintiff. (It also argues that the stipulation between S&J and Apache contained certain obligations for S&J that could not be fulfilled by (either of) the letter(s) of intent.) The Court agrees. Not only is the language of the letter of intent tentative and/or conditional, but it is clear from the documentary evidence that plaintiff itself did not believe that it had a binding agreement with defendant. Less than two weeks after it signed the letter of intent with defendant, plaintiff sent the exact same letter of intent to America; if it had already entered into a binding contract with defendant, plaintiff would have breached it by doing so. In the email to America, plaintiff stated that it had

just sent a proposed lease termination agreement to Apache, and then later that day, it sent a proposed lease agreement to America. This is significant because (1) if plaintiff had had a binding contract with defendant, it would have breached it by sending the lease; (2) plaintiff never sent a proposed lease agreement to defendant; (3) given that plaintiff was using the same letter of intent, the fact that plaintiff sent a proposed lease to America indicates that plaintiff itself believed that a lease was required, and that the letter of intent was insufficient; and (4) plaintiff stated that it believed that America had signed the letter of intent, which means that if true, plaintiff would have had two signed letters of intent. The letter of intent thus cannot possibly have been the binding contract that plaintiff now asserts that it is.

Accordingly, the Court grants defendant's motion, and dismisses the complaint in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
~~January~~ FEBRUARY 4, 2019

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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