Mian & Mian LLC v Vernon St. Capital LLC
2020 NY Slip Op 30447(U)
February 4, 2020
Supreme Court, Kings County
Docket Number: 515488/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MIAN & MIAN LLC,

Plaintiff, Decision and order

- against - Index No. 515488/19

MS # 1 & 2

VERNON STREET CAPITAL LLC, VSC-NY 192-08 JAMAICA AVENUE CMBC LLC, CONTROLLED DEVELOPMENT PARTNERS LLC, D/B/A CONTROLLED CAPITAL, JOSHUA ANDREW COHEN, 50 LEND INC., & NICHOLAS VAGLICA,

Defendants, February 4, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant Vernon Street Capital LLC has moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state a cause of action. The plaintiff has cross-moved seeking sanctions and for defaults. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 17, 2019 the plaintiff, the owner of property located at 192-08 Jamaica Avenue in Hollis New York executed a letter of intent wherein the defendant Vernon Street Capital LLC was to provide funding for the refinance of a loan in the amount of two million dollars. On July 9, 2019 Vernon informed the

plaintiff they would not be funding the refinance. The plaintiff then sued the defendants alleging eight causes of action including breach of contract and related claims. Vernon has now moved seeking to dismiss the action on the grounds no contract was ever formed and consequently Vernon cannot be responsible for any consequences which flowed thereafter. The plaintiff filed a motion seeking sanctions based upon a frivolous motion filed.

Conclusions of Law

Preliminarily, there is no merit to the argument the motion must be dismissed because the pleadings were not attached to the motion papers. While it is generally true that a party must include the pleadings within a motion for dismissal, that requirement is deemed satisfied if a complete set of pleadings is available from all the materials submitted (see, Welch v. Hauck, 18 AD3d 1096, 795 NYS2d 789 [3rd Dept., 2005]). Motions filed in cases which are e-filed, wherein all pleadings can be retrieved from the electronic docket, are considered complete (Cardona v. Maramont Corp., 43 Misc3d 1230 (A), 993 NYS2d 643 [Supreme Court New York County 2014]).

Substantively, "[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the

plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to state a claim for breach of contract one must allege the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and lastly resulting damages (Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 921 NYS2d 260 [2d Dept., 2011]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

In order for a valid contract to exist there must be mutual asset, commonly defined as a meeting of the minds (Express

Industries and Terminal Corp., v. New York State Department of Transportation, 93 NY2d 584, 693 NYS2d 857 [1999]). Thus, such mutual assent must sufficiently demonstrate that the parties have agreed to all essential terms (id).

The Verified Complaint asserts that although Vernon never signed the letter of intent nevertheless it was forwarded to Vernon for "underwriting and processing" (see, Verified Complaint, ¶ 6). Indeed, the Verified Complaint asserts Vernon created a distinct entity for the purpose of refinancing the property (id) and that on June 25, 2019 "Vernon advised that their underwriting team had cleared the file to close" (id ¶ 7). Thus, on June 26 and again on June 27 the plaintiff pressured Vernon for the closing documents insisting that time was of the essence. On June 28, 2019 Vernon sent the closing documents to the plaintiff, however, they were deficient and required revisions. In an email dated June 28, 2019 at 2:04 PM, in response to the plaintiff's urging to make the revisions, Sean Goldsmith of Vernon Street Capital responded "I will get onto it now" (see, Email submitted within Plaintiff's Opposition, Exhibit 2). The closing failed to take place on June 28 and the following day, a Saturday the plaintiff inquired why the closing had not taken place. On Monday July 1 at 2:40 AM Vernon responded "the reason for the delay is because the team was unable to get it done before the cut-off. They will get it done

today" (see, Email submitted within Plaintiff's Opposition, Exhibit 2). The plaintiff sent an email on July 1 at noon asking for an update. Vernon responded eleven minutes later that they were "working on it" (see, Email submitted within Plaintiff's Opposition, Exhibit 2). At 3:10 PM Vernon sent the following email "we finally get a response from the investor so we should be able to get this moving forward. What exactly do you need to be corrected in order to get the Doc's signed and returned?" (see, Email submitted within Plaintiff's Opposition, Exhibit 2). The plaintiff responded that three necessary changes were required including the correct name of the borrower, the correct spelling of the managing member and the fact the plaintiff is a New York limited liability company. At 6:36 PM Vernon sent an email that stated "please let me know if everything is correct now" and it included four documents, a CEMA, a corrected consolidation note, a new money mortgage and a new money note with correct name (see, Email submitted within Plaintiff's Opposition, Exhibit 2). All the necessary documents were executed by the plaintiff and Vernon confirmed receipt of the documents. The following day on July 2 Vernon and the plaintiff exchanged numerous emails concerning the funding of the loan. The plaintiff stressed they needed the funding as soon as possible to stave off another lender from foreclosing on the property. On July 2, 2019 at 4:37 PM Vernon responded "it should

be funding soon" (see, Email submitted within Plaintiff's Opposition, Exhibit 2). Ultimately, the financing never occurred.

Clearly, the above exchanges demonstrate that there are questions whether a meeting of the minds existed and thus a contract was formed between the plaintiff and Vernon. There can be little dispute that Vernon had been working diligently to effectuate the refinance, the subject of the agreement. Surely, at this juncture, before any discovery has been presented the Verified Complaint alleges the existence of a contract and allegations of a breach. Whether in fact a meeting of the minds existed and whether the plaintiff breached is a matter for further discovery and is not a basis upon which to grant dismissal.

In addition, there is no basis for the argument there was no meeting of the minds as a matter of law because the name of the plaintiff in the agreement was misspelled and was described as a Delaware corporation. Those mistakes were clearly known to the parties and those two errors comprise two of the three items that needed correcting of which Vernon was fully aware.

Further, a contract for the sale of land must be in writing to be enforceable (General Obligations Law §5-703(2), Zito v. County of Suffolk, 106 AD3d 814, 964 NYS2d 644 [2d Dept., 2013]). The plaintiff, however, premises their arguments establishing the

validity of the contract upon the doctrine of part performance. That doctrine acts as a defense against the statute of frauds and precludes the enforcement of the statute (Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group PLC, 93 NY2d 229, 689 NYS2d 674 [1998]). That doctrine is only available if the performance is "unequivocally referable" to the alleged agreement and any actions taken would be "unintelligible or at least extraordinary" and can only be explained with reference to the oral agreement (see, Anostario v. Vicinanzo, 59 NY2d 662, 463 NYS2d 409 [1983]). In this case the email exchange as well as specific tasks undertaken by Vernon were unmistakably referable to the subject agreement signed by the plaintiff. There can be no other way to explain all the work and efforts by Vernon in any other way. Therefore, at this juncture there is no basis to conclude the statute of frauds acts as a bar regarding the enforcement of the agreement.

Moreover, at this juncture any motion to dismiss on the grounds the damages are speculative is denied. The plaintiff will be required to demonstrate the damages suffered and ultimately a trier of fact will evaluate those claims.

Therefore, based on the foregoing, the motion seeking to dismiss the complaint is denied in full.

The cross-motions seeking defaults against any of the defendants is denied. Lastly, all motions damages seeking sanctions are denied.

So ordered.

ENTER:

DATED: February 4, 2020
Brooklyn NY

Hon. Leon Ruchelsman
JSC