1855 Broadway LLC v New York Inst. of Tech.
2021 NY Slip Op 32501(U)
November 29, 2021
Supreme Court, New York County
Docket Number: Index No. 650063/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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1855 BROADWAY LLC,

Plaintiff,

- v -

NEW YORK INSTITUTE OF TECHNOLOGY, COMMONWEALTH LAND TITLE INSURANCE COMPANY

Defendants.

INDEX NO. 650063/2021

MOTION DATE 03/09/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 20, 22, 23

were read on this motion to DISMISS.

This case arises out of a real estate sale and purchase agreement (the "SPA") under which Defendant New York Institute of Technology ("Defendant" or "NYIT") agreed to sell Plaintiff, 1855 Broadway LLC ("Plaintiff"), two properties that house Defendant's Manhattan campus (Compl. ¶1 [NYSCEF 1]). The sale was conceived as part of a planned relocation of the NYIT campus (*e.g.*, *id.* ¶¶2, 5). Upon entering the SPA, Plaintiff paid Defendant an initial deposit of $4.5 million (*id.* ¶21; *see* SPA §3 [NYSCEF 2]), which would apply to the total price at closing (Compl. ¶3; SPA §3). But the closing, Plaintiff contends, is a mirage. Defendant allegedly scrapped its plans to relocate the NYIT campus, but is "pretend[ing] that it will move forward" with the transaction – rather than terminating the SPA – in order to keep the $4.5 million deposit and extract more money from Plaintiff for a sale that will never happen (Compl. ¶3). Plaintiff is now looking to get its original deposit back.

Plaintiff asserts three causes of action in this case.[1] The first is for breach of contract, which has two main components. Plaintiff alleges that Defendant breached the SPA by (i) anticipatorily repudiating its obligations under the contract and (ii) failing to use "commercially reasonable efforts" to obtain certain regulatory approvals prior to closing (*id.* ¶¶48-68). In addition, Plaintiff asserts claims for breach of the implied covenant of good faith and fair dealing as well as for a declaratory judgment. Defendant moves to dismiss the complaint in its entirety, for failure to state a cause of action and in light of documentary evidence.

For the reasons set forth below, the motion to dismiss is granted in part and denied in part.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211 [a] [1], the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). And under CPLR 3211 [a] [7], dismissal is warranted if the plaintiff "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017] [internal citation omitted]). When determining a motion to dismiss, the Court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, allegations that are "bare legal

[1] The nominal defendant, Commonwealth Land Title Insurance Company, has been named in this action solely because it is holding the disputed $4.5 million deposit, which it must remit to the appropriate party in accordance with an order from this Court (Compl. ¶16).

conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence," are not sufficient to withstand a motion to dismiss (*see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009] [internal citation omitted]).

A. Breach of Contract

1. Anticipatory Repudiation

Assuming the truth of its factual allegations, Plaintiff states a viable claim for breach of contract based on Defendant's alleged anticipatory repudiation of the SPA. The anticipatory repudiation doctrine provides that "a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach" (*Am. List Corp. v U.S. News & World Report, Inc.*, 75 NY2d 38, 44 [1989]). "A repudiation can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (*Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 [1998]). Whether expressed through "words or deeds" (*id.*), "[t]he repudiation must be unequivocal, definite, and final" (*Children of Am. (Cortlandt Manor), LLC v Pike Plaza Assocs., LLC*, 113 AD3d 583, 584-85 [2d Dept 2014]; *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 267 [1st Dept 1995]).

Often, "[w]hether such a repudiation took place is a factual determination" (*Fonda v First Pioneer Farm Credit, ACA*, 86 AD3d 693, 695 [3d Dept 2011]), not suitable for resolution as a matter of law (*see, e.g.*, *Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 488 [1st Dept 2012] [denying summary judgment because of "an issue of fact with respect to plaintiffs' claims for anticipatory repudiation"]; *Gardiner Intern., Inc. v J.W. Townsend & Assoc., Inc.*, 13 AD3d 246,

247-48 [1st Dept 2004] [finding "conflicting allegations raise[d] questions of fact as to whether plaintiffs repudiated the contract by seeking to withdraw prematurely"]; *Plastokit (Prod. 1986), Ltd. v Am. Bio Medica Corp.*, 105 AD3d 1115, 1116 [3d Dept 2013] [denying summary judgment where "[t]he language upon which plaintiff relies was not unequivocal as a matter of law"]; *Stewart v Sternberg*, 137 AD2d 592, 594 [2d Dept 1988] [finding "an issue of fact exists as to whether the Stewarts' letter of November 25, 1983, constituted a repudiation of the contract"]; *Riv. Terrace Assoc., LLC v The Bank of New York*, 10 Misc.3d 1052(A), *6 [Sup Ct, New York County 2005] [denying summary judgment because of "open questions of fact regarding whether or not [defendant] repudiated"]).

Here, the Complaint alleges that on September 29, 2020, Defendant's "broker directly confirmed to Plaintiff that Defendant had abandoned its plans to relocate its New York City campus and to move forward with the sale in light of the pandemic" (Compl. ¶60). Those statements, accepted as true at the pleading stage, may constitute anticipatory repudiation under New York law (*e.g.*, *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 64 [2d Dept 2013] ["deeming the allegations in the complaint as true and resolving all inferences in favor of the plaintiff, the complaint states a cause of action to recover damages for anticipatory repudiation."]). To be sure, there may be fact disputes about, *inter alia*, what the broker said and whether it was accurate, what communications the parties engaged in following the broker's statement, and whether Defendant retracted a prior repudiation (more on that below). But those are issues for discovery, not grounds for dismissal.

At this stage, Defendant's arguments for dismissal as a matter of law are unavailing. To begin with, Defendant oversimplifies the issue when insisting that "NYIT's relocation plans, or lack thereof, have no contractual connection to its ability or inability to deliver the premises

'vacant and free of all tenancies' on the Closing Date" (NYSCEF 8 at 13-14). While it is true that the SPA does not explicitly require NYIT to relocate its Manhattan campus, relocation is still relevant to the SPA. The contract requires Defendant to "vacate and then sell" the premises to Plaintiff (Compl. ¶1). Relocation, generally understood, involves vacating one place and moving someplace else. So, even if relocation is not a requirement under the contract, vacating the premises is a requirement for relocation. Therefore, giving Plaintiff the benefit of all permissible inferences in its favor, Defendant's apparent abandonments of its plan to relocate signaled that Defendant would breach its contractual obligation to vacate. In any event, Plaintiff's allegations are not cabined to conjecture about NYIT's relocation plans (or lack thereof): it specifically alleges that Defendant, through its broker, announced that "the sale" was off (*id.* ¶60).

Next, Defendant argues, without authority, that "statements made to a third party, or the general public, are not proper grounds for a claim of anticipatory repudiation" (NYSCEF 8 at 15 [mot. to dismiss]). Public statements can, in fact, "constitute[ ] an anticipatory repudiation" (*Argonaut P'ship v Sidek*, 1996 WL 617335, at *6 [SD NY Oct. 25, 1996] [statement to *The Wall Street Journal* "constituted an anticipatory repudiation"]), though it remains to be seen whether such a repudiation occurred here.

And finally, Defendant argues that even if an anticipatory repudiation did occur, it retracted any repudiation with its October 28, 2020 letter to Plaintiff (NYSCEF 3 [the "October 28 Letter"]). The October 28 Letter stated only that Defendant "look[ed] forward to closing" (*id.* ¶40; NYSCEF 3). Despite defense counsel's gloss on it, the October 28 Letter did not clearly state that NYIT "was ready, willing and able to close this transaction" (NYSCEF 24 at 9:8-11 [oral arg. tr.]; *Argonaut P'ship*, 1996 WL 617335, at *6 ["[I]n order for a retraction to negate a

prior repudiation, the retraction must take the form of a statement by the repudiating party that it will perform."]; *Dow Elec., Inc. v Intl. Broth. of Elec. Workers, Local Union No. 910*, 500 F Supp 2d 148, 156 [ND NY 2007], *affd*, 283 Fed Appx 841 [2d Cir 2008] ["[L]ike the repudiation itself, the retraction is effective only if a reasonable man in the aggrieved party's position would conclude that the repudiating party clearly and unambiguously indicated its intention to perform."]).

Ultimately, whether the October 28 Letter constituted a retraction may raise issues of fact (*S. Shore Ambulatory Surgery Ctr., LLC v Lynbrook Anesthesia Services, P.C.*, 165 AD3d 998, 1000 [2d Dept 2018] [finding "triable issues of fact" about "whether Lynbrook retracted its repudiation, and if so, if it retracted prior to South Shore having materially changed its position in reliance thereon"]; *see also Campbell v Mark Hotel Sponsor, LLC*, 2012 WL 3577531, at *14 [SD NY Aug. 20, 2012] [concluding after trial that "letter was equivocal about [plaintiff's] intent and thus did not clearly indicate that she intended to perform"]).

2. Breach of Covenant to "Use Commercially Reasonable Efforts"

Plaintiff also states a claim for breach of contract based on Defendant's alleged failure to "use commercially reasonable efforts" to secure certain regulatory "Approvals" prior to closing. "The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The allegation of breach is straightforward. In section 20, Defendant covenanted to "use commercially reasonable efforts to obtain . . .

Approvals" prior to closing (*see* SPA §20 [a] [xiv]).[2] Plaintiff alleges that Defendant made no such efforts, in violation of the covenant, because it decided against proceeding with the sale and thus "did not seek" the required approvals (Compl. ¶53). Further, Plaintiff alleges that it "repeatedly provided Defendant notice that Defendant had failed to use commercially reasonable efforts to obtain the required approvals," and "Defendant did not contest this fact" (*id.* ¶54).

Contractual provisions promising to "use commercially reasonable efforts" are, despite what Defendant argues, enforceable (*see* NYSCEF 8 at 12 [arguing "under New York law, such claims regarding 'efforts clauses' generally ***cannot be sustained under any circumstances***"] [emphasis added]). New York cases, applying New York law, have sustained claims springing from "commercially reasonable efforts" clauses (*Seaport Glob. Sec. LLC v SB Group Holdco, LLC*, 162 AD3d 466, 467 [1st Dept 2018] [denying motion to dismiss breach of contract claim alleging that defendant "failing to make commercially reasonable efforts"]; *Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433 [1st Dept 2013] [reinstating breach of contract claim "since plaintiff has sufficiently pled that [defendant] breached its duty under the parties' licensing and distribution agreement (LDA) to engage in 'commercially reasonable efforts' to sell plaintiff's product"][3]; *see Holland Loader Co., LLC v FLSmidth A/S*, 313 F Supp 3d 447, 480 [SD NY 2018] [finding that "Defendant, itself and through its subsidiaries, breached its duty to

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[2] These "Approvals" referred to all "approvals and consents of appropriate regulatory and accrediting agencies incidental and associated with the operation by Seller of an institution of higher education," including the New York State Education Department (SPA §9 [a] [iv]).

[3] Notably, in *Netologic*, the First Department reversed the trial court's holding that "because there were no objective criteria against which Goldman's efforts could be measured, that portion of plaintiff's second cause of action alleging breach of contract must be dismissed" (*Netologic, Inc. v The Goldman Sachs Group, Inc.*, 2011 WL 10819854, at *5 [Sup Ct, New York County 2011]).

use commercially reasonable efforts"], *affd*, 769 Fed Appx 40 [2d Cir 2019]). And the authorities on which Defendant relies are inapposite. In *Timberline Dev. LLC v Kronman*, 263 AD2d 175, 178 [1st Dept 2000], the court did not analyze a "commercially reasonable efforts" clause. And in *Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647 [1st Dept 2009], the court dismissed an "efforts clause" claim on a summary judgment record, and where the parties' agreement "provided that defendants shall have no liability" except in specific circumstances.

Section 23, in turn, provides that Plaintiff may terminate the SPA and recover its deposit payment "[i]f Seller shall be unable to perform its obligation to convey the Premises to Purchaser ***in accordance with the terms of this Agreement*** (other than by reason of Seller's Willful Default (as hereinafter defined))" (SPA §23 [emphasis added]). Whether Defendant's alleged breach of section 20 triggered the remedy in section 23 remains to be seen. Plaintiff argues that because Defendant did not "use commercially reasonable efforts" to obtain the Approvals under section 20, it could not comply "with the terms of th[e] Agreement" as required under section 23. In Plaintiff's view, non-compliance with the covenants in section 20 – any of them – are grounds for termination under section 23 because the covenants – each of them – are "terms of th[e] Agreement."

The text of section 23 can be read to support Plaintiff's position. The provision singled out the covenants specifically as grounds for termination. Section 23 uses the term "Willful Default." If Defendant is "unable to perform its obligation to convey the Premises to Purchaser in accordance with the terms of this Agreement" because of a Willful Default, then Plaintiff would access additional post-termination rights. In defining Willful Default, the SPA states that "Seller's noncompliance with any of its covenants shall not be deemed Seller's Willful Default"

(SPA §23). That is important because if "Seller's noncompliance with any of its covenants" was not covered by section 23, then this carve-out would be unnecessary. But because "Seller's noncompliance with any of its covenants" *is* (arguably) encompassed within section 23, the contract must clarify that such "noncompliance" cannot cause a Willful Default.

Although Defendant offers a potentially plausible reading of the agreement in its favor, it does not provide grounds for dismissal as a matter of law. For example, Defendant points out that the "commercially reasonable efforts" covenant is not one of the "15 explicit Conditions of Title, 17 specific Closing Deliveries, [or] 3 Conditions Precedent for Purchaser to closing" listed in the SPA (NYSCEF 22 at 7). But the termination right in section 23 is not necessarily limited to those provisions. It refers to compliance with "the terms of this Agreement," not a specific sub-set of terms. Defendant also argues that Plaintiff's interpretation of section 23 would lead to "absurd, commercially unreasonable" results because the provision was meant to protect Defendant, not Plaintiff, if the Approvals were not obtained. But that argument raises, at most, a fact issue that cannot be resolved at this stage.[4] Accordingly, as noted above, whether Defendant's alleged breach of section 20 triggered the remedy in section 23 remains to be seen.

* * * *

Therefore, the branch of Defendant's motion seeking to dismiss the claim for breach of contract is denied.

[4] Tellingly, Defendant cites only to *Luver Plumbing and Heating, Inc. v Mo's Plumbing and Heating*, 144 AD3d 587, 588 [1st Dept 2016], which concluded that a contract interpretation led to absurd results "following a nonjury trial," not at the motion to dismiss stage.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing is dismissed on two grounds. *First*, it is duplicative of the breach of contract claim, as it arises from the same underlying allegations (*see Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015] [dismissing implied covenant claim as duplicative of breach of contract claim]). *Second*, "[t]he duty of good faith and fair dealing does not imply obligations inconsistent with contractual provisions (*Gottwald v Sebert*, 193 AD3d 573, 582 [1st Dept 2021]). If it is found, ultimately, that Defendant did not breach its contractual obligations, that is the end of the story. The Court will not impose additional contractual obligations to the ones agreed to by these sophisticated parties.

Therefore, the branch of Defendant's motion seeking to dismiss the claim for breach of the implied covenant of good faith and fair dealing is granted.

C. Declaratory Judgment

In its third cause of action, Plaintiff seeks a declaration that "(i) it is not required to make an additional deposit under the SPA, (ii) it is entitled to a return of its initial deposit of $4.5 million plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys' fees, and (iii) its ROFO rights under Section 9(a) are in effect and Defendant is enjoined from selling the subject property to a third party without first complying with the ROFO provisions of the SPA." (Compl. ¶85). The second prong of that relief duplicates Plaintiff's breach of contract claim and is therefore "unnecessary and inappropriate" (*Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016] ["A cause of action

for declaratory judgment is 'unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract' or injunctive relief']). The first and third prongs, however, seek additional, forward-looking relief not sought in Plaintiff's contract claim (*M&A Oasis, Inc. v MTM Assocs.*, 307 AD2d 872, 872 [1st Dept 2003] [declaratory judgment claim involving adjudication of a right of first refusal is not duplicative]).

Therefore, the branch of Defendant's motion seeking to dismiss the claim for declaratory judgment is granted in part.[5]

* * * *

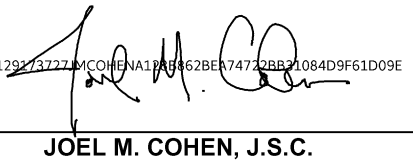
It is therefore

ORDERED that Defendant's motion to dismiss is DENIED with respect to Plaintiff's claim for breach of contract (first cause of action), GRANTED with respect to Plaintiff's claim for breach of the implied covenant of good faith and fair dealing (second cause of action), and GRANTED IN PART with respect to Plaintiff's claim for declaratory judgment (third cause of action); it is further

[5] "When a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendant[ ]" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). But if "the record before the motion court is insufficient to resolve all factual issues such that the rights of the parties cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible" (*Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1151 [2d Dept 2011]; *see also Guthart v Nassau Cty.*, 178 AD3d 777, 778-79 [2d Dept 2019] [same]). Here, as noted *supra*, there are fact issues concerning whether Defendant is entitled to a return of its initial $4.5 million deposit, so the Court cannot issue a counter-declaration at this time.

ORDERED that the parties appear for a telephonic preliminary conference on **December 21, 2021 at 10:00 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.[6]

This constitutes the Decision and Order of the Court.



11/29/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[6] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.