SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
----------x
ORANGE GOWANUS LLC,

Plaintiff, Decision and order

- against - Index No. 537850/2023

PCLING LLC; STE Developer LLC; and
EYAL BEN-YOSEF,

Defendants, May 7, 2024
----------x
PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds of documentary evidence and that it fails to allege any causes of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, in February 2022 the plaintiff Orange Gowanus LLC, through its sole member Andrew Bradfield entered into an agreement with PCLING LLC through its members Yossef Meir Ariel and Ido Paul Amit. The agreement provided for the purchase and development of property located at 125 Third Street in Kings County. The parties created a new entity called Third St Development LLC [hereinafter 'Third Street LLC']. PCLING LLC and defendant Eyal Ben-Yosef collectively owned over 80% of that entity while the plaintiff owned the remainder, close to 20%. The parties formed additional entities including Gowanus GP Ventures LLC which was appointed the managing member of Third

Street LLC. Another entity, defendant STE Developer LLC owned by Ariel and Amit was the majority partner in Gowanus GP while the plaintiff was the minority partner. Thus, Third Street LLC was effectively managed by Ariel and Amit.

On February 25, 2022 Orange Gowanus LLC, Gowanus GP, PCLING LLC and Ben-Yosef entered into an operating agreement and on the same date the property was purchased for $22.5 million. In January 2023 defendants informed the members of Third Street LLC that there was an offer to purchase the property for $27.5 million from an individual named Rotem Rosen. The defendants voted to approve the transaction and the plaintiff voted against it. Thus, pursuant to the operating agreement the plaintiff informed the defendants of its intention to purchase the defendants membership interests in Third Street LLC. The complaint alleges the defendants engaged in tactics to delay the plaintiff's ability to purchase defendant's shares, accusing the defendants of trying to secure the deal with Rosen. Indeed, the plaintiff commenced an action seeking to prevent the defendants from proceeding with any transaction with Rosen. On April 27, 2023 the court ruled the plaintiff's ability to purchase the membership interests of the defendants was valid and enforceable. In any event, the complaint alleges the defendants continued to delay the plaintiff's acquisition of the membership shares. This delay made it difficult for the defendants to secure financing

but ultimately sold the property to an entity controlled by the Joyland Group for $29.5 million on June 16, 2023. The sale required a closing by August 25, 2023 and a down payment of $1.5 million. The shortened time frame was necessary to enable the developer to take advantage of significant tax abatements pursuant to Section 421-a of the New York Real Property Tax Law.

The plaintiff scheduled a combined closing wherein the plaintiff would purchase the membership interests of the defendants and transfer title to the property to Joyland. The parties subsequently stipulated to agree to the transfer of the membership interests and terminate the prior lawsuit. However, it is alleged the defendants refused to facilitate the transfer of the interests and refused to participate in the combined closing. Eventually, the plaintiffs were forced to close twice, first to purchase the membership shares and then to transfer title. The delay allegedly caused by the defendants required the plaintiff to incur an additional $125,000 in fees and interest and an additional $690,000 in additional transfer taxes. This lawsuit was filed wherein the plaintiff seeks recovery of those sums from the defendants. The lawsuit alleges causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference, breach of a fiduciary duty and aiding and abetting that breach.

The defendants have now moved seeking to dismiss the action

arguing it fails to state any viable causes of action. Specifically, they are the assignment agreement executed by the parties upon the transfer of the membership interests forecloses any ability to pursue any further claims against the defendants. As noted, the plaintiff opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). 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, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

On September 11, 2023 the defendants transferred their membership interests to the plaintiff and executed an Assignment of Membership Interests. That agreement states that "as a condition to the Assignment and Purchaser's payment of the

Purchase Price as contemplated hereunder, on the Effective Date, simultaneously with the effectiveness of this Assignment, Seller and Purchaser shall enter into a Stipulation in the form of Exhibit C attached hereto...pursuant to which the parties agree to discontinue the litigation in New York Supreme Court Kings County" (see, Assignment of Membership Interests in Third St Development LLC and Gowanus GP Ventures LLC, ¶7 [NYSCEF Doc. No. 28]). Further, the parties executed a stipulation of discontinuance which states that the previous lawsuit as well all claims asserted "are discontinued without prejudice" (see, Stipulation of Discontinuance [NYSCEF Doc. No. 36]). It is well settled that a stipulation of discontinuance without prejudice does not have any res judicata effect and does not bar a party from maintaining further claims (Maurischat v. County of Nassau, 81 AD3d 793, 916 NYS2d 235 [2d Dept., 2011]). Moreover, pursuant to CPLR §3217(c) unless expressly stated, any stipulation of discontinuance is without prejudice. Thus, the existence of language expressly stating the discontinuance is without prejudice should not bar the claims sought here.

The defendants argue that pursuant to the merger clause contained within the assignment agreement no further claims are possible. That clause states that "no changes of or modifications or additions to this Assignment shall be valid unless the same shall be in writing and signed by the parties

hereto" (see, Assignment of Membership Interests in Third St Development LLC and Gowanus GP Ventures LLC, ¶13 [NYSCEF Doc. No. 28]). It is true that a merger clause which states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). However, first, the stipulation of discontinuance is not an oral modification. It is a written document signed by all parties. Moreover, the stipulation of discontinuance is not an extrinsic document sought to contradict the assignment agreement. Rather, the stipulation is intrinsic to the agreement and is specifically referenced in the agreement. Thus, any claims that may flow from the stipulation agreement does not violate the merger clause of assignment agreement. Likewise, no clause of the assignment agreement itself contradicts the merger clause. This conclusion is compelled by the "no prejudice" language contained in the stipulation of discontinuance and the failure to specifically include "with prejudice" language either in the stipulation agreement or the assignment agreement.

The defendants insist that since the assignment agreement did not specifically state the claims concerning the transfer tax would survive closing then no such claims are now possible. The

assignment agreement contains four essential conditions. First, that Ariel would be released from all liability pursuant to the mortgage made by Maxem Capital Group in the amount of $16 Million. Second, the action would be discontinued pursuant to the stipulation of discontinuance. Third, the plaintiff would pay the sum of $7,270,165.50. Fourth, the plaintiff would deliver to defendant's counsel funds sufficient to pay all transfer taxes (see, Assignment of Membership Interests in Third St Development LLC and Gowanus GP Ventures LLC, ¶2 [NYSCEF Doc. No. 28]). Notwithstanding, the allowance afforded to pursue claims in this action, specifically, to recover the transfer taxes the assignment agreement required the plaintiff to pay, does not contradict the assignment agreement. Essentially, the assignment agreement authorized the plaintiff to pay the transfer taxes with the ability to try and recover them in another action. The existence of this action does not mean the defendants will be required to repay the plaintiff. It merely allows the plaintiff to try and recover those funds. As noted, the discrete language that the stipulation was without prejudice compels this result. It may be true the defendants were not aware of the words "without prejudice" contained in the stipulation of settlement. However, ignoring those words, expressly agreed upon by all parties, merely because of the merger clause in the assignment agreement would essentially negate the full thrust of the

stipulation of settlement. Clearly, a result where both agreements can be read in consonance with each other, even if such reading may negatively impact the defendants is far preferable than ignoring them altogether.

The defendants next argue that an earlier stipulation in open court on July 20, 2023 forecloses the claims sought here. However, that stipulation merely settled the action. As noted, any settlement is always considered without prejudice unless the language 'with prejudice' is specifically included.

Next, the defendants seek to dismiss claims asserted against STE Developer LLC on the grounds the operating agreement bars all such claims. The operating agreement states that "neither the Managing Member nor its Affiliated Persons shall be liable to the Company or its Members for any loss or damages resulting from errors in judgment or for any acts or omissions within the scope of the authority granted to the Managing Member under this Agreement or by law, unless such act or omission was determined by a final judgment of a court of competent jurisdiction to have resulted from an act of fraud, gross negligence, misappropriation of funds or theft" (see, Limited Liability Company Agreement for Third St Development LLC, ¶5.9 [NYSCEF Doc. No. 30]). Thus, the operating agreement permits suits against STE Developer LLC for fraud, gross negligence, misappropriation of funds and theft. Although the complaint alleges tortious interference and

"intentional conduct" there are no allegations STE Developer LLC committed fraud or theft or any misappropriation of funds. Thus, STE Developer LLC cannot be sued for mere intentional tortious conduct that does not involve fraud, theft or misappropriation of funds. The operating agreement also permits lawsuits for gross negligence. Gross negligence is defined as a failure to use even slight care or involves conduct that is so careless as to demonstrate a complete disregard for the rights of others (Greenwood v. Daily News, Inc., 8 Misc3d 1002A, 2005 WL 1389052 [Nassau County 2005]). Further, gross negligence may consist of intentional conduct (Sommer v. Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957 [1992], see, also, Seti v. Carnell Associates Inc., 218 AD3d 509, 193 NYS3d 80 [2d Dept., 2023]). Thus, at this stage of the litigation there are questions whether STE Developer LLC's conduct constituted gross negligence. Moreover, in order state a claim for tortious interference with prospective economic advantage the plaintiff must allege specific business relationships with an identified third party with which the defendant interfered (Mehrhof v. Monroe-Woodbury Central School District, 168 AD3d 713, 91 NYS3d 503 [2d Dept., 2019]). As a non-party to the contract there are surely allegations STE Developer LLC interfered with the contract and such interference harmed the plaintiff. Consequently, the motion seeking to dismiss the third cause of action against STE Developer LLC is

denied.

As noted, STE Developer LLC was not a party to any contract. The plaintiff argues that STE Developer LLC "controlled" the other signatories to the contract and therefore can be held liable for breach of contract as well. However, the complaint only alleges conclusory assertions that STE Developer LLC controlled any other entity to assert that STE Developer LLC was really the entity that made all the decisions. It is well settled that to demonstrate two corporations are really the same and that obligations flowing from one are incumbent upon the other a "heavy burden" of evidence must be presented (Etex Apparel Inc., v. Tractor International Corp., 83 AD3d 587, 922 NYS2d 315 [1st Dept., 2011]). The Second Department in explaining the definition of an 'alter ego entity' held that a party must demonstrate that one entity controls the "day to day" activities of the other (Constantine v. Premier Cab Corp., 295 AD2d 303, 743 NYS2d 516 [2d Dept., 2002]). The language "day to day" activities was borrowed from another area of corporate law, namely the doctrine of piercing the corporate veil. The standard espoused in that context was that a parent corporate entity's veil could be pierced if it controlled the daily activities of the subsidiary such that it was "the true prime movers behind the subsidiary's actions" (Pebble Cove Homeowners' Association Inc. v. Fidelity New York FSB, 153 AD2d 843, 545 NYS2d 362 [2d Dept.,

1989]). Thus, the court held that joint stock ownership and interlocking directors and officers was insufficient to fuse the two companies together to pierce all corporate veils, rather control of the daily activities was required. Whether one entity controls another's day to day activities is obviously a factual question. Therefore, in Mournet v. Educational & Cultural Trust Fund of Electrical Industry, 303 AD2d 474, 756 NYS2d 433 [2d Dept., 2003], the court concluded that where insufficient evidence was presented whether two companies were alter egos of each other it was proper to resolve that issue in a motion for summary judgement.

In this case other than describing the corporate structure, the complaint does not allege any facts at all demonstrating such control by the parent entity STE Developer LLC. Therefore, the motions seeking to dismiss the first two causes of action against STE Developer LLC is granted.

The second cause of action alleges a breach of the Implied Covenant of good faith and fair dealing. That cause of action is duplicative of the breach of contract claim (Salamon v. Citigroup Inc., 123 AD3d 517, 999 NYS2d 21 [1st Dept., 2014]). Thus, the motion seeking to dismiss that cause of action as to all defendants is granted.

The motion seeking to dismiss the third cause of action for tortious interference with economic advantage is dismissed as to

all parties except STE Developer LLC. A party to any contract cannot be liable for the tortious interference with the breach of such contract.

Lastly, concerning the fourth cause of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendants failed to honor the terms of the operating agreement entered into between the parties. Consequently, the motion seeking to dismiss the fourth cause of action and the fifth cause of action is granted.

Thus, only the first cause of action remains against defendant PCLING LLC and Ben-Yosef and only the tourtious interference claim remains against STE Developer LLC.

So ordered.

ENTER:

DATED: May 7, 2024
Brooklyn NY

Hon. Leon Ruchelsman
JSC