SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** **IAS MOTION 54EFM**
Justice

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OCS DEVELOPMENT GROUP, LLC

Plaintiff,

- v -

MIDTOWN FOUR STONES LLC,

Defendant.

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INDEX NO. 653525/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
were read on this motion to DISMISS.

Upon the foregoing documents, it is ORDERED that the motion to dismiss by defendant Midtown Four Stones LLC (Midtown) pursuant to CPLR 3211(a)(1) and (7) is granted. The parties' operating agreement (Affidavit in Support [Supp], Ex 2) and the "Application for Finance Letter" (*id.*, Ex 3) conclusively defeat the causes of action asserted by plaintiff OCS Development Group, LLC (OCS) (*see Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431 [1st Dept 2016] [a written agreement that unambiguously contradicts the complaint's allegations is documentary evidence compelling dismissal]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2014]).

Background

Lex 47th Development LLC (the Company) was formed to develop, construct and operate a condominium building in Manhattan (the Project). On May 5, 2017, OCS, as the managing member, and Midtown, as the majority member, executed the Second Amended and Restated Operating Agreement (Operating Agreement) of the Company (Supp, Ex 2), which governs the parties' relationship and sets forth their responsibilities. Among its "critical responsibilities" as managing member, OCS was required to "seek out Construction Lenders to provide a Qualified Construction Loan" (Supp, Ex 1 [Complaint] ¶ 23).

The Operating Agreement defines a Construction Loan Commitment Letter (CLCL) as "a letter agreement or signed term sheet between a Construction Lender and the Company containing a firm commitment by such Construction Lender, subject only to standard market conditions, of its intentions to provide a Qualified Construction Loan to the Company for the Project" (Supp, Ex 2 at 5 [emphasis added]). It further provides that OCS would be in default if a CLCL was not signed by the parties "on or prior to July 31, 2017 or on or prior to August 31, 2017 if [Midtown] so consents in writing to such extension" (Supp, Ex 2 at § 7.12[a][v]) or if the construction loan closing date was not on or before September 30, 2017 (*id.* at § 7.12[a][vi]). Upon such defaults, the Operating Agreement authorized Midtown to remove OCS as the managing member by written notice and to cause the Company to redeem its membership interests at a price equal to the

"aggregate unreturned Capital Contributions" that OCS had made, which was $1.00 at the time (*id.* at §§ 7.13[b], 7.12[b]; Schedule C).

On June 16, 2017, OCS and Midtown executed an "Application for Finance Letter" with Santander Bank (Santander Letter). The letter explicitly states it is "provided for discussion purposes only and does not constitute an offer, agreement or commitment to lend or borrow" (Supp, Ex 3 at 1 [emphasis added]). At the bottom of each of its nine pages, the Santander Letter's footer designates that it is "For Discussion Purposes Only" (*id.* at 2-9). The letter makes clear that "if no commitment is issued or if the terms of a commitment are materially different" then the $100,000 deposit would be refundable (*id.* at 7) and immediately above the signature lines reconfirms that it "is not a commitment to lend" (*id.* at 8).

On October 6, 2017, Midtown informed OCS that it was removing it as managing member based on defaults pursuant to §§ 7.12(a)(v) and (vi) of the Operating Agreement (Supp, Ex 4). Later that month, Midtown notified OCS that it was exercising its purchase right pursuant to § 7.12(b) for $1.00.

In June 2018, purportedly pursuant to § 7.07 of the Operating Agreement, OCS commenced an arbitration before JAMS, asserting three claims. OCS first alleged that Midtown breached the Operating Agreement by (1) failing to submit "deadlocked disputes to a binding 'mediated negotiation for resolution,'" (2) refusing to execute loan documents and (3) removing OCS from the Company (Supp, Ex 6 ¶¶ 39-41). Second, it pled a claim for unjust enrichment because "through its unreimbursed efforts in connection with the

joint venture, OCS awarded a benefit to [Midtown] to its own detriment" and equity and good conscience required restitution (*id.* ¶¶ 45-46). Third, OCS maintained that Midtown breached the implied covenant of good faith and fair dealing by "refusing to execute the Qualified Construction Loan, [purporting] to remove OCS as Managing Member, and [purporting] to buy out OCS' interest in the joint venture for one dollar, depriving OCS of the benefits of the Operating Agreement to which it was entitled" (*id.* ¶ 50). After Midtown informed OCS that it would seek a stay of the arbitration based on lack of any agreement to arbitrate, OCS withdrew the arbitration demand and, weeks later, commenced this action.

In this action, OCS alleges that Midtown was uncooperative and that despite the fact that "by June 2017, OCS was able to obtain a commitment from Santander" to provide a qualified construction loan, which "commitment was memorialized in a June 16, 2017 term sheet (Term Sheet)," when it came time to finalize the loan and move forward Midtown refused (Complaint ¶¶ 6-8). Like in its earlier arbitration demand, OCS asserts three causes of action. Defendant's motion to dismiss those causes of action is granted and plaintiff's cross-motion to compel arbitration is denied.

Analysis

Arbitration

At the outset, there is no contractual basis for arbitration of the parties' disputes (*see also* discussion of §§ 7.07 and 7.02 of the Operating Agreement *infra*). Even if there were, OCS waived the right to arbitrate by commencing this action and not seeking to compel

arbitration (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]; *Black Rhino Invs. LLC v Wilson*, 160 AD3d 531, 532 [1st Dept 2018] [rejecting plaintiff's claim, made in response to defendant's motion to dismiss, that the controversy had to be arbitrated]).

Breach of Contract

OCS' first cause of action is for breach of contract. It maintains that it performed under the Operating Agreement but that Midtown breached by (1) ignoring the provision that requires that "deadlocked disputes" be submitted to binding mediated negotiation (¶ 49), (2) purporting to remove OCS from the Company and purchasing its interests for $1 (¶ 51), (3) refusing to reimburse OCS for its out-of-pocket expenses in connection with its development efforts (¶ 52) and (4) refusing "to consummate the loan transaction described in the Term Sheet" (¶ 50). Each and every one of these claims is defeated by the express, explicit and unequivocal terms of the Operating Agreement.

Deadlock Mediation

Section 7.07 of the Operating Agreement requires that the parties "attempt in good faith to resolve any deadlock arising under any of the matters requiring their mutual agreement pursuant to Section 7.02 (each a 'Dispute')" and that if a Dispute was not resolved "in the ordinary course of business" and continued for 30 days, either "may" give the other notice of its desire to initiate a mediated negotiation (Supp, Ex 2 at 26 [emphasis added]). The parties were to then "appoint a mutually agreeable person" as mediator, who was to make a determination regarding the Dispute within five days of appointment (*id.*). Midtown's refusal to submit to OCS' arbitration, as a matter of law, is not a breach of the

Operating Agreement. When OCS commenced its arbitration, it was no longer a member and the parties, at that point, were not operating in the "ordinary course of business" and "deadlocked" about how to proceed with any matter requiring their mutual agreement pursuant to § 7.02. The arbitration, moreover, far exceeded the scope of § 7.02 because that section contemplated deadlock on an issue that was necessary for ongoing business and the arbitration sought damages against Midtown for its alleged improper removal of OCS from the Company. Nor was Midtown required to implement the deadlock procedure with respect to any dispute (*see* O'Sullivan Affidavit ¶ 18) as the provision is permissive. It uses "may" and not "must" or "shall" (*see* Supp, Ex 2 at § 7.07).

Purchase of OCS' Interests

Sections 7.12(a) and (b) authorized Midtown to purchase OCS' interests in the Company based on its default because a CLCL was never signed. OCS urges that in "drafting the Operating Agreement, the parties understood that a CLCL "need not be a binding agreement" and that a "conditional term sheet was sufficient" (Opp Mem at 3, 14). It further maintains that the Santander Letter was a "final term sheet," that discovery will show that the parties were aware that no further documentation regarding Santander's commitment would be forthcoming other than the final loan documents and that Midtown treated the letter as a CLCL (Opp Mem 6-7). Its arguments are unavailing. The sophisticated parties here chose to define CLCL as "a letter agreement or signed term sheet . . . containing a firm commitment" by a construction lender (Supp, Ex 2 at 5 [emphasis added]). If that is not what they intended, they would not have opted for that very specific

unambiguous language. The fact that the Santander Letter, which made explicit that there was no commitment to lend, was unenforceable against the lender (Opp Mem at 13-14) is the very basis of the default. Additionally, OCS did not allege that it ever made the capital contribution that it was required to make on "or prior to the CLCL Signing Date" (Supp, Ex 2 § 3.02[a]).

It does not matter that Midtown did not immediately declare a default (*id.* § 12.11 ["no . . . delay in exercising any right, remedy, power or privilege" shall operate as a waiver]).

Reimbursement

The Operating Agreement specifically addresses reimbursement of Pre-Development Services and Costs. It provides that "no reimbursement or other payment will be made to [OCS] in respect of such Pre-Development Services or payments of [OCS] Pre-Development Costs made by it" (Supp, Ex 2 at § 7.09[c]; *see* also § 12.01 [costs in connection with the Operating Agreement "shall be paid by the party incurring such costs and expenses"]).

Section 4.02 ("No Personal Liability") of the agreement, which provides that "no Member will be obligated personally for any debt, obligation or liability of the Company or other Members, whether arising in contract, tort or otherwise, solely by reason of being a Member," also precludes recovery against Midtown.

Failure to Consummate Loan

Claims based on Midtown's lack of cooperation, which relate to the closing of the loan, are a red herring. Based on the terms of the Operating Agreement set forth above, OCS was in default and Midtown was authorized to purchase its interests in the Company because there was no CLCL.

In the end, OCS, fully counseled, entered into the Operating Agreement and it is bound by the agreement's clear terms.

Unjust Enrichment

Because a contract governs here, there is no viable claim for unjust enrichment (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Additionally, as set forth above, there is no basis for holding Midtown, a member of the Company, personally responsible for benefits or expenses (Supp, Ex 2 § 4.02).

Breach of the Implied Covenant of Good Faith and Fair Dealing

Finally, the cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed because, as set forth above, Midtown's actions were all specifically authorized by the Operating Agreement (*see Korangy v Malone*, 161 AD3d 645 [1st Dept 2018] [no breach of implied covenant where operating agreement authorized conduct]; *Phoenix Capital Invs. LLC v Ellington Mgt. Group, LLC*, 51 AD3d 549, 550 [1st Dept 2008]).

Accordingly, it is

ORDERED that plaintiff's cross-motion to compel arbitration is denied; it is further

ORDERED that defendant's motion is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/11/2019
DATE

JENNIFER G. SCHECTER, J.S.C.

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