Invs

Supreme Court of New York, New York County

January 18, 2022, Decided; February 9, 2022, Published

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Reporter
2022 NYLJ LEXIS 84 *

Parkmerced Invs. LLC v. WeWork Cos. LLC

(Parkmerced Invs. LLC v. WeWork Cos. LLC, NYLJ, Feb. 9, 2022 at p.17, col.1)

Core Terms

term sheet, alleges, non-binding, damages, good faith, terms, binding, parties, fair dealing, covenant, breach of contract claim, liquidated damages, redevelopment, promissory estoppel, motion to dismiss, bad faith, promise

Judges: [*1] Judge: Justice *Andrea Masley*

Opinion

This action involved redevelopment of a neighborhood in San Francisco. Plaintiff alleged that defendant WeWork, which provides shared office space and related services to business and individuals, entered into an agreement containing material terms for defendant's investment in the project. Plaintiff argued that defendant paid it a $20 million nonrefundable exclusivity fee for the right to participate in the redevelopment but that defendant then acted in bad faith by "intentionally and proactively" misleading plaintiff by planning to terminate the transaction. After defendant repudiated the agreement, plaintiff contended it took it an additional year to close an investment transaction for the property, costing plaintiff millions in interest, expenses, and other damages. The court granted defendant's motion to dismiss the complaint, finding that there was no breach of contract as the parties' document provided that the term sheet was non-binding; no breach of the covenant of good faith and fair dealing as plaintiff failed to allege specific bad faith by defendant; and no promissory estoppel as the term sheet clearly provided that it was a "non-binding indication **[*2]** of terms."

Full Case Digest Text

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, 23 were read on this motion to/for DISMISS.

DECISION + ORDER ON MOTION Upon the foregoing documents, it is Defendant WeWork Companies LLC (WeWork) moves pursuant to *CPLR 3211 (a) (1)* and *(7)* to dismiss the complaint. Plaintiff Parkmerced Investors, LLC (Parkmerced) alleges (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) promissory estoppel. (NYSCEF Doc. No.

[NYSCEF] 6, Complaint

43-59.)

The following facts are drawn primarily from the complaint and are assumed to be true for purposes of this motion. (See *Kronos, Inc. v. AVX Corp., 81 NY2d 90, 92 [1993]*.) Additional facts are drawn from the documentary submission, the Term Sheet.

This case involves a redevelopment of the Parkmerced neighborhood in San Francisco, California, originally designed in the early 1940s, consisting of approximately 3,221 residences and over 9,000 residents. (Id.

10.) WeWork is a corporation that provides shared office space and related services to businesses and individuals. (Id.

15.) Plaintiff alleges that in 2015 WeWork's CEO, Adam Neumann, contacted Robert Rosania, the founder **[*3]** of Maximus Real Estate Partners, which was the company leading plaintiff's redevelopment. (Id.

14, 19.) Plaintiff alleges that Neumann urged for WeWork to participate in the redevelopment project. (Id.

17.)

Plaintiff alleges that WeWork and plaintiff met numerous times to discuss the details of WeWork's investment. (Id.

21-22.) On September 18, 2018, plaintiff and WeWork allegedly entered into an agreement that contained all the material terms for WeWork's investment. (Id.

24.) This agreement was a "non-binding indication of terms for a preferred equity investment (the 'Preferred Investment')" of $450 million. (NYSCEF 16, Term Sheet at 1.) The Term Sheet was "non-binding," except for the paragraphs captioned "Costs and Expenses", "Confidentiality," "Attorney's Fees," "Exclusivity," "Miscellaneous," and "Closing Date," which were binding. (Id. at 9.)

Plaintiff ended its discussions with potential investors, as required by the agreement and terminated an existing term sheet with a different entity. (NYSECEF 6, Complaint at

25, 26.) WeWork paid plaintiff a $20 million nonrefundable exclusivity fee for the right to participate in the redevelopment. (Id.

27.) Plaintiff relies on the agreement's **[*4]** requirement that WeWork negotiate in good faith "to expeditiously close the Preferred Investment." (Id.

32.) Plaintiff contends that instead WeWork acted in bad faith by "intentionally and proactively" misleading plaintiff by planning to terminate the transaction. (Id.

37-38.) On November 1, 2018, WeWork repudiated the agreement. (Id.

40.) Plaintiff alleges that, following WeWork's breach, it took plaintiff "an additional year to close an investment transaction for the property," which cost plaintiff millions in interest, out-of-pocket expenses, and other damages. (Id.

42.)

To prevail on a *CPLR 3211 (a)(1)* motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v. Filmat Futures USA, 290 AD2d 383, 383 [1st Dept 2002]* [citation omitted].) "A cause of action may be dismissed under *CPLR 3211 (a)(1)* 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v. Cyclops Prod., Inc., 120 AD3d 436, 438 [1st Dept 2014]* [citation omitted].) "The

documents submitted must be explicit and unambiguous." (*Dixon v. 105 W. 75th St. LLC, 148 AD3d 623 [1st Dept 2017]* [citation omitted].)

On a motion to dismiss pursuant to *CPLR 3211 (a)(7)*, the court must "accept the facts as alleged in **[*5]** the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez, 84 NY2d 83, 87-88 [1994]*.) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v. Lacher, 212 AD2d 487, 487 [1st Dept 1995]* [citation omitted].)

Breach of Contract

Plaintiff alleges WeWork breached the binding Term Sheet by failing to fund the $450 million Preferred Investment on the specified Closing Date. (NYSCEF 6, Complaint

2, 3, 46.) Plaintiff alleges damages caused by the additional year to close the investment transaction to acquire the property, interest, and out of pocket expenses. (Id.

42.)

WeWork argues the Term Sheet explicitly states it was generally non-binding. Further, while the exclusivity fee section was binding, it specifically states that WeWork may decline to pursue the transaction. Finally, the $20 million exclusivity fee was to serve as liquated damages.

The elements of a breach of contract claim are: (1) existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of contractual obligations, **[*6]** and (4) resulting damages. (*Harris v. Seward Park Housing Corp., 79 AD3d 425, 426 [1st Dept 2010]* [citation omitted].) The court will enforce a clear and complete written agreement according to the plain meaning of its terms, and not look to extrinsic evidence to create ambiguities within the four corners of the contract. (*New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc., 28 AD3d 175, 177-78 [1st Dept 2006]*.) "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Greenfield v. Philles Records, Inc., 98 NY2d 562, 569 [2002]* [citations omitted].) Moreover, the court considers the context of the clauses when reading the contract as a whole. (*Waverly Corp. v. City of New York, 48 AD3d 261, 264 [1st Dept 2008]*.) A term sheet is non-binding when it sets forth the general intent for the parties to engage in good faith discussions and only be bound by a future written agreement. (*Keitel v. E*TRADE Fin. Corp., 153 AD3d 1181, 1181 [1st Dept 2017]*, lv denied *31 NY3d 903 [2018]*.)

In its first paragraph, the Term Sheet provides that it is a "non-binding indication of terms for a preferred equity investment." (NYSCEF 16, Term Sheet at 1.) In a paragraph entitled "Non-Binding," the Term Sheet states that

"Maximus, GMF and WeWork understand and agree that this term sheet is provided solely for discussion purposes and is not a commitment or agreement of any kind on the part of WeWork or GMF and shall not be relied upon as such. The terms herein are indicative, not intended to **[*7]** be all-inclusive, and are subject to the execution and delivery of binding definitive transaction documents. Notwithstanding the foregoing, Maximus, GMF and WeWork acknowledge and agree that the paragraphs captions 'Costs and Expenses', 'Confidentiality', 'Attorney's Fees', 'Exclusivity', 'Miscellaneous', 'Closing Date', and this paragraph shall be binding agreements of the parties."

(Id. at 9).

Plaintiff contends that because the "Closing Date" provision was binding, WeWork was therefore bound to close and fund at least $275 million of the $450 million Preferred Investment on October 31, 2018. (Id. at 1 and 8.)

The court looks at the contract provisions in context. The document clearly provides that the Term Sheet is non-binding, which is emphasized at the beginning and the end of the Term Sheet. Plaintiff attempts to extend the binding nature of the Closing Date to funding the proposed transaction. However, the Term Sheet sets October 31, 2018 as the goal by which the parties either proceed with the deal or walk away. The Term Sheet is also clear that a binding contract will follow. Finally, plaintiff has not identified an ambiguity precluding dismissal.

Next, WeWork contends the "Exclusivity" **[*8]** clause caps plaintiff's recovery at $20 million if the transaction did not close. Plaintiff argues the "Exclusivity Fee" does not bar plaintiff from recovering actual damages.

The Exclusivity clause states in part:

"[e]xcept as set forth in the immediately preceding sentence, if the Preferred Investment fails to close by the Outside Date for any reason, or no reason, of if WeWork fails to timely pay the second installment of the Exclusivity Fee, then Maximus shall be deemed to have earned an amount equal to the entire Exclusivity Fee as liquidated damages, and not as a penalty, the parties agreeing that the damage to be incurred by Maximus for the failure of the transaction to proceed or to be consummated by [the] Outside Date would be difficult to compute."

(Id. at 8.)

"[O]rdinarily plaintiffs are awarded either actual damages or liquidated damages, but not both when the predicate for the awards is the same." (*Creative Waste Management, Inc. v. Capitol Environmental Services, Inc., 495 FSupp2d 353, 359 [SDNY 2007]*.) Here, the provision identifies the Exclusivity Fee as liquidated damages for the very breach for which plaintiff seeks recovery in this action: failure to "proceed" or "consummate" in the Term Sheet compared to failure to negotiate or close in the complaint. (NYSCEF 16, Term **[*9]** Sheet at 8; NYSCEF 6, Complaint

28, 51-52.) The Term Sheet explains why a liquidated damages provision was necessary: "the parties agree[d]...the damage to be incurred by Maxim us for the failure of the transaction to proceed or to be consummated by Outside Date would be difficult to compute." (NYSCEF 16, Term Sheet at 9.) However, plaintiff opposes reading this provision as a liquidated damages clause that bars all damages for any breach of the Term Sheet. Such a reading of the Exclusivity Provision, according to plaintiff, would render meaningless the remainder of the Term Sheet, such as the "Attorney's Fees" provision.

The court agrees with plaintiff that "[t]here is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner." (*J. E. Hathaway & Co. v. United States, 249 US 460, 464 [1919]*; see *Town of North Hempstead v. Sea Crest Const. Corp., 119 AD2d 744, 746 [2d Dept 1986]* [clause providing for liquidated damages for "delays" did not bar damages for defendants' "abandonment of the contract"].) Indeed, the parties here did so agree; there is a separate provision for attorneys' fees and WeWork seeks them here. (NYSCEF 4, WeWork's MOL at 13.) The Exclusivity **[*10]** Fee compensates plaintiff for the possibility of the Proposed Transaction not closing

within the forty-three day period while plaintiff was not pursuing other investors, while the Attorney's Fees provision may be awarded to either party in the event that a party commences an action and prevails. Clearly, reading the Exclusivity Fee as a liquidated damage does not render the Attorney's Fees provision meaningless as they are two independent provisions that peacefully coexist.

For all of these reasons, WeWork's motion to dismiss the first cause of action is granted.

Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff alleges WeWork did not work in good faith by refusing to negotiate and finalize the transaction outlined in the Term Sheet. (NYSCEF 6, Complaint U 52.) Plaintiff insists that this claim is not duplicative of the breach of contract claim.

WeWork argues there was no breach of the covenant of good faith and fair dealing because the Term Sheet was non-binding, the plaintiff's allegations are vague, and it is duplicative of the breach of contract claim.

"The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that 'neither party **[*11]** shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (*Moran v. Erk, 11 NY3d 452, 456 [2008]* [citation omitted].) "While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." (*Fesseha v. TD Waterhouse Inv. Services, Inc., 305 AD2d 268, 268 [1st Dept 2003]*.) A cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained if it is based on the same facts relied on for a breach of contract claim and seeks the same damages. (*MBIA Ins. Corp. v. Merrill Lynch, 81 AD3d 419, 420 [1st Dept 2011]*.) Further, plaintiff must allege facts that the defendant acted in bad faith. (*Duration Mun. Fund, LP. v. J.P. Morgan Sec, Inc., 77 AD3d 474, 475 [1st Dept 2010]*.)

Here, plaintiffs allegations are based on the same facts as the breach of contract claim: that WeWork failed to complete the transaction. Additionally, plaintiff fails to allege any specific bad faith by WeWork. Plaintiff vaguely claims WeWork refused to negotiate in good faith which is hopelessly conclusory. (NYSCEF 6, Complaint at U 52.) Even when viewing the complaint in the light most favorable to plaintiff, the court cannot sustain plaintiff's bare legal conclusions which are contradictory. Plaintiff alleges **[*12]** that WeWork was determined to be involved and viewed itself as necessary for the property's development prior to the signing of the Term Sheet (Id.

14, 20-23) but plaintiff is silent as to what WeWork did or did not do once the Term Sheet was signed.

The second cause of action is dismissed.

Promissory Estoppel

Plaintiff alleges that it reasonably relied upon WeWork's promise to enter into the transaction in the Term Sheet and suffered as a result of WeWork's refusal to close. WeWork maintains that plaintiff failed to establish reasonable reliance.

To state a claim for promissory estoppel under New York law, a party must allege: "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." (*MatlinPatterson ATA Holdings LLC v. Fed. Express Corp., 87 AD3d 836, 841-42 [1st Dept 2011]*, lv denied *21 NY3d 853 [2013]*.) Detrimental reliance is a vital element and must be adequately pled. (*Schroederv Pinterest Inc., 133 AD3d 12, 32 [1st Dept*

2015] [citations omitted].) A claim for promissory estoppel is not viable where the alleged conduct is governed by a contract and plaintiff fails to allege a duty independent of the contract. (*Coleman & Assoc. Enterprises, Inc. v. Verizon Corp. Services Group, Inc., 125 AD3d 520, 521 [1st Dept 2015]*.)

Here, the alleged promise is that plaintiff and WeWork would consummate the transaction in the Term Sheet. The opening sentence of the Term sheets **[*13]** clearly provides that it is a "non-binding indication of terms." (NYSCEF 16, Term Sheet at 1.) The Term Sheet states clearly that it "is provided solely for discussion purposes and is not a commitment or agreement of any kind on the part of WeWork or GMF, and shall not be relied upon as such." (Id. at 9.) Plaintiff fails to explain how or why the non-binding language of the Term Sheet is overruled. Likewise, plaintiff fails to explain why its reliance is reasonable when the Term Sheet prohibits reliance. Finally, plaintiff's reliance on WeWork's promise to complete the transaction is duplicative of the breach of contract claim. Therefore, plaintiff's third cause of action is dismissed.

ORDERED that the WeWork's motion to dismiss is granted and the complaint is dismissed.

CHECK ONE: X CASE DISPOSED NON-FINAL DISPOSITION X GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Dated: January 18, 2022

New York Law Journal

Cara Meyer

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