JLO Dev. Corp. v. Amalgamated Bank

Supreme Court of New York, Nassau County

July 15, 2022, Decided

Index No.: 615682/21

Reporter
2022 N.Y. Misc. LEXIS 6061 *

JLO DEVELOPMENT CORP., Plaintiff, -against- AMALGAMATED BANK and AMALGAMATED BANK AS TRUSTEE OF LONGVIEW ULTRA CONSTRUCTION LOAN INVESTMENT FUND, Defendants.

Core Terms

subdivided, email, cause of action, termination, terms, parties, breach of contract, subdivision

Judges: **[*1]** Present: HON. RANDY SUE MARBER, J.S.C.

Opinion by: RANDY SUE MARBER

Opinion

Upon the foregoing papers, the motion by the Defendants, AMALGAMATED BANK and AMALGAMATED BANK AS TRUSTEE OF LONGVIEW ULTRA CONSTRUCTION LOAN INVESTMENT FUND (collectively referred to as "Amalgamated Bank"), seeking an Order, pursuant to *CPLR §3211(a)(1)* and *(a)(7)*, dismissing the Plaintiff's complaint, is determined as provided herein.

The following facts are taken from the complaint and are presumed, for the purposes of this motion to dismiss, to be true (*Joseph v Fensterman, 204 AD3d 766, 167 N.Y.S.3d 106 [2d Dept 2022]*).

Factual Background

On or about August 4, 2014, the Plaintiff, JLO DEVELOPMENT CORP. ("JLO"), and the Defendant, Amalgamated Bank, entered into a Consulting Agreement (the "Agreement") pursuant to which the Plaintiff was to provide the Defendant with asset and property management services related to the development of several properties (the "Projects"), as set forth in Schedule A to the Agreement. The Agreement contained a merger clause which expressly stated that its terms could not be changed or modified orally.

Nonetheless, sometime during the latter portion of 2014, the Defendant approached the Plaintiff to request that it provide services in addition to those delineated in the Agreement. The services **[*2]** were to be provided in relation to a project located at 2657 E. 66th Street in Brooklyn (the "Mill Basin Project"). The parties, however, had conversations concerning the Mill Basin Project and did not reduce these conversations to writing. The Defendant requested, and the Plaintiff agreed, to obtain all the necessary permits pursuant to the requirements of New York City and the New York State Department of Environmental Conservation that would lead to the subdivision of the Mill Basin property into residential building lots that could be sold on a retail basis for their maximum individual retail prices. In exchange for its work on the Mill Basin Project, the Defendant offered to the Plaintiff a non-specific percentage of the future profits that the Defendant would realize from the sale of the subdivided individual units. While again, these discussions were conducted orally and without reducing the agreement for the Mill Basin Project to writing, the Plaintiff believed Defendant's representations that the terms of the Mill Basin Project would eventually be memorialized.

Based on these representations, Plaintiff undertook the Mill Basin Project. The property was in great disrepair, choked **[*3]** with garbage and overgrown, having been

ravaged by Superstorm Sandy. The waterfront, bulkheads and docks required complete overhauls. In addition, hundreds of violations that had been issued by the City and State over the years needed to be cleared, site plans had to be drafted and approved, easements for water and utilities mapped and installed, dock constructions realized and street numbers arranged. The Plaintiff commenced all this work.

On or about November 6, 2017, the Defendant sent Plaintiff an email (the "November 6 email") which purported to memorialize the agreement pertaining to the Mill Basin Project. The email reads:

> This will serves as an additional amendment to the Consulting Agreement dated 9/4/14 (the "Agreement") between Amalgamated Bank (the "Bank") as Trustee for the LongView Ultra Construction Loan Investment Fund and JLO Development Corp to provide certain consulting and asset management services to the Fund. Schedule A of the Agreement is hereby amended to include an additional project known to be Project G to be identified and described as "66th Street" or "Mill Basin" owned by a subsidiary of the Fund.
>
> As you know, we have had a verbal agreement for your role **[*4]** and services since I engaged you in 2014 to manage the process of obtaining all governmental approvals, including but not limited to DEC and New York City approvals to clean up and subdivide the property into a minimum of five separate building lots which would then be sold individually to third party purchasers.
> Under our agreement, it was agreed that you would not receive any monthly asset management fees and your entire compensation would be "success based". We agreed that if you were to be successful in obtaining all government approvals and successfully subdivided and subsequently sold a minimum of five building lots then you would be entitled to 15% of the gross profit.
>
> For ease of calculation, the 15% is based on the differential between the aggregate gross sales prices of all the lots and $2.9MM which was the appraised value of the property when you commenced this effort in 2014. The entirety of your compensation will be payable from the sale of the final lot. In other words, even if all the lots are subject to contracts of sale, the Fund will receive all of the net sale proceeds from the first lots and your compensation will be paid in full upon closing of the final lot sale. **[*5]**
>
> It is further agreed that since you have already accomplished the majority of the work required to effect the subdivision of the Property the obligation to pay your compensation as set forth herein will survive any termination of the Agreement by the Bank.

In or about May 2018, Defendant advised Plaintiff that it would be terminating the Agreement. Moreover, instead of continuing with the plan to subdivide the Mill Basin Property, Defendant elected to sell the property as is for $2,000,000. The Plaintiff believes that had Defendant allowed Plaintiff to complete the agreed upon plan to subdivide and sell the individual properties, Defendant would have been able to sell the subdivided properties for over $6,000,000.[1]

The Plaintiff then commenced the instant action, asserting causes of action for (i) breach of contract, (ii) detrimental reliance, (iii) promissory estoppel, (iv) quantum meruit and (v) unjust enrichment related to the Defendant's purported breach of the Agreement.

Motion to Dismiss

The Defendant now moves to dismiss the complaint pursuant to *CPLR §3211(a)(1)* and *(a)(7)*. As a threshold matter, the Court notes that the Plaintiff has sued the Defendant in two separate capacities: in its individual capacity **[*6]** and in its capacity as Trustee of the Investment Fund. The Defendant has moved to dismiss the complaint insofar as it is asserted against it in its individual capacity based on a clause in the Agreement that specifically states that the Agreement was between Plaintiff and Defendant insofar as Defendant was acting as Trustee for the Fund, and not in its individual capacity. The Plaintiff has not opposed this branch of Defendant's motion. Accordingly, the complaint is dismissed, in its entirety, insofar as it is asserted against the Defendant in its individual capacity.

The Court further notes that Plaintiff has specifically consented to the dismissal of its second cause of action, for detrimental reliance, which is not a recognized cause

---

[1] The Court notes that the complaint is mostly silent on whether the remediation project necessary for subdividing the properties was completed. The Defendant asserts, however, that should the Court deny this motion to dismiss, it will establish that the Mill Basin Project was nowhere near completion and would have required the investment of substantial additional monies to reach subdivision.

of action in the State of New York (*see, e.g.,* McGowan v Clarion Partners, 2019 N.Y. Misc. LEXIS 3558, 2019 WL 2745056 (New York County Supreme Court 2019).

The Court will consider the remaining causes of action asserted against the Defendant in its capacity as Trustee for the Fund.

Breach of Contract

The Plaintiff asserts, for its breach of contract cause of action that (1) for good and valuable consideration, Plaintiff contracted with Defendant to manage the Mill Basin Project and obtain the necessary permits and approvals to subdivide the property for their **[*7]** maximum individual retail price; (2) that Defendant promised Plaintiff that at the conclusion of the Mill Basin project, the property would be subdivided, the parcels sold at their highest retail sale prices and that Plaintiff would receive 15% of the profit realized from the sale of the subdivided properties; (3) that, even though Plaintiff had spent years performing the work necessary to result in the subdivision, "on the very eve of approval" (Complaint ¶40), Defendant unilaterally decided to breach the agreement, end the Mill Basin Project, and sell the property as a single parcel for less than fair market value. Plaintiff claims damages from the breach of at least $500,000, which it contends is the value of the services it provided on the Mill Basin Project.

The Defendant argues that Plaintiff's cause of action for breach of contract must be dismissed because (a) the alleged oral agreement between the parties in 2014 that led Plaintiff to undertake the Mill Basin Project is unenforceable; (b) the agreement as reflected in the November 6 email is unenforceable because it lacks consideration; and (3) even assuming the agreement as reflected in the November 6 email was enforceable, **[*8]** it does not contain any promises or representations that at the conclusion of the Mill Basin Project, the property would indeed by subdivided or that the Property would not be sold as one parcel.

The Plaintiff's claim for breach of contract is based on the oral agreement it entered into with Defendant in 2014 as memorialized in the November 6 email. Here, while perhaps unusual, it is clear that the parties agreed, both orally in 2014 and then as memorialized in the November 6 email, to a course of conduct that encouraged Plaintiff to undertake the Mill Basin Project. Moreover, it is clear from the plain terms of the November 6 email that the oral agreement and subject email were intended to amend the Agreement. The question before this Court is whether Defendant's course of conduct constitutes a breach of that Agreement as amended. The Court concludes that the Defendant's conduct does not.

In considering the terms of a contract, it is axiomatic that when parties set down their agreement clearly and completely, that contract should be enforced according to its terms (*see, e.g.,* WWW Assoc. Inc. v Giacontieri, 77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]). A court may not, under the guise of interpreting a contract, add or excise terms or distort the meaning to **[*9]** those terms to fashion a new or different contract between the parties (*see, e.g.,* Teichman v Community Hosp. of Western Suffolk, 108 A.D.3d 9, 966 N.Y.S.2d 108 [2d Dept 2013]). Rather, the court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which an aggrieved party failed to insert when it initially drafted the contract (*see, e.g.,* Wells Fargo Bank, N.A. v Meyers, 108 AD3d 9, 966 N.Y.S.2d 108 [2d Dept 2013]).

The Agreement plainly states under section 2, the "Term and Termination of Agreement", that Plaintiff's services shall commence and terminate on the dates set forth with respect to each Project as set forth in Schedule A. However, there was no termination date set forth in the November 6 email concerning the Mill Basin Project. Nonetheless, the Mill Basin Project could still be terminated according to the terms of the Agreement, which specifically state in §2(a) that the "Agreement may be terminated at any time" by Plaintiff or Defendant with "ninety (90) days written notice to the other party, at which time services should cease." Additionally, while the Agreement states in §2(e) that "the termination or expiration of this Agreement shall not relieve the party from obligations that have accrued pursuant to the terms," the Defendant **[*10]** had no remaining obligations to Plaintiff for the work done on the Mill Basin Project.

This is because Plaintiff specifically waived its right to compensation for the work it performed on the Mill Basin Project by agreeing that it "would not receive any monthly asset management fees" and that its "entire compensation would be success based." Accordingly, to the extent Plaintiff alleges it its complaint that it is entitled to $500,000 for the "time and effort" it invested in managing the Mill Basin Project, the November 6 email clearly states it is not entitled to that compensation. Rather, Plaintiff's compensation was tied to the success of the Mill Basin Project and was not to

be paid until after the closing of the fifth and final sale of the subdivided property, assuming that Plaintiff was successful in obtaining all the necessary permits that would result in the subdivision of the property. The Plaintiff does not allege that it had completed the work of obtaining all the necessary permits to allow the subdivision of the property and it is without question that the contemplated sales did not occur. Accordingly, the conditions precedent to Plaintiff receiving compensation have not **[*11]** been met. While Plaintiff is undoubtedly frustrated by Defendant's decision to terminate the Mill Basin Project and sell the undivided property, there is nothing in the Agreement that prevented Defendant from taking this course of action.

The Quasi-Contract Causes of Action

The Plaintiff's remaining causes of action are for promissory estoppel, quantum meruit and unjust enrichment. These are considered "quasi-contract" causes of action. Given the Court's conclusion that there was a valid agreement between the parties that the Defendant did not breach, these causes of action are not viable. It is well settled that "quasi-contractual remedies are unavailable where there exists a valid and enforceable agreement governing the particular subject matter" (*Kramer v Greene, 142 AD3d 438, 440, 36 N.Y.S.3d 448 [1st Dept 2016]*).

Accordingly, it is hereby

ORDERED, that the Defendant's motion to dismiss Plaintiff's complaint pursuant to *CPLR §3211(a)(1)* and *(a)(7)*, is **GRANTED** in its entirety, and the Plaintiff's complaint is hereby **DISMISSED**.

This constitutes the decision and Order of this Court.

Dated: Mineola, New York

July 15, 2022

/s/ Randy Sue Marber

Hon. Randy Sue Marber, J.S.C.

XXX