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NO. 9613-03

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 19 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-7-03
Submission Date: 8-29-03
Motion Sequence No.: 001,002/MOT D

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LIGHTHOUSE 2001, L.L.C.,
Plaintiff,

- against -

LEG-INV I, LLC,
Defendant.

---x

COUNSEL FOR PLAINTIFF
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COUNSEL FOR DEFENDANT
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ORDER

The following papers were read on Defendant's motion to dismiss, for sanctions and attorney's fees and Plaintiff's cross-motion for sanction and summary judgment dismissing Defendant's defenses:

Notice of Motion dated July 21, 2003;
Affirmation of David J. Kerstein, Esq. dated July 21, 2003;
Affidavit of F. Jonathan Dracos sworn to on July 21, 2003;
Notice of Cross-motion dated August 1, 2003;
Affirmation of Mark L. Lubelsky, Esq. dated August 1, 2003;
Affidavit of Paul Cooper sworn to on July 30, 2003;
Affirmation of David J. Kerstein, Esq. dated August 21, 2003;
Affirmation of Mark L. Lubelsky, Esq. dated August 27, 2003.

Defendant LEG-INV I, LLC ("LEG") moves for an order pursuant to CPLR 3211(a)(1) and/or (7) dismissing this action, sanctioning Plaintiff for failing the discontinue the action and awarding counsel fees to LEG's attorneys.

Plaintiff Lighthouse 2001, LLC ("Lighthouse") cross-moves for sanctions and for an order for summary judgment dismissing Defendant's defenses.

BACKGROUND

In March, 2001, LEG purchased the premises known as 2001 Marcus Avenue, Lake Success, New York from Lighthouse. This property is improved with an office building and a parking lot.

MONY of Lake Success, LLC ("MONY") is the owner of the adjoining property, 1991 Marcus Avenue, Lake Success, New York. This property is also improved with an office building and a parking lot.

At the time that 2001 Marcus Avenue was conveyed by Lighthouse to LEG, Lighthouse was engaged in a dispute with MONY regarding easements involving access to the parking lots at the respective properties. As a result of the inability of Lighthouse and MONY to resolve this dispute, MONY had commenced an action in this Court seeking a determination that it had acquired title to the disputed area through adverse possession.

The properties, 2001 Marcus Avenue and 1991 Marcus Avenue, are adjacent properties that are located between Marcus Avenue and Union Turnpike in Lake Success. An easement existed in favor of the owner of 1991 Marcus Avenue over a portion of 2001 Marcus Avenue to provide access to the parking area for 1991 Marcus Avenue at a traffic light on Marcus Avenue. An easement existed in favor of the owner

of 2001 Marcus Avenue over a portion of 1991 Marcus Avenue to provide access to the parking area of 2001 Marcus Avenue from Union Turnpike.

Pursuant to Paragraph 3H of the First Amendment to Purchase and Sale Agreement ("Amendment") between Lighthouse and LEG, Lighthouse assigned to LEG the right to negotiate and enter into an agreement with MONY relating to the easements. This provision further provided that in the event that LEG received "...payment of a sum of money from the adjacent property owner (MONY) on account of the Easement" that LEG was to pay Lighthouse seventy-five percent (75%) of the "Net Easement Proceeds."

The term "Net Easement Proceeds" is defined in Paragraph 3H of the Amendment as "... the total amount of money paid by the adjacent property to Purchaser (LEG) *for the Easement only*, less any costs and expenses (including, but not limited to attorneys' fees and disbursements) incurred by Purchaser in connection with the negotiation and drafting of the Easement." (Emphasis added)

In October 2001, LEG and MONY settled their claims regarding their respective easements. In connection with this settlement, LEG and MONY agreed to discontinue the adverse possession action and cancel the notice of pendency. In addition, LEG and MONY entered into a Third Amendment of Declaration of Easement which recited that the easement was granted for "Ten Dollars... and other good and valuable consideration."

As part of the settlement agreement between LEG and MONY, MONY agreed to at its sole cost and expense to pump out and clean debris from a recharge basin. MONY also agreed that it would, at its sole cost and expense, cover the footings of the exposed perimeter wall and stabilize the slope of the underground parking garage of the LEG property and install landscaping on an approximately 13 foot wide portion of the LEG property.

LEG asserts that it did not receive a payment of a sum of money for the grant of the easement. Since LEG did not receive payment of a sum of money on account of the easement, it is not obligated to pay any money to Lighthouse.

Lighthouse asserts that expenses incurred by MONY to the landscaping and for the repairs on the footings and stabilization of the underground garage on the LEG's property were actually paid to secure the easement and that pursuant to the Amendment Agreement between LEG and Lighthouse that Lighthouse is entitled to 75% of those funds. Lighthouse estimates the cost of these improvements to be between $1,390,000.00 and $1,650,000.00.

The complaint herein alleges three causes of action. The first cause of action seeks damages for breach of the Amendment and seeks to recover 75% of the amount received by LEG in settlement of the easement claim.

The second cause of action alleges a breach of contract but asserts that LEG received "the equivalent of a sum of money."(Amended Complaint ¶ 19). Lighthouse seeks to recover 75% of this amount.

The third cause of action seeks damages based upon a breach of implied covenant of good faith.

DISCUSSION

A. Standard

CPLR 3211(a)(1) provides for the dismissal of an action based upon documentary evidence. In this case the documentary evidence is the Settlement Agreement between LEG and MONY.

An action will be dismissed pursuant to CPLR 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). See also, 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); 730 J & J LLC v. Fillmore Agency, Inc., 303 A.D.2d 486 (2nd Dept., 2003); and Berger v. Temple Beth-El of Great Neck, 303 A.D.2d 346 (2nd Dept., 2003).

When deciding a motion made pursuant to CPLR 3211(a)(7), the court must accept as true all of the facts alleged in the pleadings and any submissions in opposition to the motion. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., *supra;* and Harriman Estates Development Corp., 96 N.Y.2d 409 (2001). The Court must also give the pleader the benefit of every possible inference which may be drawn from the pleading. Leon v. Martinez, *supra*. See also, Dye v. Catholic Med. Ctr. of Brooklyn & Queens, Inc., 273 A.D.2d 193 (2nd Dept., 2000).

The court must read the challenged pleading to determine if the pleader has a

cause of action and not whether the cause of action has been properly pled. Guggneheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976). See also, Kenneth R. v. Roman Catholic Dioceses of Brooklyn 229 A.D.2d 159 (2nd Dept., 1997); and Goldman v. Goldman, 118 A.D.2d 498 (1st Dept., 1986). In so doing, the court must determine from the facts as alleged and the inferences which may be drawn from those facts whether the pleader has any legally cognizable cause of action. Frank v. Daimler Chrysler Corp., 292 A.D.2d 118 (1st Dept., 2002).

While the allegations in the complaint must be deemed to be true, facts contradicted on the record are not entitled to such a presumption. Morris v. Morris, 306 A.D.2d 449 (2nd Dept., 2003); and Doria v. Masucci, 230 A.d.2d 764 (2nd Dept., 1996). When the moving party offers adverse evidence, the court must determine if the pleader has a cause of action remaining. Morris v. Morris, *supra*; and Meyer v. Guinta, 262 A.D.2d 463 (2nd Dept., 1999).

B. Third Cause of Action

Every contract has an implied contract of good faith and fair dealing. AFBT-II, LLC v. Country Village on Mooney Pond, Inc., 305 A.D. 2d 340 (2nd Dept., 2003); and Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513 (2nd Dept., 1999). The implied right of good faith and fair dealing is in aid and furtherance of the other provisions of the agreement between the parties. Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983); and Wood v. Lady Duff-

Gordon, 222 N.Y. 88 (1917). However, the implied covenant of good faith does not give rise to obligations beyond those stated in and agreed to in the contract. See, Cornhusker Farms, Inc. v. Hunts Point Cooperative Market, Inc., 2003 WL 22923038 (1st Dept., 2003); and Engelhard Corp. v. Research Corp., 268 A.D.2d 358 (1st Dept., 2000). See also, Sutton Assocs. v. Nexis-Lexis, 196 Misc. 2d 30 (Sup.Ct., Nassau Co., 2003).

The third cause of action seeks to recover based upon the breach of the implied covenant of good faith and fair dealing. As such, it both fails to set forth an independent cause of action upon which relief can be granted. Further, it is duplicative of the first cause of action's breach of contract claim and, thus, must be dismissed. See, Cornhusker Farms, Inc. v. Hunts Point Cooperative Market, Inc., *supra*; and Sutton Assocs. v. Nexis-Lexis, *supra.*

C. First & Second Causes of Action

The viability of the first and second causes of action depend upon the interpretation of the second sentence of Paragraph 3H of the Amendment which provides:

> "If Purchaser [LEG] shall receive a payment of a sum of money from the adjacent property owner on account of the Easement, then, in such event Purchaser shall pay to Seller [Lighthouse] an amount equal to seventy-five percent (75%) of the "Net Easement Proceeds", which shall mean the total amount of money paid by the adjacent property owner to Purchaser for the Easement only, less any costs or expenses (including, but not limited to,

> attorneys' fees and disbursements) incurred by Purchaser in connection with the negotiation of the Easement."

An agreement that is clear and unequivocal shall be enforced in accordance with its terms. The interpretation of a clear and unequivocal contract is a matter of law for the court. Greenfield v. Philles Records, Inc. 98 N.Y.2d 562 (2002); and Russack v. Weinstein, 291 A.D.2 439 (2nd Dept., 2002).

When interpreting an agreement, the court will determine the intent of the parties for the express language of the agreement. Greenfield v. Philles Records, Inc. *supra;* W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990); and Katina, Inc. v. Famiglietti, 306 A.D.2d 440 (2nd Dept., 2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. Greenfield v. Philles Records, Inc., *supra*; and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept., 2001). The court is to give "...practical interpretation to the language employed and the parties reasonable expectations." Del Vecchio v. Cohen, 288 A.D.2d 426, 427 (2nd Dept., 2001) *quoting,* Slamow v. Del Col, 174 A.D.2d 725 (2nd Dept., 1991), *aff'd.* 79 N.Y.2d 1016 (1992). See also, AFBT-II, LLC v. Country Village on Mooney Pond, Inc., *supra.*

The court may not add or delete provisions of an agreement under the guise of interpretation nor may the court interpret the language in such a way as would be contrary to the intent of the parties. Petracca v. Petracca, 302 A.D.2d 576 (2nd Dept., 2003); and Tikotzky v. New York City Transit Auth., *supra.*

Paragraph 3H of the Amendment requires LEG's receipt of a "sum of money" to

trigger Lighthouse's rights. Money is defined as:

> "The medium of exchange authorized or adopted by a government as part of its currency." Black's Law Dictionary, 7th ed., p. 1021
>
> * * *
>
> "Something generally accepted as a medium of exchange, a measure of value, or a means of payment." Webster's Ninth New Collegiate Dictionary, p. 765.

Money is statutorily defined by Uniform Commercial Code §1-201(24) as "...a medium of exchange authorized by a foreign or domestic government as a part of its currency."

Considering these definitions of money and an ordinary reading of the language of the Agreement, the second cause of action in the Amended Complaint must be dismissed. This cause of action alleges that LEG received the "equivalent of a sum of money." The Amendment specifically requires the payment of a sum of money. LEG did not receive payment of a sum of money on account of the easement. Interpreting the Amendment to sustain this cause of action would require the Court to interpret the word "money" to mean "consideration" or add the words "or its equivalent" after the term "sum of money." This would constitute the adding terms in the guise of interpretation. To sustain the second cause of action would require the Court to interpret the term money in a manner other than its plain meaning. Therefore, the second cause of action fails to state a cause of action and must be dismissed.

The first cause of action, on the other hand, states sufficient facts to withstand a

motion to dismiss. Every contract contains an implied covenant of good faith and fair dealing. See, e.g., Murphy v. American Home Products Corp., *supra*; and Wood v. Lady Duff-Gordon, *supra*. That covenant is breached when a party to a contract acts in a way which is not expressly prohibited by the provisions of the contract but which denies the other party to the contract the right to receive the benefit of the agreement. Aventine Investment Mgt., Inc. v. Canadian Imperial Bank of Commerce, *supra;* and Collard v. Incorporated Village of Flower Hill, 75 A.D.2d 631 (2nd Dept., 1980), *aff'd.*, 52 N.Y.2d 594 (1981).

In this case, there are sufficient factual allegations for the Court to determine, at this stage of the litigation, that LEG violated the implied covenant of good faith and deprived Lighthouse the benefits due it under the terms of the Amendment. The settlement of the easement claim was specifically structured so that no money was paid directly to LEG in settlement of the easement claim. The money which might otherwise have been paid on account of the easement was paid by MONY to third parties to make repairs to the LEG property. Clearly, LEG received a benefit in the increased value of its property by reason of the improvements or the savings it realized in not having to pay for such improvements itself.

Prior to entering into the agreement to sell the property to LEG, Lighthouse had retained the services of a consulting engineer who had prepared a plan to remediate these conditions which indicated the anticipated costs of these repairs. As part of its due diligence, LEG should have been aware of these problems and should have

anticipated incurring these expenses.

The monies expended by MONY to repair the LEG property could be considered payments of money to LEG since they were paid to defray the costs of repairs and improvements which otherwise would have been paid by LEG. This procedure was used by LEG to avoid having to pay for these necessary repairs to its property and to avoid having to pay to Lighthouse the money due it to in settlement of the easement claim. This is, at least at this stage, sufficient to show that LEG acted in such a way as was designed to withhold the benefit of the bargain from Lighthouse thus breaching the implied covenant of good faith and fair dealing. Therefore, the motion to dismiss the first cause of action must be denied.

D. Sanctions

Both parties move for sanctions. The decision to impose sanctions is within the discretion of the court. See, Wagner v. Goldberg, 293 A.D.2d 527 (2nd Dept., 2002). Since the Court has sustained the first cause of action, Plaintiff's failure to consent to the discontinuance of the action is justified. A party cannot be sanctioned for continuing the prosecution of a meritorious claim. 22 NYCRR 130-1.1.

In addition, sanction cannot be awarded to the Plaintiff since the Court found that two of the three cause of action were dismissible as a matter of law. A party cannot be sanctioned for making a motion which results in the dismissal of some the causes of action pled in the complaint. 22 NYCRR 130-1.1

Therefore, the motion and cross-motion for sanctions must be denied with the

admonition to both sides that making a frivolous application for sanctions may well be viewed as sanctionable. 22 NYCRR 130-1.1 (c).

E. Counsel Fees

LEG's motion for counsel fees is denied at this time. Paragraph 9.9 of the Purchase and Sale agreement provides for counsel fees to the prevailing party. Since the Court sustained Lighthouse's first cause of action, LEG is not the prevailing party and is not entitled to counsel fees. Such determination must await a determination on the merits.

F. Dismissal of Defendant's Defenses

From the papers submitted on this motion, no answer has been served. Thus, it is unclear as to what defenses have been interposed. A motion for summary judgment made before issue has been joined must be denied even in regard to parties who have appeared in the action. Matter of National Amusements, Inc. v. County of Nassau, 156 A.D.2d 566 (2nd Dept., 1989); and Garden City Center Assocs. v. Board of Assessors of the County of Nassau, 153 A.D.2d 667 (2nd Dept., 1989). Issue is joined when an answer is served. Siegel, *New York Practice 3rd* §279.

Issue has not yet been joined since LEG moved to dismiss via the pre-answer procedure of CPLR 3211. Since issue has not been joined, Lighthouse's cross-motion for summary judgment dismissing LEG's defenses must be denied.

Accordingly, it is,

ORDERED, that Defendant's motion to dismiss is **granted** only to the extent that the second and third causes of action pled in the Amended Complaint are dismissed and is **denied** as to the first cause of action; and it is further,

ORDERED, that the Defendant's motion and Plaintiff's cross-motion for sanctions are **denied**; and it is further,

ORDERED, that Defendant's motion for counsel fees is **denied** without prejudice to renew in the event that it prevails on the first cause of action; and it is further,

ORDERED, that Lighthouse's cross-motion for summary judgment dismissing LEG's defenses is **denied**; and it is further,

ORDERED, that the attorneys for the parties are directed to appear for a Preliminary Conference February 19, 2004 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 6, 2004

Hon. LEONARD B. AUSTIN, J.S.C.