

**Better Homes Depot Inc. v New York Community
Bank**

2011 NY Slip Op 31335(U)

May 10, 2011

Supreme Court, Nassau County

Docket Number: 022670-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
BETTER HOMES DEPOT INC.,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

Index No: 022670-10

Motion Seq. No.: 1

Submission Date: 3/18/11

-against-

NEW YORK COMMUNITY BANK,

Defendant.

-----x

The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Affirmation in Support and Exhibit.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibit.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Defendant New York Community Bank ("Bank" or "Defendant") on February 3, 2011 and submitted on March 18, 2011. For the reasons set forth below, the Court grants Defendant's motion and dismisses the Complaint. The Court denies Defendant's application for counsel fees.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), 1) dismissing the Complaint of Plaintiff Better Homes Depot, Inc. ("BHD" or "Plaintiff") in its entirety, with prejudice; and 2) awarding the Bank the attorney's fees and disbursements incurred with respect to this motion, pursuant to paragraph 7 of the parties' Loan Agreement.

Plaintiff opposes the motion.

B. The Parties' History

The Complaint contains a single cause of action in which Plaintiff alleges that Defendant's refusal to provide Plaintiff with further advances was wrongful in light of the Line of Credit, parties' course of conduct and Plaintiff's reasonable expectations of its rights and Defendant's obligations. In the Complaint (Ex. 1 to Adams Aff. in Supp.), Plaintiff alleges as follows:

This action arises from Defendant's alleged wrongful termination of a twenty five million (\$25,000,000) dollar line of credit in favor of Plaintiff. Plaintiff alleges that it is a "very successful" real estate company that employs up to 400 people at any given time (Compl. at ¶ 4).

Plaintiff's principal business is the acquisition of homes, often at foreclosure sales, which it renovates and resells at a profit. Plaintiff typically makes a down payment of 10-20% of the purchase price, closes on the purchase and then obtains financing from Defendant equal to 75% of the purchase price. When Plaintiff resells the property, it repays the monies borrowed from Defendant. Plaintiff borrowed, repaid and re-borrowed "tens of millions of dollars per year" (Compl. at ¶ 6).

Plaintiff established a relationship with Defendant in or about 2004 when Plaintiff borrowed the sum of \$10,000,000 from Defendant. Thereafter, the parties' relationship developed and Plaintiff obtained a \$25,000,000 line of credit/borrowing facility ("Line of Credit") with the Defendant. This Line of Credit allowed Plaintiff to borrow, repay and re-borrow up to \$25,000,000 from Defendant at any given time. These loans were secured by real property purchased by the Plaintiff.¹ Defendant charged, and Plaintiff paid, commitment fees in connection with this Line of Credit.

By virtue of the parties' relationship, Plaintiff received information regarding Defendant and its business operations. This information included the fact that "the plaintiff's business model was predicated on plaintiff's ability to obtain loans from the defendant pursuant to the \$25,000,000 line of credit/borrowing facility" (Compl. at ¶ 12). By its terms, the Line of Credit expired in February of 2008, and was extendable at Plaintiff's option until February of 2010.

¹ The Complaint alleges that the loans were secured by real property the "defendant" purchased (Compl. at ¶ 8), but the Court surmises that Plaintiff intended to write "plaintiff."

Defendant was authorized to terminate the Line of Credit only if 1) Plaintiff made misrepresentations in its loan application; 2) there was an adverse change with respect to the premises, Defendant/Borrower, guarantor, another person or entity connected with the loan, collateral for the loan or other source of repayment, prior to the closing of the loan, 3) any part of the premises was taken by condemnation or a similar proceeding, 4) the borrower, guarantor or other person or entity connected with the loan was involved in a bankruptcy or related proceeding; 5) there was an adverse government regulatory action with respect to the Borrower or guarantor; or 6) any of the conditions precedent specified in the loan commitment were not fulfilled (collectively "Termination Events").

Plaintiff alleges that none of these Termination Events occurred in or prior to August of 2007. In or about August of 2007, however John Adams ("Adams"), Senior Vice-President of the Bank, advised Plaintiff that Defendant would no longer provide advances to Plaintiff, allegedly in violation of Defendant's obligation pursuant to the Line of Credit. Plaintiff objected, advising Adams that Plaintiff had 40-50 properties under contract, many with imminent closing dates, and that Defendant's decision would result in Plaintiff's loss of payments and profits of those transactions. In addition, Plaintiff's credibility in the marketplace and ability to operate would be adversely affected.

In his Affidavit in Support, Adams affirms that he was personally involved in the origination and administration of loans made by the Bank to BHD pursuant to the terms of a loan agreement. Adams submits that Plaintiff's claims are belied by the language of the parties' agreement dated May 13, 2004 (Ex. 3 to Adams Aff. in Supp.) which provides, in pertinent part, as follows at paragraph 3(a), titled "Additional Loans":

The Borrower may own additional properties (each, an "Additional Property" and, collectively, the "Additional Properties") and request that the Bank make a new loan secured by such Additional Properties. The decision to accept Additional Properties and make a new loan with respect thereto shall be made in the sole and absolute discretion of the Bank...

Adams submits, further, that in light of the fact that BHD's primary business was buying and selling distressed residential properties in the sub-prime real estate market, which was "rapidly deteriorating" in early 2007 (Adams Aff. in Supp. at ¶ 2), the Bank's decision to stop lending money to BHD was both a valid exercise of its express contractual rights and a

reasonable attempt to limit its financial exposure.

Adams provides details in support of his assertion that the declining real estate market had a “disastrous impact” on BHD and its principal, Eric Fessler (“Fessler”) (Adams Aff. in Supp. at ¶ 2) as demonstrated by 1) BHD’s inability to sell properties as quickly as it could in the past, 2) BHD’s delinquency in paying real estate taxes on properties that served as security for the Bank’s existing loans, 3) Fessler’s default on other credit facilities obtained from the Bank, including a \$12.75 million real estate loan through another entity owned by him, and a \$2.5 million personal line of credit, and 4) BHD’s subsequent default on existing real estate loans from the Bank of nearly \$10 million.

Adams affirms, further, that the Bank filed an action in connection with Fessler’s default on his personal line of credit in an action titled *New York Community Bank v. Eric Fessler*, Nassau County Index Number 21653-08 (“Fessler Action”). Adams provides a copy of the complaint in the Fessler Action (Ex. 29 to Adams Aff. in Supp.). In opposition to the Bank’s motion for summary judgment in the Fessler Action, Fessler asserted the same breach of contract claim asserted by Plaintiff in the matter *sub judice* (“Instant Action”), as reflected by the Fessler Affidavit provided (*id.* at Ex. 30). By decision dated April 7, 2010 (“Fessler Decision”) (*id.* at Ex. 32), the Honorable R. Bruce Cozzens, Jr. granted the Bank’s motion for summary judgment in lieu of complaint and directed Plaintiff to submit judgment on notice in the amount of \$2,032,744.33, with interest.² Justice Cozzens subsequently signed a Judgment and Amended Judgment in connection with the Fessler Action (*id.* at Ex. 33). Adams affirms that Fessler has failed to make any payments on those Judgments, and has attempted to prevent the Bank from enforcing those Judgments. Adams suggests that the Instant Action is an effort by Fessler to gain leverage in an attempt to obtain a settlement in the Fessler Action.

In his Affidavit in Opposition, Fessler, the President of BHD, affirms that Defendant’s submissions in support of its motion do not included the commitment regarding its \$25 million loan to BHD. Fessler provides a copy of that commitment (Ex. A to Fessler Aff. in Opp.) which, he submits, defined the \$25 million loan as a revolving line of credit.

² Justice Cozzens’ decision reflects that he initially denied the Bank’s motion for summary judgment in lieu of complaint, but granted its subsequent motion for leave to reargue and, upon that reargument, granted the Bank’s motion. The Bank has provided documentation reflecting that Fessler is appealing Justice Cozzens’ decision.

Fessler affirms that Adams notified him that the Bank was considering terminating his borrowing facility but also claims that Adams, when pressed, stated “in sum and substance” (Fessler Aff. in Opp. at ¶ 16) that he agreed with Fessler but was obligated to proceed with the termination. Fessler submits that the Bank was only permitted to terminate BHD’s line of credit if a Termination Event occurred, and that no such Event in fact occurred.

Fessler asserts that, prior to the Bank’s decision to terminate its loans to BHD, Adams encouraged Fessler to increase BHD’s borrowing facility to \$100,000,00.00. He alleges, further, that the Bank advised him repeatedly that it would accommodate BHD’s financial needs, and that BHD need not seek financing elsewhere. Fessler contends that the Bank did not assert other rights they had under the parties’ agreements, such as the right to reject individual properties because of their condition or location. Fessler argues that Defendants owed BHD, in the discharge of its contractual obligations, a duty of good faith and fair dealing which the Bank breached by refusing to make further loans.

C. The Parties’ Positions

Defendant submits that 1) the Loan Agreement gave the Bank the sole and absolute discretion whether to extend additional loans to BHD; 2) in the relevant amendments, BHD and Fessler, in his capacity as guarantor of BHD’s liabilities, expressly ratified and confirmed the terms of the Loan Agreement; 3) the Bank engaged in an “orderly end to its lending relationship with BHD” (D’s Memorandum of Law at p. 6) which included its notifying BHD of its decision, meeting with Fessler, continuing to lend against new properties acquired by BHD and providing BHD with the opportunity to pursue alternate funding sources; 4) the Bank’s decision to stop making loans to BHD was warranted in light of the declining real estate market and Fessler’s default under his personal line of credit; and 5) Justice Cozzens, in the Related Decision, rejected Fessler’s claim that the Bank, notwithstanding the terms of the Loan Agreement, was obligated to continue lending money.

Defendant also seeks attorney’s fees pursuant to paragraph 7 of the Loan Agreement which provides, in pertinent part, as follows:

The Borrower shall pay on demand all expenses of the Bank... in connection with the Bank’s exercise, preservation, administration or enforcement of any of its rights, remedies or options hereunder or under any of the other Loan Documents, including, without limitation, reasonable fees of outside legal counsel...

Plaintiff opposes Defendant's motion submitting, *inter alia*, that 1) the Adams affidavit cannot serve as documentary evidence in support of a motion for dismissal pursuant to CPLR § 3211(a)(1); and 2) the provision in the 2004 Loan Agreement that gave the Bank discretion to make additional loans does not entitle Defendant to relief in light of the fact that a) Defendant has not established that the 2004 Loan Agreement relates to the lending transaction at issue; and b) even assuming that the 2004 Loan Agreement does apply to the lending transaction at issue, the language of that Agreement may have permitted Defendant to reject specific properties offered as collateral, but did not permit Defendant to "unilaterally and arbitrarily decide that it would not even consider accepting additional properties" (P's Memorandum of Law at p. 5).

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Contract Principles

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and

unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party 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. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group, LLC*, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003).

C. Application of these Principles to the Instant Action

The Court concludes that, in light of the language of the parties' Loan Agreement, the decision whether to continue to extend loans to BHD was within the Bank's discretion, which it exercised by terminating its loans to BHD in light of factors including the declining real estate market and Fessler's default under his personal line of credit. The duty of good faith and fair dealing did not impose an obligation on the Bank to make additional loans to BHD. Accordingly, the Court grants Defendant's motion and dismisses the Complaint.

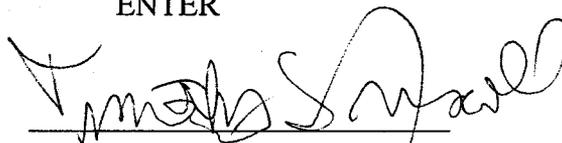
The Court denies Defendant's application for counsel fees, based on the Court's conclusion that such an award is not mandated by the applicable provision in the Loan Agreement. The Court notes that, other than the conclusory statement that such fees are required, Defendant has provided neither argument nor authority to support its request.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
May 10, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 13 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**