Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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BW PATIO, LLC,

Plaintiff,

-against-

BRUCE BARNET, KATHERINE MILLER, as Co-Executor of the Estate of JOHN BLANEY, and ELLEN WORTH as Co-Executor of the Estate of JOHN BLANEY,

Defendants.

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INDEX NO.: 202160/2022
MOT. SEQ. NO.: 001 - MG
002 – MG; Dismissed

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In this action, the Plaintiff, BW Patio LLC (hereinafter the Plaintiff), seeks the payment of approximately $1,549,800 together with interest of 15% per annum, compounded monthly by the Defendants who personally guaranteed four loans by the Plaintiff to Patio Gardens III, LLC (hereinafter "Patio Gardens"). The record reveals that non-parties George Heinlein, Barnet Patio LLC and Blaney Patio LLC, as members, formed Patio Gardens on February 17th, 2005. The Defendant Bruce Barnet is a member of Barnet Patio LLC, decedent John Blaney was a member of Blaney Patio LLC, and non-party Ron Horowitz is the current managing member of Plaintiff. The purposes of Patio

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Gardens are, *inter alia*, to "acquire, own, manage, operate, develop, sell exchange and/or dispose of or otherwise take such action as the Managers shall determine."

Patio Gardens obtained a mortgage loan on May 25th, 2005 secured by a Note in the amount of $750,000 for a term of twenty-four months, until May 25th, 2007. Through a series of writings, the maturity date of the initial loan was extended through April 30th, 2011.[1] In 2007, the Plaintiff became a member of Patio Gardens. The Plaintiff made the four loans to Patio Gardens from 2007 through 2009. Along with certain capital contributions which are not at issue in this matter, Defendant Bruce Barnet and decedent John Blaney[2] executed personal guarantees to repay the Plaintiff's loans according to ownership interests held by members Blaney Patio, LLC and Barnet Patio, LLC in Patio Gardens. At the time of the commencement of this action, Blaney Patio LLC and Barnet Patio LLC each owned a 12.5% interest in Patio Gardens.

The record reveals that the Operating Agreement was amended three times when the Plaintiff loaned funds to Patio Gardens. The first amendment reveals a loan from George Heinlein which was assigned to the Plaintiff. The second amendment reveals the second loan to Patio Gardens. The third amendment reveals the third and fourth loans which were made to Patio Gardens. Each Amendment specifies that the term of the loan would expire concurrently with the maturity date of the initial bank financing.

[1] Letters dated July 2, 2010, January 12, 2010 and March 31, 2011 reference two land loans, numbered 1663662 and 1664232 with a collateral of approximately 8 acres on Montauk Highway, Westhampton Beach, NY.
[2] John Blaney died on February 12, 2022. The Defendants Katherine Miller and Ellen Worth allegedly obtained Letters Testamentary on June 30, 2022.

The bank lender commenced a foreclosure action on March 13th, 2012[3] to foreclose on two notes secured by two mortgages on two lots. The Court, by order dated November 14th, 2013 (Emerson, J.), granted the motion seeking summary judgment to foreclose the mortgages and held that the loans made by the lender matured on April 30th, 2011. A Judgment of Foreclosure was entered on July 14th, 2015 by the Court wherein two lots[4] would be sold in one parcel. According to the Complaint, the property was sold on June 2nd, 2021, at which time the purchaser of the property assumed the mortgage that encumbered the property in the amount of $2,500,000, and the sum of $967,140.00 was credited in the Plaintiff's favor at closing. The Plaintiff alleges that its entitlement to payment on the guarantees of the four loans accrued on June 2nd, 2021.

The Plaintiff commenced the instant action on October 4th, 2022, alleging six causes of action: 1) breach of contract as against Barnet for his share of the balance of the moneys owed to Plaintiff, 2) breach of the covenant of good faith and fair dealing as against Barnet, 3) unjust enrichment as against Barnet, 4) breach of contract as against Blaney for his share of the balance of the moneys owed to Plaintiff, 5) breach of the covenant of good faith and fair dealing as against Blaney, 6) unjust enrichment as against Blaney.

The Defendants Katherine Miller and Ellen Worth as Co-Executors of the Estate of John Blaney move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7). The Defendant Bruce Barnet also moves to dismiss the complaint on the same grounds and

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[3] The foreclosure action is captioned *People's United Bank, successor by merger with Bank of Smithtown v Patio Gardens III, LLC, John Blaney, Bruce Barnet, and George Heinlein*, Index No. 12/8058.

[4] The two lots were designated as District 0905, Section 004.00, Block 01.00, Lots 023.003 and 030.001, as well as District 0905, Section 004.00, Block 01.00, Lot 022.001.

incorporates the arguments and defenses as set forth in Miller and Worth's motion in his motion to dismiss the complaint as asserted against him.

In support of the motion, Defendants submit the complaint, a copy of the Operating Agreement, Amendments to the Operating Agreement, the mortgage and note dated May 25th, 2005, correspondence from the lender which extends the loan terms, and a copy of an Order, dated November 14th, 2013 (Emerson, J.) in the foreclosure action. In each Amendment, Paragraph 7 of the Operating Agreement was deleted and replaced by language reflecting, *inter alia*, the amount loaned by the Plaintiff, the personal guaranties and that the term of the loan would expire concurrently with the maturity date of the initial bank financing. Paragraph 12.2 of the Operating Agreement provides: "No amendment to this Agreement shall be effective unless made in a writing duly executed by all members and specifically referring to each provision of this Agreement being amended."

Defendants contend that their submissions qualify as documentary evidence, citing F***ontanetta v John Doe 1*** (73 AD3d 78, 898 NYS2d2d 569 [2d Dept 2010], holding that it is well settled that judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions, such as contracts, deeds, wills and mortgages all qualify as documentary evidence properly considered on a motion pursuant to CPLR 3211 [a] [1]).

Defendants contend that the maturity date of the initial bank loan was determined by the Supreme Court in the above related foreclosure action to be April 30th, 2011. Since Patio Gardens was in default on its initial obligation to the lender on April 30th, 2011, repayment of the Plaintiff's four loans also accrued on April 30th, 2011, and consequently, the six-year statute of limitations on Plaintiff's guarantee claim began to run on April 30th,

2011. At any time during the following six years, the Plaintiff could have demanded payment on the guarantees without concern for the Statute of Limitations but failed to do so. Therefore, this action, which was commenced on October 4th, 2022, more than eleven years later, is time-barred. In addition, the Defendants cite ***Liberman v Worden*** (268 AD2d 337, 701 NYS2d 419 [1st Dept 2000], which holds that the causes of action alleging breach of the implied covenant of good faith and fair dealing implicit in all contracts is also subject to six-year limitations period). Thus, the second and fourth causes of action should be dismissed as time-barred, since the claim accrues at the time of the breach, which was April 30th, 2011. The Defendants also contend that the claim for breach of the covenant of good and fair dealing is duplicative of its breach of contract claim since it is based on the same facts and seeks the same damages.

Moreover, the Defendants state that the third and sixth causes of action alleging unjust enrichment should be dismissed since the six-year statute of limitations governs these allegations, citing ***Mannino v Passalacqua*** (172 AD3d 1190, 101 NYS3d 381 [2d Dept 2019]) and ***N. Salem Cent. Sch. Dist. v Mahopac Cent. Sch. Dist.*** (1 AD3d 418, 419, 768 NYS2d 11, 13 [2d Dept 2003], which held that the limitations period for unjust enrichment accrues "upon the occurrence of the wrongful act giving rise to a duty of restitution").

Defendants also argue that res judicata applies under these circumstances and rely upon ***Myers v Meyers***, 121 AD3d 762, 765 [2d Dept 2014], which holds that the rationale for the doctrine of res judicata is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again). Thus, under the doctrine of res judicata, a plaintiff may not institute a new action circumventing a decision received in a

previous one. In addition, the Defendants state that the doctrine of collateral estoppel applies here, since the issue of the maturity date of the bank loans was raised in the prior action and decided against the Patio Gardens and those in privity, citing ***D'Arata v N.Y. Cent. Mut. Fire Ins. Co.*** (76 NY2d 659, 666, 563 NYS2d 24 [1990]) and the Plaintiff should be precluded from re-litigating the same issue in this action.

The Defendants further claim that they did not breach the contract inasmuch as they did not agree in writing to any other expiration date, citing ***Key Bank of Long Island v Burns*** (162 AD2d 501, 556 NYS2d 829 [2d Dept 1990], which holds that the liability of a guarantor is narrowly construed and will not be extended beyond the plain and explicit language of the guaranty).

In opposition, the Plaintiff submits the personal affidavit of Ron Horowitz who states that an email by Bruce Barnet which questions whether his decreasing membership interest means that he will owe less money shows that the members agreed to wait to pay their guarantees until the property was sold. The Plaintiff also claims that an ambiguity exists with regard to "maturity date" and "initial bank financing." The Plaintiff contends that the parties understood and intended that the term "maturity date" in the Operating Agreement could only be defined as the date the underlying note was paid off or the property was sold.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be liberally construed, the facts alleged in the pleading are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference to determine whether the facts as alleged fit within any cognizable legal theory (*see*, ***IHC Services, Inc. v Prod. Safety Mgmt***, 268 AD2d 559, 702 NYS2d 831 [2d Dept. 2000]).

Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (CPLR 3211 [a] [1], ***Trade Source v Westchester Wood Works, Inc.***, 290 AD2d 437, 736 NYS2d 605 [2d Dept 2002]; ***Berger v Temple Beth-El of Great Neck***, 303 AD2d 346, 756 NYS2d 94 [2d Dept 2003]). Here, the Defendants' submissions, which include the pleadings, mortgage and note, the Court Order dated November 14th, 2013 (Emerson, J.), the Operating Agreement, and three letters from the lender which extended the expiration of the bank loans to April 30th, 2011 establish as a matter of law that the four loans expired on April 30th, 2011 as well. Moreover, the Operating Agreement contained a merger clause which prohibited oral agreements, thereby resolving all factual issues as a matter of law.

In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired (see ***Stewart v GDC Tower at Greystone***, 138 AD3d 729, 729, 30 NYS3d 638 [2d Dept 2016]; ***J.A. Lee Elec., Inc. v City of New York***, 119 AD3d 652, 653, 990 NYS2d 223 [2d Dept 2014]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (see ***Beroza v Sallah Law Firm***, P.C., 126 AD3d 742, 742-743, 5 NYS3d 297 [2d Dept 2015]; ***Kitty Jie Yuan v 2368 W. 12th St., LLC***, 119 AD3d 674, 674, 988 NYS2d 898 [2014]). Here, the Defendants have demonstrated with documentary evidence that the cause of action for breach of contract accrued on April 30th, 2011 and that the instant action, commenced more than six

years later on October 4th, 2022, is time-barred. The Plaintiff failed to raise a question of fact by its submission of an email chain, dated February 20th, 2018 between Horowitz and Barnet since these emails do not establish that all of the members agreed in writing to extend the maturity date of the four loans from April 30th, 2011 to a later date when the property would be sold. Moreover, while the parties could have entered into a written agreement to amend the Operating Agreement, as they did three prior times, they did not.

The Court further finds that there is no ambiguity in the Operating Agreement regarding "maturity date" and "initial bank financing." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (see ***Slatt v Slatt***, 64 NY2d 966, 967, 488 NYS2d 645 [1985], *rearg denied* 65 NY2d 785 [1985]). The best evidence of the parties' intentions is what they say in their writing, where the agreement is complete, clear and unambiguous on its face (***R/S Assocs. v New York Job Dev. Auth.***, 98 NY2d 29, 32, 744 NYS2d 358 [2002]). Such a writing must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous if the language it uses is not definite and precise and has the danger of misconception in the purport of the agreement itself (***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978]). The court finds that each Amendment to the Operating Agreement provided for the expiration date of the loans in the exact same clear and explicit language that there could be no confusion or ambiguity. Thus, the Court rejects the Plaintiff's argument seeking the use of extrinsic evidence.

Therefore, the first and fourth causes of action alleging breach of contract are dismissed as time barred.

The remaining causes of action fail to state a claim. As a general rule, on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a) (7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (***Gruen v County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 [2d Dept 1992]). The sole criterion is whether the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law (***Davis v CCF Capital Corp.***, 277 AD2d 342, 717 NYS2d 207 [2d Dept 2000]).

A claim for breach of the implied covenant of good faith and fair dealing is generally actionable only where wrongs independent of the express terms of the contract are asserted and demands for the recovery of separate damages not intertwined with the damages resulting from a breach of a contract are advanced (see ***Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.***, 97 AD3d 781, 949 NYS2d 115 [2d Dept 2012]). Where a contractual party is merely seeking to reap the benefits of its contractual bargain, the implied covenant breach claim will not lie (***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995], *supra*, citing ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 552, 583 NYS2d 957 [1992]) as it is considered duplicative of the breach of contract claim (see ***Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.***, 89 AD3d 913, 933 NYS2d 312 [2d Dept 2011]). Here, upon a plain reading of the complaint and construed in the light most favorable to the Plaintiff, there are no allegations of wrongs independent of the express terms of the contract or separate damages other than the purported guarantees. Therefore, the second and fifth causes of action fail to state a claim, are duplicative of the breach of contract causes of action and are dismissed.

An agreement may be implied under the doctrine of unjust enrichment in order to prevent one person who has obtained a benefit from another without ever entering into a contract with that person from unjustly enriching himself at the other party's expense (***Chadirjian v Kanian***, 123 AD2d 596, 598, 506 NYS2d 880 [2d Dept 1986], *quoting* ***Bradkin v Leverton***, 26 NY2d 192, 196-197, 309 NYS2d 192 [1970]). However, an agreement will not be implied under this doctrine in a case such as this, where there is a valid express agreement between the parties which explicitly covers the same specific subject matter for which the implied agreement is sought (***Id.***). Here, there is no dispute that an express executory contract exists, thus the doctrine of unjust enrichment is not applicable under these circumstances. Therefore, the third and sixth causes of action fail to state a claim and are dismissed.

Accordingly, the Defendants' motions (Mot. Seq. 001, 002) are granted.

The action is dismissed.

This Memorandum also constitutes the Order of the Court.

Submit Judgment.

Dated: March 2nd, 2023
Riverhead, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court