Lehman Bros. Holdings, Inc. v Wall St. Mtge. Bankers, Ltd.
2012 NY Slip Op 33526(U)
November 15, 2012
Supreme Court, New York County
Docket Number: 603021/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 603021/2009
LEHMAN BROTHERS HOLDINGS, INC.
vs
WALL SRTEET MORATGAGE BANKERS,
Sequence Number : 003
SUMMARY JUDGEMENT
JUSTICE SHIRLEY WERNER KORNREICH

PART 54

INDEX NO. _____
MOTION DATE 8/2/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 37-38
Answering Affidavits — Exhibits _____ | No(s). 41-45
Replying Affidavits _____ | No(s). 46

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/15/12

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

☒ X-MOTION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LEHMAN BROTHERS HOLDINGS, INC., Index No.: 603021/2009

Plaintiff, **DECISION & ORDER**

-against-

WALL STREET MORTGAGE BANKERS, LTD.,
d/b/a, POWER EXPRESS,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

In this breach of contract case, both plaintiff, Lehman Brothers Holdings, Inc. (Lehman), and defendant, Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express (Wall Street), move for summary judgment. CPLR 3212. Plaintiff's motion is granted, and defendant's cross-motion is denied for the reasons that follow.

I. Factual Background

This action arises from Wall Street's alleged breach of an agreement that governed the sale of two mortgage loans (the Loans) to Lehman Brothers Bank, FSB (LBB), Lehman's predecessor-in-interest. The following facts are undisputed.

Wall Street is a mortgage lender that originates mortgage loans and sells them to investors, such as LBB. On July 20, 1998, Wall Street became a correspondent bank for LBB and LBB's authorized agent and servicer, Aurora Loan Services, LLC (Aurora).[1] The two loans at issue in this case are governed by Loan Purchase Agreements entered into on August 13, 2001 and July 8, 2004 and incorporate the terms and conditions of the Aurora Seller's Guide (the Seller's Guide)

[1] As correspondent bank, Wall Street originated and closed mortgage loans on behalf of LBB.

(collectively, the Agreement). The Agreement is governed by New York law.

Pursuant to the Agreement, Wall Street had the authority to "review, approve, and close Mortgage Loans . . . without any prior underwriting approval by [Aurora]," except when the loan amount exceeded $400,000. Section 710 of the Seller's Guide provides that Lehman has the option to demand that Wall Street repurchase a loan (for a Repurchase Price discussed *infra*) if: (1) Wall Street breaches any of the warranties contained in Sections 700-710; or (2) an Early Payment Default occurs. Section 703(36) stated that Wall Street warranted that "[t]he fair market value of the Mortgaged Property as indicated by the property appraisal or valuation is materially accurate." Pursuant to Section 704(1), a breach of such warranty is an Event of Default. Section 707 requires a waiver of "any default by [Wall Street] in the performance of [Wall Street]'s obligations" to be in writing. Pursuant to Section 715, a loan becomes an Early Payment Default if, *inter alia*, the borrower fails to make either the first or second monthly payment within 30 days of the payment due-date.

Section 8 defines the Repurchase Price as follows:

> An amount equal to (i) the greater of the Purchase Price or par multiplied by the outstanding principal balance of the Mortgage Loan as of the Purchase Date; less (ii) the aggregate amount received by Purchaser of reductions and curtailments of the principal balance of the Mortgage Note; plus (iii) any and all interest payable on the outstanding principal balance of the Mortgage Note as of the date of repurchase; plus (iv) any and all expenses, including, without limitation, costs of foreclosure and reasonable attorney's fees, incurred by Purchaser in the exercise by Purchaser of its rights and remedies in connection with the Mortgage Loan, the Mortgaged Property, and/or the Mortgagor, as more specifically identified in this Seller's Guide.

The first loan at issue, ending in loan number ***1225, was secured by real estate located in Southampton, New York, and had an original principal balance of $4 million (the First Loan). Before LBB purchased the First Loan, two appraisals were prepared. The first appraisal, dated July

14, 2003, estimated that the fair market value, as of April 11, 2003, was $8.5 million. Lehman had concerns about this appraisal and outlined them in a notice to Wall Street dated July 31, 2003. Pursuant to the Agreement, Lehman suspended underwriting on the First Loan pending a second appraisal. Wall Street obtained a second appraisal, dated August 20, 2003, that estimated that the fair market value as of August 18, 2003 was $8.525 million. LBB then purchased the First Loan on October 14, 2003.

In a notice dated October 29, 2007, Lehman demanded that Wall Street repurchase the First Loan because the second appraisal was "misleading and a gross misrepresentation of value" because it overstated the value of the Southampton property by $5.7 million. Wall Street refused to repurchase the First Loan.

The second loan at issue, ending in loan number ***0176, was secured by real estate located in Staten Island, New York, and had an original principal balance of $477,000 (the Second Loan). LBB purchased the Second Loan on June 8, 2007. The borrower did not make the second payment on the Second Loan within 30 days of November 1, 2007, the due date. Therefore, in December 2007, Lehman demanded that Wall Street repurchase the Second Loan due to an Early Payment Default. Wall Street refused to repurchase the Second Loan.

On September 2, 2008, LBB assigned its rights under the Agreement to Lehman. Lehman commenced this action on October 1, 2009, asserting two causes of action against Wall Street: (1) Breach of Contract; and (2) Breach of Express Warranty. Lehman now moves for summary judgment on both causes of action. Wall Street cross-moves for partial summary judgment on liability for the First Loan.

II. Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. The First Loan

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) plaintiff's performance under the contract; (3) defendant's breach of the contract; and (4) resulting damages. *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). To establish a claim for breach of an express warranty, the plaintiff must demonstrate that the defendant materially breached the express warranty. *CBS Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 503 (1990).

Lehman has established its *prima facie* case. First, it is undisputed that the Agreement was a valid contract that governed the Loans. Second, it is undisputed that Lehman performed under the Agreement. Third, Lehman has presented evidence that Wall Street breached the Agreement by failing to repurchase the First Loan even though the appraised value of the First Loan was not materially accurate. Finally, Lehman has established that it suffered damages in an amount discussed *infra*, part II.C.

Wall Street, in opposition, argues that it had no contractual obligation to repurchase the First Loan because: (1) Lehman waived its right to demand repurchase when it demanded, received and relied upon a second appraisal; and (2) Lehman's repurchase demand was untimely.

Wall Street's waiver argument is unconvincing. The fact that Lehman "was fully aware of any alleged deficiencies in the original appraisals" and therefore "required Wall Street to obtain a second appraisal" has no bearing on whether Wall Street was obligated, pursuant to Section 703(36), to ensure that the second appraisal too was "materially accurate." Lehman bargained for Wall Street's warranty of the appraisal value of the First Loan. Whether there was one or two appraisals does not affect this bargained-for right. Moreover, a waiver is an intentional relinquishment of a known right with knowledge of its existence and an intention to relinquish it. *Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Employment Relations Bd.*, 7 NY3d 458, 465 (2006). The mere fact that Lehman asked for a second appraisal is insufficient to demonstrate that it knowingly relinquished the warranty. Finally, Section 707 requires that a waiver of Wall Street's obligations must be in writing. No such writing is before the court.

Wall Street's reliance on *Ziff-Davis* and its progeny in support of its waiver argument is misplaced. Here, as in *Ziff-Davis*, the plaintiff's doubt as to the truth of the warranted information does not constitute a waiver. 75 NY2d at 503-04. The Court of Appeals has made it clear that "[t]he critical question is not whether the buyer believed in the truth of the warranted information . . . but 'whether [it] believed [it] was purchasing the [seller's] promise [as to its truth].'" *Id.* at 503 (quoting *Ainger v Michigan General Corp.*, 476 FSupp 1209, 1225 (SDNY 1979) (brackets in original)). Lehman has submitted evidence that it relied on the second appraisal. While Wall Street contends otherwise, it does not submit any evidence that supports its contention.

Wall Street also disputes Lehman's contention that the appraisal overstated the value of the Southampton property by $5.7 million. However, Wall Street has not submitted any evidence to rebut Lehman's two expert evidence affidavits, which conclude that the second appraisal of the Southampton property overstated its value by over $6 million (even more than $5.7 million originally claimed by Lehman in its October 29, 2007 notice).

As for Wall Street's argument that Lehman's repurchase demand was untimely, such argument is predicated on the fallacy that Lehman is seeking rescission. Lehman is not seeking rescission of any contract between the parties. Rather, Lehman seeks compensatory damages for Wall Street's breach of its repurchase obligations under Section 710 of the Seller's Guide. Pursuant to Section 8, such damages should be computed based on the formula for calculating the Repurchase Price, which is discussed *infra*, part II.C.

In sum, there is no question of material fact that precludes summary judgment on liability in Lehman's favor for Wall Street's breach of its repurchase obligations for the First Loan.

B. The Second Loan

Wall Street neither cross-moves for summary judgment or submits any meaningful opposition to Lehman's claims related to the Second Loan. At oral argument, Wall Street conceded that the Second Loan must be repurchased. *See* Transcript, Sept. 20, 2012, pp.9-10, ll 24-5. As with the First Loan, damages should be calculated based on the Repurchase Price formula in Section 8.

C. Damages

Lehman submits a calculation of the Repurchase Price in the Affidavit of Zachary Trumpp dated June 6, 2011 (Trumpp Aff.). The calculations are made in a spreadsheet (Ex. L) based on loan data from Lehman's business records (Exs. D, E, G, I, J, K, and M). *See* Trumpp Aff. ¶¶ 28-41. The calculations are made pursuant to the formula specified in Section 8, *supra*, part I, and computed by adding columns 7, 19, and 20 (in the spreadsheet) and by subtracting columns 11 and 12. ¶¶ 25, 41; *see* Ex. L.

Trumpp calculates that the total Repurchase Price for the First Loan is $3,183,268.84 and $230,910.59 for the Second Loan. However, these totals may need to be adjusted based on further proceeds received on account of the Loans (which would decrease the Repurchase Price) or any further interest payable (which would increase the Repurchase Price), since Trumpp's calculations were made over a year ago. Therefore, the current calculation of the Repurchase Price for the Loans is referred to a Special Referee to hear and report. The calculation of pre-judgment interest, post-judgment interest, reasonable attorneys' fees, and costs is also referred to a Special Referee to hear and report.

D. Wall Street's Cross Motion

As the Court grants Lehman's motion for summary judgment, Wall Street's cross-motion for partial summary judgment is denied. Accordingly, it is

ORDERED that the motion for summary judgment by plaintiff Lehman Brothers Holdings, Inc. against defendant Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express is granted; and it is further

ORDERED that the cross-motion for partial summary judgment by defendant Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express against plaintiff Lehman Brothers Holdings, Inc. is denied; and it is further

ORDERED that the calculation of the Repurchase Price for the Loans, pre-judgment interest, post-judgment interest, attorneys' fees, and costs is referred to a Special Referee to hear and report, and pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: November 15, 2012

ENTER:

J.S.C.