Hildene Opportunities Master Fund II, Ltd. v NRF Holdco, LLC
2023 NY Slip Op 34252(U)
November 30, 2023
Supreme Court, New York County
Docket Number: Index No. 652692/2023
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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HILDENE OPPORTUNITIES MASTER FUND II, LTD., HILDENE RATED CREDIT FUND I, LP

Plaintiff,

- v -

NRF HOLDCO, LLC,

Defendant.

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INDEX NO. 652692/2023

MOTION DATE 08/11/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Plaintiffs Hildene Opportunities Master Fund II, Ltd. and Hildene Rated Credit Fund I, LP ("plaintiffs" or "Hildene") move, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against defendant NRF Holdco, LLC ("defendant" or "NRF") in the amount of $19,373,387.46 (Doc 2 [Notice of Motion]). Defendant NRF opposes the motion and, in turn, cross-moves, pursuant to CPLR 3211 (a)(1), (a)(3), and (a)(7), to dismiss this case in its entirety with prejudice (Doc 18 [Notice of Cross-Motion]).

NorthStar Realty Finance Limited Partnership ("NRF Partnership"), as issuer, NorthStar Realty Finance Corp. ("NRF Corp."), as guarantor, and Wilmington Trust Company, as trustee, were all parties to a March 10, 2006 dated Junior Subordinated Indenture (the "Indenture"). The Indenture allowed NRF Partnership, or its successors, to issue up to $50,100,000 in debt securities to a trust named NorthStar Realty Finance Trust IV (the "Trust"). Defendant NRF is a now a party to the Indenture, as amended, and is the ultimate successor in interest to NRF Partnership and NRF Corp. through several mergers involving the first, second, and third supplemental indentures.

Pursuant to the First Supplemental Indenture dated June 30, 2014 (Doc 5), NRF Partnership merged into NRF Corp., and NRF Corp. then merged into NRFC Sub-REIT Corp., later renamed NorthStar Realty Finance Corp. ("New NRF Corp."). As such, NRF Corp. assumed NRF Partnership's obligations, as Issuer, under the Indenture. Additionally, New NRF Corp. assumed NRF Corp.'s obligations, as both Issuer and Guarantor, under the Indenture.

Pursuant to the Second Supplemental Indenture dated March 13, 2015 (Doc 6), New NRF Corp. transferred all its assets to NorthStar Realty Finance Limited Partnership ("New NRF Partnership"), allowing New NRF Partnership to assume the obligations as Issuer under the Indenture.

Pursuant to the Third Supplemental Indenture dated January 10, 2017 (Doc 7), New NRF Partnership merged into New NRF Corp., that then converted to NRF. Due to the merger, New NRF Corp. assumed New NRF Partnership's obligations, and subsequently, NRF assumed the obligations of both Issuer and Guarantor under the Indenture from New NRF Corp. Thus, a responsibility that NRF assumed as both Issuer and Guarantor was the obligation to ensure the payment of certain securities under the Indenture. The Indenture required that interest be paid quarterly on March 30, June 30, September 30, and December 30 each year during its term.

Under Section 5.8 of the Indenture, holders of preferred securities have an unconditional right to receive payments of principal and interest and can bring suit directly against the Issuer and Guarantor to enforce that right. Further, pursuant to Section 5.2(a) of the Indenture, upon an Event of Default, registered holders of more than 25% of the principal amount of Preferred Securities may declare the total principal of all Securities due and payable immediately.

Plaintiffs hold $6,750,000.00 in face amount of Preferred Securities issued by the Trust, identified by CUSIP 66703GAA3, and $12,000,000.00 in face amount of Preferred Securities

issued by the Trust, identified by CUSIP 66703GAA3. Thus, the principal amount plaintiffs hold is $18,750,000. That sum is approximately thirty-eight percent (38%) of the aggregate principal amount of the outstanding Preferred Securities.

Section 5.1(a) of the Indenture provides that failure to make payment of any interest upon the Securities that continues for more than 30 days after the due date is an Event of Default (Doc 4 [Indenture] § 5.1[a]).

On March 30, 2023, NRF failed to make the quarterly payment of interest as the Indenture required. On May 11, 2023, Plaintiffs sent a notice of acceleration to NRF and the Trustee that notified them that an Event of Default occurred under Section 5.1(a) of the Indenture and declared the total principal of all Securities due and payable immediately pursuant to Section 5.2(a).

Discussion

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *see Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]).

The same standards that apply to motions for summary judgment apply to CPLR 3213 motions. The movant must make a *prima facie* case by submitting the instrument and evidence of the defendant's failure to make payments in accordance with the instrument's terms (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]).

The court grants the motion and denies the cross motion. Plaintiffs have demonstrated its *prima facie* entitlement to summary judgment as a matter of law under the relevant documents.

Defendant has neither raised an issue of fact nor established that dismissal is appropriate at this time pursuant to CPLR 3211 (a)(1), (a)(3), or (a)(7).

In its opposition and cross-motion, NRF primarily argues that Hildene lacks standing to bring this case because it is the beneficial holder, not registered holder, of the preferred securities, and because it does not have the proper authority to do so. In its reply, plaintiffs' main argument is that, as beneficial owner of the Preferred Securities, it received authorization from the registered holder of record of the Preferred Securities, Cede & Co. to bring this case pursuant to two authorization letters (Doc 23 [Authorization Letters] at 3-7).

Plaintiffs, as beneficial owners of the preferred securities, received authorization from the registered holder of the preferred securities, Cede & Co., to bring this case pursuant to the two authorization letters submitted on this motion (Docs 8-9 [Cede & Co. Authorization Letters]). Courts routinely hold that similar letters from Cede & Co. are sufficient to confer standing on the beneficial owner of debt securities to accelerate and sue, including in cases filed pursuant to CPLR 3213 (*see Espadarte Partners, LLC v. Riverside Gulf Coast Banking Co.*, No. 654289/2018, 2020 WL 1955672, at *6 [N.Y. Sup. Ct. Apr. 23, 2020]; see also *Chickpen, S.A. v. Bolivarian Republic of Venezuela*, No. 21 CIV. 597 (AT), 2022 WL 1684275, at *3 [S.D.N.Y. May 26, 2022] [holding exact same letter as that involved here was sufficient to confer "contractual standing"]).

Here, Hildene obtained authorization letters from the registered holder, Cede & Co., to "exercise any and all rights and remedies" that Cede could take as the registered holder. This includes accelerating the principal and filing suit. Thus, the Cede letters authorized the beneficial owners to exercise rights under the relevant agreements. The authorization letters

from Cede and Co therefore confer standing on Hildene as the beneficial owner to accelerate principal and sue NRF for default in this case.

Nevertheless, in addition, Hildene submitted account statements from U.S. Bank, the custodian of the Trust preferred securities, confirming Hildene's ownership. These documents, that are standard U.S. Bank account statements, identify plaintiffs by name and the specific preferred trust securities of which they are the beneficial owners. The statements further identify the securities by CUSIP number, and face value.

In further support, Hildene also submits an affidavit from U.S. Bank (Doc 24 [U.S. Bank Affidavit]) confirming that it serves as the custodian for Hildene's trust preferred securities, that the trust preferred securities are held in book entry form at DTC in a segregated account, that U.S. Bank serves as the DTC participant for the trust preferred securities, and that U.S. Bank is holding, on behalf of Hildene, trust preferred securities identified by CUSIP 66703GAA3, with a total face value of $18,750,000.00. The affidavit also confirms that US Bank, as custodian, has no "ownership interests, legal or equitable, in the" trust preferred securities, "nor is it entitled to any of the underlying benefits" (Doc 24 [U.S. Bank Affidavit]).

This affidavit, along with the letters, establish that Hildene is the beneficial owner of the trust preferred securities, and is authorized to bring this case. As such, plaintiffs have established its *prima facie* entitlement to judgment as a matter of law.

Specifically, plaintiffs' submissions establish that defendant owed them a total of $18,750,000 in principal ($6,750,000 in face amount of Preferred Securities identified by CUSIP 66703GAA3 + $12,000,000.00 in face amount of Preferred Securities identified by CUSIP 66703GAA3). Plaintiffs also establish that defendant missed the March 30, 2023 interest payment of $352,962.19. Under the applicable indentures, defendant was required to pay "Additional

Interest" at "a variable rate per annum, reset quarterly, equal to LIBOR plus 2.80%" on any missed interest payments and unpaid principal amounts (Indenture, §§ 1.1 [definitions], 3.1 (a) [Payment of Principal and Interest]). Defendant's failure to make the March 30th interest payment for more than 30 days qualifies as an event of default under Section 5.1 (a) of the Indenture. Thus, an event of default occurred on May 1, 2023. On May 11, 2023, plaintiffs sent a notice of acceleration of the principal amounts owed (Doc 12 [Acceleration Notice]). Default interest accrues at the same rate as Additional Interest (Indenture, §§ 1.1, 3.1).

Thus, plaintiffs established that defendant owed Hildene $19,373,387.46 as of the June 2, 2023. That sum consists of: $18,750,000.00 in principal; $352,962.19 for the missed interest payment on March 30, 2023; and $270,425.00 in interest and Additional Interest (*see* Doc 3 [Jennifer Nam Affidavit]). Plaintiffs are also entitled to pre-judgment interest at the Defaulting Rate from June 3, 2023 until entry of judgment. Defendant does not dispute plaintiffs' calculations of amounts owed for principal, interest, or additional interest (*see generally* Doc 19 [defendant's mem. opp.]).

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, against defendant, is granted in accordance with this decision; and it is further

ORDERED that the defendant's cross-motion to dismiss is denied in its entirety; and it its further

ORDERED that plaintiffs shall submit a proposed judgment by e-filing and email to SFC-Part60@nycourts.gov, cc'ing all counsel, within 10 days of the date of this decision and order; and it is further

ORDERED that the clerk is directed to enter judgment accordingly and to mark this case as disposed.

11/30/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE