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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN Justice PART 19

0604347/2002

WELLS FARGO BANK MINNESOTA
VS
COHN, MARK F.

SEQ 2

INDEX NO. _____

MOTION DATE 10/28/04

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED
DEC 07 2004
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 12/3/04

Herman Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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WELLS FARGO BANK MINNESOTA, N.A., as TRUSTEE for the REGISTERED HOLDERS of CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2000-FL1,

Plaintiff,

-against-

Index No. 604347/02

MARK F. COHN, RONALD I. ANSON, JACK E. GARRETT and CLIFFWOOD MANAGEMENT COMPANY,

Defendants.

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Herman Cahn; J.:

Plaintiff Wells Fargo Bank Minnesota, N.A., brings this action as trustee for the registered holders of Credit Suisse First Boston Mortgage Securities Corp., commercial mortgage pass-through certificates, series 2000-FL1. It moves for summary judgment against defendants under a guaranty of payment of a note executed by nonparty Hemmingsway Hotel, LLC. Wells Fargo seeks a judgment in the amount of $788,000, together with more than $900,000 in accrued interest. It also seeks to recover its attorneys' fees, costs and disbursements or, in the alternative, directing that an assessment of damages of its reasonable litigation costs be held.

The guaranty which is the basis of the claim is set forth in an agreement of

principals executed in October 2000 by the defendants to enable Hemmingsway Hotel to obtain a $5,630,000 loan from Credit Suisse. In connection with the loan, Hemmingsway executed a mortgage loan agreement, a promissory note, and other related documents. Defendants Cohn, Anson, and Garrett are principals of Hemmingsway. Defendant Cliffwood Management is a Hemmingsway affiliate. The loan was secured by mortgages on two hotels, one located in New Mexico and the other, in Maine.

Wells Fargo brings this action as trustee for the registered holders of Credit Suisse First Boston Mortgage Securities Corp., commercial mortgage pass-through certificates, series 2000-FL1. It is the successor-in-interest to Credit Suisse First Boston Mortgage Capital LLC, the named beneficiary under the mortgage documents (see assignment of New Mexico mortgage, security agr., assignments of leases and fixture filing, June 27, 2001; assignment of Maine mortgage, security agr., assignments of leases and fixture filing, June 27, 2001; allonge to mortgage note, December 2000).

Pursuant to the agreement of principals, the defendant guarantors agreed to become jointly and severally personally liable for the payment of unpaid principal, interest, and any other sums payable under the note, loan agreement, and related mortgage documents upon the occurrence of any one of certain events. One such event was the filing of a petition in bankruptcy by Hemmingsway (see agr. of principals at § 2). They also expressly waived the right to assert certain defenses, including defenses based on the lender's acts or omissions which vary, increase, or decrease the principals' risk and the

lender's failure to first proceed against the borrower or the collateral (see agr. of principals at §§ 3, 7).

After July 2002, Hemmingsway admittedly defaulted on its payment obligations. In August 2002, Wells Fargo gave Hemmingsway and the defendant guarantors written notice of the default and demanded that the borrower cure by September 2, 2002. Hemmingsway failed to cure and the lender accelerated the amount due under the note, together with all other amounts due under the mortgage documents, and demanded payment in full. Hemmingsway failed to pay any of the accelerated debt.

Subsequently, Wells Fargo commenced actions to foreclose the New Mexico property mortgage (see Wells Fargo Bank Minnesota, N.A., as trustee v Hemmingsway Hotel, LLC, a Del. ltd. liability co., & New Mexico Last Call, Inc., a N.M. corp., Dist Ct, Lincoln County, N.M., case no. CV-02-222) and to appoint a receiver over the Maine property (see Wells Fargo Bank Minnesota, N.A. v Hemmingsway Hotel, LLC, Sup Ct, State of Me., civ. action docket no. CV-02-256).

On November 7, 2002, Hemmingsway filed a petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code (see In re Hemmingsway Hotel, LLC, US Bankr Ct, Dist. of N.M., case No. 11-02-17903-MR [the Hemmingsway bankruptcy proceeding]) which automatically stayed the New Mexico and Maine proceedings.

By memorandum decision and order dated August 3, 2003, the Bankruptcy Court granted the lender's motion, dismissed the petition, and vacated the automatic stays on the

ground that, because Hemmingsway was earning insufficient revenues to fund both its business operations and its obligations under its proposed reorganization plan, it had no realistic prospect for an effective reorganization.

The Maine foreclosure sale was held on November 5, 2003, and the New Mexico foreclosure sale was held on March 1, 2004. Notwithstanding the sales, as of July 26, 2004, there remained a principal amount due under the accelerated note of $788,000.

Meanwhile, Wells Fargo commenced the instant action against the defendant guarantors to recover the accelerated principal due under the guaranty, together with interest, late fees, attorneys' fees, costs, expenses, and other charges, as provided in the mortgage documents.

In the answer, the defendant guarantors deny accrual of the debt and assert affirmative defenses based on allegations that Wells Fargo, its agents, or its predecessor: failed to satisfy a condition precedent to the commencement of this action; breached the covenant of good faith and fair dealing implied in the mortgage documents; lacked the right to accelerate the mortgage and, therefore, lacked a good faith basis upon which to commence the Maine and New Mexico proceedings, inasmuch as the loan had not yet matured; and improperly forced Hemmingsway to file for bankruptcy protection, one of the contractual triggers of the defendant guarantors' personal liability under the guaranty.

Wells Fargo now seeks summary judgment in its favor on its claim to recover the $788,000 unpaid principal, together with $946,895.43 in interest accruing since July 11,

2002, and $1,246,784.74 in attorneys' fees, costs, and disbursements or, in the alternative, an order directing an inquest to set its reasonable attorneys' fees, costs, and disbursements. Wells Fargo contends that the defendant guarantors' affirmative defenses are barred by the underlying facts giving rise to the dispute and the doctrines of law of the case and res judicata.

In opposition, the defendant guarantors contend that their liability under the guaranty has not been triggered.

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (City of New York v Clarose Cinema Corp. , 256 AD2d 69, 71 [1st Dept 1998]; see Chemical Bank v Nemeroff, 233 AD2d 239 [1st Dept 1996]; CPLR 3212).

Wells Fargo has demonstrated a prima facie right to recover under the guaranty.

The guaranty provides in relevant part as follows:

> Retained Liabilities. The Principals shall, jointly and severally with the Borrower, be personally liable for, (i) the full recourse obligation to pay the Obligations upon the occurrence of . . . (m) (i) Borrower . . . filing a voluntary petition under the United States Bankruptcy Code.

(Agr. of principals at § 2.)

The guaranty further provides in relevant part as follows:

> Primary Liability. The Liability of each of the Principals shall be direct and immediate as a primary and not a secondary

> obligation or liability, and is not conditional or contingent upon the pursuit of any remedies against Borrower, any other Principal or any other Person, or against any collateral or liens held by Lender.

(Agr. of principals at § 3.)

Therefore, pursuant to the express terms of the guaranty, the defendant guarantors became jointly and severally liable for the debt upon Hemmingsway's filing a Chapter 11 bankruptcy petition.

Wells Fargo having demonstrated a prima facie right to recover, the burden of proof now shifts to the defendant guarantors to demonstrate the existence of a viable defense. "To defeat a motion for summary judgment, the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist. A bona fide triable issue must be established and reliance upon mere suspicion or surmise is insufficient for this purpose" (Kornfeld v NRX Technologies, Inc., 93 AD2d 772, 773 [1st Dept 1983], affd 62 NY2d 686 [1984] [internal citations omitted]). The defendant guarantors have failed to sustain their burden.

The defendant guarantors contend that Wells Fargo breached the express and implied terms of the mortgage documents by improperly demanding that Hemmingsway pay amounts into various reserve accounts which the documents did not require to be paid and then, unjustifiably declaring Hemmingsway in default and accelerating the balance due under the note. They further contend that, with these actions, Wells Fargo intentionally and improperly forced Hemmingsway into bankruptcy, which then

inequitably triggered their payment obligation under the guaranty. On these allegations, they assert affirmative defenses based on equitable estoppel, failure to satisfy a condition precedent, a documentary evidence bar, breach of the implied covenant of good faith and fair dealing, and unjustifiable declaration of default.

The defendant guarantors have failed to raise any triable issues regarding whether Wells Fargo unjustifiably declared Hemmingsway in default and improperly accelerated the debt, thereby compelling it to file a bankruptcy petition to prevent the foreclosure sale of the hotels which triggered their personal liability under the guaranty.

First, although the defendant guarantors raise these contentions here and although Cohn, on behalf of Hemmingsway, participated in the prior proceedings, Hemmingsway failed to interpose defenses based on these contentions in the New Mexico and Maine proceedings, nor did it seek to stay those proceedings before filing for bankruptcy.

Second, the record conclusively demonstrates that Hemmingsway's decision to file for Chapter 11 protection was not motivated solely by Wells Fargo's declaration of default and acceleration of the principal, but also by the severe financial difficulties it experienced in the renovation and operation of the hotels, and that bankruptcy was inevitable. In the order dismissing the Hemmingsway bankruptcy proceeding, the bankruptcy court noted that more than $6 million was due under the note, yet the combined value of the two hotels was only $5.1 million. In addition, $700,000 in capital improvements was needed to repair and improve the New Mexico property. The court

held that, therefore, Hemmingsway had no equity in the hotels. The court also noted that Hemmingsway's monthly operating reports demonstrated that it had yet to make a profit in 2003, was suffering an average net monthly loss of $22,408.20, was showing accrued post-petition liabilities of more than $770,000, and was generating insufficient revenues to fund both its business operations and its obligations under its proposed reorganization plan. The court held that, therefore, Hemmingsway had no realistic prospect for an effective reorganization. The court then dismissed the Chapter 11 proceeding, with leave for Hemmingsway to convert it to a Chapter 7 proceeding within 10 days. Hemmingsway chose not to do so.

Furthermore, Cohn admitted during testimony in the bankruptcy proceeding that, leaving aside the furniture, fixtures, and equipment reserve payments which the defendant guarantors contend were improperly demanded by Wells Fargo, Hemmingsway also defaulted on the principal and interest payments due in August and September 2002 (testimony of Mark F. Cohn, Jan. 16, 2003, hearing, In re Hemmingsway Hotel, LLC, supra, tr. at 266 [li 15] through 267 [li 1]).

Third, the defendant guarantors expressly waived the right to assert any defenses based on the lender's conduct. The waiver provision provides in relevant part that "Each of the [guarantors] hereby waives and agrees not to assert or take advantage of any defense based upon . . . (f) any acts or omissions of [Lender] which vary, increase or decrease the risk on either principal" (agr. of principals at § 7 [f]). It is well-established

that a contractual waiver-of-defense provision is enforceable, absent fraud, novation, or modification (Citibank, N.A. v Plapinger, 66 NY2d 90 [1985]).

The defendant guarantors do not allege that the waiver clause was induced by fraud or was modified after execution of the guaranty, nor could they. As this court noted in its prior decision, the underlying transaction was a complex multi-state real estate transaction between sophisticated business people dealing at arms' length. Therefore, the defendant guarantors cannot claim fraud (see Wells Fargo Bank Minnesota, N.A. v Cohn, NYLJ, Jul. 23, 2003, at 19, col 2 [the prior decision], affd 271 AD2d 278 [1st Dept 2003]).

Inasmuch as they have waived any defenses arising out of the lender's acts or omissions, the defendant guarantors are precluded from asserting defenses based on the lender's alleged breach of express or implied terms of the loan agreement (see Credit Suisse First Boston Mtge. Capital LLC v Cohn, 2004 WL 1871525 [SD NY 2004], citing the prior decision).

Fourth, the defenses are barred by the doctrine of res judicata. The doctrine "embraces not only those matters which are actually litigated before a court but also those relevant issues which could have been litigated" (Buechel v Bain, 275 AD2d 65, 72 [1st Dept 2000], affd 97 NY2d 295 [2001], cert denied 535 US 1096 [2002], quoting Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp., 250 NY 304, 306 [1929], Cardozo, C.J.). Moreover, "it is fundamental [to the doctrine] that a judgment in a prior action is

binding not only on the parties to that action, but on those in privity with them, i.e., those with interests that were represented in the prior proceeding, or who controlled the conduct of the prior action to further their own interests. It is also fundamental that once an action has been resolved, all other claims arising out of the same transaction are also barred even if based upon different theories or seeking different remedies" (Castellano v City of New York, 251 AD2d 194, 194 [1st Dept], lv denied 92 NY2d 817 [1998] [internal citations omitted]; Prudential Lines, Inc. v Firemen's Ins. Co. of Newark, N.J., 91 AD2d 1 [1st Dept 1982] [holding that, although not named party, president of corporation is in privity with corporation]).

Any defense based upon allegations of the lender's inequitable conduct in accelerating the debt which allegedly caused the borrower's default and subsequent bankruptcy is most certainly crucial to the issues raised in proceedings to foreclose on the mortgage securing the loan. However, Hemmingsway chose not to assert such defenses in the New Mexico and Maine proceedings.

There is no real dispute that the defendant guarantors are in privity with Hemmingsway, the borrower of the funds sought to be recovered herein, because they are Hemmingsway's controlling principals. The agreement of principals includes a recital that "[e]ach of the Principals owns, either directly or indirectly, beneficial interests in [Hemmingsway] and, as a result of such beneficial interests, will derive substantial benefits from the making of the Loan to [Hemmingsway]" (agr. of principals at recitals, §

C). There is also no dispute that Cohn actively participated in the Hemmingsway bankruptcy proceeding and attended hearings and testified on behalf of Hemmingsway, and that Anson attended a mediation session on behalf of Hemmingsway.

For these reasons, the branches of the motion to dismiss the third, fourth, sixth, and seventh affirmative defenses are granted and these defenses are dismissed.

That branch of the motion to dismiss the second affirmative defense is granted. In that defense, the defendant guarantors allege that, having elected to pursue the equitable remedy of foreclosure, Wells Fargo may not now maintain an action at law to recover the balance of the debt from them (see RPAPL 1301[3]).

As noted above, the defendant guarantors each expressly waived and "agree[d] not to assert or take advantage of any defense based upon: . . . (i) an election of remedies by Lender, including any election to proceed against any collateral by judicial or nonjudicial foreclosure, whether real property or personal property, or by deed in lieu thereof" (agr. of principals at § 7 [i]).

Further, the defense is barred by the doctrine of law of the case. "The . . . doctrine is a rule of practice which provides that once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation" (Holloway v Cha Cha Laundry, Inc., 97 AD2d 385, 386 [1st Dept 1983]). The doctrine has been applied to bar assertion of an affirmative defense where, as here, the argument has been previously rejected as a basis

upon which to dismiss an action (see e.g. Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co., 271 AD2d 278 [1st Dept 2000]). The defense has previously been rejected by this court on the ground that no election of remedies is required where, as here, the mortgaged real property is located outside the state of New York (see Wells Fargo Bank v Cohn, NYLJ, Jul. 23, 2003, at 19, col 2, affd 4 AD3d 189, supra). For these reasons, the second affirmative defense is dismissed.

For the reasons stated above, the first affirmative defense based upon allegations that the complaint fails to state a viable cause of action is dismissed.

Finally, Wells Fargo seeks an award of reasonable attorneys' fees pursuant to the express terms of the loan agreement and the agreement of principals (see loan agr. at § 4.16, agr. of principals at § 2). That branch of the motion is granted as to liability without opposition (see A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1 [1986]; BNY Fin. Corp. v Clare, 172 AD2d 203 [1st Dept 1991]).

However, an assessment of damages is required. "[T]he courts possess the traditional authority 'to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law' " (Collier, Cohen, Crystal & Bock v MacNamara, 237 AD2d 152, 152 [1st Dept 1997], quoting First Natl. Bank of E. Islip v Brower, 42 NY2d 471, 474 [1977]). "It is well settled that an award of attorney's fees should be 'reasonable in light of the skill, experience and background of . . . counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and

law involved in the case, as well as the time actually spent on [the case]' " (Willis v Willis, 149 AD2d 584, 584 [2d Dept 1989], quoting Silver v Silver, 63 AD2d 1017, 1018 [2d Dept 1978]). The issue of the reasonable amount of attorneys' fees that the plaintiff is entitled to recover is respectfully referred to a Special Referee to hear and report. This issue may continue even after entry of judgment on the claim for recovery of principal and interest, as to which a judgment may be immediately entered.

Accordingly, it is

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff Wells Fargo Bank Minnesota, N.A., and against defendants Mark F. Cohn, Ronald I. Anson, Jack E. Garrett, and Cliffwood Management Company in the amount of $788,000, together with interest as prayed for allowable by law from July 11, 2002 to the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees, costs, and disbursements incurred by plaintiff is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the special referee, or other person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the branch of the motion for an award of reasonable attorneys' fees, costs, and disbursements is held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to CPLR 4403 or receipt of the determination of the special referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (room 311) to arrange a date for the reference.

This constitutes the decision and order of the Court.

Dated: December 3, 2004

ENTER:

J.S.C.