SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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THE UNION LABOR LIFE INSURANCE COMPANY, on behalf of Separate Account J, for itself and as Administrative Agent, Collateral Agent and on behalf of Lehman Brothers Holdings Inc.,

Plaintiff,

DECISION
Index No. 102382/09
Mot. Seq. No. 001

-against-

416-432 WEST 52ND STREET LLC; YITZCHAK TESSLER; JUDA CHETRIT; NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW YORK CITY DEPARTMENT OF FINANCE; SIGNATURE INTERIOR DEMOLITION; and "JOHN DOES" and "JANE DOES" #1-100, the last names being fictitious and unknown to the plaintiff, the persons and parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the amended verified complaint,

Defendants.

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BARBARA R. KAPNICK, J.:

This is a mortgage foreclosure action arising out of various loans given in connection with a construction project involving the conversion of the former St. Vincent's Hospital complex on the West Side of Manhattan. Pursuant to a Master Credit Agreement dated as of December 18,2007 between defendant 416-432 West 52nd Street LLC ("Borrower") and Lehman Brothers Holding Inc. ("Lehman"), Lehman agreed to lend Borrower up to the aggregate principal amount of $74,000,000.00 consisting of an acquisition loan to finance the acquisition of the Property; a building loan to finance the costs

associated with the development of the Improvements, and a project loan to finance certain other costs associated with the Project.

As security for these loans, the Borrower executed and delivered to Lehman three mortgages (namely, an acquisition loan mortgage, a project loan mortgage and a building loan mortgage) encumbering the real property located at 411-419 West 51st Street and 408-432 West 52nd Street, New York, New York (the "Mortgaged Premises").

There is no dispute that defendant Juda Chetrit ("Chetrit") and defendant Yitchak Tessler ("Tessler") executed a Guaranty of Recourse Obligations ("Recourse Guaranty"), pursuant to which said defendants individually and personally guaranteed the full and prompt payment and performance of the Guaranteed Obligations. There is also no dispute that defendant Tessler executed two additional limited guarantees, i.e., a Carry Guaranty and a Guaranty of Completion ("Completion Guaranty").

Pursuant to an Assignment and Assumption Agreement dated January 14, 2008, by and between Lehman and plaintiff, The Union Labor Life Insurance Company (ULLICO), Lehman sold and assigned to ULLICO, and ULLICO assumed, certain documents, including the three mortgages mentioned above.

Plaintiff ULLICO, on behalf of Separate Account J, for itself and as Administrative Agent, Collateral Agent and on behalf of Lehman, now moves for an order:

(i) pursuant to CPLR § 3212, granting plaintiff summary judgment on its causes of action for the foreclosure of the various mortgages, and for a deficiency judgment against defendants 416-432 West 52nd Street LLC, Chetrit, and Tessler, if appropriate;

(ii) pursuant to CPLR §3212, striking the affirmative defenses contained in the Verified Answers of Borrower, Chetrit, Tessler, NYC Department of Environmental Protection ("NYCDEP") and New York City Department of Finance ("NYCDF");

(iii) pursuant to CPLR § 3215 entering a default judgment against defendant Signature Interior Demolition, Inc., which has asserted a mechanic's lien against the property, and, alternately, NYCDEP and NYCDF;

(iv) pursuant to CPLR §§ 1024 and 3025, amending the caption of this action by deleting therefrom "'John Does' and 'Jane Does' #1-100" and adding ", Inc." after defendant "Signature Interior Demolition"; and

(v) pursuant to RPAPL § 1321, appointing a referee to hear and compute the amounts due under the loan documents and to determine whether the Mortgaged Premises can be sold in one parcel, or, in the alternative, permitting plaintiff to make application to this Court for said relief.

Plaintiff argues that it has established its prima facie showing of entitlement to judgment as a matter of law on its foreclosure claims, because the Borrower has conceded (a) the validity and terms of the Notes, Mortgages and other Loan Documents, and (b) that it did not repay the Loans on the Maturity Date as required under the Loan Documents.

Plaintiff also argues that it is entitled to recover against the Guarantors based on the documentary evidence before the Court and on the ground that the Guarantors waived (in section 4.6 of the Recourse Guarantees) any and all defenses, claims, setoffs and counterclaims.

While counsel for the Borrower appeared at the oral argument which was held on July 13, 2009, the Borrower did not submit any papers in opposition to the motion, and did not raise any objection to the relief requested.

Defendant Chetrit opposes the motion only to the extent that it seeks relief against him and cross-moves for an order:

(1) granting summary judgment dismissing the Complaint against him on the grounds that plaintiff fails (a) to allege that he violated the terms of the Recourse Guaranty, and (b) to advise the Court of the clear and specific exculpatory provision contained

therein which exonerates him from any claim plaintiff could make against him under any of the loan documents; and

(2) granting him leave to amend his Answer to raise additional affirmative defenses that (a) plaintiff failed to give him proper notice of default; and (b) plaintiff breached its duty of good faith owed to him.

Defendant Tessler also cross-moves for summary judgment dismissing the Complaint against him, on the grounds that: (a) plaintiff, as Assignee of the Loan Agreements, took possession of the Loan Agreements subject to any defenses the Guarantor had against the Lendor/Assignor; (b) defendant Tessler is entitled to assert defenses to his liability under the Guarantees; and (c) defendant Tessler is not liable under the Guarantees for obligations which he never agreed to guarantee.

Discussion

Plaintiff's motion against the Borrower

Plaintiff's motion is granted on default to the extent that it seeks: (i) summary judgment on its causes of action for the foreclosure of the various mortgages and for a deficiency judgment against defendant 416-432 West 52nd Street LLC; (ii) an order striking the affirmative defenses contained in the Verified Answers of the Borrower, NYCDEP, and NYCDF; (iii) a default judgment

against defendant Signature Interior Demolition, Inc.; (iv) to amend the caption of this action; and (v) to appoint a referee.

The Carry Guaranty

The Carry Guaranty is a Guaranty that the Borrower will pay the carrying costs of the Project including interest, insurance premiums, taxes and similar charges by certain identified dates. Defendant Tessler argues that plaintiff has failed to state a cause of action against him under the Carry Guaranty.

Plaintiff alleges in its Complaint that real estate taxes and water charges may have been due and owing as of January 1 and 2, 2009. However, there is no allegation that any taxes or water charges were due on December 17, 2008, the Initial Maturity Date under the Guaranty, and Tessler denies that any taxes were then due.

There is no dispute that the Lender elected not to extend the Maturity Date or fund the Construction Loan Facility. Thus, it appears that the Carry Guaranty expired by its own terms on December 17, 2008, at which time the interest, insurance premiums, taxes and similar charges were paid and up to date. Therefore, that portion of plaintiff's motion seeking summary judgment on the basis of the Carry Guaranty must be denied.

The Completion Guaranty

The Completion Guaranty applies if a Construction Loan was issued. Defendant Tessler argues that plaintiff has failed to state a claim against him under the Completion Guaranty because the Lender never issued the Construction Loan Facility.

Since no Construction Loan was ever issued, no duty ever arose under the Completion Guaranty. That portion of plaintiff's motion seeking summary judgment on the basis of the Completion Guaranty must, therefore, also be denied.

Recourse Guaranty

The Recourse Guaranty is a non-recourse carve-out guaranty that covers bad acts by the Borrower or Borrower Party (which, as defined in the Master Credit Agreement, includes defendants Tessler and Chetrit). Under the Recourse Guaranty, the Guarantors' personal liability would be triggered only by specific non-recourse carve-outs (or "bad boy" acts) set forth in Sections 9.2 and 9.3 of the Master Credit Agreement, which deal with Partial Recourse and Full Recourse Events.[1]

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[1] According to the cross-moving defendants, such a "Bad Boy Guaranty" is not designed to place absolute liability upon the guarantor, but is rather devised to force the guarantor not to do anything that would improperly harm the lender, such as filing a bankruptcy petition for the borrower or absconding with the funds.

Defendants Chetrit and Tessler argue that plaintiff is thus not entitled to seek recourse against them absent the happening of an event triggering recourse liability. They contend that the Verified Complaint is silent as to any violations of any of the covenants to create liability on behalf of the guarantors under the Recourse Guarantees, and that plaintiff fails to even refer to sections 9.2 and 9.3 of the Master Credit Agreement in its moving papers.

Plaintiff represents that it joined the Guarantors in this action solely for the purpose of preserving its claims against them in the event the proceeds from the foreclosure sale are less than the amounts due under the Loan Documents.

Plaintiff further acknowledges that it will be required to demonstrate the requirements defined in the Guarantees in the event there is a deficiency judgment and it pursues its claims against the Guarantors, but argues that it is not required at this early stage of the proceeding to prove that the Guarantors engaged in any specific bad act or omission that would trigger their liability.

Tessler relies on *Vanderbilt v Schreyer*, 46 Sickels 392 (Sup Ct., NY Co. 1883]) for the proposition that "when the liability of a person to pay a mortgage debt depends upon some extrinsic event which cannot be determined in the prosecution of the foreclosure

suit, he could not be made a party to such an action and charged with a deficiency, because by the terms of his contract his liability does not commence until the happening of the event contracted for." See also, *The Northwestern Mutual Life Ins. Co., v Uniondale Realty Assocs.*, Index No. 8465/04 (Sup Ct., Nassau Co. - November 18, 2004). However, it is now well settled that a party may (and, in certain circumstances, is required to) seek a deficiency judgment in the context of the foreclosure action. *See, Sanders v Palmer*, 68 NY2d 180 (1986).

Moreover, pursuant to Section 9.1(a) of the Master Credit Agreement,

> Lender, by accepting the Notes, this Agreement, the Security Instruments and the other Loan Documents, agrees, unless deemed necessary by Lender [emphasis supplied] to preserve potential liability of any Person for a Recourse Event, that Lender shall not sue for, seek or demand any deficiency judgment against Borrower or any other Person in any such action or proceeding under or by reason of or under or in connection with the Notes, this Agreement, the Security Instruments or the other Loan Documents.

Thus, the Master Credit Agreement specifically authorized plaintiff, where it deemed it necessary to preserve the potential liability of Chetrit and Tessler for a Recourse Event, to sue for, seek or demand a deficiency judgment in the context of the foreclosure action.

Plaintiff also argues that even if no Recourse Event occurred prior to the filing of the Complaint, (i) the Guarantors' opposition to plaintiff's motion, their assertion of additional defenses and their proposed amendments to the pleadings constitute Recourse Events because they are directly or indirectly contesting or intentionally hindering, delaying or obstructing the pursuit of the Lender's rights and remedies;[2] (ii) Chetrit and Tessler failed to respond to a letter dated June 17, 2009 sent by plaintiff requesting proof that general liability and property insurance are in place for the mortgaged property, thus constituting a separate Event of Default; and (iii) a partial Recourse Event occurred because defendants failed to discharge the mechanic's lien asserted by Signature Interior Demolition prior to the commencement of this action.

However, plaintiff has not formally moved to amend its Complaint to allege any of these purported defaults. Thus,

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[2] Pursuant to Section 9.3 ("Full Recourse") of the Master Credit Agreement, the Debt shall be fully recourse to Borrower in the event "Borrower or any of the Borrower Parties in any judicial or quasi-judicial case, action or proceeding directly or indirectly contests the validity or enforceability of the Loan Documents or directly or indirectly contests or intentionally hinders, delays or obstructs the pursuit of any rights or remedies by Lender (including the commencement and/or prosecution of a foreclosure action, judicial or non-judicial, the appointment of a receiver for the Property or any portion thereof or any enforcement of the terms of the Assignment of Leases) after an Event of Default, ..."

plaintiff is not entitled to summary judgment at this time on the basis of the Recourse Guaranty.

Affirmative Defenses

Defendants Tessler and Chetrit have both asserted affirmative defenses alleging failure to state a cause of action against them (first affirmative defense) and failure to allege any claim against them (second affirmative defense).

Plaintiff has moved to strike those affirmative defenses as barred under the terms of the Recourse Guaranty.

Defendants oppose the motion and defendant Chetrit cross-moves for leave to amend his Answer to raise additional affirmative defenses alleging that: (a) plaintiff failed to give him the required ten days' written demand prior to the imposition of liability upon him (third affirmative defense); and (b) plaintiff breached its duty of good faith owed to Chetrit because plaintiff's acts and omissions caused Borrower's failure to repay the Loan (fourth affirmative defense).

The first and second affirmative defenses are stricken and Chetrit's cross-motion for leave to assert the additional affirmative defenses is denied, since pursuant to Section 4.6(xviii) of the Recourse Guaranty, defendants expressly waived any and all defenses "(other than that the Release Conditions have

been satisfied), claims, counterclaims (except for mandatory or compulsory counterclaims) or rights of set-off Grantor may now or hereafter have against the Lender or any other party in connection with the enforcement of this Guaranty, ..." *See, Citibank v Plapinger*, 66 NY2d 90 (1985); *Red Tulip, LLC v Neiva*, 44 AD3d 204 (1st Dep't 2007), *lv to app dism'd* 10 NY3d 741 (2008).[3]

A status conference shall be held in IA Part 39 on May 5, 2010 at 10:00 a.m. in order to coordinate all outstanding discovery.

Settle Order.

Dated: April 7, 2010

BARBARA R. KAPNICK
J.S.C.

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J.S.C.

[3] Moreover, the proposed amendments to Chetrit's Answer lack merit since it appears that plaintiff gave Chetrit more than ten days notice prior to instituting this action. In addition, defendant Chetrit's proposed Amended Answer contains no factual allegations in support of his proposed defense that plaintiff took any actions to affect the Borrower's ability to repay the Loan.