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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

MELVIN L. SCHWEITZER J.S.C.

U.S. BANK NATIONAL ASSOCIATION

INDEX NO. 651951/2010

MOTION DATE

- v -

LIGHTSTONE HOLDINGS LLC, et al

MOTION SEQ. NO. 004

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

Upon the foregoing papers, it is ordered that this motion by plaintiff for declaratory relief is DENIED for the attached Decision and Order.

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

Dated: August 25, 2011

MELVIN L. SCHWEITZER J.S.C.

MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

In re: Lichtenstein Loan Guaranty Litigation	
U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates Series 2007-ESH, acting by and through its Plaintiff, -against- LIGHTSTONE HOLDINGS LLC, DAVID LICHTENSTEIN, LINE TRUST CORPORATION LTD, DEUCE PROPERTIES LTD, BANK OF AMERICA, N.A., WACHOVIA BANK, N.A., MERRILL LYNCH MORTGAGE LENDING, INC., U.S. BANK NATIONAL ASSOCIATION, as Trustee for MAIDEN LANE COMMERCIAL MORTGAGE BACKED SECURITIES TRUST 2008-1, DEBT II ESH, L.P., DEBT-U ESH L.P., and KEYBANK NATIONAL ASSOCIATION, Defendants.	Index No. 651951/2010 DECISION AND ORDER Motion Sequence No. 004, 005

MELVIN L. SCHWEITZER, J.:

The core question in this case is whether, plaintiff, senior lender, states a valid cause of action for breach of a guaranty agreement. Plaintiff seeks declaratory relief while mezzanine lenders move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

Background

In June 2007, Lightstone Holdings LLC, whose managing principal was defendant David Lichtenstein (collectively, the Guarantors), purchased Extended Stay Hotels LLC (ESH), which controlled a group of over 600 hotels known as the "Extended Stay Hotels portfolio" in the United States and Canada. To finance the ESH purchase, the Guarantors arranged loans

from Wachovia Bank, N.A. (Wachovia), Bear Stearns Commercial Mortgage, Inc. (Bear Stearns) and Bank of America, N.A. (collectively, the Lenders) in the amount of $7.4 billion. The loans were structured as a senior mortgage loan (the Senior Loan), and ten tranched mezzanine junior loans designated A through J (collectively, the Mezzanine Loans and together with the Senior Loan, the Loans).

The Senior Loan was in the principal amount of $4.1 billion. It was secured by mortgages on the more than six hundred hotel properties. Subsequent to the closing of the purchase, the Lenders securitized their interest in the Senior Loan, and received certificates representing the ownership of the beneficial interests in a trust (the Senior Lender) holding the senior debt, and the collateral therefor. Thereafter, certain investors bought the certificates. Plaintiff is the special servicer acting on behalf of the trustee, for the benefit of the certificate holders.

The Mezzanine Loans, in the aggregate amount of $3.3 billion, were made to the chain of companies that indirectly owned ESH – a series of upstream parent entities, each owning 100% of the equity interest of the borrower beneath it in the chain (collectively, the Mezzanine Borrowers; together with the borrowers on the Senior Loan, the Borrowers). The Mezzanine Loans were secured by the membership interests of each of the ESH entities to which each respective Mezzanine Loan was made.

In order to obtain the Senior Loan and the Mezzanine Loans, the Guarantors executed personal guaranties (the Guaranty Agreements) for each of the Loans. There was one Guaranty Agreement for the Senior Loan, and one Guaranty Agreement for each of the ten tranches of the Mezzanine Loans. The Guaranty Agreements with respect to the Mezzanine Loans were substantively identical, and established a single obligation whereby, in the event the Mezzanine

Borrowers filed for bankruptcy, the Mezzanine Lenders would have the right to collectively recover in aggregate $100 million.

Under Section 1.1. of the Guaranty Agreements, each of the Guarantors:

> "[i]rrevocably and unconditionally guarantees to Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of the maturity or otherwise. Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as primary obligor."

The Guaranty Agreements were so-called "Non-Recourse Carve-Out" guaranties, meaning that the obligations of the Borrowers that were guaranteed were non-recourse, but became fully recourse and immediately due under certain circumstances. Section 1.2 of each Guaranty Agreement defines "Guaranteed Obligations" as including "the obligations of or liabilities of Borrower to Lender under Section 9.4 of the Loan Agreement." Section 9.4(b) of each Loan Agreement enumerates the circumstances under which the Borrower's obligations become recourse, including, among others, the Borrower's filing of a voluntary petition under the Bankruptcy Code. In accordance with the Loan Agreements, with limited exceptions, the Guarantors liability under the Guaranty Agreements is capped at $100 million (the Guaranty Cap), notwithstanding the amount of the outstanding indebtedness.

On June 15, 2009, ESH and all of the Mezzanine Borrowers (collectively, the Debtors) filed Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York. The bankruptcy cases were administratively consolidated under the caption *In re Extended Stay Hotels LLC*. As a result, the $3.3 billion that the Mezzanine Borrowers owed to the Mezzanine Lenders under the Mezzanine Loan Agreements, became fully recourse and immediately due and payable. Because the indebtedness owed to the Mezzanine Lenders

exceeded $100 million, the Guarantors became jointly and severally liable to the Mezzanine Lenders for $100 million pursuant to the Guaranty Cap.

On July 20, 2010, the Bankruptcy Court confirmed the Debtors' Fifth Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code, dated June 8, 2010, as Amended (the Plan). As part of the Plan, the Senior Loan collateral was sold and over $3.9 billion of the $4.1 billion indebtedness owed to the Senior Lender was satisfied. In contrast to the Senior Lender, the Mezzanine Lenders, received $0 on the outstanding $3.3 billion indebtedness owed to them under the Mezzanine Loans.

Two actions have been filed by Mezzanine Lenders to enforce the Guaranty Agreements. Immediately after the June 15, 2009 bankruptcy filings, the Mezzanine Lenders, holding Mezzanine Debt in tranches A through E, sought to enforce the Guaranty Agreements and recover partial payment of the billions still owed to them under the Mezzanine Loans. On July 7, 2009, these Mezzanine Lenders filed a motion for summary judgment in lieu of complaint. The action is captioned *Bank of America, N.A., et al. v LIGHTSTONE Holdings, LLC, et al.*, Index No. 601853/09 and has been decided by this Court (the *Bank of America* Action). The second action to, *inter alia*, enforce the Guaranty Agreements, was filed on June 24, 2009 by holders of a portion of the indebtedness under the Mezzanine Loan designated as tranche G. The action is captioned *Line Trust Corp., et al. v David Lichtenstein, et al.*, Index No. 601951/09 (the *Line Trust* Action).

Some seventeen months after the *Bank of America* and *Line Trust* Actions were filed, on November 8, 2010, Senior Lender- which was not only aware of these two actions but never brought a claim in this Court or the Bankruptcy Court to enforce the Guaranties – filed this action, as a related case to the *Bank of America* Action. In this case, Senior Lender seeks to

enforce the Senior Lender's Guaranty Agreement and recover $100 million from the Guarantors. In addition, Senior Lender seeks a declaratory judgment against the Mezzanine Lenders contending that pursuant to Sections 6(b), 10(b) and 15(q) of the Intercreditor Agreement between Mezzanine and Senior Lenders (i) the Senior Lender's rights to the $100 million proceeds of the Guaranty Agreements are superior to those of the Mezzanine Lenders, and (ii) any recovery by the Mezzanine Lenders under the Guaranty Agreements must be held in trust for the benefit of the Senior Lenders.

The June 11, 2007 Intercreditor Agreement is the sole document governing the relationship between the Senior Lender and the Mezzanine Lenders in their respective capacities as debtholders under the Senior Loan and Mezzanine Loans. Section 10 of the Intercreditor Agreement, entitled "Payment Subordination," addresses the general priority of payment as between the Senior Lender and the Mezzanine Lenders. Section 10(a), provides in pertinent part:

> "[E]xcept as (i) otherwise expressly provided in this Agreement and (ii) in connection with the exercise by a Junior Lender of its rights and remedies with respect to the Separate Collateral (or, subject to the terms of Section 6(b) hereof, any Guaranty Claim) . . . all of such Junior Lender's rights to the payment of the Junior Loan held by such Junior Lender . . . are hereby subordinated to all of the Senior Lender's rights to payment by the Borrower of the Senior Loan . . ."

However, the parties dispute as to whether this general priority is dispositive with respect to the rights of each party throughout the entirety of the Agreement. On October 6, 2010, the Senior Lender notified the Mezzanine Lenders that it was exercising the rights and remedies it believed it had in accordance with the terms of the Intercreditor Agreement, thus prohibiting the Mezzanine Lenders from enforcing and collecting on the Guaranties. The Mezzanine Lenders, not agreeing with Senior Lender's reading of the Intercreditor Agreement, refused Senior Lender's demands. Mezzanine Lenders asserted that Senior Lender's reading of the

relevant documents was inconsistent with their clear terms and provisions and that as Mezzanine Lenders they had every right to seek judgment on and enforcement of their Guaranty.

In response to Mezzanine Lender's refusal to abide by Senior Lender's demands, Senior Lender filed this action requesting that the Court enter judgment in favor of the Senior Lender as against the Guarantors and Mezzanine Lenders.

Motion Sequence No. 4 is brought by defendants Line Trust Corporation Ltd. and Deuce Properties Ltd. Motion Sequence No. 5 is brought by defendants Bank of America, N.A., Merrill Lynch Mortgage Lending, Inc., U.S. Bank National Association, as trustee for Maiden Lane Commercial Mortgage Backed Securities Trust 200801, Debt II ESH, L.P., Debt –U ESH, L.P., and Keybank National Association. Both motions are motions to dismiss under CPLR 3211(a) (1) and CPLR 3211(a) (7). The two motions include all the Mezzanine Lenders in this action. Although the Guarantors are not included as parties in either motion, the motions encompass the causes of action against the Guarantors.

Discussion

CPLR 3211 dictates dismissal of the Senior Lender's complaint. Pursuant to CPLR 3211 (a) (7), the court shall dismiss a complaint when "the pleading fails to state a cause of action." In assessing a pleading under this Rule, the court must presume that the facts alleged in the complaint are "true and accorded every favorable inference." (*Quatrochi v Citibank, N.A.*, 210 AD2d 53 [1st Dept 1994]). However, allegations that "consist of bare legal conclusions" or are "inherently incredible or flatly contradicted by documentary evidence" are inadequate to sustain a complaint. (*Ullman v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]; *accord Delran v Prada USA, Corp.*, 23 AD3d 308 [1st Dept 2005]; *HT Capital Advisors, LLC v Optical Res. Group, Inc.*, 276 AD2d 420 [1st Dept 2000]).

Further, pursuant to CPLR 3211 (a) (1), the court is to dismiss a cause of action when documentary evidence refutes the plaintiff's allegation and establishes a defense as a matter of law. (*See e.g. Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Indeed, a claim based on a contract must be dismissed when the unambiguous terms of the contract establish that the plaintiff has not stated a claim upon which relief can be granted, regardless of any extrinsic evidence or self-serving allegations proffered by a party to the contract. (*See Taussing v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004]; *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 A2d 257, 257-58 [1st Dept 1999]). This rule is especially significant where "commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." (*150 Broadway N.Y. Assocs. L.P.*, 14 AD3d at 6 (quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004])). Thus, absent ambiguity, the unequivocal language of the parties' contract controls. (*Surge Licensing, Inc.*, 258 AD2d at 258).

The express language of the Intercreditor Agreement authorizes the Mezzanine Lenders to enforce and recover on their "Non-Recourse Carve-out" Guaranty Agreements. Therefore, Senior Lender's cause of action against the Mezzanine Lenders is flawed and, for the reasons discussed below, all causes of action in the complaint are dismissed.

Sections 6(b) and 10(a) of the Intercreditor Agreement clearly and unambiguously provide that the Guaranty claims are an exception to the general subordination provisions thereof. Senior Lender's requested relief hinges on its allegation that under the Intercreditor Agreement, "the [Mezzanine Lenders] agreed that their right of payment under their guaranty claims shall be subject and subordinate in all respects to the rights and claims of the Senior

Lender." However, the express language of the Intercreditor Agreement forecloses this conclusion. Section 6(b) states: ". . . any right of payment of any [Mezzanine] Lender under a Guaranty Claim shall be subject and subordinate in all respects to the rights and claims of Senior Lenders . . . against such Guarantor . . . except in connection with any [Mezzanine] Lender pursuing its rights under Sections 15(q) hereof." Further, Section 10(a) expressly carves out Guaranty claims from payment subordination:

> "Except (i) as otherwise expressly provided in this Agreements and (ii) in connection with the exercise by a Junior Lender of its rights and remedies with respect to the Separate Collateral (or, subject to the terms of Section 6(b) hereof, any Guaranty Claim) . . . all of such Junior Lender's rights to payment of the Junior Loan . . . are hereby subordinated to all of Senior Lender's rights to payment."

Section 15(q) expressly grants the Mezzanine Lenders the exclusive right to enforce and recover under the Guaranty Agreements, and apply the recovery to the unpaid Mezzanine Loans, *notwithstanding* any general payment priority the Senior Lender may have under the Agreement:

> "Notwithstanding anything to the contrary which may be contained in this Agreement, each of the Junior Lenders shall have the right to commence and prosecute an action under its respective Guaranty, including without limitation, for up to the full amount of the Guaranty Cap and may apply any amounts recovered, up to its ratable portion, to the balance of its respective Junior Loan . . . [and such amounts] shall be applied on a pro rata basis among each of the Junior Loans . . . up to the full amount of the Guaranty Cap."

Section 15(q) says nothing about the Mezzanine Lenders' rights being subordinated to the payments of the Senior Lenders for the Guaranty claims, as Senior Lender contends.

Section 15(q) negates Senior Lender's demand that any recovery on the Guaranties by the Mezzanine Lenders be held in trust for the Senior Lender. The first paragraph of 15(q) concludes with the following sentence:

> "In the event that any Junior Lender shall recover more than its ratable pro rata share of the Guaranty Cap under its related Guaranty determined in accordance

> with this Section 15(q), the Junior Lender recovering such amount shall deposit such excess amount in a trust account at an Eligible Institution to be held *for the benefit of all of the other Junior Lenders* until such time that the other Junior Lenders are entitled to receive their pro rata share of such amounts." (emphasis added).

The Intercreditor Agreement explicitly states that any recovery by any Mezzanine Lender under its Guaranty beyond its pro rata share is to be held for the benefit of the other Mezzanine Lenders, and not for the benefit of the Senior Lender. Thus, the relief sought by the plaintiff is inconsistent with the express language of Section 15 (q) of the Intercreditor Agreement and cannot withstand the motion to dismiss. (*See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."). *See also 150 Broadway Assocs., L.P.*, 14 AD3d at 6; *Taussig*, 13 AD3d at 167).

Senior Lender's reliance on Section 10(b) of the Intercreditor Agreement, is incorrect. Although Senior Lender contends that Section 10(b) saves the complaint in providing that "payments to the [Mezzanine Lenders] are subordinate in every respect to payments to the Senior Lender," this argument fails, as it is not based on a full reading of the Agreement or even Section 10(b) thereof.

Not only is Section 10(b) a general provision that says nothing about Guaranties, but Senior Lender ignores the language in Section 10(b) that immediately precedes the general payment subordinate language: "except as expressly otherwise provided herein." As made clear above, Section 15(q) "otherwise provides" that up to the Guaranty Cap, the Mezzanine Lenders not only have the right to enforce and recover on the Guaranties regardless of whether the Senior Lender has been fully paid, but those rights are exclusive. It is well established that specific contractual provisions take precedence over general provisions with respect to the subject of the

specific provisions. (1 Restatement, Contracts, § 236, subd. [a]. *See e.g. Waldman v New Phone Dimensions, Inc.*, 109 AD2d 702, 704 [1st Dept 1985] ("Where general and special provisions appear, special provisions control.")). Therefore, up to the Guaranty Cap, the Senior Lender has no enforcement rights with respect to the Guaranties.

General rules of construction compel the court to reach the same conclusion. These require adopting an interpretation which gives meaning to every provision of a contract, leaving no provision without force and effect. (1 Restatement of Contracts, § 235, subd. [c]. *See e.g. Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42; *Fleishman v Furgueson*, 223 NY 235; *Rentways, Inc. v O'Neil Milk & Cream Co.*, 308 NY 342, 347; *150 Broadway N.Y. Assocs. L.P.*, 14 AD3d at 6 ("It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless.'") (quoting *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 [1984])). Senior Lender's reading, subordinating the rights of the Mezzanine Lenders to those of the Senior Lender, with respect to the Guaranty Agreements based on Section 10(b), would render the language in Section 15(q) a nullity. Mezzanine Lender's reading of the language of Section 15(q) must be adopted as it does not render the Senior Guaranty illusory, nor any other provision of the Agreement.

Under New York law, the court has the power to dismiss all causes of action in the complaint, including those against the non-moving defendants. (*See Citicorp N. Am., Inc. v Fifth Ave. Acquisition Co.*, 70 AD3d 408, 409 [1st Dept 2010] (affirming dismissal of a complaint against all defendants, where only one defendant moved to dismiss)). Under the plain language of Section 15(q) of the Intercreditor Agreement, the right to recover on the Guaranties, up to the Guaranty Cap, is reserved exclusively for the Mezzanine Lenders:

> "Senior Lender and each [Mezzanine] Lender hereby agree that the cumulative monetary caps set forth . . . [in] the Guaranty delivered to Senior Lender with respect to the Senior Loan and each [Mezzanine] Lender with respect to its Junior Loan (the Guaranty Cap), shall be applied on a ratable pro rata basis among each of the Junior Loans."

The court therefore dismisses plaintiff's two causes of action against the Guarantors, in addition to the cause of action against the Mezzanine Lenders. As Senior Lender has no legal right to enforce the Guaranty Agreements to the extent of the Guaranty Cap, its first two causes of action, seeking to enforce the Guaranties and recover the $100 million Guaranty Cap, fail for lack of standing. As Senior Lender is a party to the Agreement, but has no right to collect damages under the Agreement, Senior Lender lacks standing to pursue any claim on the Agreement. (*See Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007] (holding that plaintiff could not bring a claim where it attempted to proceed independently of others creditors notwithstanding unambiguous contractual language to the contrary); *Caprer v Nussbaum*, 36 AD2d 176, 182-83 [2d Dept 2006] (holding plaintiff lacked standing where it had no "interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request")).

Senior Lender's complaint is dismissed without leave to replead. Despite the general rule that leave to replead "should be freely granted absent prejudice or surprise to the opposing party," here, "leave to replead should not be granted because such a proposed amendment would be "devoid of merit or palpably insufficient," based on the plain meaning of the Intercreditor Agreement. (*Janssen v Inc. Village of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008]). As Senior Lender's claims are based on a clear misreading of the plain language of the Intercreditor Agreement, the Agreement itself precludes Senior Lender from having any viable claim. (*Fischbein v Beitzel*, 281 AD2d 167 [1st Dept 2001]).

As a matter of law, the express language of the Intercreditor Agreement warrants dismissal of this action under CPLR 3211 (a) (1) and CPLR 3211 (a) (7), without leave to replead.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion for declaratory relief is denied; and it is further

ORDERED that defendants' motions to dismiss pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7) are granted.

Dated: August 25, 2011

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.