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

PRESENT: LAWRENCE K. MARKS Justice PART 41

Lehman Brothers Holding Inc. Shareholder

v.

Approved Funding Corp.

INDEX NO. 651496/2011

MOTION DATE

MOTIONSEQNO. 001

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

Plaintiff's motion is granted in part and denied in part; defendant's cross-motion is denied.

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

Dated: 9-3-13

HON. LAWRENCE K. MARKS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 41

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LEHMAN BROTHERS HOLDINGS, INC.,

Plaintiff,

-against- Index No. 651496/2011

APPROVED FUNDING CORP.,

Defendant.

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LAWRENCE K. MARKS, J.

This is an action for damages for breach of a loan repurchase agreement. Plaintiff Lehman Brothers Holdings Inc. ("Lehman Brothers") moves for summary judgment against defendant Approved Funding Corp. ("Approved Funding"). Approved Funding cross-moves for summary judgment dismissing the complaint.

BACKGROUND

Approved Funding is a mortgage lender which sells mortgage loans in the secondary market to investors. Compl, ¶ 9. Approved Funding entered into written Loan Purchase Agreements with non-party Lehman Brothers Bank, FSB ("LBB"), dated January 14, 2005 ("the Agreements"). *Id.* at ¶ 10. The Agreements incorporated the terms of the Seller's Guide of non-party Aurora Loan Services LLC ("Aurora"), which was LBB's agent. *Id.* at ¶ 11; Baker Aff, Exh B ("Guide").

Among the loans that Approved Funding sold to LBB was loan number 40002768, the loan at issue in this dispute ("the Loan"). Compl, ¶ 13. *See also* Baker Aff, Exh E. The Loan had a principal amount of $480,000. Baker Aff, Exh E. LBB later sold the loan to plaintiff Lehman Brothers. Baker Aff, ¶ 6.

The first payment under the Loan was due on March 1, 2007. Baker Aff, ¶ 16; Baker Aff, Exh E. The first payment was made on March 8, 2007. Baker Aff, ¶ 16. The second payment was due on April 1, 2007, but neither it nor any future payments were made. Baker Aff, ¶¶ 17-18.

By letter dated May 15, 2007, Aurora notified Approved Funding that there had been an early payment default on the Loan. Baker Aff, Exh G. The letter cites the provision and quoted relevant language from the controlling Seller's Guide regarding early payment default.[1] The letter further provides:

> Because the loan did not meet Lehman's purchase requirements, we ask that you fulfill your obligations pursuant to the Agreement and Seller's Guide and repurchase the loan within 30 days of the date of this letter. In certain circumstances, as a special courtesy to our correspondents, Lehman may permit you to pursue alternatives to repurchase, including a cure of defect within a reasonable time period, indemnification of Lehman, or repricing of the loan. Lehman's offer to Approved Funding Corp. of an alternative to repurchase may not be construed to prejudice or waiver [sic] of any rights Lehman has to request repurchase of the Loan at a later time.

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[1] This includes that the Seller's Guide provides, in pertinent part, that "a Mortgage Loan has an early payment default if either the first or second monthly payment due the Purchaser is not made with 30 days of each such monthly payment's respective due date." Guide, § 715; Baker Aff, Exh G.

> We ask that you review the loan along with our findings to determine whether you can cure the above-referenced defect or provide evidence to refute our findings. If you are unable to cure the defect or cannot provide sufficient evidence to refute our findings within 30 days, Lehman will require that you fulfill your obligations pursuant to the Agreement and the Seller's Guide and repurchase the loan.
>
> * * *
>
> Nothing in this letter may be construed to prejudice any rights or remedies that Lehman may have under the Agreement, the Seller's Guide, the Loan documents (including, but not limited to, the promissory note and security instrument), at law or in equity, nor is Lehman waiving any event of default, including those not described herein, that may exist now or in the future under the Agreement or Seller's Guide.

Baker Aff, Exh G.

Aurora, on behalf of Lehman Brothers, and Approved Funding engaged in numerous communications through at least early February 2008. Baker Aff, ¶ 25; Opp & Cross-Mot Br, at 22. The final e-mail provided on this motion, from Aurora to Approved Funding, dated February 12, 2008 states:

> We still do not have a resolution on the above loans. Our last proposal to you was to cap the loss at 162,600.00, with 25K upfront along with a volume deal. We never received a response back from you. Unfortunately, we are unable to do a volume deal as we have shut down our correspondent lending. Therefore, I am reaching out to you for 1 last time to try to reach a resolution. I believe you have some loans in the pipeline. We will not be able to fund those loans until a resolution is completed.
>
> I am proposing that we still cap the loss at 162,500.00 and Approved send 25K upfront. We can allow the difference of

> $137,500.00 to be paid overtime, perhaps 6 months or 22K per month. This is contingent upon management approval. Please respond by end of business 2/13/08 as to whether or not you can agree to this? If you would like to propose a settlement, please respond as I will be more than willing to listen. We need to finalize a resolution prior to end of the week to avoid escalating your company to our legal division. I hope we can come to a [sic] amicable resolution.

Baker Aff, Exh H. The parties did not resolve the issue.

On or about May 31, 2008, Lehman Brothers sold the Loan to the Structured Asset Securities Corporation ("SASCO"). Baker Aff, ¶ 26; Baker Aff, Exhs I - J.

Lehman Brothers filed the complaint in this action on May 31, 2011. The complaint contains a single cause of relief--Lehman Brothers alleges that Approved Funding was in breach of contract, by refusing or otherwise failing to repurchase the Loan. Compl, ¶ 23. In its complaint, Lehman Brothers seeks actual and consequential damages of not less than $150,000. *Id.* at ¶ 24. In this motion, Lehman Brothers asserts that its damages are $343,951.85, plus attorney's fees, costs and post-judgment interest. Mot Br at 3.

Plaintiff moved for summary judgment, and defendant cross-moved for same. Argument on the two summary judgment motions was held on February 11, 2013. At that time, the Court raised several concerns, and gave counsel the opportunity to address them in supplemental papers, and with further argument on those issues. Argument was

therefore held, again, on May 20, 2013.[2] Following the conclusion of the argument, counsel were told that Lehman Brothers would be granted summary judgment on liability, but not on damages, and that Approved Funding's cross-motion would be denied.

DISCUSSION

A motion for summary judgment will be granted only where a movant has made "a prima facie showing of entitlement to judgment as a matter of law" and has established the absence of or "eliminate[d] any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The assertions of the non-moving party are given every favorable inference in opposition to a motion for summary judgment. *Myers v. Fir Cab Corp.*, 64 N.Y.2d 806, 808 (1985); *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep't 1997).

Lehman Brothers' Motion for Summary Judgment:

Lehman Brothers contends that it is entitled to summary judgment because it has established both Approved Funding's default regarding the Loan, and its damages. It seeks $343,951.85, plus attorney's fees, costs and interest. Lehman Brothers asserts that it did not waive any of its rights in engaging in negotiations with Approved Funding, that

[2] The Court notes that this date was set in concert with counsel for both parties, who requested time to meet and confer and see if the case could be settled. Although the dispute was not settled, the Court has no reason to believe counsel were not attempting to do so in good faith.

it was not required to make any demand to Approved Funding following the default, and that it properly sold the Loan to SASCO when Approved Funding failed to take any action with respect to the Loan.

Approved Funding asserts that the only reason it failed to repurchase the loan was because Aurora, acting on behalf of Lehman Brothers, advised it to "hold off" on repurchasing the loan, and enter into settlement negotiations instead. AF's Supp Br at 10. It contends that Lehman Brothers cannot rely on Approved Funding's failure to perform under the contract, given that during the negotiations, Aurora "imploded and disappeared," in the context of the well publicized collapse of Lehman entities. *Id.* Approved Funding avers that this is what prevented it from actually repurchasing the loan. Opp & Cross Mot Br, at 21.[3] Approved Funding further argues that Lehman Brothers waived its right to require it to repurchase the loan when Lehman Brothers sold the loan to a third-party for less than fair market value. *Id.*

Approved Funding's arguments are unpersuasive. The contracts and agreements at issue are clear. There was a loan, payments were due under the Loan, and after the first payment defendant made no further payments. This was sufficient to trigger the early payment default clause which, in turn, triggered the repurchase obligation. Seller's

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[3] The Court need not reach a determination on this allegation in the context of these motions. However, the Court notes that the February 12, 2008 email asked for a response from Approved Funding by the end of the next business day, and the Loan was not sold to SASCO for more than three months thereafter, and it is a matter of public record that Lehman Brothers did not file for bankruptcy until September 2008 - - seven months later. Baker Aff, Exh H; Baker Aff, Exhs I - J; P's Suppl Br at 7.

Guide, §§ 715, 710. Defendant unquestionably did not repurchase the Loan. That, eventually, the Lehman entities did not respond to defendant, given their own circumstances, did not change or create any ambiguity with regard to Approved Funding's obligations. As such, defendant is in breach. "This follows from the bedrock principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document." *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 6 (1st Dep't 2004). *See also Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66-67 (1st Dep't 2008). Therefore, there is no question with regard to the liability of defendant.

However, with regard to damages, plaintiff has failed to meet its burden of proof. It "is axiomatic that the party 'complaining of injury has the burden of proving the extent of the harm suffered.'" *City of New York v. State*, 27 A.D.3d 1, 4 (1st Dep't 2005) (internal citations omitted). *See also J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 877 (1995) (where the court holds that plaintiff "bears the burden of proving the extent of the harm suffered"). It is also true that it is "defendant's burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages . . . but also the extent to which such efforts would have diminished its damages." *LaSalle Bank Nat'l Ass 'n v. Nomura Asset Capital Corp.*, 47 AD3d 103, 107-08 (2007). However, plaintiff's

continual reliance on this principle (*see, e.g.*, Mot Br at 5-6; P's Supp Br at 9-10) is to its own detriment.

The Court could not have been clearer, and gave both counsel the opportunity to submit supplemental papers following the first argument on this motion. Despite this, questions remain regarding how the Loan was valued, whether it was ever valued individually, how it was bundled and sold, and the reasonableness of this process. This may not preclude plaintiff from ultimately recovering damages from defendant,[4] but at this time plaintiff has failed to establish, as it must on a motion for summary judgment, the absence of any questions of fact or law with regard to the calculation of its damages.

Approved Funding's Cross-Motion for Summary Judgment:

In its cross motion, Approved Funding argues that it is the party that is entitled to summary judgment. Approved Funding claims that Lehman Brothers breached the Agreement, and waived its rights thereunder, by failing to give Approved Funding notice of both the default and Lehman Brothers' sale of the loan to a third party. Approved Funding also contends that Lehman Brothers is estopped from asserting a breach of contract claim, due to Lehman Brothers' conduct during the negotiations. Approved

[4] For example, plaintiff put forth additional support for its valuation, and valuation process, in its supplemental papers. *See, e.g.*, Baker Supp Aff ¶ 10 and Exh O (regarding the Loan being discounted because it was delinquent and in view of the length of the foreclosure process in New York); Baker Supp Aff ¶ 10 and Exh P (regarding that the price allocated to the Loan was reasonable). However, what was submitted, even taken together, did not meet the standard of eliminating any questions of fact.

Funding further asserts that Lehman Brothers' sole remedy was to demand a repurchase, and having elected to sell to a third party -- allegedly for below fair market value -- Lehman Brothers may not seek damages under either the repurchase or indemnification clauses.

At bottom, Approved Funding claims that the series of events results in it not being "obligated to repurchase the Loan, and that [Lehman Brothers] is not entitled to any damages from" it. Opp & Cross Mot Br, at 24. This is plainly wrong. As addressed above, every assertion and document before the Court supports the position that Lehman Brothers had every right to: seek the payments required under the Loan; when those payments were not made, seek repurchase of the loan; and, when that failed, seek to mitigate its loss. There is simply no question in this action that Approved Funding did not make payments on the loan -- beyond the very first one -- that the loan went into default, and that Approved Funding failed to repurchase the loan.

Any claim that the demand letter somehow created a new contract (*see, e.g.*, D's Supp Br at 6), is equally unconvincing. The Seller's Guide contained a clear merger clause that required any modification to be not only in writing, but signed by the party against which such modification is sought to be enforced. Guide, § 713.5. Merger clauses that require any modification of an agreement to be in writing are routinely enforced. *See, e.g.*, General Obligations Law § 15-301 (1); *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 201-03 (1st Dep't 2001); *Opton Handler*

Gottlieb Feiler Landau & Hirsch v. Patel, 203 A.D.2d 72, 73 (1st Dep't 1994).

Further, the May 15, 2007 letter explicitly contained a statement that nothing in it may be construed to prejudice Lehman Brothers' rights or remedies under the Agreements, Seller's Guide, Loan documents, and the law. Baker Aff, Exh G. That the same letter references that there is similarly no waiver of Lehman Brothers' right to request repurchase "at a later time" (*id.*) cannot credibly serve to transform the situation into one where there are no past or current obligations between the parties. This is especially true where there is an operative merger clause in an underlying agreement between those parties.

Accordingly, defendant's motion for summary judgment in its favor is denied.

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff Lehman Brothers Holdings, Inc.'s motion for summary judgment against defendant Approved Funding Corp. is granted only as to liability, and it otherwise denied; and it is further

ORDERED that defendant Approved Funding Corp's cross-motion for summary judgment against plaintiff Lehman Brothers Holdings, Inc. is denied.

This constitutes the Decision and Order of the Court.

Dated: September 3 , 2013

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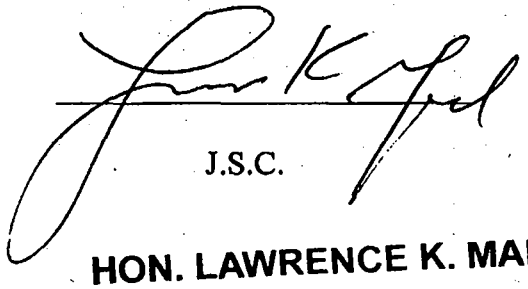

J.S.C.

HON. LAWRENCE K. MARKS