| **Beltway 7 Props., Ltd. v Blackrock Realty Advisers, Inc.** |
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| 2017 NY Slip Op 31985(U) |
| September 18, 2017 |
| Supreme Court, New York County |
| Docket Number: 654187/2016 |
| Judge: O. Peter Sherwood |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49
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BELTWAY 7 PROPERTIES, LTD.,

Index No. 654187/2016

Plaintiff,

- against -

BLACKROCK REALTY ADVISERS, INC.,
BLACKROCK FINANCIAL MANAGEMENT, INC.,
and BLACKROCK, INC.,

Defendants.
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**O. PETER SHERWOOD, J.:**

Defendants BlackRock Realty Advisers, Inc., BlackRock Financial Management, Inc., and BlackRock Inc. (collectively, BlackRock) move, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the amended complaint.[1]

**Background**

The amended complaint alleges as follows: In November 2012, Beltway 7 Properties, Ltd. (Beltway) and its affiliated entity, L Reit Ltd. (L Reit, together with Beltway, Borrowers [individually, Borrower]), closed on two loans (Loans). JPMorgan Chase Bank National Association (JPMorgan, together with BlackRock, Lenders [individually, Lender]) was the original Lender on each of the Loans (amended complaint ¶ 8).

Pursuant to a loan agreement dated November 2, 2012 (Mortgage Loan Agreement), L Reit borrowed $26 million from JPMorgan (Mortgage Loan). As collateral, L Reit granted

[1] Beltway filed an amended complaint after BlackRock made the instant motion to dismiss. BlackRock informed the Court that it is "prepared to stand on its Motion to Dismiss."

JPMorgan a mortgage lien on, and security interest in, seven commercial properties located in Houston, Texas (collectively, Mortgaged Property) (*id.* ¶¶ 34-35). The Mortgage Loan, and all of JPMorgan's rights and obligations under the Mortgage Loan Agreement and other loan documents, were assigned to Wells Fargo Bank, N.A. (Wells Fargo), as trustee for the registered holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2013-FL3. JPMorgan appointed Keybank National Association (Keybank) as servicer for the Mortgage Loan, and Keybank assumed Wells Fargo's role as JPMorgan's agent (*id.* ¶ 36).

Pursuant to a mezzanine loan agreement (MLA), dated November 2, 2012, Beltway borrowed $25 million from JPMorgan (Mezzanine Loan). As collateral, Beltway pledged its equity interest in L Reit, thus linking the Mortgage Loan and the Mortgaged Property pledged as collateral to the Mezzanine Loan. JPMorgan appointed Midland Loan Services (Midland), a PNC Real Estate Business, as servicer for the Mezzanine Loan, and Midland served as JPMorgan's agent (*id.* ¶ 32). Shortly thereafter, JPMorgan transferred its interest in the Mezzanine Loan to BlackRock (*id.* ¶¶ 37-40).

The loan agreements provided for payment on the ninth day of each calendar month or, if not a business day, the immediately preceding business day (Payment Date) (*id.* ¶ 41). Pursuant to Section 2.2.1 of the loan agreements, on each Payment Date, the Borrower (Beltway or L Reit) was required to pay to the Lender the interest accrued for the related period (Interest Period). The Interest Period for each month began on the 15th day of the calendar month, and ended on the 14th day of the calendar month in which the Payment Date occurred. Lenders refused to accept payment except on the Payment Date during the term of the Loans (*id.* ¶ 43).

Under section 2.3.4 of the loan agreements, Beltway was to pay an amount equal to the lesser of 5% of such unpaid sum or the "Maximum Legal Rate" if it did not pay any principal, interest or any other sums due under the Loan documents on or prior to the date on which the payment is due (Late Payment Charge) (*id.* ¶ 49). The MLA also provides for a "Default Rate" of interest of 5% above the Interest Rate, and that all interest that occurs following an "Event of Default" accrues at the Default Rate (*id.* ¶ 51). For two years, L Reit and Beltway made timely payments in accordance with the Loan Agreements (*id.* ¶ 52).

JPMorgan appointed Keybank as servicer for the Mortgage Loan (*id.* ¶ 54). In late October 2014, Beltway's insurance agent indicated that the umbrella policy on the Mortgaged Property would soon expire and that a new policy would need to be procured at a cost of approximately $8,600. It was Keybank's duty as servicer to ensure that the umbrella policy was renewed (*id.* ¶ 57). In November, 2014, L Reit was attempting to refinance its Mortgage Loan, and Beltway was attempting to refinance its Mezzanine Loan on the Mortgaged Property (Refinances). JPMorgan was the Lender on the Refinances for both loans. The closing of the Refinances was set for November 7, 2014, the same day that the loans were set to be paid (*id.* ¶ 58). Keybank failed to pay the amount required to renew the umbrella policy prior to the expiration of the prior policy as its duties as servicer required (*id.* ¶ 59).

The umbrella policy was finally renewed, and on November 14, 2014, seven days after the Payment Date for the matured indebtedness under the Loan Agreements, JPMorgan agreed to close the Refinances and BlackRock agreed to close the Mezzanine Loan (*id.* ¶ 62). The only impediment to closing was the refusal by JPMorgan and Blackrock to close the loans without the $8,600 premium paid on the umbrella policy. Despite this, both Lenders alleged a technical

default by Beltway, caused by the failure to close the loans on or before November 7, 2014 (*id.* ¶ 63).

JPMorgan, recognizing that its own agent, Keybank, caused the default, determined that the late payment penalty charge and default interest provisions of the Mortgage Loan Agreement were inapplicable or unenforceable (*id.* ¶ 64). BlackRock, through its agent, Midland, charged Beltway a late charge representing the full amount allowed by the penalty provision in the MLA, in the amount of 5% of Beltway's unpaid indebtedness, or $1.25 million (*id.* ¶ 67).

Despite the closure of the refinancing on November 14, 2014, just one week after the maturity date, which should have stopped any further interest from accruing, BlackRock further charged additional interest and default interest totaling approximately $344,000 for the period November 15, 2014 to December 14, 2014 (*id.* ¶ 71). This amount was caused by applying the interest rate, 9.654%, to a full additional Interest Period, from November 7, 2014 to December 14, 2014, as well as applying the default interest rate of 14.654% to this same period (*id.* ¶ 72).

Beltway immediately protested payment of both the Late Payment Charge and the excessive interest and default interest. Nevertheless, BlackRock refused to waive the penalties (*id.* ¶¶ 75-76). In emails with JPMorgan and its servicer, Beltway was expressly told that it must pay the fees and interest charged within hours of receiving the payment demand, or risk being declared in default and foreclosure of the Mortgaged Property (*id.* ¶ 79). Despite its continuing protest, Beltway paid the charges under the threat of having the loan declared in default and thus its property interests seized by a simple nonjudicial taking (*id.* ¶ 80).

Beltway commenced this action in August 2016. The complaint contains five causes of action. The first cause of action, for breach of contract, alleges that in breach of Section 2.3.4 of the MLA, BlackRock charged Beltway a Late Payment Charge representing 5% of the unpaid balance of the loan. Beltway seeks restitution in the amount of approximately $422,222.22, plus consequential and compensatory damages, its reasonable attorneys' fees and costs, and pre- and post-judgment interest.

The second cause of action, for breach of contract, alleges that, without justification, BlackRock charged interest and default interest through December 14, 2014, despite Beltway's paying off the loan on November 14, 2014. Beltway seeks restitution in the amount of approximately $344,000, plus consequential and compensatory damages, its reasonable attorneys' fees and costs, and pre-and post-judgment interest.

The third cause of action is for a declaratory judgment. It states that, should the court determine that Blackrock did not materially breach the MLA, plaintiff seeks a declaratory judgment that the late payment charge and increased default interest rate provided for in the MLA were unenforceable penalties as a matter of law at the time of contracting and that the demand for such payments was unconscionable and against public policy.

The fourth cause of action is for a declaratory judgment. Beltway alleges that it protested payment of BlackRock's late charge and default interest charge, but ultimately paid under the threat of having the loan declared in default and its property foreclosed upon. It seeks a declaratory judgment holding that the voluntary payment doctrine does not bar its recovery of the improper late payment charge and default interest charged by BlackRock paid by Beltway under protest, under duress and coercion, and under mistake of fact and law.

The fifth cause of action is for restitution. Upon BlackRock's demand, and to avoid further claims of late penalty charges or increased default interest, Beltway paid a $500,000 late payment penalty charge and approximately $344,000 in increased interest and default interest. These charges were contractually improper, or alternatively, were unenforceable penalties and equity demands that they be returned to Beltway.

In support of its motion to dismiss based on documentary evidence and failure to state a cause of action, Blackrock argues that: (1) Beltway admits that it breached the MLA; (2) under the MLA, Beltway owed BlackRock the Late Payment Charge, default interest, and interest and default interest through the December interest period; (3) the late charges are not unconscionable; (4) the voluntary payment doctrine bars Beltway's claims; (5) Beltway's declaratory judgment claim is duplicative of its restitution and contract claims; and (6) Beltway has no damages.

In opposition, Beltway argues that: (1) the Late Payment Charge and default provisions are unenforceable penalties; (2) BlackRock's enforcement of the default interest provision was unconscionable; (3) BlackRock's calculation of increased interest and default interest were contrary to the MLA; (4) the voluntary payment doctrine is inapplicable; (5) Beltway's declaratory judgment claim is not duplicative of the other causes of action; and (6) Beltway has adequately alleged damages.[2]

For the reasons discussed below, the motion is granted, and the complaint is dismissed.

[2] Beltway does not object to the dismissal of its claims against BlackRock Realty Advisers, Inc. and BlackRock Inc.

**Discussion**

A motion to dismiss founded upon documentary evidence "may be granted if 'documentary evidence utterly refutes [the] plaintiff's factual allegations'" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]), quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]), "thereby conclusively establishing a defense as a matter of law" (*id.* [internal quotation marks and citation omitted]). Moreover, the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). BlackRock has demonstrated that it is entitled to dismissal of the complaint based upon the voluntary payment doctrine.

As a preliminary matter, and contrary to Beltway's assertion, the issue can be decided on a pre-answer motion to dismiss. In *DRMAK Realty LLC v Progressive Credit Union* (133 AD3d 401 [1st Dept 2015]), the First Department granted the defendant's motion to dismiss, based, as here, on CPLR 3211 (a) (1) and (7). The Court held that, because plaintiff failed to allege that it made the payment at issue to the defendant under duress and protest, the voluntary payment doctrine barred the plaintiff's claims (*id.* at 406).

Plaintiff alleges it made payment under protest (*see* amended complaint ¶¶ 20, 75 ["Beltway immediately protested payment"], 79-80, 87). Not just any form of protest is sufficient to overcome the voluntary payment doctrine, however. Rather, "[i]n order for a protest to be characterized as appropriate, it must be in writing and must have been made at the time of payment" (*Neuner v Newburgh City Sch. Dist.*, 92 AD2d 888 [2nd Dept 1983]). Additionally,

this written protest must indicate that [plaintiff] was reserving his rights when [it] made payment" (*DRMAK Realty LLC*, 133 AD3d at 405) and must be communicated to the party receiving the payment (*c.f. Walton v New York State Dept. of Correctional Services*, 13 NY3d 475, 489 [2009] [noting that "the protest requirement would have been fulfilled by a letter to MCI," the entity levying the charge, "and DOCS," the entity receiving commission for that charge "at the time the bills were paid"]).

While on a motion to dismiss, "it is assumed, of course, that a plaintiff's factual allegations are true . . . conclusory allegations will not serve to defeat a motion to dismiss." Thus, it is not enough to simply allege that protest was made. Rather, plaintiff's allegations must be sufficient to establish that its protest satisfied the above requirements. (*See DRMAK Realty LLC*, 133 AD3d at 403-405 [finding voluntary payment doctrine barred plaintiffs' claims, despite plaintiffs' claim that they had protested the demand for payment, where there was "not a single allegation that [plaintiffs] protested the payment in such a way that he preserved his right to later sue to recover it"].) Although plaintiff alleges it "immediately protested," it offers no explanation as to the manner in which it purportedly communicated such protest – let alone how its protest satisfied the above requirements (*see* amended complaint ¶¶ 20, 75, 79-80, 87; Nasr aff ¶¶ 21, 29). Plaintiff does not state whether its protest was in writing or to whom this protest was communicated to. Moreover, there is no indication that Beltway "took steps" to indicate that it "was reserving [its] rights" when it made payment to BlackRock (*DRMAK Realty LLC*, 133 AD3d at 405 [plaintiff only "stated in his affidavit in opposition that he complained to defendant when it presented its payoff letter in May 2013"]). Accordingly, plaintiff has failed to establish formal protest sufficient to defeat the voluntary payment doctrine.

Beltway contends that it was induced to make the payment by a mistake of fact and law (i.e. that it owed the fee under the MLA and that the fee was enforceable). This contention is untenable. Beltway itself claims that it deemed the charges in error at the time that it paid BlackRock. According to Mohammad Nasr, Beltway's president, Beltway:

> "immediately protested that the penalty charge and increased default interest believing they might be contrary to the terms of the Mezzanine Loan Agreement. Beltway knew the penalties were absurdly high given the short length of Beltway's alleged insurance default, which was caused by Keybank's failure to comply with its duties pursuant to its agreement to act as agent to JPMorgan. Despite these facts, BlackRock refused to waive the penalties"

(Nasr aff ¶ 21). Thus, Beltway has not shown that the payment was made based on a mistake, because Beltway was apprised of the amount and reasons for the charges (*see Dillon*, 100 NY2d at 526 [no fraud or mistake alleged where, according to the complaint, plaintiff knew she would be charged a $5 late fee if she did not make timely payment]).

To be sure, Mr. Nasr also states that:

> "While Beltway 7 continued to protest the charges, it mistakenly agreed with BlackRock's representations that the charges were correct, and paid the charges under economic duress in order to avoid losing its entire interest in the Mortgaged Properties of approximately $75 million, with an understanding that it would be able to later challenge the charges if they were indeed improper.
>
> "However, upon later investigation, Beltway now believes that these late charges were unenforceable penalties, as well as that BlackRock had incorrectly assessed nondefault and default interest according to the terms of the MLA. Beltway thus filed this action to recover these amounts"

(Nasr aff ¶¶ 29-30). Assuming for purposes of this motion the veracity of these statements (*Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 144 [1st Dept 2015]), Beltway has not shown that it made a reasonable effort to learn its legal obligations. As stated by the Second Department, in granting the application of the voluntary payment doctrine: "[W]e find that the

weight of the evidence supports the conclusion that Gimbels was not operating under an actual mistake of law but, instead, made the subject payments voluntarily, as a matter of convenience, without having made any effort to learn what its legal obligations were" (*Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2d Dept 1986]; *see also Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244, 246 [1st Dept 2006] [payment without inquiry]; *Birchwood Towers #1 Assoc. v Haber*, 98 AD2d 697, 699 [2d Dept 1983] [parties were represented by independent counsel, aware of the relevant facts, and had the opportunity to explore the law on the subject; hence, no basis for relieving defendants from the stipulation on the ground of mistake]).

A threatened loss of property could be the basis of an economic duress finding (*see e.g.* (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971], *rearg denied* 29 NY2d 749 [1971]). As noted, above, Mr. Nasr states that "Beltway had no choice but to pay; if it had not, BlackRock would have foreclosed on Beltway's interest in L Reit, which was the security for the Mezzanine Loan. Had this occurred, Beltway would have lost its entire 75 million dollar interest in the Mortgaged Property, which it held through its interest in L Reit" (Nasr aff ¶ 27). However, "one who would recover moneys allegedly paid under duress must act promptly to make his claim known" (*Austin Instrument v Loral Corp.*, 29 NY2d at 133). Beltway waited one and one-half years prior to instituting this action and did not assert a defense of duress until nearly two months afterwards.

Plaintiff's delay of nearly two years before instigating this action or asserting a defense of duress negates its claim of economic duress. Since a contract entered into under duress is voidable, not void, courts have found that parties have waived the defense by failing to act

promptly to repudiate (*see Steen v Bump*, 233 AD2d 583, 585 [3d Dept 1996] [rejecting claim of economic duress where "there is no evidence of continuing economic duress which would justify defendant's failure to act promptly to repudiate the" disputed promissory note]; *Teachers Ins. and Annuity Ass'n of Am. v Wometco Enterprises, Inc.*, 833 F Supp 344, 348 [SD NY 1993] [noting that "[u]nder New York law, a contract entered into under duress is voidable, not void, and a party who fails promptly to disaffirm a contract entered into under duress is deemed to have waived its right to disaffirm or to have elected to affirm it"]). The same principle also applies to payments allegedly made under duress, and "one who would recover moneys allegedly paid under duress must act promptly to make his claim known" (*Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124, 133 [1971], citing *Oregon Pac. R. Co. v Forrest*, 128 NY 83, 93 [1891]; *see also Williams v Rutherford Realty Co.*, 159 AD 171, 175-177 [1st Dept 1913] [holding that "had there been any such duress as is alleged, plaintiff's long and inexcusable delay in seeking relief would be sufficient to bar her recovery" for sums allegedly paid under duress]).

Mr. Nasr states that "upon later investigation, Beltway now believes that these late charges were unenforceable penalties, as well as that BlackRock had incorrectly assessed nondefault and default interest according to the terms of the MLA. Beltway thus filed this action to recover these amounts" (Nasr aff ¶ 30). Mr. Nasr has not supplied the court with any details as to this "later investigation," or explained the delay in seeking to repudiate the alleged overcharge. Beltway makes no other statements as to why it did not timely pursue its rights.

In *Port Chester Elec. Const. Corp. v Hastings Terraces* (284 AD 966, 966–67 [2d Dept 1954]), the court rejected a defense of duress where there was a gap of roughly one year, three months between when the alleged duress would have ended and when the defense of duress was

first asserted – in the second amended answer. By comparison, in the present case, although the alleged duress ended on November 14, 2014 (when the plaintiff made payment), plaintiff took no action until filing this lawsuit on August 9, 2016, nearly one year and nine months later. Moreover, plaintiff did not assert a claim of duress until nearly two months after that when it served its papers in opposition to this motion on November 18, 2016. Accordingly, plaintiff has abandoned any claim of duress it might have had.

None of Beltway's five causes of action are viable, because application of the voluntary payment doctrine disposes of each of them.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 18, 2017

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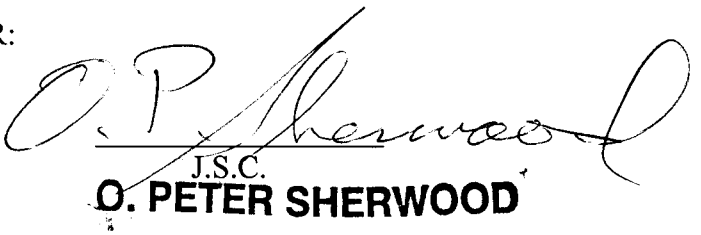

J.S.C.
O. PETER SHERWOOD