1604-1610 Broadway Owner, LLC v U.S. Bank, N.A.
2018 NY Slip Op 31039(U)
May 30, 2018
Supreme Court, New York County.
Docket Number: 650772/2013
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

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1604-1610 BROADWAY OWNER, LLC, SL GREEN MANAGEMENT CORP.

Plaintiff,

- v -

U.S. BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF GE COMMERCIAL MORTGAGE CORPORATION, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C1,

Defendant.

INDEX NO. 650772/2013

MOTION DATE 6/26/2017

MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208

were read on this application to/for Judgment - Summary.

Upon the foregoing documents, it is

In this action stemming from an alleged breach of a commercial loan agreement, Defendant U.S. Bank, N.A. ("U.S. Bank") moves for summary judgment dismissing the first cause of action for breach of contract and for summary judgment on its second

counterclaim for waste and its third counterclaim for attorneys' fees.[1] Plaintiffs 1604 Broadway Owner, LLC ("Broadway") and SL Green Management Corp. ("SL Green") (together Plaintiffs) cross-move for summary judgment on the issue of liability on their first cause of action for breach of contract and to dismiss U.S. Bank's remaining counterclaims and affirmative defenses.

In November 2005, Broadway entered into a long-term commercial lease with Farmore Realty, Inc. ("Landlord") for the rental of several floors in two buildings located at 1604-1610 Broadway and 732-736 Seventh Avenue, in the Times Square area of Manhattan (the "Property"). The lease called for an annual base rent of $2,350,000, to be paid in monthly installments. It also required Broadway to keep the property in compliance with all applicable laws and to pay the taxes and other costs associated with the Property. SL Green served as manager and leasing agent for the Property.

In March 2007, Broadway obtained a loan from Deutsche Bank Mortgage Capital, LLC ("Deutsche Bank") in the sum of $27 million (the "loan"). In exchange for the loan, Broadway signed a promissory note (the "Note") and a leasehold mortgage and security agreement ("Mortgage Agreement") granting a mortgage to Deutsche Bank, which pledged its leasehold interest in the property as collateral for the loan. Subsequently, Deutsche Bank securitized the loan and sold the resulting commercial mortgage-backed securities to U.S. Bank.

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[1] U.S. Bank, N.A. is named as the defendant in its capacity as trustee for the registered holders of GE Commercial Mortgage Corporation, Commercial Mortgage Pass-through Certificates Series 2007-C1.

The Mortgage Agreement required Broadway to make monthly payments under the terms of the Note, pursuant to which Broadway agreed to make monthly interest-only payments from May 1, 2007 through April 1, 2010, and, thereafter, monthly payments of $168,393.37 through March 2012. The Loan was to mature on April 1, 2012, with a $27 million balloon payment then due. Under the Mortgage Agreement, Broadway agreed to comply in all material respects with the terms and conditions of its lease with the Landlord.

Under section 6.2(a) of the Mortgage Agreement, U.S. Bank's prior written approval was required before Broadway could enter into any "Major Lease." Specifically, this section of the Mortgage Agreement provides:

> Mortgagor covenants and agrees that it shall not enter into any Lease affecting the lesser of (x) ten percent (10%) of the gross leasable area of the Improvements and (y) 12,000 square feet or more of the Mortgaged Property (whether pursuant to a single lease or one or more leases made with the same tenant) or having a term of ten (10) years or more, exclusive of options (each, a 'Major Lease'), without the prior written approval of Mortgagee, which approval shall not be unreasonably withheld, conditioned or delayed. The request for approval of each Major Lease shall be made to Mortgagee in writing... Failure of Mortgagee to approve or disapprove any such proposed Major Lease... within ten (10) business days after receipt of such written request... shall be deemed approved, provided that the written request for approval specifically mentioned the same.

The Mortgage Agreement specified which events would constitute an "event of default" including:

> (a) Mortgagor fails to make any payment under the Note when due...
>
> ***
>
> (m) Mortgagor shall fail in the payment of any rent, additional rent, or other charge payable under the Ground Lease...

Upon an event of default, the Mortgage Agreement gave U.S. Bank the option to accelerate the entire amount of Broadway's debt. Section 15.3 of the Mortgage Agreement also gave U.S. Bank the right to "enter upon and take possession and control of any and all of the Mortgaged Property," "enter into such leases, whether of real or personal property, or tenancy agreements, under such terms and conditions as Mortgagee may in its sole discretion deem appropriate or desirable," and to "collect and receive the Rents and Profits from the Mortgaged Property."

Broadway subleased the property to various commercial businesses, but during the first quarter of 2009, Broadway's primary tenant, Spotlight Live, closed, leaving a large vacancy on the property.

In October 2009, Broadway informed U.S. Bank that it would no longer be able to make the payments due under the Mortgage Agreement, and Broadway failed to make the required loan payments for November and December 2009. The loan was assigned for administration to U.S. Bank's special servicer, LNR Partners, Inc. ("LNR").

On December 28, 2009, LNR, on behalf of U.S. Bank, served Broadway with a notice of default, citing Broadway's failure to make its loan payments, as well as Broadway's failure to make the rent payment to the Landlord for December 2009. U.S. Bank then began making protective advances by paying rent to the Landlord on Broadway's behalf.

In the interim, Broadway alleges that it sought to restructure the loan and marketed the vacant space to secure new tenants. In January 2010, Broadway and Adventure Entertainment, LLC ("Adventure Entertainment"), a company that intended to operate a

Jekyll & Hyde theme restaurant on the property, executed a 12-year sublease that was conditioned upon U.S. Bank's approval. Broadway submitted a draft of the proposed sublease to U.S. Bank on December 15, 2009 and provided an executed copy to U.S. Bank on January 7, 2010. U.S. Bank did not approve or disapprove the proposed sublease. In or about April 2010, the proposed sublease was terminated with "no liability or obligation to either party."

In November 2012, U.S. Bank stopped making the protective advances of rent to the Landlord. The Landlord then commenced a non-payment and eviction proceeding against Broadway in Civil Court, New York County. The Civil Court proceeding ultimately resulted in Broadway's eviction from the property.[2]

On March 5, 2013, Plaintiffs commenced this action against U.S. Bank for breach of contract and tortious interference with prospective economic advantage.[3] Plaintiffs allege that U.S. Bank breached the Mortgage Agreement by failing to approve Broadway's proposed sublease with Adventure Entertainment, and that U.S. Bank also breached a March 31, 2010 letter agreement between the parties (the "Letter Agreement") which provided that plaintiff SL Green would receive a $808,082 commission from the proposed sublease between Broadway and Adventure Entertainment.

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[2] The Civil Court awarded final judgment to landlord Farmore in the eviction proceeding on November 15, 2013. *Farmore Realty, Inc. v. 1604-1610 Broadway Owner, LLC*, Index No. L&T 90151/2012 (Civ. Ct., New York County 2013). On December 5, 2013, U.S. Bank and Farmore entered into a new lease for the property pursuant to the terms of Broadway's lease with Farmore. In September 2015, the leasehold interest was sold for $15 million.

[3] On January 8, 2014, Justice Barbara Kapnick dismissed the second cause of action for tortious interference, leaving only the breach of contract cause of action.

Plaintiffs further allege that, under section 6.2(a) of the Mortgage Agreement, the proposed sublease required U.S. Bank's prior written approval, which could "not be unreasonably withheld, conditioned or delayed." Plaintiffs claim that, due to U.S. Bank's failure to respond to and approve the proposed sublease, Broadway was unable to either make rent payments to the Landlord or loan payments to U.S. Bank. Plaintiffs seek to recover $20 million in damages from U.S. Bank for lost rental income, management fees, leasing fees, and the diminished value and dispossession of the leasehold interest.

U.S. Bank answered the complaint, denying all material allegations, and asserted numerous affirmative defenses and three counterclaims. In the first counterclaim, U.S. Bank seeks a declaration that: (1) Broadway defaulted on the loan by failing to make rent and loan payments, failing to pay the balance of the loan on the maturity date, and by committing material waste; and (2) U.S. Bank may seek a $46.2 million offset against plaintiffs' damages award to cover the unpaid loan amount, protective advances, and waste. In the second counterclaim, U.S. Bank alleges that Plaintiffs breached the Mortgage Agreement by intentionally permitting waste to occur on the Property. In the third counterclaim, U.S. Bank seeks attorneys' fees relating to this suit and for enforcing the terms of the Note and Mortgage.

In in a decision and order dated February 11, 2016 (the "February 2016 Decision") I: (1) dismissed U.S. Bank's first counterclaim to the extent it sought a declaration that it was entitled to an offset for the unpaid loan amount and protective advances, and ordered the remaining portion of the first counterclaim severed and continued; and (2) dismissed so much of the second counterclaim as sought damages for intentional waste created at

the property after March 31, 2010 and which waste was allegedly created by subsequent property manager Newmark and Co. Real Estate, Inc. ("Newmark").[4]

U.S. Bank now moves for summary judgment dismissing Plaintiffs' cause of action for breach of contract and for summary judgment on its second and third counterclaims for waste and attorneys' fees. Plaintiffs cross-move for summary judgment on the issue of liability on the cause of action for breach of contract and to dismiss U.S. Bank's remaining counterclaims and affirmative defenses.

Discussion

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012) (citation omitted). The proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324.

Plaintiffs' Cause of Action for Breach of Contract

In their breach of contract cause of action, Plaintiffs allege that U.S. Bank breached its obligation, under section 6.2(a) of the Mortgage Agreement, to not

[4] *1604-1610 Broadway Owner, LLC v. U.S. Bank, N.A.*, 2016 WL 540699, 2016 NY Slip Op 31196[U] (Sup Ct, New York County 2016).

"unreasonably" withhold, condition or delay consent to a major sublease by failing to respond to and approve the proposed sublease with Adventure Entertainment. In its summary judgment motion, U.S. Bank contends that Broadway's failure to perform its own contractual obligations under the Mortgage Agreement is grounds for dismissal of Plaintiffs' breach of contract claim. U.S. Bank argues that because Broadway was already in default when it presented the proposed sublease, U.S. Bank had no duty to consent to the proposed sublease under section 6.2(a) of the Mortgage Agreement.

The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010). Further, "[i]t is a rule of long standing that, as a matter of law, the declaration by one party that material obligations imposed by contract will not be performed relieves the other party of any duty to perform obligations similarly imposed by the contract." *Stadtmauer v. Brel Assoc. IV*, 270 A.D.2d 59, 60 (1st Dept. 2000).

Here, U.S. Bank established that Broadway failed to perform its contractual obligations under the Mortgage Agreement by not making the payments due under the loan for November and December 2009, not remaining in good standing under its lease with landlord Farmore, and in allowing numerous code violations on the property. U.S. Bank also established that Broadway failed to cure its default under the Mortgage Agreement and that these events occurred prior to Broadway presenting a written copy of the proposed sublease to U.S. Bank. Because Broadway cannot establish its own performance under the Mortgage Agreement – a necessary element of Broadway's breach

of contract claim – I find that U.S. Bank has shown, as a matter of law, that Broadway's breach of contract cause of action must be dismissed. *See Dorfman v. American Student Assistance*, 104 A.D.3d 474, 474 (1st Dept. 2013); *Thomas v. JPMorgan Chase & Co.*, 811 F.Supp 2d 781, 797 (SD NY 2011) (holding that because plaintiffs admitted they were not current on their mortgage and did not cure their default under the loan documents, they failed "to allege that they have performed their own contractual obligations (under the mortgage agreement) and are therefore estopped from seeking damages for breach by the other party").

In opposition to U.S. Bank's motion and in support of their own cross-motion, Plaintiffs do not dispute that Broadway defaulted on its obligations under the Mortgage Agreement prior to presenting the proposed sublease to U.S. Bank, or that it failed to cure its default. Instead, Plaintiffs argue that U.S. Bank's obligation not to unreasonably withhold consent to a proposed major sublease survived Broadway's failure to perform its own obligations under the Mortgage Agreement. Plaintiffs claim that Broadway's promise to make payments on the loan was independent of U.S. Bank's promise not to unreasonably withhold, condition, or delay its consent to major leases, and, therefore, U.S. Bank's performance was not excused by any alleged default by Broadway.

In arguing that the promises are independent, Plaintiffs contend, among other things, that: 1) the Mortgage Agreement does not expressly condition Broadway's rights under section 6.2(a) upon Broadway satisfying its obligations under the Mortgage Agreement; and 2) U.S. Bank's post-default conduct reflects that its obligations under

section 6.2 (a) were independent of Broadway's payment obligations. Plaintiffs' contentions, however, lack merit.

"The interpretation of a mortgage, like any contract, 'is to be arrived at by a fair consideration of all its terms and provisions.'" *Archer v. Skokan*, 70 A.D.3d 877, 878 (2d Dept. 2010) (citation omitted). Moreover, courts should not put form over substance and words should be given a "sensible" meaning. *Id.* Significantly, commercial agreements "should not be interpreted in a commercially unreasonable manner or contrary to the reasonable expectations of the parties." *HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co.*, 37 A.D.3d 43, 49-50 (1st Dept. 2006); *see also Cole v Macklowe*, 99 A.D.3d 595, 596 (1st Dept. 2012).

In addition, whether covenants are dependent or independent of each other "is a question to be determined 'by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication.'" *Greasy Spoon v. Jefferson Towers*, 75 N.Y.2d 792, 795 (1990) (citation omitted). Generally, "where a question of intention is determinable by written agreements, the question is one of law, appropriately decided... on a motion for summary judgment." *Mallad Constr. Corp. v. County Fed. S&L Assn*, 32 N.Y.2d 285, 291 (1973).

Here, U.S. Bank's available remedies in case of default, contained in the Mortgage Agreement, shows the parties' intent that U.S. Bank's promise not to unreasonably withhold consent to a major sublease was conditioned on Broadway's not being in default. Specifically, the Mortgage Agreement provides that upon an event of default, U.S. Bank may enter the property, take possession and control, "enter into such leases . . .

under such terms and conditions as [U.S. Bank] may in its sole discretion deem appropriate or desirable" and "collect and receive the Rents and Profits." In addition, the Mortgage Agreement states that the mortgagor may collect, receive and enjoy the Rents and Profits "until the occurrence and during the continuance of an Event of Default." These provisions plainly show that the mortgagee's obligation under section 6.2(a) is conditioned upon the mortgagor not defaulting on its own obligations under the Mortgage Agreement, because once the mortgagor defaults, the mortgagee has the option to collect and receive the rents and profits from the property and to enter into leases it finds appropriate or desirable from its own perspective.

In its breach of contract claim, Plaintiffs also allege that U.S. Bank breached the Letter Agreement by not paying SL Green a commission from the proposed sublease. This claim is contradicted by the express terms of the Letter Agreement which states:

> If a lease with Adventure Entertainment . . . for space at the Property is entered into with [U.S. Bank's] approval . . . [U.S. Bank] shall be responsible for payment to [SL Green] of the leasing commission set forth in Schedule I annexed hereto (it being agreed and understood that no such lease has been executed as of the date hereof and that [SL Green] shall not become entitled to such leasing commission solely by reason of the execution of this letter agreement).

Thus, SL Green is not entitled to the leasing commission because the payment of such commission was expressly conditioned upon a sublease with Adventure Entertainment being entered into with U.S. Bank's approval, an event that never transpired.

Therefore, in opposition to U.S. Bank's *prima facie* showing, Plaintiffs failed to raise any triable issues of fact. Accordingly, that branch of U.S. Bank's motion for summary judgment dismissing the breach of contract cause of action is granted, and that

branch of the Plaintiffs' cross-motion for summary judgment on the breach of contract cause of action is denied.

U.S. Bank's Counterclaim for Waste

U.S. Bank asserts, in its second counterclaim, that Broadway breached the Mortgage Agreement by intentionally permitting material waste to occur at the property. In the February 2016 Decision, I stated that pursuant to the Letter Agreement, Broadway could only be held liable for intentional waste that it committed on the property *prior* to March 31, 2010, and for intentional waste that it committed post- March 31, 2010 that was not within the scope of Newmark's management obligations.

U.S. Bank now moves for summary judgment on what remains of its second counterclaim. U.S. Bank asserts that during the Winter and early Spring of 2010, SL Green stopped work, or threatened to stop work, on the necessary management of the property, and that U.S. Bank incurred $192,330.48 in costs related to addressing the waste created by Plaintiffs' intentional neglect of the property.

The cost estimates for correcting various code violations submitted by U.S. Bank in support of its motion (Exhibit 16) are insufficient to establish, as a matter of law, the actual costs incurred because of intentional waste created on the property before March 31, 2010, or from any intentional waste that Broadway committed on the property after March 31, 2010 that was outside the scope of Newmark's management obligations. Further, U.S. Bank cannot rely on evidence submitted for the first time in its reply papers (e.g. Exhibits 45 and 46) to satisfy its *prima facie* burden. *See L'Aquila Realty, LLC v. Jalyng Food Corp.*, 103 AD3d 692, 692 (2d Dept. 2013) (finding that plaintiff failed to establish its

prima facie entitlement to judgment as a matter of law and "could not rely on evidence submitted for the first time in its reply papers in support of its motion"); *Merchants Bank of New York v. Gold Lane Corp., 28 A.D.3d 266* (1st Dept. 2006). Therefore, this branch of U.S. Bank's summary judgment motion is denied.

In support of that branch of their cross-motion s to dismiss this counterclaim, Plaintiffs contend that since U.S. Bank failed to submit competent evidence of intentional waste created prior to March 31, 2010, the counterclaim should be dismissed. That U.S. Bank did not meet its summary judgment burden is an insufficient basis upon which to dismiss the counterclaim. As proponents of the cross-motion, Plaintiffs were required to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. Plaintiffs did not do so, and I therefore deny this branch of their cross-motion.

U.S. Bank's Counterclaim for Attorney's Fees

In its third counterclaim, U.S. Bank asserted that it is entitled to remuneration from Broadway for all expenses incurred by it, with interest, in any efforts to enforce any terms of the Mortgage Agreement, including attorneys' fees. In this motion, U.S. Bank seeks a determination that it is entitled to such fees and for a hearing to ascertain the amount it is due.

In this regard, U.S. Bank relies on the following provision of the Mortgage Agreement:

> 15.7 Payment of Expenses. Mortgagor shall pay on demand all of Mortgagee's expenses incurred in any efforts to enforce any terms of this Mortgage, whether or not any lawsuit is filed and whether or not

> foreclosure is commenced but not completed, including but not limited to, reasonable legal fees and disbursements.

As this Court already determined in the February 2016 Decision, U.S. Bank may seek attorneys' fees under the above provision to the extent that its counterclaims seek to enforce the Mortgage Agreement's terms. However, a hearing to determine the amount of attorneys' fees, if any, owed to U.S. Bank is premature at this juncture, given that U.S. Bank has not yet prevailed on its second counterclaim seeking to enforce the Mortgage Agreement.

In accordance with the foregoing, it is

ORDERED, that U.S. Bank's motion for summary judgment on Broadway's and SL Green's cause of action to recover damages for breach of contract is granted and the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion of Broadway and SL Green is denied in all respects; and it is further

ORDERED that those branches of U.S. Bank's motion which were for summary judgment on its second and third counterclaims are denied and these counterclaims are severed and shall continue; and it is further

ORDERED that the parties are directed to appear for a status conference at 60 Centre Street, Room 208 on July 25, 2018 at 2:15pm.

This constitutes the Decision and Order of the Court.

5/30/2018
DATE

SALIANN SCARPULLA J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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