Somera Rd. - 1100 Main St., LLC v TPG RE Fin. 1, Ltd.
2020 NY Slip Op 32374(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 652288/2020
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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SOMERA ROAD - 1100 MAIN STREET, LLC,

Plaintiff,

- v -

TPG RE FINANCE 1, LTD., TRTX 2019-FL3 ISSUER, LTD., TPG RE FINANCE TRUST, INC.,DOES 1 THROUGH 10

Defendants.

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INDEX NO. 652288/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, it is DENIED.

Plaintiff Somera Road –1100 Main Street, LLC, moves for a preliminary injunction pursuant to CPLR 6301 for an order directing defendants, TPG RE Finance 1, TRTX 2019-FL3 Issuer, Ltd. and TPG RE Finance Trust, Inc., to fund $5,948,392.52 from a $60.2 million loan to purchase and renovate Lightwell, a 30 story office building in Kansas City, and to release an additional $943,528.45 defendant is holding. (NYSCEF Doc. No. [NYSCEF] 11, Memorandum of Law in Support of Motion for Preliminary Injunction, p. 25).[1]

[1] The court notes that plaintiff's notice of motion is woefully inadequate identifying the relief requested as a preliminary injunction without more. (NYSCEF 10, Notice of Motion). The court cannot attribute this and other flaws (e.g. failing to identify documents by NYSCEF number) as arising from a rush to secure a TRO since no TRO was requested in this action. Indeed, this action is identical to an April 21, 2020 action filed in the SDNY, except there plaintiff sought a TRO, identical to the preliminary injunction sought here, which the court denied. (NYSCEF 34, SDNY Complaint; NYSCEF 37, Order to Show Cause of SDNY by Judge Engelmayer). Plaintiff withdrew the SDNY action on June 5, 2020.

The issue is whether there is a "shortfall" of $2.4 million between what was budgeted and what is needed to complete the project, as defendants have demanded, or $0, as plaintiff argues. The resolution of this action depends on the calculation of "shortfall" as defined in the January 8, 2019 Loan Agreement (Agreement). (NYSCEF 3, Agreement).

After using the loan proceeds to purchase the building, $31,950,000 remain for renovation. (*Id.*, §2.1.2). Since the purchase, defendants have released funds totaling $11,289,483.90,[2] leaving a balance of $20,660,516.10.[3] Plaintiff performed renovations and claims that $10,936,420.93 of budgeted work remains. (NYSCEF 12, Basel Bataineh [Plaintiff's Vice President] Aff ¶ 6). Beginning on March 9, 2020, plaintiff requested three more advances totaling $5,948,392.52. (NYSCEF 12, Bataineh Aff, ¶ 22). On April 9, 2020, defendant declared a "shortfall" of $2,459,777 pursuant to Section 2.14 of the Agreement and refuses to issue further advances until plaintiff clears it. (NYSCEF 7, Shortfall Notice).

Plaintiff insists that defendant approved its revised budget of December 4, 2019 for $16.5 million defined in the Agreement as the "Cap-Ex Budget" (Budget). (NYSEF 4, Budget). Plaintiff claims that defendants' approval was conditioned upon a rebalance payment of $463,987 which plaintiff paid. (NYSCEF 15, Steven Velasquez, Plaintiff's

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(NYSCEF 2, Complaint ¶ 60). This motion was filed 10 days after this action was filed, but not by OSC.

[2] The balance is actually less. Plaintiff alleges that defendants funded advances 1 to 10, but plaintiff fails to mention the amount of the tenth advance. (NYSCEF 2, Complaint ¶¶ 36, 38; NYSCEF 11, Plaintiff's Memo of Law, p. 6). Based on the SDNY complaint, it may be $2,073,100.85, but this court is not going to guess. (NYSCEF 34, SDNY Complaint ¶ 38).

[3] Plaintiff claims the balance is $29,723,662.23 by including "the Cap-Ex Advance, the TI/LC Advance, the Interest Advance, and any Reserve accounts available to Borrower." (NYSCEF Complaint ¶ 53).

employee, Aff ¶¶ 2-5). However, the revised budget raised red flags. Indeed, in a January 15, 2020 email, plaintiff admitted that "we are having some capitalization issues" and that "[w]e are over budget on the base building capex work and on the spec leasing work." (NYSCEF 25, 1/15/20 email). In a January 22, 2020 email, plaintiff delineated $8.1 in additional work previously called "essential" to success. (*Id.*; NYSCEF 28, 1/22/20 email).

Plaintiff initiated this action on June 5, 2020 against defendants for (1) breach of contract; (2) a declaratory judgment that the amount of the "Shortfall" is $0 and defendant must fund the advances plaintiff requested pursuant to section 2.14 of the Agreement; and (3) an injunction. (NYSCEF 2, Complaint).

The court is compelled to deny plaintiff's request for a preliminary injunction in the absence of establishing a likelihood of success on the merits. Plaintiff's simplistic reading of Section 2.14 as Budget less advances is rejected. Rather, section 2.14 and the Agreement is significantly more complex and provides:

> "Section 2.14 Insufficiency of Loan Proceeds. Anything in this Agreement contained to the contrary notwithstanding, it is expressly understood and agreed that the Loan shall at all times be "in balance" as reasonably determined by Lender from time to time. At any time and from time to time during the term of the Loan, Lender shall have the right (but not the obligation) to notify Borrower in writing (a "Shortfall Notice") that, as determined in Lender's sole but good faith discretion, (a) the cost of all Project Related Costs necessary to achieve Final Completion of the Project Improvements that remain unpaid at the time in question exceeds the difference between (A) the amount of Advances then available to Borrower (including, without limitation, amounts in the Rebalancing Reserve Account) and (B) the amounts required to paid for Basic Carrying Costs and Debt Service, or (b) the cost of completing any line item in the Cap-Ex Budget exceeds the amount of Advances then available to Borrower allocated to such line item (the amount of any such deficiency under clauses (a) and/or (b) being herein referred to as a "Shortfall"). If Lender at any time shall deliver a Shortfall Notice to Borrower, Borrower shall within ten (10) Business Days of delivery of the Shortfall Notice, deposit in the Rebalancing Reserve Account an amount equal to the amount of such Shortfall, which Lender shall allow Borrower to apply to Project Related Costs in accordance with the Loan Documents (as if such reserved amounts were Advances). Lender shall have no obligation to make any further advances of proceeds of the Loan until the sums required to be deposited in the Rebalancing Reserve Account pursuant to

this Section 2.14 have been exhausted and disbursed to Borrower and applied towards Project Related Costs, and in any such case, the Loan is back 'in balance'.

The relevant definitions are as follows:

'Project Improvements' shall mean the construction of the Property, as described in the Cap-Ex Scope of Work and as depicted in, and done in accordance with, the Cap-Ex Budget, the Plans and Specifications, all Legal Requirements and the terms and conditions of the Loan Documents.

'Project Related Costs' shall mean all costs and expenses of constructing the Project, Improvements (including, without limitation, Basic Carrying Costs and Debt Service)."

Contrary to plaintiff's reading of Section 2.14, it does not use the term "Budget," but "the cost of all Projected Related Costs necessary to achieve Final Completion." This makes sense because the relevant factor is the cost to actually complete the project, not just the budgeted amount. Plaintiff's proposed reading fails to account for going over budget necessitating a new budget. (NYSCEF 25, 1/15/20 email). It also failsa to account for plaintiff's additional $8 million projection exceeding the Budget which plaintiff deemed "essential" to complete the project. (NYSCEF 28, 1/22/20 email). Defendants' estimate to complete the project is $2.5 million because plaintiff double counted some items. (NYSCEF 27, Defendants' projections). Either way, when debt servicing estimated at $4.5 million[4] is considered, plaintiff exceeds the remaining balance.

Whether plaintiff is approaching the loan limit or exceeding it is for defendants to "reasonably" determine "from time to time." (NYSCEF 3, Agreement §§ 2.14, 10.2). Plaintiff asserts that defendants are "acting in bad faith to deprive plaintiff of the fruits of a loan agreement and then, based on those bad faith acts, to trigger a default under the loan agreement and foreclose on the security for the [l]oan." (NYSCEF 2, Complaint ¶ 89).

[4] See argument Transcript dated July 17, 2020.

However, that is the ultimate issue of fact that cannot be determined on this motion. Moreover, it requires the court to speculate because defendants have yet to declare a default.

Next, plaintiff has not established irreparable harm. At stake here is money: how much must plaintiff pay defendants for defendants to issue advances pursuant to the Agreement? The burden of paying such a sum is the paradigmatic case of a monetary harm. (*Matter of J.O.M. Corp. v Department. of Health of State of N.Y.*, 173 AD2d 153, 154 [1st Dept 1991] ["monetary harm which can be compensated by damages does not constitute irreparable injury"] [internal citation omitted]). Plaintiff's concern that its reputation among the Kansas City Community may be tarnished by defendants' breach is not actionable in New York. (*See Aretakis v Hearst Publs.*, 24 Misc. 3d 1233[A], 5 [Sup Ct, NY County 2009] [internal citation omitted]). Rather, harm to reputation is not irreparable because it can be measured in monetary damages. (*See Matter of Campbell Apt., Ltd. v Metropolitan Transp. Auth.*, 53 Misc 3d 282 [Sup Ct, NY County 2016]). To the extent that plaintiff argues that damages would be difficult to calculate, a convoluted formula in the 245-page Agreement negotiated by the parties does not make them irreparable. (*SportsChannel Am. Assoc. v National. Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]).

Finally, the balance of equities does not favor plaintiff either. Rather, it would be inequitable for the court to allow plaintiff to use a preliminary injunction to get its ultimate relief. (*St. Paul Fire and Mar. Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 [1st Dept 2003] [improper to grant "provisional remedy" that grants "ultimate relief sought" and thus "treat[s] the motion as one for accelerated judgment"]; *SportsChannel*, 186 AD2d at 418 [improper to grant preliminary injunction "seeking a decree of specific performance in

the guise of an injunction pendente lite"]). Rather, the purpose of a preliminary injunction is to maintain the status quo. (*Residential Bd. of Managers of the Columbia Condominium v Alden*, 178 AD2d 121, 122 [1st Dept 1991]).

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, for the reasons stated above and incorporating the reasons stated on the record on July 17, 2020,[5] it is

ORDERED that the motion is denied.

Motion Seq. No. :

7/20/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	x DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[5] Plaintiff is directed to submit the transcript to be so ordered.