

Annaly CRE LLC v Ashkenazy
2021 NY Slip Op 30119(U)
January 11, 2021
Supreme Court, New York County
Docket Number: 652487/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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ANNALY CRE LLC

Plaintiff,

- v -

BEN ASHKENAZY,

Defendant.

-----X

INDEX NO. 652487/2020

MOTION DATE 06/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER)

Upon the foregoing documents and for the reasons set forth on the record (1/11/2021), Annaly CRE LLC's (the Lender) motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is granted and Ben Ashkenazy's (the Guarantor) cross-motion to dismiss pursuant to CPLR § 3211 (a)(1), (a)(7), and (a)(8) is denied.

The Relevant Facts and Circumstances

Reference is made to (i) a certain Loan Agreement, dated January 4, 2017 (NYSCEF Doc. No. 4), by and between Prime Chevy Chase Asset I LLC (the Borrower) and the Lender, as amended by a First Amendment to Mortgage Loan Documents (NYSCEF Doc. No. 5), dated January 9, 2019, effective as of January 15, 2019, by and between the Borrower and Annaly CRE WF LLC, as assigned pursuant to three assignment agreements, each dated February 28, 2019, respectively by and between (a) Annaly CRE WF LLC to Annaly CLO Seller, LLC, (b) Annaly CLO Seller LLC and NLY 2019-FL2 Issuer Ltd., and (c) NLY 2019-FL2 Issuer Ltd. and Annaly CRE LLC

(NYSCEF Doc. No. 11), (ii) a certain Promissory Note (NYSCEF Doc. No. 6), dated January 4, 2017, by and between the Borrower and the Lender, as amended and restated by a certain Amended and Restated Promissory Note (the **Amended and Restated Note**; NYSCEF Doc. No. 7), dated January 9, 2019, effective as of January 15, 2019, by and between the Borrower and Annaly CRE WF LLC, as assigned pursuant to three allonges (the **Allonges**; the Amended and Restated Note, together with the Allonges, hereinafter, collectively, the **Note**), each dated February 28, 2019, respectively by and between (a) Annaly CRE WF LLC to Annaly CLO Seller, LLC, (b) Annaly CLO Seller LLC and NLY 2019-FL2 Issuer Ltd., and (c) NLY 2019-FL2 Issuer Ltd. and Annaly CRE LLC (NYSCEF Doc. No. 12), (iii) a Purchase Money Deed of Trust and Security Agreement (the **Deed of Trust**; NYSCEF Doc. No. 8), dated January 4, 2017, by and between the Borrower and Lawyers Title Reality Services, Inc. as trustee for the benefit of the Lender, and (iv) a Limited Payment Guaranty (the **Guaranty**; NYSCEF Doc. No. 10), dated January 4, 2017, by the Guarantor.

Pursuant to the Note, the Lender loaned (the **Loan**) the Borrower \$50,000,000, plus interest. The scheduled maturity date was January 9, 2020. The Loan was secured by the Deed of Trust on four parcels of land in Washington, DC. Pursuant to the Guaranty, the Guarantor “irrevocably and unconditionally” provided a limited payment guarantee of up to \$3,600,000 (*id.*, ¶¶ 1(a)-(c), 2(a)-(c)). The Guaranty was a guaranty of payment not collection and provided that the Guarantor’s obligation would not be “reduced, discharged or released because or by reason of any existing or future offset, claim or defense of Borrower, or any other party against Lender or against payment of the Guaranteed Obligations (*id.*, ¶ 3(b)). The Guarantor also designated David Kriss, his then attorney, as an authorized agent for service of process (*id.*, ¶ 20).

On January 10, 2020, the Lender properly and in accordance with the loan documents notified the Borrower that the Borrower defaulted on its obligation to repay the Loan in that a maturity default had occurred and that the debt remained outstanding (NYSCEF Doc. No. 13) and by letter, dated January 29, 2020, the Lender properly and in accordance with the Guaranty sent written notice to the Guarantor that a maturity default had occurred and properly demanded payment of \$3,600,000 under the Guaranty (NYSCEF Doc. No. 14).

Subsequently, on June 15, 2020, pursuant to CPLR §3213, the Lender filed the instant motion for summary judgment in lieu of complaint. By email, dated June 24, 2020, the Lender's counsel requested that Mr. Kriss accept service as agent for the Guarantor (NYSCEF Doc. No. 27). By email, dated June 25, 2020, Mr. Kriss confirmed his acceptance of service on behalf of the Guarantor (NYSCEF Doc. No. 28). The Guarantor subsequently filed a cross-motion to dismiss for failure to state a claim and lack of personal jurisdiction.

Separately, the Lender has pursued the foreclosure sale of one property pursuant to the Deed of Trust, which sale took place on August 28, 2020 (NYSCEF Doc. No. 25) where the Lender purchased the property for the price of \$38,000,000 (NYSCEF Doc. No. 29).

Discussion

A. Lender's Motion for Summary Judgment in Lieu of Complaint is Granted

Pursuant to CPLR § 3213, a plaintiff may bring a summary judgment motion in lieu of complaint when the action is based on an instrument for the payment of money only. To meet its prima

facie burden on such a motion, the plaintiff must prove (1) the existence of the guaranty, (2) the underlying debt, and (3) guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Once a *prima facie* showing is made, the defendant must present admissible evidence that raises a triable issue of fact to preclude liability (*Zuckerman v New York*, 49 NY2d 557, 562 [1980])

Here, the Lender adduces evidence of the Guaranty, a valid debt, and the Guarantor's failure to pay \$3,600,000 pursuant to the Guaranty (NYSCEF Doc. No. 10, ¶¶ 1(a), 2(a)-(c); NYSCEF Doc. Nos. 4-12; NYSCEF Doc. No. 3, ¶ 14, 16, 17). In addition, as discussed above, the Guaranty was a guaranty of payment, not collection (NYSCEF Doc. No. 10, ¶ 1 (c)). Thus, under the circumstances, it is not relevant that the Lender has also and separately foreclosed on one of the Borrower's encumbered properties. The motion for summary judgment in lieu of complaint in the amount of \$3,600,000, plus interest and attorneys' fees is granted.

B. Guarantor's Cross-Motion to Dismiss is Denied

The Guarantor's cross-motion to dismiss for failure to state a claim and lack of personal jurisdiction, pursuant to CPLR §§ 3211 (a)(1), (a)(7), and (a)(8) premised on the argument that (i) the Guarantor was not served in accordance with the method set forth in the Guaranty and (ii) that the Lender failed to file proof of service fails.

The Guaranty expressly designated Mr. Kriss as an agent for service on behalf of the Guarantor (NYSCEF Doc. No. 10, ¶ 20). Service was proper because Mr. Kriss accepted service on behalf of the Guarantor with the express authority to do so and waived any requirement that service be

effected on him in a different matter (*see Riordan v Garces*, 2020 NY Slip Op 34169[U], *5 [Sup Ct NY County 2020] [service deemed proper where court drew reasonable inference that agent accepted service on behalf of defendant after being given authority to do so; *contra Charles H. Greenthal & Co. v 301 E. 21st St. Tenants' Assn.*, 91 AD2d 934, 934 [1st Dept 1983] [service on counsel rejected where there was no evidence that counsel was duly authorized by purported defendants to act as their agent for the purpose of service]).

It is also of no moment that the Lender did not file proof of service at the time the action was commenced because such delay is not a jurisdictional defect and may be corrected *nunc pro tunc* by the court (*see Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984]), which the court does here. Accordingly, the Guarantor's cross-motion is denied.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the defendant's cross-motion to dismiss is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Annaly CRE LLC and against Ben Ashkenazy in the amount of \$3,600,000, plus statutory interest of 9% per annum from January 9, 2020 until the date of entry of judgment, plus statutory interest of 9% from the date of

entry of judgment, plus costs and disbursements as allocated by the Clerk, and the plaintiff shall have execution thereof; and it is further

ORDERED that that portion of the plaintiff’s motion that seeks the recovery of attorney’s fees and costs is severed and the issue of the amount of reasonable attorney’s fees and costs that plaintiff may recover against the defendant is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date to hear and determine the amount of reasonable attorneys’ fees and costs; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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1/11/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> SETTLE ORDER			

¹ Available on the Court’s website at www.nycourts.gov/supctmanh under the “References” link on the navigation bar.

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE