Talos Capital Designated Activity Co. v 257 Church Holdings LLC
2021 NY Slip Op 30137(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 651458/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK — *Justice*

PART IAS MOTION 53EFM

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TALOS CAPITAL DESIGNATED ACTIVITY COMPANY,

Plaintiff,

- v -

257 CHURCH HOLDINGS LLC,BA 616 COLLINS MEMBER LLC,LEEDS CAPITAL LLC,BEN ASHKENAZY

Defendant.

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INDEX NO. 651458/2020

MOTION DATE 03/03/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents and for the reasons set forth on the record (1/13/2021), Talos Capital Designated Activity Company's (the **Mezzanine Lender**) motion for summary judgment in lieu of complaint is granted.

The Relevant Facts and Circumstances

Reference is made to (i) a certain Mezzanine Loan Agreement (the **Loan Agreement**; NYSCEF Doc. No. 4), dated November 25, 2013, by and between 625 Mad Holdings LLC (the **Borrower**) and the Mezzanine Lender, (ii) a certain Guaranty of Payment (the **Payment Guaranty**; NYSCEF Doc. No. 6), dated November 25, 2013, by and between 257 Church Holdings LLC, BA 616 Collins Member LLC, and Leeds Capital LLC, (iii) a Pledge and Security Agreement (the **Collins Pledge**; NYSCEF Doc. No. 8), dated November 25, 2013, by BA 616 Collins Member LLC and Leeds Capital LLC (collectively, the **Collins Pledgors**) in favor of the

Mezzanine Lender, (iv) a Pledge and Security Agreement (the **Church Pledge**; NYSCEF Doc. No. 9), dated November 25, 2013, by 257 Church Holdings LLC in favor of the Mezzanine Lender, and (v) a Guaranty of Recourse Payment Obligations (the **Five Year Recourse Guaranty**; NYSCEF Doc. No. 7), dated November 25, 2013, by Ben Ashkenazy for the benefit of the Mezzanine Lender.

Pursuant to the Loan Agreement, the parties agreed that the Borrower was required to increase the equity/debt ratio within five years. If the total equity contributions to the Borrower as of the "Five Year Paydown Date" were less than $40,000,000, the Loan Agreement provided that the Borrower would have to prepay a portion of the principal balance of the loan in an amount equal to the "difference between $40,000,000 less the amount of such Qualified Equity Contributions (the **"Five Year Paydown"**)" (NYSCEF Doc. No. 4, § 2.4.3.). In the event of a paydown default, the parties agreed that there would be no default under the mezzanine loan, but the Five Year Paydown would be increased to $20,000,000 and that the Mezzanine Lender could exercise its remedies under the Payment Guaranty and related pledge agreements (*id.*). As discussed below, it is undisputed that the total equity contributions were not $40,000,000 and that the Borrower failed to pay the Five Year Paydown by the "Five Year Paydown Date."

Pursuant to the Payment Guaranty, 257 Church Holdings LLC, BA 616 Collins Member LLC, and Leeds Capital LLC (collectively, the **LLC Guarantors**) irrevocably and unconditionally guaranteed the Borrower's payment of the Five Year Paydown and the amounts due and payable under the Collins Pledge and Church Pledge, and agreed to pay the Mezzanine Lender all costs and expenses incurred in the enforcement of its rights (NYSCEF Doc. No. 6, §§ 1.1, 1.7). The

Payment Guaranty was secured, in part, by the Collins Pledge, which provided that the Collins Pledgors would not (i) mortgage or transfer any interests in a certain property (the **Collins Property**) without the prior written consent of the Mezzanine Lender or (ii) refinance the existing mortgage unless the Mezzanine Lender concurrently received a pledge of 100% of the interest in BA 616 Collins Member LLC – i.e., an increase in equity collateral for the loan (NYSCEF Doc. No. 8, § 8.6 [a]).

Pursuant to the Five Year Recourse Guaranty, Mr. Ashkenazy irrevocably and unconditionally guaranteed to the Mezzanine Lender the payment and performance of the "Guaranteed Obligations … as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise" (NYSCEF Doc. No. 7, §1.1[a]). "Guaranteed Obligations" was defined in the Five Year Recourse Guaranty to mean

> … all obligations and liabilities of Borrower to pay Five Year Paydown if any of the following has occurred:
>
> (i) (a) if any pledge or encumbrance other than the Pledges shall encumber any direct or indirect interests in the Church Property (as such term is defined in the Church Pledge) or the Collins Property (as such term is defined in the Collins Pledge); provided that any as to any encumbrance of the Church Property or Collins Property that was not intentionally placed on such property by the owner thereof, Guarantor shall be liable only for losses incurred by Loan Party as a result of such pledge or encumbrance; or (2) if any loan shall be secured by a lien against the Church Property or the Collins Property, other than (A) the mortgage loan in existence as of the date hereof with respect to the Collins Property (provided that no new borrowings or refinancing under such existing loan facility is permitted hereunder) or (B) any other loan that is permitted under the Pledges;
>
> (ii) (a) any Transfer (as such term is defined in the Collins Pledge) by Guarantor of any direct or indirect interests in the Collins Property, (b) any Transfer (as such defined in the Church Pledge) of any direct or indirect interests in the Church Property, or (c) any surrender, termination, cancellation, material change, material amendment, material supplementation or other material modification to or of the Owner Lease (as defined in the Church Pledge), in the case of any of the foregoing,

in violation of the Pledges; provided that in the case of any Transfers addressed under clauses (a) and (b) above, if such Transfer was not intentionally caused by the holder of such interests in the Church Property or the Collins Property, as applicable, Guarantor shall be liable only for losses incurred by Loan Party as a result of such pledge or encumbrance

(iii) following Borrower's failure to pay the Five Year Paydown in accordance with the Loan Agreement only, if Guarantor, Borrower, Owner, Collins Owner, Collins Pledgor, Church Owner, Church Pledgor or any Affiliate of any of the foregoing, takes an affirmative action to interfere with Agent or fails to cooperate with a reasonable request of Agent made pursuant to its rights under the Payment Guaranty, the Collins Pledge, the Amendment or the Church Pledge in connection with Agent's exercise of remedies thereunder, including without limitation, if, in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of Agent or any Lender under or in connection with the Payment Guaranty, the Collins Pledge, the Amendment or the Church Pledge, seeks judicial intervention or injunctive or other equitable relief of any kind, or asserts a defense, claim or counterclaim against Agent or such Lender or Servicer in a pleading in any judicial proceeding in connection with any security for the Five Year Paydown, provided, that a court of competent jurisdiction, in determining liability under this clause (iii), also determines that such defense, claim, counterclaim, judicial intervention or claim for injunctive or other equitable relief was frivolous;

(iv) Intentionally deleted;

(v) any of Church Owner, Church Pledgor, Collins Owner or Collins Pledgor is substantively consolidated with any other Person; unless such consolidation was involuntary and not consented to by Church Owner, Church Pledgor, Collins Owner or Collins Pledgor, respectively, and is discharged, stayed or dismissed within sixty (60) days following the occurrence of such consolidation;

(vi) any of Church Owner, Church Pledgor, Collins Owner or Collins Pledgor files a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law;

(vii) the filing of an involuntary petition against Church Owner, Church Pledgor, Collins Owner or Collins Pledgor under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law by any other Person in which Church Owner, Church Pledgor, Collins Owner or Collins Pledgor colludes with such Person, and/or Church Owner, Church Pledgor, Collins Owner or Collins Pledgor solicits or causes to be solicited petitioning creditors for any involuntary petition against Church Owner, Church Pledgor, Collins Owner and/or Collins Pledgor by any Person;

(vii) If (A) Collins Pledgor shall or shall permit Collins Owner to enter into, materially modify, terminate or accept the surrender of any Lease (as such term is defined in the Collins Pledge) other than as permitted under the Collins Pledge or (B)

> Church Pledgor shall or shall permit Church Owner to enter into, materially modify, terminate or accept the surrender of any Lease (as such term is defined in the Collins Pledge) other than as permitted under the Collins Pledge; or
>
> (ix) If (A) Collins Pledgor fails to pay Sale Proceeds to Agent in violation of Section 8(b) of the Collins Pledge or (B) Church Pledgor fails to pay Sale Proceeds to Agent in violation of Section 8(b) of the Church Pledge.

(*id.,* §§ 1.1[b][i]-[ix]).

Pursuant to the Five Year Recourse Guaranty, Mr. Ashkenazy also agreed to pay the costs and expenses incurred by the Mezzanine Lender in enforcing its rights (NYSCEF Doc. No. 7, § 1.7).

The Five Year Paydown Date occurred on November 6, 2018 and as of that date only approximately $30,000,000 in Qualified Equity Contributions had been made (NYSCEF Doc. No. 3, ¶ 18). By letter, dated November 26, 2018, the Mezzanine Lender advised the Borrower of a paydown default of $20,000,000 pursuant to the Loan Agreement (NYSCEF Doc. No. 10).

In February 2019, the Mezzanine Lender learned that the mortgage loan secured by the Collins Property as of November 25, 2013 was paid off and replaced by an Amended and Restated Mortgage, dated July 10, 2017, by and between 616 Collins Associates, LLC and Ocean Bank (the **Collins Refinancing**) (NYSCEF Doc. No. 3, ¶ 38; NYSCEF Doc. No. 13). To wit, the Collins Refinancing was executed without notice and without the prior consent of the Mezzanine Lender (NYSCEF Doc. No. 3, ¶ 40), as required by Section 1.1(b) of the Five Year Recourse Guarantor. Thus, by letters, dated February 21, 2019 and February 14, 2020, the Mezzanine Lender advised the defendants of the paydown default and demanded payment of $20,000,000

pursuant to the Payment Guaranty and Five Year Recourse Guaranty (NYSCEF Doc. Nos. 11-12).

Discussion

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]).

A. The Payment Guaranty

Here, the Mezzanine Lender establishes *prima facie* entitlement to summary judgment. In support of its motion, the Mezzanine Lender adduces evidence of (i) the Payment Guaranty, (ii) an undisputed debt of $20,000,000 pursuant to the Borrower's Five Year Paydown obligation in the Loan Agreement, and (iii) the LLC Guarantors' failure to pay $20,000,000 pursuant to the Payment Guaranty.

To the extent that the defendants assert that a judgment pursuant to the Payment Guaranty is duplicative of relief available under the relevant pledge agreements, the argument fails. The Mezzanine Lender is not required to sell its interests in the pledged collateral before seeking a monetary judgment (NYSCEF Doc. No. 8, §§ 3.5[b], 3.5[f], 4.7[a][ii]; NYSCEF Doc. No. 9, §§

3.5[b], 3.5[f], 4.7[a][ii]). Accordingly, the Mezzanine Lender's motion for summary judgment in lieu of complaint as against the LLC Guarantors is granted.

B. The Five Year Recourse Guaranty

The Mezzanine Lender also establishes *prima facie* entitled to summary judgment against Mr. Ashkenazy. In support of its motion, the Mezzanine Lender adduces evidence of (i) the Five Year Recourse Guaranty, (ii) an undisputed debt of $20,000,000 pursuant to the Borrower's Five Year Paydown obligation in the Loan Agreement, (iii) the Collins Refinancing without the Mezzanine Lender's consent, which was required, and (iv) Mr. Ashkenazy's failure to pay $20,000,000 pursuant to the Five Year Recourse Guaranty.

Inasmuch as the defendants claim that Mr. Ashkenazy's obligation under the Five Year Recourse Guaranty can only be collected when the Borrower is obligated to pay the principal balance of the loan on the maturity date, because the Loan Agreement indicates that following a paydown default, the loan gets increased by the amount of the paydown default, the argument fails. The business deal reflected in the Loan Agreement is for an equity infusion or debt paydown by the Five Year Paydown Date. The Five Year Recourse Guaranty is a guaranty of payment, not of collection, and the express terms of the Five Year Recourse Guaranty provide that Mr. Ashkenazy guaranteed payment of the Five Year Paydown if any loan was secured by a lien against the Collins Property "as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise" (NYSCEF Doc. No. 7, § 1.1[a]-[b]). The obligation to pay the Five Year Paydown is as of the Five Year Paydown Date.

The Five Year Recourse Guaranty also provides that Mr.Ashkenazy shall, within 10 days of a written demand pay the amount due under the Five Year Paydown if "all of any of the Guaranteed Obligations is or shall give rise to a monetary obligation, and such monetary obligation shall not be punctually paid when due, whether ***at demand***, maturity, acceleration or otherwise" (*id.*, § 1.4 [emphasis added]). To the extent that the Loan Agreement provides that in the event that there is a paydown default that the unpaid amount gets added to the principal balance, this is only to preserve the Mezzanine Lender's ability to collect the unpaid balance of the Five Year Paydown if the Mezzanine Lender cannot collect against the other collateral and pursuant to the other guarantees, including the Five Year Recourse Guaranty. Accordingly, the Mezzanine Lender's motion for summary judgment in lieu of complaint against Mr. Ashkenazy is granted.

Accordingly, it is

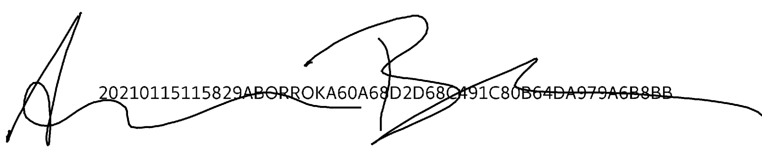
ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Talos Capital Designated Activity Company and against 257 Church Holdings LLC, BA 616 Collins Member LLC, Leeds Capital LLC, and Mr. Ashkenazy, jointly and severally, in the amount of $20,000,000, plus statutory interest of 9% per annum from November 6, 2018 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 a late payment charge and attorney's fees and costs is severed and the issue of the amount of the late payment charge and 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 the late payment charge and 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).



1/15/2021		ANDREW BORROK, J.S.C.	
DATE			

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

[1] Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.