57th & 60th St. Lender LLC v State Bank of Texas
2022 NY Slip Op 32844(U)
August 22, 2022
Supreme Court, New York County
Docket Number: Index No. 654007/2018
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: HON. JENNIFER SCHECTER **PART** 54

Justice

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57TH AND 60TH STREET LENDER LLC,

Plaintiff,

- v -

STATE BANK OF TEXAS, SUSHIL PATEL, CHANDRAKANT PATEL, TIC CAPITAL III, LLC, JOHN DOE, ABC CORP,

Defendants.

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INDEX NO. 654007/2018

POST-TRIAL DECISION

This action concerns defendant State Bank of Texas' (SBT) alleged breach of its obligation to sell two loans to plaintiff 57th and 60th Street Lender LLC pursuant to a Mortgage Loan Sale Agreement (Dkt. 188 [the LSA]). Section 6.7 of the LSA provides that "if the Loan(s) are **repaid in full** on or before the Closing Date, Seller shall be entitled to retain all of such payment, the Deposit shall be returned to Buyer, and this Agreement shall terminate" (*id.* at 13 [emphasis added]). After finding the phrase "repaid in full" to be ambiguous, the court held a bench trial to determine whether it "required cancelation of the notes, satisfaction of the mortgage or other official reduction of the balances due on the notes to zero, as plaintiff urges, or whether, as defendants assert, 'repayment in full' simply meant that, in connection with the loans, SBT ultimately received the full amount of money outstanding on the notes before the LSA's Closing Date irrespective of anything else, permitting it to assign the mortgage and the notes before repayment was actually made and effectively allowing a third party to swoop in and purchase the loans on better terms than those SBT and plaintiff agreed to" (Dkt. 170 at 1-2; *see* Dkt. 51 at 8-10). The credible evidence convincingly demonstrates that plaintiff's interpretation is more persuasive.

The evidence established that the Loans were not repaid in full prior to closing. The assignments did not result in repayment of the Loans (Dkt. 217 at 4), and, after they were assigned, the Loans were merely amended and restated but the borrower still owed the debt (Dkt. 224). Significantly, "repaid in full" modifies the word "Loans" in § 6.7 and not "Seller" (Dkt. 188 at 13). Thus, even if SBT considered itself repaid (regardless of whether it was otherwise entitled to recover additional default interest and fees), that does not mean the Loans were actually repaid in full. They were not. Instead, what matters is whether the borrower actually fully repaid its debt rather than whether the original lender subjectively considered itself repaid, which would allow it to escape its obligations under the LSA whenever it wanted so long as it deemed itself sufficiently satisfied by the

OTHER ORDER – NON-MOTION

borrower. So even if there was some circumstance where an assignment could satisfy the "repaid in full" requirement, that would at least require the debt to be extinguished by virtue of the assignment. Here it was not. The borrower still had to repay the Loans to the new buyer and the Loans were subject to the same mortgages. So while the "repaid in full" caveat is merely a logical extension of the earlier portions of § 6.7, which permit SBT to keep all payments made by the borrower prior to closing, the court is not persuaded that the parties intended that payments made by an assignee to compensate SBT for the assignment, rather than payments by the borrower to actually extinguish his debt, constitute "Payments of principal and/or interest payable pursuant to the Loan" or results in the Loans being "repaid in full" within the meaning of § 6.7.

To be sure, the court does not doubt that the assignment was structured to ensure that the purchaser maintained lien priority and avoided paying transfer taxes. That the purchaser was driven by these considerations, however, has no bearing on whether SBT had the right under the LSA to assign the Loans if they were not paid in full prior to closing. It did not. The court does not find it credible that the parties intended to permit another purchaser to swoop in and buy the Loans for more than the price agreed in the LSA under the guise of the sale proceeds really being used to "repay" the loans. After all, if what SBT did was permitted, a seller could always find a higher bidder prior to closing and simply structure the transaction this way, rendering plaintiff's rights illusory. Under SBT's commercially implausible interpretation, a seller would always have the option to continue shopping the Loans for a higher price until closing. That cannot be what these contracting parties intended and certainly that intent is not evidenced by the expression "repaid in full."

This conclusion is reinforced by the LSA's confidentiality provision (Dkt. 188 at 20). Even SBT agrees that the purpose of the confidentiality provision is "to protect against a third-party learning about the terms of the deal through the press or otherwise, and then attempting to outbid [plaintiff] for the deal" (Dkt. 312 at 19). While SBT proffers the unpersuasive argument that "the clause does not prohibit disclosure of the existence of the LSA to a noncompetitor; only its 'terms and conditions'" (*id.* at 20), Sushil Patel confirmed at trial that he "could not discuss the contract with anybody ... besides my counsel or the bank employees and or an assignee on behalf of the bank" (Dkt. 316 at 23-24). Thus, disclosure to Liu was a breach. Moreover, the testimony of Sushil and Krausz is consistent with other circumstantial evidence and leaves no doubt that SBT did indeed improperly disclose the LSA's terms (*see id.* at 131-34; *see also* Dkt. 313 at 5 ["Sushil disclosed and described the LSA to Chan, who also had access to the LSA. Tellingly, Sushil did not deny having a conversation with Chan about 'using the loan sale agreement information for the benefit of TIC' but testified only that he did not recall whether he did so. Their shared attorney, Krausz, used LSA information, including deadlines and the termination provision, to guide his 'assistance' to Liu and his advice to TIC and SBT regarding the Loan assignments. Krausz suggested and then set up the TIC loan to VertuRoc and discussed with Chan that it would have to close very soon in order to avoid the imminent Maverick closing"], citing Dkt. 316 at 8-17).

Helping the borrower avoid foreclosure by facilitating an assignment and refinancing is incompatible with SBT's confidentiality obligations. Even if the borrowers' principal was not thrilled about plaintiff becoming the lender, the only reason he even knew that was going to occur was due to SBT's confidentiality breach. The suggestion that SBT's actions should be viewed altruistically is cynical and an unavailing attempt to excuse a blatant breach of the LSA.

Plaintiff has therefore also proven SBT's breach of the confidentiality provision and the implied covenant of good faith and fair dealing based on SBT improperly disclosing the terms of the LSA, thereby undermining the LSA's purpose by facilitating the assignment of the Loans prior to closing even though the Loans were not actually repaid by the borrower and depriving plaintiff of its contracted-for ability to purchase the Loans at the agreed-upon price. It is clear from the credible evidence that the assignment would not have occurred without improper disclosure of the terms of the LSA. That the Loans were able to be purportedly "repaid in full" only due to a confidentiality breach also further supports plaintiff's argument that this was not what the parties intended could occur. However, because plaintiff has prevailed on its breach of contract claim and these causes of action do not support recovery of any additional damages, at this juncture, they are duplicative (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 434 [1st Dept 2013]).

In sum, the court resolves the ambiguity by making the finding of fact that the parties did not intend the "repaid in full" caveat to permit the subject assignments. Consequently, the court reaches the conclusion of law that SBT breached the LSA by assigning the Loans for a higher price rather than selling them to plaintiff at the price set in the LSA.

As for damages, plaintiff is entitled to "the benefit of the bargain" such that it should be awarded "a sum of money that will, to the extent possible, put [it] in as good a position as it would have been in had the contract been performed" (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992]). Plaintiff therefore posits:

> Had the LSA been performed, Plaintiff would have paid $8,634,552.81 to SBT and recovered $10,258,228.98, the full amount outstanding on the Notes as of July 25, 2018 (plus interest at the Default Rate thereafter to the extent Borrowers delayed payment or Plaintiff pursued judgments). The refinance transactions that closed with TIC Capital and W Financial reveal that there was more than sufficient equity in the properties to cover payment "in full," including all default interest, and Plaintiff is entitled to that amount because it would have recovered it as noteholder whether by Borrower's voluntary payment or in foreclosure (Dkt. 313 at 30).

This is the correct measure of damages (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 453 [2016] ["BOTW's withdrawal was not without consequences for Stonehill,

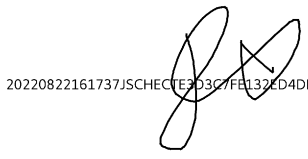
which suffered losses totaling over $1.8 million, reflecting the difference between the refinanced Discounted Payoff proceeds on account of the loan received by BOTW ($4,197,441) and the accepted bid sale price ($2,363,142)"]). While there is no logic in awarding plaintiff the $25,000 in legal fees that it did not expend, plaintiff shall recover the $1,978,202 it would have recovered on the loans had the LSA not been breached ($10,258,228.98 received by SBT, plus $354,526.83 in outstanding default interest, minus $8,634,552.81 that would have been paid to SBT at closing). Statutory pre-judgment interest shall run from July 25, 2018 (CPLR 5001[b]).

Plaintiff is also entitled to its attorneys' fees (Dkt. 188 at 21). It is not entitled to punitive damages in this private commercial dispute that does not involve conduct "aimed at the public generally" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Plaintiff's request to amend its pleadings to conform to the proof is unnecessary.

Accordingly, it is ORDERED that the parties shall promptly meet and confer to see if they can agree on the amount of reasonable costs and fees incurred by plaintiff in this action and, if not, plaintiff shall e-file a fee application (billing records and an affirmation of reasonableness) by September 12, 2022, SBT may e-file objections by October 3, 2022, and plaintiff shall notify the court by email when its application is fully submitted.

The court will direct the entry of judgment after deciding the fee application and then plaintiff shall notify the court whether it will be proceeding with its claims against the remaining defendants (*see* Dkt. 174).



DATE: 8/22/2022 **JENNIFER SCHECTER, JSC**

Check One: ☐ **Case Disposed** ☒ **Non-Final Disposition**