Valley Natl. Bank v Silvershore Props. 123 LLC
2022 NY Slip Op 32956(U)
August 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 513988/21
Judge: Lawrence Knipel
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At an IAS Term, Part Comm-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of August, 2022.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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VALLEY NATIONAL BANK, as successor by merger to ORITANI BANK,

Plaintiff,

- against -

Index No. 513988/21

SILVERSHORE PROPERTIES 123 LLC, JASON SILVERSTEIN, DAVID SHORENSTEIN, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, J. WASSER & CO. INC. JOHN DOE AND JANE DOE 1-10, said names being fictitious, it being the intention of the Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Cross Motion/Affidavits (Affirmations) Annexed	28-35
Opposition Affidavits (Affirmations) Annexed	38-46
Reply Affidavits (Affirmations) Annexed	48-51

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 236 Schenectady Avenue in Brooklyn (Block 1377, Lot 33) (Property), plaintiff Valley National Bank, as successor by merger to Oritani Bank (plaintiff), moves (in motion

sequence [mot. seq.] one) for an order dismissing the counterclaims of defendants Silvershore Property 123 LLC (Borrower), Jason Silverstein (Silverstein) and David Shorenstein (Shorenstein) (collectively, Guarantors and, including the Borrower, defendants) based upon documentary evidence pursuant to CPLR 3211 (a) (1) and for failure to state a cause of action pursuant to CPLR 3211 (a) (7).

Background

Plaintiff commenced this action, on June 10, 2021, by the filing of a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that, on October 5, 2017, Bridgehampton National Bank (Bridgehampton) issued a note in the principal amount of $1,940,000.00 (Note) to Borrower, which was secured by a consolidated mortgage executed on October 5, 2017 encumbering the Property in favor of Bridgehampton (Mortgage); and that, on the same date, Silverstein and Shorenstein, the Guarantors, executed a limited guaranty to secure certain payments, costs and expenses relating to the Property (Guaranty) (*see* complaint at ¶ 16-18 and 25 – NYSCEF Doc No. 30).

The complaint further alleges that, after Borrower failed to make timely payments under the Note and Mortgage beginning on June 6, 2020, plaintiff sent defendants a notice of default and acceleration on November 2, 2020 (*id.* at ¶ ¶ 44 and 56 – NYSCEF Doc No. 30). Thereafter, on December 11, 2020, plaintiff, Borrower and Silverstein entered into a

forbearance agreement (Forbearance Agreement),[1] by which plaintiff agreed to forebear from pursuing its rights and remedies under the Note, Mortgage and Guaranty (collectively, Loan Documents) until the earlier of May 31, 2021 or a forbearance termination event as defined in the agreement and Borrower and Silverstein (collectively, Party Obligors) agreed to make all payments due under the Note and Mortgage by May 31, 2021 (*id.* at ¶ ¶ 44-46 – NYSCEF Doc No. 30). The complaint alleges, however, that the Party Obligors defaulted under the Forbearance Agreement by failing to make the agreed payments by May 31, 2021. The complaint also alleges that defendants further defaulted under the Loan Documents, in that defendants allowed liens to be placed against the Property, and Shorenstein transferred his ownership interest in Borrower to Silverstein without plaintiff's prior consent (*id.* at ¶ ¶ 48, 49 and 52-55 – NYSCEF Doc No. 30).

As to standing, the complaint alleges that, on or about June 27, 2018, BNB Bank, formerly Bridgehampton, assigned the Note and Mortgage to Oritani Finance Company, a wholly owned subsidiary of Oritani Bank (Oritani), by Assignment of Mortgage recorded on July 24, 2018; thus, plaintiff, "as successor by merger to Oritani, is the owner of any and all rights, title, and interest in the mortgages, related debt instruments, and loan documents referenced herein" (*id.* at ¶ ¶ 28 and 30 - NYSCEF Doc No. 30).

[1] Shorenstein was not a party to the Forbearance Agreement, as he had already transferred his ownership interest in Borrower to Silverstein, which is acknowledged by the Party Obligors in the Forbearance Agreement as a default under the Loan Documents (*see* Forbearance Agreement at 2 – NYSCEF Doc Nos. 31).

Defendants' Answer

Defendants filed an answer, verified by Silverstein, on July 23, 2021, denying the material allegations in the complaint and asserting counterclaims based upon fraud and breach of the covenant of good faith and fair dealing. Defendants also asserted a counterclaim seeking a declaratory judgment declaring that the Guarantors' liability is limited to the "Guaranteed Amounts" listed in the Guaranty (*see* defendants' answer - NYSCEF Doc No. 25).

According to defendants, after plaintiff's merger with Oritani, plaintiff, by its Vice President Kenneth Swedler (Swedler), told Borrower that it wanted to divest itself of the Mortgage and began pressuring Borrower to pay off the Mortgage before its May 2025 maturity date. "In an effort to satisfy" plaintiff, Borrower attempted to refinance with another lender. During this time, defendants allege that Swedler, knowing that defendants were 60 days behind in payments, made false assurances that plaintiff would not declare a default while they were seeking to refinance (*id.* at ¶ ¶ 129-130, 132 and 145 - NYSCEF Doc No. 25). Defendants further allege that in July 2020, after they were unable to refinance due to the COVID-19 pandemic, Swedler told them to stop making payments while plaintiff contemplated a forbearance agreement. However, on August 11, 2020, plaintiff sent Borrower a default email, followed by a formal default letter. Based upon this, defendants allege that plaintiff fraudulently induced them to default on the Mortgage and also breached the covenant of good faith and fair dealing.

Additionally, defendants allege that, "following constant aggressive pressure," plaintiff fraudulently induced Borrower to execute the "completely one-sided" Forbearance Agreement, which it had "no choice but to sign," since it could neither pay off the Mortgage nor afford the default rate interest (*id.* at ¶ ¶156-157 - NYSCEF Doc No. 25). Defendants further allege that plaintiff also induced them to execute the Forbearance Agreement by failing to disclose that plaintiff intended to file a separate foreclosure action against the Party Obligors regarding an unrelated property and that defendants also breached the covenant of good faith and faith dealing by commencing the other foreclosure action, as it hindered their ability to seek refinancing and satisfy the Mortgage on the Property before May 2021 in accordance with the Forbearance Agreement.

Plaintiff's Instant Motion

On September 24, 2021, plaintiff filed the instant motion seeking dismissal of defendants' counterclaims. In support of its motion, plaintiff argues that defendants expressly waived their right to assert any counterclaims in the Forbearance Agreement, which defendants negotiated with the benefit of counsel; the general release executed in conjunction with the Forbearance Agreement (General Release); and the Loan Documents. Based upon these documents, plaintiff contends that defendants' counterclaims should be dismissed pursuant to CPLR 3211 (a) (1).

Plaintiff further argues that defendants' counterclaims should also be dismissed pursuant to CPLR 3211 (a) (7), as their fraud and breach of the covenant of good faith and fair dealing counterclaims fail to state a cause of action. Plaintiff contends that, pursuant

to the terms of the Loan Documents, as well as GOL 15-301, the Loan Documents cannot be modified absent a written agreement. Therefore, any alleged oral agreement between plaintiff, by Swedler, and defendants could not serve to modify these contracts and, since there was no valid oral agreement, there could be no breach of the covenant of good faith and fair dealing. Similarly, plaintiff contends that, since the Loan Documents and GOL 15-301 bar oral modification, defendants could not have reasonably relied upon any alleged oral agreement with Swedler, thus, defendants' fraud counterclaim fails to establish all the requisite elements that constitute a fraud.

Moreover, plaintiff argues that defendants' request for a declaratory judgment as to the Guaranty terms is dismissable as unnecessary since that issue will ultimately be determined upon resolution of the litigation.

Defendants' Opposition

In opposition, defendants argue that GOL 15-301 is inapplicable to this action since GOL 15-301 refers to actual changes to contract terms, not oral waivers of contract conditions, like in the case at bar, where plaintiff orally waived a condition in the Loan Documents by agreeing not to default defendants while they sought to refinance. Notwithstanding, defendants argue that, even if the court found their agreement with plaintiff to be an oral modification, GOL 15-301 and the Loan Documents would not serve to bar their counterclaims due to plaintiff's fraudulent acts. To substantiate their fraud and breach of the covenant of good faith and fair dealing counterclaims, defendants submitted an email chain between plaintiff, by Swedler and Louis Manderino (Manderino) [plaintiff's

Senior Vice President], and Silverstein, which they allege establishes the oral agreement between the parties, and plaintiff's later breach of that agreement. As to the other default events, defendants contend that these allegations are unproven and, thus, cannot serve as a basis to dismiss their counterclaims. Defendants further argue that their declaratory judgment counterclaim should not be dismissed, since Guarantors are entitled to seek a determination as to their liability under the Guaranty.

Email Chain

The email chain submitted by defendants begins with an email from Swedler to Silverstein dated August 3, 2020, in which Swedler asks Silverstein if the May payment was sent last week. Silverstein responds on August 10, 2020, stating that he has tried to contact Swedler "multiple times to discuss what we spoke about. Please call me." On August 11, 2020, Swedler responds,

> "[a]s you are aware, events of default have occurred and are continuing under the loan documents with respect to the subject loan . . . including but not limited to i) failure to make payment of principal, interest and escrow for the period beginning May 5, 2020. In that regard, it has been discussed and decided that the loan is being transferred to the Special Assets Dept. (i.e. workout) for handling. In the near future, you will be contacted by a representative from that department with whom you will communicate going forward."

Silverstein then responds, on the same date, stating that "[a] payment was sent in. As discussed, I would appreciate if the bank would agree to defer payments, as other banks have been doing, in the light of the pandemic and the effect it has [had] on operations."

Later, on August 11, 2020, Manderino sends an email, stating that "[the referenced loan was delinquent in payments long before the 'Pandemic' set-in. Up until now, the Bank choose not to call a default and tried to work with you, the Borrower to no avail. The Bank is now placing the loan in default and will move to protect its interest under the loan documents . . ."

Silverstein subsequently responds,

> "[p]lease have someone call me. This is unreal. A conversation was had with Ken over a week ago regarding payment deferrals and he agreed to get back to me in short order. There has been no response despite multiple follow ups over the past week. Ken is fully aware of the situation regarding the take out loan and the effect the pandemic had on it moving forward. As you know we are still working on refinancing the asset and I am hopeful it will move forward but to take this position is not only unreasonable but completely incorrect when you state you tried working with the borrower 'to no avail'. It could not be further from the truth. In any event a payment was sent this AM and the borrower fully intends on working towards a successful take out of the loan" (*see* email chain - NYSCEF Doc No. 42).

Plaintiff's Reply

In reply, plaintiff argues that the email chain confirms that there was no oral agreement between the parties, since Silverstein states in his emails that he has been awaiting plaintiff's response to his inquiry about payment deferral, which belies defendants' claim that the parties had orally agreed to defer payments while defendants pursued refinancing. Plaintiff next contends that defendants' argument that it orally waived a condition in the Loan Documents is unavailing given the express language in the Loan Documents that plaintiff's acceptance of partial or late payments "shall not constitute a

waiver or default of any provisions" of the Note or the Mortgage (Note at 2 – NYSECF Doc No. 45; *see also* Section 2.06 of the Mortgage – NYSECF Doc No. 45).

Moreover, plaintiff argues that its commencement of another proceeding against an unrelated property was not a breach of any alleged covenant of good faith and fair dealing or fraudulent act, since commencement of that action was not done to frustrate the purpose of the Forbearance Agreement; instead, that action was foreseeable as defendants had received a default and acceleration notice regarding the unrelated mortgage in September 23, 2020, nearly two months before the Forbearance Agreement was executed on December 11, 2020.

Additionally, plaintiff contends that defendants' argument that Shorenstein's transfer of interest and the Property liens are unproven and thus cannot serve as a basis to dismiss their counterclaims is unavailing, since defendants admit Shorenstein's transfer of ownership in the Forbearance Agreement, which defendants corroborated by annexing same to their attorney affirmation. Therefore, plaintiff avers that defendants' contention that plaintiff fraudulently induced them to default on the Loan Documents is meritless, since Shorenstein's transfer of his interest in Borrower to Silverstein, alone, serves as a proper basis for this foreclosure action.

Discussion

(1)

CPLR 3211 (a) (1)

CPLR 3211 (a) (1) provides, in pertinent part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense

is founded upon documentary evidence." A dismissal of a counterclaim pursuant to CPLR 3211 (a) (1) is warranted where the submitted documentary evidence utterly refutes the counterclaims' factual allegations; thus, conclusively establishing a defense as a matter of law (*see Anderson v Armentano*, 139 AD3d 769, 770 [2d Dept 2016]; *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

Here, in support of its motion to dismiss defendants' counterclaims pursuant to CPLR 3211 (a) (1), plaintiff submits the Forbearance Agreement and General Release, which each have counterclaim waiver provisions. More specifically, in section 11 (a) of the Forbearance Agreement, the Party Obligors agreed

> "[T]hat, as of the date hereof, they have no legal or equitable claim, counterclaim, cause of action, right of set off or defense of any kind by way of offset or otherwise against the Lender. The foregoing notwithstanding, to the extent that any such claim or defense may or does exist, as of the date hereof, each of the Party Obligors expressly waive and release any and all such claims, counterclaims, cause of action and defenses."

Sections 2 (a) and (c) and 11 (b) of the Forbearance Agreement reiterate this waiver, and the General Release, as well as the Note, Mortgage and Guaranty which were submitted by defendants, all have similar waivers (*see* sections 2 (a) and (c) and 11 (a) and (b) of the Forbearance Agreement; ¶ 1 of the General Release; Note at 3; sections 1.04 and 1.26 of the Mortgage; and Guaranty at 2 – NYSCEF Doc Nos. 31, 32, 45, 46 and 40, respectively).

Based upon the foregoing, this court finds that the submitted documentary evidence conclusively establishes that defendants validly waived their rights to interpose any counterclaims in this action, except for their fraud counterclaim. A waiver of the right to

interpose a counterclaim is not against public policy and will be enforced in the absence of fraud allegations (*see North Fork Bank v Computerized Quality Separation Corp.*, 62 AD3d 973, 974 [2d Dept 2009]).

Although defendants argue that the parties orally modified the Loan Documents or that plaintiff waived its right to seek a default, this argument lacks merit, in light of the Loan Documents' bar to oral modification, and waiver by plaintiff (*see* the Note at 2 and 4; sections 2.06 and 3.09 of the Mortgage; and Guaranty at 4 – NYSCEF Doc Nos. 45, 46 and 40, respectively).

As such, defendants' breach of the covenant of good faith and fair dealing and declaratory judgment counterclaims must be dismissed pursuant to CPLR 3211 (a) (1).[2]

(2)

CPLR 3211 (a) (7)

Turning to defendants' fraud counterclaim, "[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurcyleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citations omitted]).

When considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine whether the pleadings state a cognizable cause of action or defense (*see Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 531 [2d Dept.

[2] The dismissal of defendants' declaratory judgment counterclaim is of no event since the Guarantors' liability under the Guaranty will ultimately and necessarily be determined upon resolution of this litigation.

2008]). In doing so, the court must "afford the pleadings a liberal construction, take the allegations in the [pleadings] as true and afford the [pleadings] the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, defendants' counterclaim fails to demonstrate a cognizable cause of action for fraud. The email chain submitted by defendants to substantiate their claim actually contradicts it. In fact, Silverstein explicitly states in his final email to plaintiff that, "when you state that you tried working with the borrower 'to no avail'. It could not be further from the truth" (see email chain – NYSCEF Doc No. 42). Thus, defendants' allegation, that plaintiff misrepresented that it would not default defendants while they attempted to refinance, fails. Furthermore, defendants' claim that they relied upon this alleged misrepresentation is not justifiable, given the Loan Documents' restrictions against oral modification, and waiver by plaintiff.

Moreover, defendants' argument that plaintiff fraudulently induced the Party Obligors to enter into the Forbearance Agreement knowing that it was going to commence another foreclosure action on an unrelated property to hinder Party Obligors' compliance with the Forbearance Agreement is also unavailing, since defendants were served with the notice of default and acceleration in the unrelated action well before the Party Obligors entered into the Forbearance Agreement, and defendants have not shown that plaintiff was under any obligation to forbear the enforcement of its rights and remedies in the unrelated action.

As such, defendants' fraud counterclaim must be dismissed pursuant to CPLR 3211 (a) (7).

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. one) to dismiss defendants' counterclaims, pursuant to CPLR 3211 (a) (1) and (7), is granted; and it is further

ORDERED that defendants' counterclaims are hereby dismissed.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE