Valley Natl. Bank v Silvershore Props. 123 LLC
2023 NY Slip Op 31862(U)
May 22, 2023
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 22nd day of May, 2023.

P R E S E N T:

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, et. al. ,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	79-112, 118, 120-122
Opposing Affidavits (Affirmations)	121-122, 123-133, 136-146
Reply Affidavits (Affirmations)	123-133, 136-146

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 (Valley or plaintiff), moves (in motion sequence [mot. seq.] three) for an order: (1) granting it summary judgment against defendants Silvershore Properties 123 LLC (Silvershore or Borrower), Jason Silverstein (Silverstein or Guarantor) and David Shorenstein (Shorenstein or Guarantor)

on all four causes of action asserted in the complaint, pursuant to CPLR 3212, and (2) appointing a referee to compute the amount due to it, examine whether the Property may be sold in parcels and make his or her computation and report with all convenient speed, pursuant to RPAPL § 1321.

Defendants Silvershore, Silverstein and Shorenstein cross-move (mot. seq. four) for an order granting them summary judgment dismissing the complaint as against defendants Silverstein and Shorenstein *only*, pursuant to CPLR 3212 (*see* NYSCEF Doc No. 120).

Background

On June 10, 2021, Valley commenced this foreclosure action by filing 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 to Silvershore, the Borrower, which was secured by a consolidated mortgage encumbering the Property. On that same date, Silverstein and Shorenstein, the Guarantors, allegedly executed a limited guaranty to secure certain payments, costs and expenses relating to the Property (Limited Guaranty) (NYSCEF Doc No. 2 at ¶¶ 16-18 and 25). The complaint alleges that when Borrower failed to make mortgage payments beginning on June 6, 2020, Valley served defendants with a November 2, 2020, notice of default and acceleration (*id.* at ¶¶ 44 and 56).

The Forbearance Agreement

Thereafter, on December 11, 2020, Valley, Borrower and Silverstein allegedly entered into a forbearance agreement (Forbearance Agreement),[1] by which Valley agreed to forebear from pursuing its rights and remedies under the Note, Mortgage and Limited Guaranty (collectively, the Loan Documents) until the earlier of May 31, 2021 or a forbearance termination event as defined in the Forbearance Agreement, and Silvershore and Silverstein agreed to make all payments due by May 31, 2021 (*id.* at ¶¶ 44-46). The complaint alleges that defendants defaulted under the Forbearance Agreement by failing to make the payments by May 31, 2021. The complaint alleges that defendants further defaulted under the Loan Documents by allowing liens to be filed against the Property, and Shorenstein transferred his ownership interest in Silvershore, the Borrower, to Silverstein without Valley's prior consent (*id.* at ¶¶ 48, 49 and 52-55).

Regarding standing, the complaint alleges that, on or about June 27, 2018, Bridgehampton's successor, BNB Bank, assigned both 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, and thus, Valley "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).

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[1] Shorenstein was not a party to the Forbearance Agreement, as he had already transferred his ownership interest in Silvershore to Silverstein, which is acknowledged by defendants in the Forbearance Agreement as a default under the Loan Documents (*see* Forbearance Agreement, NYSCEF Doc No. 31 at 2).

The complaint asserts four causes of action for: (1) breach of the Loan Documents; (2) foreclosure of the Property; (3) recoupment and disgorgement of rental income that defendants collected from the Property in violation of the Loan Documents; and (4) a deficiency judgment, if necessary.

Defendants' Answer and Affirmative Defenses

On July 23, 2021, defendants collectively filed an answer, verified by Silverstein, in which they denied the material allegations in the complaint and asserted affirmative defenses, including failure to satisfy a condition precedent, the Statute of Frauds, res judicata and collateral estoppel, the statute of limitations, lack of standing and that the relief sought in the complaint is barred by the terms of the parties' agreements (NYSCEF Doc No. 25). Defendants also asserted three counterclaims against Valley for fraud, breach of the covenant of good faith and fair dealing and a judgment declaring that the Guarantors' liability is limited to the "Guaranteed Amounts" listed in the guaranty (*id.*).

On September 24, 2021, Valley moved (in mot. seq. one) to dismiss defendants' counterclaims, pursuant to CPLR 3211 (a) (1) and (a) (7), which was granted by this court's August 29, 2022 decision and order (*see* NYSCEF Doc No. 70).

On June 8, 2022, Valley moved for a default judgment against the non-answering and non-appearing defendants, which was granted without opposition by this court's August 22, 2022 and September 30, 2022 orders (NYSCEF Doc Nos. 69 and 78).

Valley's Instant Summary Judgment Motion

On October 3, 2022, Valley moved for summary judgment on all four of their causes of action asserted against defendants and for an order of reference.

Valley submits a fact affidavit from Angela M. Morisco (Morisco), a First Vice President, Special Assets, of Valley, as successor to Oritani by merger (effective December 1, 2019) (*see* NYSCEF Doc No. 95 at ¶ 2). Morisco attests that "Plaintiff is the owner, holder and servicer of the commercial mortgage loan . . ." issued to Silvershore and guaranteed by Silverstein and Shorenstein (*id.* at ¶ 3). Morisco attests that "I am personally familiar with the Commercial Loan Records as I routinely review them to determine a loan's payment history and date of default, which are reflected in the loan's transaction history" (*id.* at ¶ 6). Morisco further attests that the Commercial Loan Records are made and updated regularly, they incorporate the records of prior lenders and "I also have personal knowledge that every exhibit attached to this affidavit is a true and correct copy of a document contained within Plaintiff's Commercial Loan Records" (*id.* at ¶¶ 7-8).

Morisco attests that on October 5, 2017, Silvershore executed the $1,940,000.00 note in favor of Bridgehampton, which was secured by the consolidated mortgage encumbering the Property, the Limited Guarantee, an assignment of leases and rents and UCC financing statements and references the annexed Loan Documents (*id.* at ¶¶ 11-17 and NYSCEF Doc Nos. 98-103). Morisco attested to the assignments of the note and mortgage, copies of which are annexed to Valley's motion (NYSCEF Doc No. 104) and that Valley "has been the owner of any and all right, title and interest in and to the Loan

and the Loan Documents, and has been entitled to enforce same, since at least June 27, 2018" (NYSCEF Doc No. 95 at ¶¶ 18-20). Morisco attests that the note and mortgage provide that failure to make payments and a change in the ownership interests in Borrower (Silvershore) were events of default (*id.* at ¶¶ 24-26). Morisco attests that:

> "Pursuant to the Loan Documents, if an event of default has occurred and is continuing, the entire unpaid principal balance due under the Loan, accrued interest, interest accruing at the default rate, prepayment penalty and all other indebtedness, at the option of Plaintiff, shall immediately become due and payable, without any prior written notice to Obligors" (*id.* at ¶ 28).

Morisco attests that "Borrower defaulted on the Loan by, among other things, failing to make timely payments under the Loan Documents when due, beginning with the monthly installment due June 5, 2020, and continuing" based on the loan history, which is annexed to Valley's moving papers as Exhibit 10 (*id.* at ¶ 35 and NYSCEF Doc No. 105).

Morisco also attests that "Borrower further defaulted on the Loan by causing a material change in ownership of Borrower to occur [on October 24, 2019], in contravention of the Loan Documents, as a result of Shorenstein selling or otherwise transferring his interest in Borrower to Silverstein" (NYSCEF Doc No. 95 at ¶ 36 and NYSCEF Doc No. 106). Morisco attests that Borrower also defaulted by failing to pay various other debts, including property tax, mechanics liens, water and sewer charges, etc. . . . (NYSCEF Doc No. 95 at ¶ 37).

Morisco attests that Valley's counsel notified defendants of the various defaults by a November 2, 2020 default notice, demand for payment and acceleration letter, which

advised that the default rate would begin to accrue on June 6, 2020, amongst other things (*id.* at ¶ 38 and NYSCEF Doc No. 108).[2] Morisco then described the parties' execution of the December 11, 2020 Forbearance Agreement, pursuant to which defendants Silvershore and Silverstein promised to pay all amounts due by May 31, 2021 (*id.* at ¶¶ 39-40). Morisco attests that "[t]he Forbearance Agreement expired pursuant to its terms on May 31, 2021 at 5:00 p.m. without Borrower or Silverstein having made the required payments" (*id.* at ¶ 44). Morisco attests that "[d]espite the Notice of Default, the Notice of Expiration[3] and the Forbearance Agreement, Obligors failed to cure their defaults, and any and all grace periods permitted thereunder or under the Loan Documents expired prior to the commencement of the above-entitled foreclosure action on June 10, 2021" (*id.* at ¶ 45).

Morisco notes that Silvershore and Silverstein "acknowledged and agreed in the Forbearance Agreement that the defaults under the Loan Documents as previously noticed by Plaintiff to Obligors had occurred and were continuing unabated" (*id.* at ¶ 41). Morisco further noted that under the Forbearance Agreement, Silvershore and Silverstein agreed that: (1) Borrower was in default under the Loan Documents; (2) "[t]he Indebtedness (as defined therein) was due and owing to Plaintiff without setoff, counterclaim, defense, recoupment or right of reduction of any kind, whether at law or in equity"; (3) the Loan

[2] Valley's counsel, Robert J. Malatak, Esq., affirms that he personally served the notice of default upon defendants by both the United States Postal Service, return receipt requested, and FedEx and submits proof of such service (*see* NYSCEF Doc No. 80 at ¶ 4 and NYSCEF Doc No. 81).
[3] On May 27, 2021, Valley's counsel served a Notice that the Forbearance Agreement was about to expire on May 31, 2021 (*see* NYSCEF Doc No. 80 at ¶ 5 and NYSCEF Doc No. 82).

Documents were valid and enforceable; and (4) Borrower and Silverstein waived and released all counterclaims and defenses against Valley (*id.* at ¶ 42).

Morisco attests that in the Note defendants specifically waived "any defense based upon any statute of limitations or any claim of laches and any setoff or counterclaim of any nature or description" and in the Consolidated Mortgage defendants waived "any right to interpose or assert any offset, counterclaim or defense of any nature whatsoever in any action or proceeding brought by Plaintiff upon the Mortgage, the Note and/or the [Limited] Guaranty" (*id.* at ¶¶ 32-33).

Defendants' Summary Judgment Cross Motion

Defendants cross-move for summary judgment dismissing the complaint as against defendants Silverstein and Shorenstein, the Guarantors, pursuant to CPLR 3212.

Defendants only submit a brief attorney affirmation and a copy of the Limited Guaranty and argue that Valley seeks judgment against the defendant Guarantors "pursuant to a guaranty that does not apply to any of the facts alleged in the Complaint" (NYSCEF Doc No. 121 at ¶ 4). Specifically, defense counsel argues that "the Plaintiff's claims against Silverstein and Shorenstein arise out of that certain LIMITED GUARANTY OF PAYMENT of 'NON-RECOURSE MORTGAGE,' dated October 5, 2017, whereby Silverstein and Shorenstein agreed to guarantee *certain* obligations belonging to co-defendant Silvershore . . ." (*id.* at ¶ 5 [emphasis added]). Defense counsel explains that "the Plaintiff's mortgage loan to Borrower was a 'non-recourse' loan, and Silverstein and Shorenstein can only be liable to Plaintiff for the specific categories of losses identified in

the [Limited] Guaranty as items '(a) through (j)'" which are: (a) legal fees and expenses arising out of the proceeds of any insurance policy due to damage to the Property; (b) awards for condemnation of the Property; (c) for tenant security deposits; (d) for rental income received from tenants; (e) for rent and revenues received after any notice of default; (f) damage to Property due to Borrower's gross negligence; (g) damages based on Borrower's failure to pay taxes, mechanics' liens or other liens that are *superior* to the subject loan; (h) all obligations of Borrower under the Mortgage and the Loan Documents relating to hazardous or toxic substances; (i) misapplication of Borrower's funds or Property or fraud by Borrower; and (j) all loss and expense due to Borrower's bankruptcy (*id.* at ¶ 9 and NYSCEF Doc No. 122 at 1-2).

Defense counsel asserts that a comparison of the alleged defaults in the complaint compared to the specific limitations in the Limited Guaranty listed above reveal that "Silverstein and Shorenstein have no obligation to pay the Borrower's loan payments, and it is equally plain that Shorenstein's assigning his interest in the Borrower entity to Silverstein also does not cause any liability to arise for either of them under the Guaranty" (NYSCEF Doc No. 121 at ¶ 12). Defense counsel claims that "Plaintiff is not only trying to hold Shorenstein and Silverstein liable for these charges, but for all of the Borrower's obligations under the mortgage documents, despite the 'non-recourse' nature of the loan, and despite the strict and limited language of the [Limited] Guaranty" (*id.* at ¶ 18).

Valley's Opposition to the Cross Motion and Reply

Valley opposes defendants' summary judgment cross motion to dismiss all claims asserted against the Guarantors and submits an affirmation from counsel, exhibits and a reply memorandum of law in further support of its "unopposed" motion for an order of reference and summary judgment on its claims asserted against Silvershore, the Borrower. Valley argues in its reply memorandum of law that:

> "[i]n opposition to Plaintiff's motion for summary judgment and an order of reference, Borrower remained silent, thereby conceding Plaintiff's entitlement to the relief requested, and Guarantors cross-moved for summary judgment dismissing the Complaint insofar as asserted against them, contending they are not liable under the Guaranty for any of Borrower's defaults" (NYSCEF Doc No. 134 at 2).

Valley, in opposition to defendants' summary judgment cross motion, argues that the court should "decline to dismiss" the Guarantors, individual defendants Silverstein and Shorenstein. Specifically, Valley argues that the cross motion is "defective" because: (1) defendants failed to submit a statement of material facts, a procedural requirement under New York State and Kings County Commercial Division Rules; (2) "Guarantors did not sufficiently plead their limited liability under the Guaranty as an affirmative defense";[4] (3) "the Guaranty unequivocally obligates Guarantors to pay the outstanding property taxes and other liens or potential liens, property losses and damages and related legal fees and

[4] However, Valley acknowledges that Guarantors' fifth affirmative defense specifically alleges that the relief sought in the complaint is barred by the terms of the parties' agreements, which includes the Limited Guaranty (*see* NYSCEF Doc No. 87).

expenses owed by Borrower under the Loan Documents"; and (4) "this Court previously determined that "Guarantors' liability under the Guaranty will ultimately and necessarily be determined upon resolution of this litigation" and so Guarantors' request for dismissal at this juncture is precluded by the doctrine of the law of the case" (*id.*).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and

evidence of default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta,* 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]).

Valley's Summary Judgment Motion

Here, Valley has amply demonstrated its prima facie entitlement to summary judgment as against Silvershore, the Borrower, on its first and second causes of action for Silvershore's breach of the Mortgage, the Forbearance Agreement and to foreclose the Property. Valley submitted the note, the consolidated mortgage, admissible evidence of Silvershore's payment default under the consolidated mortgage and subsequently under the Forbearance Agreement, proof of service of a copy of the summons and complaint and proof of the facts constituting Valley's breach of contract claim (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]).

Valley has also established that the Borrower, as further security for the loan, executed an October 5, 2017 Assignment of Leases and Rents, pursuant to which Borrower granted Valley all of its right, title and interest in the leases and rents derived from the Property (NYSCEF Doc No. 5). The Forbearance Agreement between Valley, Silvershore and Silverstein specifically acknowledges Valley's right to the rental income that Silvershore collected at the Property, and thus, Valley is entitled to summary judgment on its third cause of action to recoup the rental income that Silvershore collected from the Property in violation of the Loan Documents, the premise amount of which will be determined by the referee along with the amounts due and owing by the Borrower under

the Loan Documents, which were set forth as of December 10, 2020, in the parties' Forbearance Agreement (NYSCEF Doc No. 109 at ¶ 2 [b]).

However, summary judgment on Valley's fourth cause of action for a deficiency judgment is premature at this juncture. The Second Department has held that *after* a foreclosure sale has been concluded, and *after* an application is made to the confirm the sale, the court shall then consider whether a deficiency judgment is warranted (*see Sidco Distributing Co., Inc. v Milco Food Corp.*, 43 AD2d 844, 844 [1974]).

Defendants failed to oppose Valley's motion for summary judgment and an order of reference, nor could they, since defendants Silvershore and Silverstein explicitly acknowledged the subject loan, Silvershore's payment default and the amount due under the Loan Documents as of December 10, 2020 in the Forbearance Agreement (*see* NYSCEF Doc No. 109). Accordingly, Valley is entitled to an order of reference and summary judgment on its first, second and third causes of action against Silvershore.

The Guarantors' Summary Judgment Cross Motion

The Guarantors cross-move for summary judgment dismissing the complaint as against them on the ground that they are not liable under the plain language of the *Limited* Guaranty, which specifically sets forth the *limited* circumstances under which Silverstein and Shorenstein could be held liable to Valley. It is well-settled that "[a] guaranty agreement must be strictly construed" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]).

While Valley broadly contends that "the Guaranty obligates Guarantors to pay the outstanding property taxes and other liens or potential liens, property losses and damages and related legal fees and expenses owed by Borrower under the Loan Documents" (NYSCEF Doc No. 134 at 6), the "*Limited* Guaranty of Payment" specifically provides, at subsection (g), that Guarantors only agree to indemnify Valley:

> "for so long as Borrower is in possession and control of the Premises, for failure to pay any valid taxes, assessments, mechanic's liens, materialmen's liens or other liens *which could create liens on any portion of the Premises* ***which would be superior*** *to the lien or security title of the Mortgage or the Loan Documents* . . . (NYSCEF Doc No. 122 at 1 [g] [emphasis added]).

Valley specifically alleges in the complaint that the Limited Guaranty only applies to costs "arising out [of] *certain of* Borrower's obligations" and identifies a mechanic's lien allegedly held by defendant J Wasser & Co. Inc. and potential liens by the New York City Environmental Control Board and the Criminal Court of the City of New York, all of which are allegedly *subordinate* to Valley's "first mortgage lien" encumbering the Property (NYSCEF Doc No. 2 at ¶¶ 11-13, 25, 31 [emphasis added]). Thus, contrary to Valley's contention, the Guarantors only guaranteed against a *superior* lien recorded against the Property, and those circumstances are inapplicable here.

However, section (d) and (e) of the Limited Guaranty in the record reflects that the Guarantors could be held liable for rental income collected from tenants, especially after the Borrower's default. Specifically, sections (d) and (e) of the Limited Guaranty provide that Guarantors must indemnify Valley:

> "(d) for rent and other payments received from tenants under leases of all or any portion of the Premises paid more than one month in advance [and] (e) for rents, issues, profits and revenues of all or any portion of the Premises received or applicable to a period after any notice of default from Bank hereunder or under the Loan Documents in the event of any default by Borrower hereunder or thereunder which are not either applied to the ordinary and necessary expenses of own.i.ng and operating the Premises or paid to Bank" (NYSCEF Doc No. 122 at page 1 at [d] and [e]).

Thus, Valley's third causes of action for recoupment and disgorgement of rental income that defendants allegedly collected from the Property is a viable cause of action against the Guarantors, Silverstein and Shorenstein, under the terms of the Limited Guaranty. Consequently, the Guarantors are entitled to summary judgment dismissing all causes of action asserted against them with the exception of the third cause of action in the complaint. Accordingly, it is

ORDERED that Valley's motion (mot. seq. three) is only granted to the extent that: (1) Valley is granted summary judgment on its first and second causes of action asserted against defendant Borrower Silvershore and on its third cause of action asserted against defendant Borrower Silvershore and the Guarantors, Silverstein and Shorenstein, and (2) Valley is entitled to an order of reference, which shall be settled on notice within 30 days after service of this decision and order with notice of entry thereof; Valley's motion for summary judgment on its fourth cause of action for a deficiency judgment is denied without prejudice and with leave to renew, if necessary, after the foreclosure sale of the Property; and it is further

ORDERED that defendants' summary judgment cross motion (mot. seq. four) to dismiss the complaint as against the Guarantors, individual defendants Silverstein and Shorenstein, is only granted to the extent that the first, second and fourth causes of action are dismissed as against those defendants; the cross motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE