

Valley Natl. Bank v FPG Maiden Lane, LLC

2023 NY Slip Op 34096(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 657252/2020

Judge: Barry R. Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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Valley National Bank as successor by merger to Bank Leumi USA,

Plaintiff,

- v -

FPG Maiden Lane, LLC, Maiden Rental Holdings, LLC, Maiden Rental Holdings II, LLC, Maiden Rental Holdings III, LLC, Fortis Property Group, LLC, Joel Kestenbaum, City Safety Compliance Corp., HD Supply Construction Supply Ltd., New York Concrete Washout, Neat Heat Climate Control LLC, TPE DBA Plumbing Exchange, Pizzarotti LLC, Cuetes Corp., Extech Building Materials, United Rentals (North America) Inc., Able Rigging Contractors Inc., Abbey Associates LLC, Gryphon Contracting Corp., BPRT Construction of NY LLC, Pearlgreen Corporation, Roman Labor Services Corp., Dura-Lift Inc., Pizzarotti IBC, LLC, Diamond Coring & Cutting Inc., Alboro National LLC, Horizon Interiors Inc., Silvercup Scaffolding I LLC, Quality Facility Solutions Corp., Aish Mechanical Corp., DHS Fraco, LLC, Swing Staging LLC, MCWI Inc., Guma Construction Corp., Hill West Architects, LLP, ADD Mechanical Inc., Berry's Cooling & Heating, LLC, Rent A Unit NY Inc., New Jersey Boom and Erectros, 1 Seal USA LLC, Primaview LLC, AGM Deco Inc., Expressive Lighting Inc., A&D Entrances Inc., Centrifugal Electric LLC, Ray Builders Inc., RC Structures Inc., Doria Inc., New York State Department of Taxation & Finance, New York City Department of Finance,

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and corresponding values: 657252/2020, blank, 012, 013 & 014

DECISION & ORDER ON MOTION

Defendants.

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HON. BARRY R. OSTRAGER

On October 27, 2023, the Court heard multiple hours of oral argument on the motion by the plaintiff Lender Valley National Bank as successor by merger to Bank Leumi USA ("Valley National" or "the Lender") for (a) summary judgment in its favor on its First and Second Causes

of Action for foreclosure and attorney's fees, respectively; (b) an Order dismissing with prejudice the various affirmative defenses asserted by defendants FPG Maiden Lane, LLC ("Borrower" or "FPG"), Maiden Rental Holdings, LLC, Maiden Rental Holdings II, LLC, Maiden Rental Holdings III, LLC Fortis Property Group, LLC ("Fortis") and Joel Kestenbaum (collectively, the "Fortis Defendants") (NYSCEF Doc. No. 894) and dismissing any affirmative defenses and counterclaims asserted by defendants Swing Staging LLC, Hill West Architects, LLP, United Rentals (North America) Inc., Hill West Architects, LLP, Ray Builders Inc., Able Rigging Contractors, Inc., and Doria, Inc. (collectively, the "Lienholder Defendants", NYSCEF Doc. Nos. 888-897) to the extent they purport to deny the Lender's right to foreclosure as alleged in the Amended Complaint, and/or severing any surviving Fortis Defendants' affirmative defenses, and any surviving Lienholder Defendants' counterclaims, crossclaims and third-party claims; and (c) for an Order of Reference for the appointment of a Referee to Compute the amount due the Lender, pursuant to RPAPL § 1321. The motion is granted to the extent provided herein.

This decision is the culmination of three years of voluminous testimonial and documentary discovery, motion practice, and appeals which has generated 1,714 docket entries in this case and the related case *FPG Maiden Lane, LLC; Fortis Property Group, LLC; and Joel Kestenbaum v Bank Leumi USA; Valley National Bank as successor by merger to Bank Leumi USA; Bank Leumi le-Israel BM; Harel-Maiden Lane-General Partnership; and Harel Insurance Investments and Financial Services Ltd.*, Index No. 653584/2020 (referred to as the "Lender Liability Action"). In the Lender Liability Action, commenced before the Lender commenced this foreclosure action, the Borrower and the named Fortis Parties seek declaratory relief and money damages based on alleged wrongdoing by the Lender, including alleged breaches of the Loan Agreements that purportedly interfered with Borrower's construction efforts and loan payment obligations.

The two litigations arise out of the contemplated construction of a building at 161 Maiden Lane that was known as “One Seaport” (“the Project”). The Project, which commenced in or about 2015, was originally financed in part by Bank Leumi USA, as well as the developer FPG Maiden Lane, LLC, and other parties related to the Fortis financial conglomerate. A mezzanine lender and another lender also became involved in the Project, and those parties last year initiated a separate action, *MREF REIT Lender 2 LLC, et al. v. FPG Maiden Holdings, LLC, et al.*, 653189/2022. And there is another case pending before another Commercial Division Justice involving a deca-million-dollar surety bond in which the parties to this case have an interest. By Decision and Order dated March 5, 2021 (NYSCEF Doc. No. 138), this Court in this action granted the Lender’s motion for the appointment of a temporary receiver to manage the property while this litigation was pending.

It is undisputed that all work on the Project ceased in or about July 2020 when the general contractor, Ray Builders, walked off the Project because Ray Builders was not being funded. In addition to its filing here of an Answer with a counterclaim and various crossclaims seeking to foreclose the mechanic’s lien it filed (NYSCEF Doc. No. 892), Ray Builders recently filed a separate action in which Ray Builders seeks to recover nearly \$12 million dollars in money damages for services rendered and material delivered based on claims sounding in breach of contract and account stated. *Ray Builders Inc., v. FPG Maiden Lane, LLC*, Index No. 651219/2023 (the “Ray Builders Action”). By Decision and Order dated August 22, 2023, this Court stayed the Ray Builders Action pending the resolution of this foreclosure action.

There is no dispute that the Borrower executed various loan documents that were consolidated in a mortgage, that the Borrower received approximately \$90 million in funding from the Lender, and that the parties executed a Third Amendment to the Building Loan

Agreement dated as of March 13, 2020 (NYSCEF Doc. No. 901). There is also no dispute that the Borrower failed to meet the June 2020 deadline to secure a Temporary Certificate of Occupancy contemplated by the Third Amendment and then failed to repay the loan on the December 31, 2020 Maturity Date, which precipitated a *maturity default* on the loan, the cause of which remains hotly contested. There is also no dispute that the Third Amendment and a related pre-negotiation agreement provided that only written agreements signed by all parties would modify the Third Amendment deadlines. Through its filing of a party affidavit (NYSCEF Doc. No. 902) and an extraordinary number of exhibits, the Lender has established a prima facie case for foreclosure. However, the claim for attorney's fees is deferred until the foreclosure.

The Borrower has asserted affirmative defenses to this foreclosure action that in large part mirror the claims asserted in the Amended Complaint by the Borrower as plaintiff in the related Lender Liability Action (NYSCEF Doc. No. 157). The claims remaining in that action are the Second Cause of Action, sounding in fraudulent inducement, and the Fifth Cause of Action, sounding in breach of contract, the Sixth Cause of Action asserting anticipatory breach of the Loan Agreements, and the Seventh, Eighth and Ninth Causes of Action seeking various forms of declaratory relief. Those claims, which were the subject of extensive scorched earth discovery and motion practice, do not defeat the Lender's motion for summary judgment in foreclosure. Rather, they give rise to a claim for potential money damages and declaratory relief in the related Lender Liability Action.

In the interests of judicial economy, any affirmative defenses asserted by the Borrower and the Fortis Parties that are not barred by the foreclosure judgment are severed and consolidated with the claims in the related Lender Liability Action, which is continuing based on the Decision being efiled in that action contemporaneously with this Decision.

Similarly, any and all affirmative defenses, counterclaims, crossclaims and third-party claims asserted by the Lienholder Defendants shall be determined in connection with the foreclosure sale. Therefore, the motion by defendant Ray Builders for summary judgment on its counterclaim and crossclaim for foreclosure on its mechanic's lien filed on February 18, 2021, and for leave to file a second mechanic's lien (mot. seq. 012), and the motion by defendant Able Rigging Contractors, Inc. for summary judgment on its various defenses and crossclaims (mot. seq. 013), are both denied without prejudice to the assertion of those parties' claims in connection with the foreclosure sale.

The parties have long been advised that this action and all related actions will be randomly assigned to another Commercial Division Justice when this Justice retires from active service as a Commercial Division Justice at the end of this year. The never-ending stream of discovery disputes, motions, and appeals has resulted in an exponential devaluation of the collateral during the multi-year period in which construction financing was available at extremely reasonable rates. The Court continues to urge the parties to negotiate a commercially reasonable consensual resolution of this case which the parties have refused to do despite the involvement of an experienced mediator.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (seq. 014) is granted on its First Cause of Action for Foreclosure and for the appointment of a Referee to Compute, except that any affirmative defenses asserted by the Borrower and the Fortis Parties that are not barred by the foreclosure judgment are severed and consolidated with the claims in the related Lender Liability Action, which is continuing; and it is further


ORDERED that by December 1, 2023, the parties shall meet and confer and efile a Consent Order Appointing a Referee to Compute with a letter confirming the credentials and eligibility of the Proposed Referee in accordance with Part 36 of the Rules of the Chief Judge, or submitting opposing Referee nominations if the parties cannot agree; and it is further

ORDERED that plaintiff’s motion for summary judgment on its Second Cause of Action for attorney’s fees is denied without prejudice to renewal after the foreclosure sale; and it is further

ORDERED that the motions by Ray Builders and Able Rigging Contractors, Inc. (seq. nos. 012 and 013) are both denied without prejudice to the assertion of those parties’ claims in connection with the foreclosure sale; and it is further

ORDERED that a Status Conference is scheduled for December 6, 2023 at 10:00 a.m. to resolve any disputes in connection with the appointment of the Referee to Compute, which conference the parties may seek to cancel on consent if no issues remain outstanding.

Dated: November 16, 2023



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: