SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L SCHWEITZER J.S.C. Justice PART 45

BANK OF AMERICA, N.A., et al

- v -

LIGHTSTONE HOLDINGS, LLC, et al

INDEX NO. 601853/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is GRANTED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 14, 2011

MELVIN L SCHWEITZER J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

BANK OF AMERICA, N.A., et al.,	
Plaintiffs,	Index No. 601853/09
-against-	DECISION AND ORDER
LIGHTSTONE HOLDINGS, LLC, et al.,	Sequence No. 002
Defendants.	

MELVIN L. SCHWEITZER, J.:

Background

The plaintiffs in the present case are Bank of America, N.A., Wachovia Bank, N.C., Merrill Lynch Mortgage Lending, Inc., U.S. Bank National Association, as trustee for Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1, Debt II ESH, L.P., Debt-U ESH, L.P. and Key Bank National Association (plaintiffs). The defendants are David Lichtenstein (Mr. Lichtenstein), a residential and commercial real estate developer and investor, and Lightstone Holdings, LLC (Lightstone), of which Mr. Lichtenstein is the sole managing member (defendants).

In June 2007, Mr. Lichtenstein and Lightstone, along with an investment consortium, purchased ESH, a hotel chain, for approximately $8 billion. A large portion ($1.9 billion) of that sum was raised through five mezzanine loans to various companies that indirectly owned ESH. The plaintiffs have held the notes issued pursuant to these loans since no later than December 16, 2008. The mezzanine loans were secured by the membership interests in each of the ESH entities to which each respective loan was made. While the mezzanine loans are generally non-recourse, they become fully recourse under certain conditions.

As additional security, the mezzanine loans were guaranteed by the defendants. Section 1.1 of each Guaranty Agreement (Guaranty Agreements) provides in relevant part that "Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor." In Section 1.2, "Guaranteed Obligations" is defined to include, "the obligations or liabilities of Borrower to Lender under Section 9.4 of the Loan Agreement." Section 9.4(b) of each mezzanine loan agreement provides that if (among others) the Mortgage Borrower, an Operating Lessee, a Mortgage Principal, the Borrower, a Senior Mezzanine Borrower or the Property Owner (as those terms are defined in the mezzanine loan agreements) files a voluntary petition under the Bankruptcy Code, the debt due under the mezzanine loans becomes fully recourse to the Borrower as well as immediately due and payable.

On June 15, 2009, the Borrowers, as well as the Mortgage Borrower and the Property Owner, filed voluntary petitions under the Bankruptcy Code. Although the indebtedness under the mezzanine loan agreements which became fully recourse to the Borrowers exceeds $100 million, the obligations due under the Guaranty Agreements are capped thereat.

On June 16, 2009, the plaintiffs notified the defendants that their obligations to pay $100 million as primary obligors under the Guaranty Agreements were due and owing. The defendants have not paid any portion of the $100 million.

Procedural History

On August 27, 2009, Plaintiffs moved for an order granting summary judgment in lieu of a complaint pursuant to CPLR 3213 with respect to the Guaranty Agreements in the amount of $100 million, plus prejudgment interest.

Discussion

Under CPLR 3213, "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint."

Defendants claim that the CPLR 3213 motion with respect to the Guaranty Agreements is not correctly made in this case for the following seven reasons. First, defendants argue, the Guaranty Agreements are not instruments for the payment of money only as they involve obligations other than payment, including obligations related to representations made in connection with the mezzanine loans, representations, covenants and indemnifications related to, *inter alia*, environmental laws and hazardous substances, and the obligation to permit inspections of the property. Second, the Guaranty Agreements also depend on future events or external documents to trigger an obligation to pay. Third, the defendants assert that the Guaranty Agreements do not state a "sum certain." Fourth, defendants claim that a latent ambiguity in the Mezzanine Loan Agreements must be resolved before the court can determine liability, and that discovery is required to do so. Fifth, the defendants argue that Section 9.4 of the Mezzanine Loan contains other ambiguities precluding summary judgment. Sixth, defendants argue that Section 9.4 of the Mezzanine Loan Agreements and the Guaranty Agreements are void as a matter of public policy. Seventh, defendants claim that it was the plaintiffs breached and/or frustrated defendant's performance. The court addresses each argument in turn.

First, the defendants assert that the Guaranty Agreements are not instruments for the payment of money only as they contain obligations other than the payment of money. The non-monetary obligations are obligations related to representations in connection with the loan,

representations, covenants and indemnifications related to, *inter alia*, environmental laws, and hazardous substances, and the obligation to permit inspections of the property.

This argument fails. It rests upon a misreading of Section 9.4(a) of the Mezzanine Loan Agreements. Section 9.4(a) does not obligate defendant to perform any provision of the lease. It merely describes under what conditions the Borrower is liable for actual damages. It does not require additional performance as a condition precedent to payment, so it does not affect the plaintiffs' ability to pursue a CPLR 3213 motion. *See, UBS Commercial Mortg. Trust 2007-FL1 v Garrison Special Opportunities Fund L.P.*, Index No. 652412/2010, 2011 WL 900949 (Sup Ct NY Cty Mar. 8, 2011) ("Accordingly, as the additional provisions present in the Guaranty do not require additional performance as a condition precedent to payment, and as the references to the underlying obligations do not add to or alter the guarantors obligations, the court is of the opinion that the Guaranty is an instrument for the payment of money only which is suitable for a CPLR 3213 motion for summary judgment in lieu of complaint.").

The second reason for which the defendants claim that the guaranties are not instruments for the payment of money is that such instruments depend on future events or external documents to trigger an obligation to pay. This argument rests on a faulty reading of *Kerin v Kaufman*, 296 AD2d 336 (1st Dept 2002). In *Kerin*, the defendants' obligation to pay money was contingent upon the plaintiff refraining from making disparaging comments about her former employer. In a separate proceeding, the former employer had claimed that Kerin had made disparaging comments, but the court rejected these claims on the merits. *See Sage Realty Corp. v Kerin,* 281 AD2d 334 (1st Dept 2001). When Kerin filed her suit, the defendants asserted that CPLR 3213 was inappropriate because Kerin had made disparaging comments, referring to the very same comments out of which the earlier dispute arose. Kerin contended that

CPLR 3213 was appropriate as there was no issue of fact to be resolved before judgment could be made since *res judicata* precluded the defendants claim that she had made disparaging comments. The court instead agreed with the defendants' contention that "res judicata invokes an excursion outside the four corners of the agreement, and is thus unavailable under the statute." *Kerin at* 337.

The court went on to explain the grounds for its holding:

> "Plaintiff maintains that prior litigation has now removed all obstacles to what was previously a conditional obligation. But the availability of CPLR 3213 can never depend upon the occurrence (or nonoccurrence) of any unrelated future event. As *Weissman* instructs, in order for an agreement to qualify for this unique form of accelerated judgment, it must conform to the statutory definition when read immediately upon execution; *terms and conditions precedent that remain unresolved within the instrument itself cannot be satisfied by future events requiring proof dehors the agreement.*"

Kerin at 338, citing *Weissman v Sinorm Deli,* 88 NY2d 437 (1996) (emphasis added). The defendant's contention that the Appellate Division's opinion stands for the holding that any obligation to pay money that is contingent upon the occurrence of a condition precedent is an improper source of a 3213 motion is mistaken. The court's unequivocal holding is rather that "terms and conditions that remain unresolved within the instrument itself cannot be satisfied by future events requiring proof dehors the agreement." There is a significant distinction between a condition precedent that is well-defined "within the four corners of the debt instrument" and a condition precedent that requires something outside the agreement to determine what constitutes this condition, for example, a judicial proceeding. The latter condition does not qualify for the CPLR 3213 motion.

The centrality of this distinction to the Supreme Court decision in *Kerin* is made clear in its distinguishing *Diversified Invs. Corp. v DiversiFax, Inc. See, Kerin at* 337-38 (discussing

Diversified Invs. Corp. v DiversiFax, Inc., 239 AD2d 231, *lv dismissed*, 90 NY2d 935). In *Diversified Invs. Corp.*, "the agreement, by its own terms, provided that a suspended debt would be automatically reinstated and become due upon the debtor's failure to make a necessary registration of the securities held as collateral by a date certain. The debtor's failure to comply with this obligation resulted in a situation specifically contemplated within the four corners of the debt instrument." *Id.* The court affirmed that such a conditional obligation to pay rightly came within the ambit of CPLR 3213, as the document itself made clear under what conditions the obligation was due.

The condition in question in the present case, the voluntary filing of bankruptcy, is like that in *Diversified Invs. Corp.* It is a clear obligation, one "specifically contemplated within the four corners of the debt instrument." Unlike the condition to refrain from making disparaging comments in *Kerin*, it is perfectly clear what constitutes a voluntary filing for bankruptcy. The former requires an evaluation of the comments made to determine whether they are disparaging, and it is unclear from the terms of the contract just what constitutes a disparaging comment. As there is clarity in the present case, there is no reason to deny a CPLR 3213 motion.

Third, the plaintiff contends that the instrument in question is inappropriate for a CPLR 3213 motion as it does not state a "sum certain." However, the law is well settled that so long as a sum certain is readily ascertainable, a "guarantee may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain." *Mfrs. Hanover Trust Co. v Green*, 95 AD2d 737, 737 (2d Dept 1983). The defendants have not disputed that the amount in question is $100 million. They have only objected that the amount is not a fixed sum, as it could potentially be less than $100 million. This is wrong; it would be true if the plaintiffs were pursuing their claim under 9.4(a), which involves liability for damages.

However, the plaintiffs are pursuing their claim as under 9.4(b). They are pursuing full recourse as triggered by 9.4(b) and limited to $100 million by the Guaranty Agreements. As a sum certain is readily ascertainable in the present case, this objection is irrelevant. The instrument in question thus is an instrument for the payment of money only for the purposes of a CPLR 3213 motion.

The defendants' fourth assertion is that a conflict between the commands of 9.4(a) that ESH both not commit waste and not file for bankruptcy raises factual issues regarding contractual intent that require discovery and precludes a grant of summary judgment. There is no such ambiguity. The language of the contract is clear and unambiguous. Section 9.4(a)(ii) triggers liability if the Borrowers commit "intentional damage to or physical waste of" their properties. It is not a blanket command to not commit waste. It in no way conflicts with 9.4(a)(xiv), which triggers liability for actual damages if the Borrowers file for bankruptcy, or even with 9.4(b), which converts the loan to full recourse status in the event of a voluntary filing for bankruptcy.

These clauses do not create substantive obligations. They simply state the various conditions under which the Borrowers are liable for actual damages or the conversion of the loan to full recourse status is triggered. As such, there is no conflict or ambiguity. The plaintiffs are correct in stating in their *Reply in Further Support* that, "In short, there is no ambiguity or inconsistency between a provision stating that Borrowers are liable for damages for intentional physical waste and a provision stating that the debt becomes recourse in the event of a bankruptcy filing, thereby triggering the Guaranty."

As their fifth assertion, the defendants have argued that Section 9.4 contains other ambiguities precluding summary judgment. It does not. The defendants' arguments are

specious. They amount to no more than variations on the theme that there is a conflict between 9.4(a)(xiv) and 9.4(b). This is the same conflict that has just been discussed, and it does not exist. As the defendants fail to identify any other ambiguities, this argument is rejected.

As regards the sixth argument (void as a matter of public policy), it has recently been addressed by this court in *Garrison*. It is to be rejected here for the same reasons that it was in that case: first, the defendants waived their right to assert such a defense, and second, there is no public policy that would authorize defendants to walk away from their contractual obligations. Regarding waiver, the court had this to say:

> "Garrison is a sophisticated distressed real estate investor. The Guaranty, which is a lenders assurance against a borrowers being permitted to take certain acts, is a common feature in commercial mortgage loans. Such guarantees almost uniformly contain language which makes them unconditional and waives the right to assert defenses. Courts have upheld such features as valid financing arrangements. *See Sapir*. Accordingly, the court is of the opinion that Garrison has waived the right to argue that the Guaranty constitutes an unenforceable penalty."

Garrison, citing *Onshore LLC v Sapir*, 2010 WL 5071785 (Sup Ct NY Cty. Nov. 2010). The waiver in Section 1.4 of all of the Guaranty Agreements is identical to that in Garrison. The plaintiffs have waived their right to assert a public policy defense. Regarding public policy itself, the court had this to say:

> "This court is not a bank, insurance or pension fund regulatory authority with the administrative power required to address these circumstances. The court is an arbiter of commercial disputes, charged with upholding freely entered into contractual arrangements in accordance with common law precedents and the rules of legislative interpretation. It does not have a mandate to rewrite the rules relating to commercial and real estate finance. If there is a need to address the present situation, it is the operation of a legislative or executive function that is called for. Accordingly, the court finds Garrison's public policy approach to be misdirected and without effect on this matter."

Id. Likewise, this court finds defendants' public policy approach to be misdirected and without effect on this matter.

The defendants' seventh argument is that the plaintiffs breached the guaranty or mezzanine loan agreements and/or frustrated the defendants' performance by not accepting a tender of collateral in the form of ESH and its properties. However, the plaintiffs were under no obligation to accept a tender of collateral or to exercise any particular remedy upon a default, so the defendants have failed to show that the plaintiffs breached. As regards the allegation that the plaintiffs breached the implied covenant of good faith and fair dealing, the defendants have done no more than string together conclusory language and irrelevant case law. Therefore, the court rejects the defendants' claims that the plaintiffs breached the guaranty or mezzanine loan agreements and/or frustrated the defendant's performance.

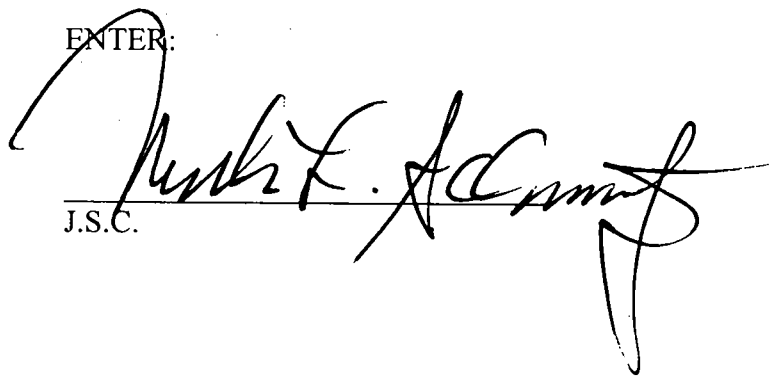
As the plaintiffs have made a prima facie case for summary judgment under CPLR 3213 and the defendants have failed to demonstrate that such summary judgment is inappropriate, the motion is granted.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment pursuant to CPLR 3213 is granted.

Dated: July 14, 2011

ENTER:



J.S.C.