

**YL W. 87th St., LLC v Arbor Realty Sr, Inc.**

2010 NY Slip Op 31271(U)

May 10, 2010

Sup Ct, Nassau County

Docket Number: 19974/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

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YL WEST 87<sup>TH</sup> STREET, LLC, YAIR LEVY,  
SONI LEVY, RAFAELA LEVY and GALIT  
LEVY,

Plaintiffs,

INDEX No. 19974/09

MOTION DATE: March 12, 2010  
Motion Sequence # 001

-against-

ARBOR REALTY SR, INC.,

Defendant.

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The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

This motion, by defendant Arbor Realty SR, Inc. ("Arbor") for an order pursuant to CPLR 3211 (a)(3),(a)(7) dismissing the second cause of action of the plaintiffs' amended complaint is **granted** for the reasons set forth herein.

The court notes Soni Levy, Rafaela Levy and Galit Levy are no longer individual plaintiffs (see Exhibit 1 annexed to plaintiffs' affirmation in opposition). The remaining plaintiffs are Yair Levy ("Levy") and YL West 87<sup>th</sup> Street, LLC ("YL West").

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Levy is a member of non-party Fulton Realty Associates (“Fulton”). Fulton is the sole member of non-party YL 23<sup>rd</sup> Street, LLC which, in turn, is the sole member of non-party YL West 87<sup>th</sup> Street Holdings II, LLC, which, in turn, is the sole member of non-party YL West 87<sup>th</sup> Street Holdings I, LLC, which in turn, is the sole member of plaintiff YL West.

YL West purchased certain property known as 100 West 87<sup>th</sup> Street, New York, NY (“the premises”) on October 21, 2005 for \$42,500,000. YL West sought to commence a building project on the premises. To fund the project, YL West borrowed funds from Arbor’s predecessor in interest, Column Financial, Inc. There were three loans: a service loan for more than \$46,000,000; a building loan for \$23,000,000 and a project loan for more than \$5,000,000. All loans were executed on September 20, 2007, and they were all secured by mortgages and assignments of leases and rents (see Exhibits B, C and D annexed to Arbor’s motion). Plaintiff Levy was the guarantor for the three loans (see Exhibit 2 annexed to plaintiff’s affirmation in opposition).

In September, 2007, YL West 87<sup>th</sup> Street Holdings I, LLC, the sole member of plaintiffs YL West, entered into a \$20 million Mezzanine Loan with Column evidenced by an evidentiary note and secured by YL West 87<sup>th</sup> Street Holdings I, LLC’s membership interest in plaintiff YL West. Again, plaintiff Levy was the guarantor (see Exhibit B annexed to plaintiff’s affirmation in opposition).

Anchor stopped funding the loan, and YL West had to cease work on its project. This had an alleged ripple effect on the Mezzanine Loan since the \$20 million loan was secured in part by the rents and leases of YL West. YL West 87<sup>th</sup> Street Holding I, LLC is allegedly currently in bankruptcy (see Arbor’s memo of law dated December 15, 2008, Point III).

Plaintiff Levy alleges he is the third-party beneficiary of the mortgage documents which comprise the service, building and project loans in which Arbor was the lender and plaintiff YL West was the borrower. Levy contends that he may sue not only as a third-party beneficiary but also on his own behalf as guarantor. Levy contends that he suffered specific damages as a shareholder of plaintiff YL West as a result of Arbor’s failure to pay out the funds for the project.

Arbor contends that Levy, as a member of an LLC, does not have standing to sue on the mortgage documents because the agreement specifically excludes third-party claims. Levy contends that he, as guarantor, has the right to proceed against Arbor on the loans, mortgages and all related documents.

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Yair Levy has no viable direct breach of contract cause of action against Arbor given that the contracts were solely between YL West 87<sup>th</sup> Street, LLC and Arbor, and Levy was not a signatory on the contracts (see *IMS Engineers-Architects, P.C. v State*, 51 AD3d 1355). The contract is signed by David Deutsch on behalf of YL West 87<sup>th</sup> Street, LLC.

A party asserting rights as a third-party beneficiary of a contract must establish the existence of a valid and binding contract between other parties, the contract was intended for his benefit, and that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost (*State of California Public Employees' Retirement System v Shearman & Sterling*, 95 NY2d 427).

The fact that the non-party YL West 87<sup>th</sup> Street Holdings I, LLC declared bankruptcy and the Mezzanine Loan was in default (due to, allegedly, Arbor's failure to properly fund the project) is incidental to the service, building and project loans. Clearly, Levy is a third party to such loans.

Yair Levy was not specifically identified in the loan agreement as an intended beneficiary nor does the agreement imply that any third party had the power to enforce its provisions (see *Niazi v JP Morgan Chase Bank*, 66 AD3d 438).

Levy does not identify any provision of the contract as evidencing an intent to benefit Levy beyond his status as an incidental beneficiary (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38).

The best evidence of an interest to bestow a benefit upon a third party is the language of the contract itself (*767 Third Avenue LLC v Orix Capital Markets, LLC; Binghamton Masonic Temple Inc. v City of Binghamton*, 213 AD2d 742).

In the present case, a provision of the building loan agreement expressly negates enforcement by third parties (see *Mendel v Henry Phipps Plaza West, Inc.*, 16 AD3d 112, aff'd 6 NY3d 783) such as Levy (see Exhibit B, pg. 140, § 10.16 annexed to Anchor's motion).

Moreover, Yair Levy is not an intended third-party beneficiary of the prime contract. Levy fails to point to any language to support the conclusion that the contracts were intended

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for his benefit so as to evince an intent to permit enforcement by Levy (*see Binghamton Masonic Temple v City of Binghamton*, 213 AD2d 742, *lv. den.* 85 NY2d 811).

An individual shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation even though the particular wrong may have resulted in a depreciation or destruction of the value of his corporate stock (*Fifth States Management Corp. v Niagra Permanent Sav. & Loan Assn.*, 58 AD2d 177).

However, a shareholder may bring an individual suit if the defendant has violated an independent duty to the shareholder (*see Excimer Associates, Inc. v LCA Vision, Inc.*, 292 F3d 134).

Nevertheless, no such independent duty by Arbor to Levy has been shown.

Similarly, a member of a limited liability company is not a proper party to proceedings by or against a limited liability company except where the object is to inform a member's right against or liability to the limited liability company (Limited Liability Company Law § 610; *see Hoffman v Unterberg*, 9 AD3d 386).

In the present case, any benefit to Yair Levy was incidental to the loans.

A guarantee is a contract separate from and independent of the underlying contracts (*see Shire Realty Corp. v Schorr*, 55 AD2d 356). The principal debtor is not a party to the guarantee nor is the guarantor a party to the underlying contract (*see Anti-Hydro Company, Inc. v Castiglia*, 92 AD2d 741). The specific purpose of a guarantor is to give the beneficiary recourse separate from any action against the principal debtor, and it is not unusual for the beneficiary of a guarantee to sue the guarantor alone (*see Walcutt v Clevite Corp.*, 13 NY2d 48).

A guarantor may not take upon himself the election of remedies which rightfully belong solely to his principal (*see Walcutt v Clevite Corp. supra*).

Thus, Levy's status as guarantor does not establish capacity to sue for breach of the loan agreement.

In considering a motion to dismiss a complaint for the failure to state a cause of action, the court should accept the facts alleged in the complaint on time and afford the

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postponement of the complaint, the benefit of every possible favorable influence and determine only whether the facts as alleged fit within any cognizable legal theory (*see Katz v Katz, supra*).

On a motion pursuant to CPLR 3211(a)(1)(7), allegations are to be liberally construed and documentary evidence must conclusively dispose of plaintiff's claim (*Manfro v McGivney*, 11 AD3d 662; *Jorjill Holding Ltd. v Greico Associates, Inc.*, 6 AD3d 500, 501). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]; *Morris v Morris*, 306 AD2d 449; *Giustino v County of Nassau*, 306 AD2d 376; *Tal v Malekan*, 305 AD2d 281; *North Bellmore Union Free School Dist.*, 304 AD2d 551; *Olszewski v Waters of Orchard Park*, 303 AD2d 995; *Doria v Masucci*, 230 AD2d 764; *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233).

The court concludes that Yair Levy lacks standing to sue based on his status as shareholder and/or as a guarantor of the various loans.

Defendant's motion to dismiss the second cause of action in the amended complaint to the extent that it is asserted on behalf of Yair Levy is **granted**.

Dated MAY 10 2010

  
J.S.C.

**ENTERED**  
MAY 13 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE