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

PRESENT: HON. LELAND DEGRASSE PART 25
Justice

330 acquisition co LLC

- v -

Regency Sav BK FSB

I X NO. 109283-98

ION DATE 12/20/01

MOTION SEQ. NO. 08

MOTION CAL. NO. 131

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	

SCANNED

APR 1 2002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers it is ordered that this motion

is decided per attached memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/1/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

330 ACQUISITION CO., LLC,

Plaintiff, : Index No.: 109283/98

-against- : Cal. No.:131 Of 12/20/01

REGENCY SAVINGS BANK, F.S.B. :

Defendant. :

DeGrasse, J.:

Plaintiff in this action arising from a dispute between the owners of a $15 million mortgage loan moves to dismiss defendant's third, fourth and fifth counterclaims.

Defendant has stipulated to the dismissal of its third counterclaim, so the court is left to decide plaintiff's motion only with respect to the fourth and fifth counterclaims

FACTS AND PROCEDURAL HISTORY

This action is the latest chapter in ongoing litigation between the parties in state and federal court. The history of this dispute is discussed in Justice Lippman's February 5, 2001 **unpublished decision in this** case, and in Judge Scheindlin's decisions in a related federal action (see Regency Savings Bank, F.S.B. v Fours on Seventh, LLC, 251 BR 784) and will be briefly summarized herein.

On March 15, 1989, the parties' two predecessors in interest entered into a Participation Agreement by which each party owned 50% of a $15 million loan secured by a mortgage on a commercial building located at 330 Seventh Avenue in Manhattan.

Under the Participation Agreement, non-party John Hancock Mutual Life Insurance Policy was the active participant, and American Savings Bank, and later the FDIC, was the passive participant. Plaintiff 330 Acquisition Corp. ("330 Corp.") has succeeded to Hancock's role as the active participant and defendant Regency Savings Bank, F.S.B. ("Regency") has succeeded the FDIC as the passive participant.

As the active participant, 330 Corp. is responsible for taking most "decisions and actions relating to the administration of the Loan." However, it must obtain the consent of the passive participant before it, inter alia, releases or substitutes any material portion of the security for the loan, extends the maturity date of the loan, or reduces the interest payable on the principal amount of the loan. Upon default, 330 Corp. had the power to act as the attorney in fact on behalf of the passive participant and was responsible for bringing an action in foreclosure.

When the mortgagor defaulted in 1996, the passive participant in the Participation Agreement (at the time, the FDIC), apparently frustrated with what it perceived as Hancock's inaction, attempted to bring a foreclosure action in federal court. Soon thereafter 330 Corp. purchased the active participant's share in the Participation Agreement and brought a foreclosure action in state court. Thereafter the FDIC sold its interest in the Participation Agreement to Regency.

330 Corp. brought the instant action in 1998, arguing that the FDIC's transfer of its interest to Regency was void

because the FDIC did not offer 330 Corp. a right of first refusal, which 330 Corp. argued was mandated by the Participation Agreement. Regency asserted counterclaims arising from 330 Corp.'s alleged breach of the Participation Agreement.

In January 2000, the borrower under the loan filed for Chapter 11 protection in Bankruptcy Court. The initial plan of reorganization filed by the borrower included a settlement of its claims under the loan. Regency filed its own proof of claim in the Bankruptcy action. Ultimately Regency's claim in the Bankruptcy Court was rejected as untimely and dismissed as moot pursuant to In re Chateausay Corp. (10 F3d 944). (See In Re Fours on Seventh, 251 BR 784.) In her decision Judge Scheindlin expressly did not reach the disputed issues that are litigated herein. (Id. 251 BR at 795.)

Meanwhile this action continued to move forward. In a decision dated February 5, 2001, Justice Lippman granted Regency's motion to dismiss the complaint, and denied 330 Corp.'s motion for summary judgment to dismiss Regency's counterclaims. Thus the only claims left in the case are Regency's counterclaims. Regency filed an amended answer with counterclaims in August 2001, which is the subject of 330 Corp.'s instant motion.

DISCUSSION

Regency's fourth counterclaim alleges that 330 Corp. breached its fiduciary duties to Regency. This claim fails because Regency has not alleged sufficient facts tending to show that a

fiduciary relationship existed between the parties.

While New York Jurisprudence2d contains a terse statement that the active participant in a Participation Agreement acts in a fiduciary capacity toward the passive participant (see 78 New York Jurisprudence 2d, Mortgages, § 277) that statement is not a completely correct summary of the law. Rather, it is the written terms of the Participation Agreement that determines whether a fiduciary relationship exists between the participants. (See Banco Espanol de Credito v Security Pacific National Bank, 763 F Supp 36, 45, aff'd 973 F2d 51, cert. denied 509 US *903.)*

Here, the Participation Agreement does not contain language indicating that 330 Corp. acted as Regency's fiduciary. The Participation Agreement does not describe the active participant as the "agent" or "trustee" of the passive participant. (Cf. Chemical Bank v Security Pacific National Bank, 20 F3d 375.)

Moreover, section 3.1 of the Participation Agreement provides that:

> [N]either Participant shall be liable to the other for any loss not due to its own gross negligence or willful misconduct, but all loss or losses incurred in connection with the Notes or the Mortgages, whether in connection with the enforcement thereof or otherwise, shall be borne ratably by the Participants in accordance with their respective interests.

A standard of gross negligence or willful misconduct does not describe the duty of a fiduciary, which, in Judge Cardozo's famous formulation is "[n]ot honesty alone, but the punctilio of an honor the most sensitive." (Meinard v Salmon, 249 NY 458, 464; see Gibbs

v Breed, Abbott & Morgan, 271 AD2d 180.) A similar standard of liability was embodied in the participation agreement in Banco Espanol de Credito, (supra 763 F Supp at 38) and the court found that no fiduciary relationship existed between the active and passive partners to that agreement.

The fact that 330 Corp. has power of attorney to act on Regency's behalf in the event of a default is not, standing alone, indicative of a fiduciary relationship. A fiduciary relationship will not be created by the conferral of such a power where the lead entity acts on its own behalf as well as that of the passive entity. (See Louros v Cyr, 175 F Supp2d 497; Northwestern National Ins. Co. v Alberts, 769 F Supp 498, 508.) Regency points to other duties imposed on 330 Corp. by the Participation Agreement, including the duty to obtain Regency's approval before hiring counsel in a foreclosure proceeding, the duty to keep Regency apprised of events in the foreclosure action, and the duty not to compromise on various aspects of the loan without Regency's written consent. These various duties are contractual in nature and merely embody an allocation of rights and responsibilities between parties in an arms-length transaction. They do not create a fiduciary relationship. (See Banco Espanol de Credito, 763 F Supp at 45.)

Defendant's fifth counterclaim sounds in unjust enrichment. This claim fails as defendant has not alleged that 330 Corp. has been unjustly enriched by the monies obtained from the mortgagor. Rather, a sum is currently held in escrow that represents the amount due the passive participant of the

Participation Agreement. There is no allegation in the complaint tending to show that 330 Corp. somehow received funds due Regency. (See Giant Supply Corp. v New York, 248 AD2d 231.)

CONCLUSION

Plaintiff's motion to dismiss the fourth and fifth counterclaims *is* granted. The third counterclaim has been withdrawn by stipulation. This constitutes the decision and order of the court.

DATE:

J.S.C.