

<b>Niazi v JP Morgan Chase Bank</b>
2008 NY Slip Op 31530(U)
June 2, 2008
Supreme Court, New York County
Docket Number: 0602614/2007
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN  
*Justice*

PART 1

Niazi

INDEX NO. 602614/07

- v -

MOTION DATE \_\_\_\_\_

JP Morgan Chase

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for dismiss complaint

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-M

PAPERS NUMBERED

Answering Affidavits — Exhibits A

1
2
3

Replying Affidavits Exh. A

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
JUN 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 2, 2008

Martin Shulman, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
AMRAN NIAZI, TRANSCORP CONSTRUCTION  
CORPORATION,

Index No. 602614/07

Plaintiffs,

**Decision & Order**

-against-

JP MORGAN CHASE BANK,

Defendant.

**FILED**  
JUN 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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MARTIN SHULMAN, J.:

In this dispute involving a letter of credit transaction, defendant JP Morgan Chase Bank ("JP Morgan Chase" or "defendant") moves for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint. Plaintiffs Amran Niazi ("Niazi") and Transcorp Construction Corporation ("Transcorp") oppose the motion.

Niazi is president of Transcorp, a general construction company which, among other things, performs renovation work on buildings in New York City. Niazi is also the managing member and a 50% owner of non-party Harlem Properties Group, LLC ("Harlem Properties"), along with non-parties Leroy Morrison and Kenneth Morrison (collectively the "Morrison") who each hold a 25% interest in Harlem Properties. Harlem Properties itself is a 50% interest holder in non-party Action Housing II, LLC ("Action II"), an entity which is in the business of owning, developing, and operating real properties in New York. The Morrison each hold a 25% interest in Action II.

On or about May 14, 2004, Transcorp and Action II entered into a general construction agreement whereby Action II agreed to pay Transcorp \$5,250,000.00 to renovate Action II's properties located at 111 West 137<sup>th</sup> Street, 111-113 West 137<sup>th</sup>

Street and 2830 Frederick Douglass Boulevard in the city, county, and state of New York (the "Properties"). The financing for the renovation project was obtained through government financial grants and loans and through JP Morgan Chase.

On May 26, 2004, Action II entered into a construction loan with JP Morgan Chase entitled Building Loan Agreement ("BLA"), pursuant to which Action II was entitled to borrow up to \$5,715,949.00 to cover the costs involved in the project.<sup>1</sup> As security for the BLA, Action II executed a series of mortgage notes in favor of JP Morgan Chase which are denominated as: Building Loan First Mortgage Note A in the amount of \$1,887,581.00; Building Loan First Mortgage Note B in the amount of \$1,342,419.00; Building Loan Second Mortgage Note in the amount of \$1,485,949.00; and Building Loan Third Mortgage Note in the amount of \$1,000,000.00. Each of these mortgage notes was dated May 26, 2004, had a maturity date of November 25, 2005, and was subject to a one-time option to extend the maturity date for six months. The option was exercised and the maturity date for each mortgage note was extended to May 25, 2006. Both the mortgage notes and the Building Loan First Mortgage A, Building Loan First Mortgage B, Building Loan Second Mortgage and Building Loan Third Mortgage documents (the "mortgage documents"), which were also dated May 26, 2004, obligate Action II to pay JP Morgan Chase all moneys owed, with interest, at the maturity date. The notes and mortgage documents identify the events which constitute a default and the ramifications if a default occurs.

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<sup>1</sup>On June 2, 2004, the BLA was filed in the New York County Clerk's Office pursuant to Lien Law section 22.

JP Morgan Chase also made the acquisition of a letter of credit a further condition for extending the construction loan to Action II. Section 12 of the BLA provides, in relevant part, that:

The obligation of [JP Morgan Chase] to make advances of the Loan pursuant to this Agreement is subject to the following additional conditions precedent: . . . (r) [Action II] must provide or cause the General Contractor [Transcorp] to provide either (i) a letter of credit (the "LC") in the amount of . . . not less than \$525,000.00 . . . The LC must be issued to [JP Morgan Chase], as beneficiary, as an "on sight" draft . . . The LC may be drawn upon by [JP Morgan Chase] upon a default under any of the documents evidencing or securing the Loan or any of the documents guaranteeing the Loan or the completion of the Improvements. . . (Bracketed matter added).

On December 22, 2005, Transcorp procured a letter of credit in the sum of \$525,000.00 in favor of JP Morgan Chase from non-party Citibank, N.A. ("Citibank"), identified as letter of credit no. 61646760. On December 1, 2006, the letter of credit was amended and extended to March 15, 2007. It is undisputed that by sight draft, dated March 7, 2007, JP Morgan Chase sought to draw the full amount of the letter of credit and that on March 10, 2007, Citibank honored JP Morgan Chase's draw request by forwarding \$525,000.00 to JP Morgan Chase.

By service of a summons and complaint dated July 27, 2007, Niazi and Transcorp (collectively "plaintiffs") commenced the instant action sounding in fraud and breach of contract. The gravamen of the complaint is that JP Morgan Chase fraudulently claimed, in the sight draft, that there had been an event of default entitling it to access the funds under the letter of credit. The sight draft, which was tendered by JP Morgan Chase vice president Miriam Kulnis ("Kulnis"), stated, in relevant part:

Demand is hereby made for payment to [JP Morgan Chase] of five hundred and twenty-five thousand dollars . . . drawn under Citibank, N.A. Letter of Credit No. 61646760 . . .

(I) A Default has occurred under the [BLA] between [JP Morgan Chase] and [Action II].

(II) The Contractor has failed to extend, renew or replace this Letter of Credit sixty (60) days prior to its relevant expiry. (Bracketed matter added).

Plaintiffs' complaint alleges that JP Morgan Chase/Kulnis knew that there was no default at the time that Kulnis tendered the sight draft/demand, and that when she was personally contacted by Transcorp's counsel, on or about March 10, 2007, Kulnis persisted in these accusations by reasserting that there had been a default and that a notice of default had been sent out "some time ago." The complaint further alleges that, although the BLA requires JP Morgan Chase to send a notice of default to the borrower and the BLA requires a cure period after receipt of the notice of default, neither was provided, because if it had, Niazi would have cured the default.

As the issue of improperly drawing down on the letter of credit is central to each cause of action alleged in plaintiffs' complaint (fraud, breach of the covenant of fair dealing, breach of fiduciary duty and breach of contract damaging third-party beneficiary Transcorp) and its request for punitive damages, this court must first address the aspect of defendant's motion which pertains to this issue.

In its motion papers, defendant argues that, not only does the complaint fail to state a cause of action, but that the loan documents constitute documentary evidence sufficient to warrant a dismissal of the complaint. Although it is well settled that on a motion to dismiss, pursuant to CPLR 3211, the motion court must accept the facts alleged in the complaint as true, and draw every possible inference in plaintiffs' favor

[\* 6 ]

(Leon v Martinez, 84 NY2d 83, 87 [1994]), “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference [citation omitted] . . .” Morgenthau & Latham v Bank of N.Y. Co., 305 AD2d 74, 78 (1<sup>st</sup> Dept), lv denied 100 NY2d 512 (2003).

In the instant matter, defendant submits, as additional documentary evidence in support of the motion to dismiss, a copy of the verified petition in Matter of Harlem Properties, LLC, Member of Action Housing II, LLC, for the Judicial Dissolution of Action Housing II, LLC, a Limited Liability Company, pursuant to Section 702 of the New York Limited Liability Company Law v Action Housing II, LLC, Leroy Morrison and Kenneth Morrison, New York County Index No. 602645/07.<sup>2</sup> The allegations underlying this petition involve the purported failure of both Action II and the Morrisons to properly manage the business of renovating the same three properties involved in the instant action. The verified petition provides, in relevant part:

14. On December 22, 2006, and with the full knowledge and consent of the Morrison Respondents and ACTION HOUSING II, [Transcorp] (which is owned by HARLEM's managing member, Niazi), established a Letter of Credit in the sum of \$525,000.00 with [JP Morgan Chase] to be issued in favor of ACTION HOUSING II (the “Letter of Credit”) for construction work to be performed and completed for the Properties.

15. Upon information and belief, on or about March 7, 2007, and unbeknownst to HARLEM and Transcorp, the Morrison Respondents allowed ACTION HOUSING II to default on the Letter of Credit and, as a result, JP Morgan drew down on the full amount of the Letter of Credit, totaling \$525,000.00.

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<sup>2</sup> The Hon. Richard B. Lowe, III marked this matter “settled” on January 8, 2008.

\* 7 ]

16. As a result of the Morrison Respondents' improper, willful, malicious and grossly negligent action in allowing ACTION HOUSING II to trigger an event of default on the Letter of Credit, which was motivated by the Morrison Respondents' self-interests, Transcorp was required to pay \$525,000 to [JP Morgan Chase] under the Letter of Credit. (Bracketed matter added).

This petition, verified pursuant to CPLR §3020(d)(3), is binding on plaintiffs and directly contradicts the allegations that JP Morgan Chase committed fraud, breached its fiduciary duties and breached its contractual obligations when it knowingly made false claims regarding the events of default by the borrower, Action II, in order to access the funds under the letter of credit (see Morgenthau & Latham, supra).

Plaintiffs' allegations surrounding issues of notice and cure are also not supported by the documentary evidence, and plaintiffs' reliance on BLA § 20 Events of Default, subsection (a) is misplaced. Pursuant to the BLA § 20:

The term "Event of Default" as used in this Agreement shall mean the occurrence of any one or more of the following events:

(a) If [Action II] shall continue to be in default under any of the provisions of this Agreement for five (5) days after notice from [JP Morgan Chase] in the case of any default which can be cured by the payment of a sum of money, or for twenty (20) days after notice from [JP Morgan Chase] in the case of any other default, provided that if such default cannot reasonably be cured within such twenty (20) day period and [Action II] shall have commenced to cure such default within such twenty (20) day period and thereafter diligently and expeditiously proceeds to cure the same, such twenty (20) day period shall be extended for so long as it shall require [Action II] in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of sixty (60) days, or shall be construed as having the effect of extending the Completion Date;

(b) If a default shall occur and be continuing beyond any applicable grace and cure period under the Note, the Mortgage or any of the other Loan Documents or the project loan note given by [Action II] to [JP Morgan Chase], or project loan mortgage or project loan agreement, each between [JP Morgan Chase] and [Action II] and of even date herewith, or

any other mortgage encumbering the Premises . . . (Bracketed matter added).

A review of the other loan documents, including the mortgage notes and mortgage documents, fails to reveal evidence that the parties contemplated either a mandatory notice of default, or a period in which to cure, eliminating the possibility of a grace period under the note.

Section 11 of each of the four mortgage notes provides:

It is hereby expressly agreed that the entire Debt shall become immediately due and payable at the option of [JP Morgan Chase] on the happening of any default or any event by which, under the terms of this Note, the Mortgage, the [BLA] or the Other Loan Documents, the Debt may or shall become due and payable. (Bracketed matter added).

Article II, section 1 of the mortgage documents provides, in relevant part:

The Debt shall become due at the option of [JP Morgan Chase] upon the occurrence of any one or more of the following events (each of which is . . . an "Event of Default". . . :

(a) if any portion of the Debt is not paid within five (5) days of the due date or if the Debt is not paid in full on maturity. . . (Bracketed matter added).

According to JP Morgan Chase, when the notes matured on May 25, 2006, and payment was not made by Action II, there was a default entitling it to draw on the letter of credit without the necessity of a notice of default or a cure period.

Dismissal of the complaint, pursuant to CPLR 3211(a)(1), is warranted where, as here, "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d at 88). Plaintiffs' attempts to side-step the ramifications of the verified petition in Matter of Harlem

Properties, which unambiguously contradicts the instant allegations setting forth plaintiffs' causes of action, are a vain attempt to prevent a dismissal of the complaint.

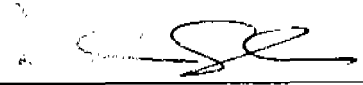
Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York  
June 2, 2008

  
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Hon. Martin Shulman, J.S.C.

**FILED**  
JUN 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK