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

PRESENT: HON. [redacted] J.S.C. PART 52

Index Number : 601644/2007

1166 JUNIOR MEZZANINE LENDER

VS.

1166 GP ASSOCIATES, LLC

SEQUENCE NUMBER : 006

DISMISS

INDEX NO. _____

MOTION DATE 11/17/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 2/23/09

[redacted] J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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1166 JUNIOR MEZZANINE LENDER LLC,

Plaintiff,

Index No. 601644/07

-against-

1166 GP ASSOCIATES, LLC, 1166 LP ASSOCIATES, LLC, BRYCAR ASSOCIATES, LLC and LOUIS R. CAPPELLI,

Defendants.

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Richard B. Lowe III, J.:

Two motions are herein consolidated for consideration: (1) defendants' motion to dismiss plaintiff's second amended complaint (mot. seq. no. 006); and (2) plaintiff 1166 Junior Mezzanine Lender LLC's motion to dismiss defendants' seventh affirmative defense and counterclaim (mot. seq. no. 007).

Certain facts in this case have been set forth with specificity in an earlier decision of this court, dated June 24, 2008. However, different aspects of the parties' complex transaction are involved in the present motion, and will be referenced as needed.

BACKGROUND

Plaintiff loaned defendants 1166 GP Associates, LLC and 1166 LP Associates, LLC (together, Associates) $25 million under a loan agreement (Loan Agreement)(Aff. of Allan Arffa, Ex. B) in November 2005. The loan was secured by Associates' interest in an office building located at 1166 Avenue of the Americas in Manhattan (the Collateral), as recognized in

two Pledge Agreements, one between plaintiff and Associates, and another between plaintiff and defendants Brycar Associates, LLC and Louis Cappelli, who are also guarantors of the loan. Aff. of Arffa, Exs. 4, 5.

The terms of the Loan Agreement required Associates to pay monthly interest of approximately $260,000, as well as periodic "deferred" interest, which included a payment of approximately $2.7 million due December 15, 2007. The outstanding principal of the loan was to be due November 30, 2009.

Part of the transaction between the parties included an Option Agreement, whereby plaintiff retained a right to purchase the Collateral upon certain conditions outlined in this court's prior decision. Plaintiff elected to exercise that option in February 2007. Associates, however, opposed plaintiff's exercise of the option, causing plaintiff to bring the present action to compel Associates to proceed to honor the Option Agreement. In this court's previous decision, this court found that Associates were not at fault in opposing plaintiff's exercising of the Option Agreement, and so, had not breached the Option Agreement.

Because plaintiff believed that Associates had breached the Option Agreement, which would constitute a default under the Loan Agreement, plaintiff sent Associates a letter, dated June 6, 2007, declaring Associates in default of the loan, subject to cure within 30 days (Aff. of Arffa. Ex. 6). Plaintiff served Associates, and the guarantors, with a Declaration of Acceleration of the loan, dated July 9, 2007 (*id.*, Ex. 7), requiring Associates to pay plaintiff the entire principal of the loan, plus substantial accrued interest and costs.

Associates responded in a letter dated July 11, 2007 (*id.*, Ex. 12), voicing their concern that acceleration of the loan, and, especially, the threat to seize the Collateral, before the court

had an opportunity to respond to the present action, would irreparably harm Associates, due to, among other things, Associates' "loss of their interest in unique real property ..." The letter continues:

> [n]evertheless, our clients are prepared at this time to make arrangements for repayment of the Loan subject to a reservation of rights and claims including lender liability claims. Pursuant to the Loan Documents, our clients will require that Lender deliver a termination of the Pledge Agreements, together with appropriate instruments of reassignment and UCC-3 termination statement.

The letter concludes with directions that plaintiff is to contact Associates "to coordinate the exchange or release documents for payment of the Loan." In a letter dated July 13, 2007 (Aff. of Richard Bemporad, Ex. B), Associates offered plaintiff a draft Termination of Pledge and Security Agreement for each Pledge Agreement, and asked that plaintiff contact Associates "to coordinate delivery of the necessary termination documents ... in connection with our clients' termination payment of the Loan."

Plaintiff followed this letter with another dated July 16, 2007 (Aff. of Arffa, Ex. 12), informing Associates that it did not believe that repayment of the loan without further accrued costs and interest would not satisfy the Loan Agreement, and that repayment should not come with any reservation of rights. Plaintiff did, however, offer the following option:

> to the extent that your clients are concerned about the possibility that the failure to repay the amounts due under the Loan Agreement might cause Lender to exercise its right to realize on the Collateral, we are willing to agree to provide your clients with 30 days notice prior to instituting any foreclosure, UCC sale, or similar process in order to give your clients a reasonable opportunity to cure all of their defaults prior to such sale.

Associates wrote plaintiff on July 18, 2007 (*id.*, Ex. 12) to confirm the 30-day notice offer, and plaintiff responded on July 19, 2007 (*id.*, Ex. 12), to confirm that the offer only extended to the foreclosure on the Collateral, and not to any other remedies plaintiff might have under the loan

documents.

Associates did not respond to this letter. Instead, they resumed paying basic interest of approximately $260,000 monthly thereafter until December 2007. In response to a letter from plaintiff to Associates dated October 18, 2007 (*id.*, Ex. 13), in which plaintiff reiterated its position that it was accepting payment of interest without prejudice to its position that it was due the entire amount of the loan, plus interest, Associates wrote, on November 5, 2007 (*id.*, Ex. 13), that "contrary to the assertions contained in your letter, Associates' October 15, 2007 interest payment in the amount of $260,416.66 constitutes payment in full of amounts due and owing in connection with the Loan." *Id.*, Ex. 14.

Associates continued payment of basic monthly interest up to and including December 15, 2007, the date upon which Associates was to make their payment of "deferred interest under the Loan Agreement, in a sum in excess of $2 million." Associates did not make the payment of deferred interest, and has paid no interest at all since that time.

Plaintiff declared Associates' failure to make the payment of deferred interest an event of default in a Notice of Default and Declaration of Acceleration dated December 19, 2007. Arffa Aff., Ex. 15. Associates wrote, on December 26, 2007 (*id.*, Ex. 16), purporting to "reject" the notice of acceleration, and claiming instead that they had been prepared to repay the loan in July 2007, and that they had been thwarted in doing so by plaintiff's refusal to deliver the Collateral. Associates claimed to have suffered "substantial damages" as a result of this refusal. Associates maintained that "[h]ad our clients been able to refinance the Loan the interest rate would have been reduced below the base rate of the existing Loan. Certainly no deferred interest would have been required to be paid." Thus, Associates claimed that, rather than plaintiff demanding

repayment in July 2007, Associates had demanded the right to repay, and been denied that right. In the December 26, 2007 letter, Associates claimed, however, that they were prepared to repay the loan, plus interest (but not deferred interest), in exchange for release of the Collateral.

In a letter dated January 15, 2008 (*id.*, Ex. 18), Associates characterized plaintiff's "refusal" to allow Associates "to deliver termination of the Pledge Agreements and otherwise release the collateral so that the Loan could be refinanced" as "material breaches" of plaintiff's contractual obligations. In subsequent letters, the parties refined their positions, with Associates arguing, among other things, that, if any deferred interest were due at all, it was much less than that claimed by plaintiff.

In a letter dated January 30, 2008 (*id.*, Ex. 21), Associates reiterated their position that plaintiff had "materially breached its contractual obligations by, among other things, refusing to deliver termination of the Pledge Agreements and otherwise releasing the collateral so that the Loan could be refinanced at the decidedly more favorable interest rates available to Associates," clarifying their contention that plaintiff was the one which had been in breach since July 2007, and that Associates were not in breach at all.

DISCUSSION

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

(Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; *see also Leon v Martinez*, 84 NY2d 83 [1994]). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law'" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner* (44 AD3d 23, 28 [1st Dept 2007]["(t)he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"]).

In Associates' seventh affirmative defense, Associates allege that plaintiff materially breached the Loan Agreement in July 2007 by refusing to allow Associates to exercise an "Optional Prepayment" right allegedly contained in section 2.5 of the Loan Agreement, and obtain the release of the Collateral. In the counterclaim, Associates seek injunctive relief permitting Associates to prepay the loan, and compelling plaintiff to terminate the Pledge Agreements to permit reassignment of the Collateral to Associates. Associates make no offer to pay interest on the $25 million, much less the deferred interest plaintiff claims is due.

Unambiguous contracts must be given their plain and ordinary meaning, and the interpretation of unambiguous contractual provisions is a matter of law for the court (*Vigilant Insurance Company v Bear Stearns Companies, Inc.*, 10 NY3d 170 [2008]). "'[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*R/S Associates v New York Job Development Authority*, 98 NY2d 29, 32 [2002]), quoting *Reiss v Financial Performance Corporation*, 97 NY2d 195, 198 [2001]).

As an initial matter, plaintiff maintains that the Loan Agreement does not contain any right to prepay the loan at all. However, as Associates indicate, section 2.5 of the Loan Agreement contains the following unambiguous language: "'**Optional Prepayment**'" [Associates] expressly waive any right to prepay the Loan, in whole or in part, prior to February

1, 2007." Since the document does not contain any other limitation on prepayment, it can only be assumed, based on the plain language of the instrument, that Associates had a right to prepay *after* February 1, 2007.

The intercourse between the parties from July 2007 until January 2008, as set forth in the above correspondence, indicates that plaintiff did not breach the Loan or Pledge Agreements in July 2007, in that (1) the terms under which Associates sought to pay the accelerated loan did not comport with the parties' agreements, in that they required plaintiff to release the Collateral before Associates paid, so that Associates could use the Collateral to refinance the loan, and satisfy plaintiff's loan; and (2) even if the court considers Associates to have expressly requested to exercise a contractual "option" to prepay under the Loan Agreement (which is not the case), Associates abandoned any intention to proceed with prepayment, and chose instead to accept plaintiff's counter offer to provide Associates with 30 days prior notice of any intent to foreclose on the Collateral, and continued to perform under the Loan Agreement up until they were faced with the deferred interest payment due in December 2007.

In *Red Apple Supermarkets, Inc., v Malone & Hyde, Inc.* (228 AD2d 176 [1st Dept 1996]), referenced by plaintiff, the Court found that a provision similar to the one contained in the Pledge Agreements herein required that the payment of all indebtedness preceded the release of the security interests, and did not create a "condition precedent" requiring the lender to arrange for the return of collateral prior to termination of the agreement upon payment (*see also Rubirosa v Perez*, 2002 WL 243620, 2008 NY Misc LEXIS 103 [App Term, 1st Dept 2002](the language of the loan documents "reasonably construed" obligated the borrower to pay all amounts due under the note before the lender was obligated to provide borrower with release of

the collateral]).

It is clear that Associates did not have the right to receive the return of the Collateral until they paid the full obligations of the loan, and that plaintiff did not breach the Loan or Pledge Agreements by not executing the documents Associates provided as terms of termination. The Pledge Agreements, paragraph 5, labeled "Termination of Agreement," require Associates to make an "indefeasible payment and satisfaction of the full Obligations" under the loan documents before plaintiff was to provide Associates with a release of the Collateral. Therefore, this court finds no breach of the contract when plaintiff did not accept Associates' terms for prepayment of the loan.

Noteworthy is the fact that Associates never declared that they were exercising any "Optional Prepayment" right when they apparently acceded to plaintiff's declaration of default. More markedly, Associates never declared that plaintiff was in default in July 2007, when plaintiff proposed to Associates that it would give Associates 30 days' notice of any intention to foreclose, instead of accepting the instruments Associates produced in order to prepay the loan and acquire the collateral. Plaintiff's alleged "breach" was only raised months later when Associates came face to face with their alleged obligation to make the deferred interest payment.

"Under New York law, when one party has committed a material breach of a contract, the non-breaching party is discharged from performing any further obligations under the contract, and the non-breaching party may elect to terminate the contract and sue for damages" (*NAS Electronics, Inc. v Transtech Electronics PTE Ltd.*, 262 F Supp 2d 134, 145 [SD NY 2003]). On the other hand, "'[a] party to an agreement who believes it has been breached may elect to continue to perform the agreement and give notice to the other side rather than terminate it'"

(Albany Medical College v Lobel, 296 AD2d 701, 702 [3d Dept 2002], quoting *Capital Medical Systems v Fuji Medical Systems, U.S.A.*, 239 AD2d 743, 746 [3d Dept 1997]).

When performance is continued, and timely notice is provided to the breaching party, "the nonbreaching party does not waive the right to sue for the alleged breach" (*Albany Medical College*, 296 AD2d at 702), although it does surrender the right to terminate the contract based on that breach (*id.*). However, if there has been no timely notice to the breaching party of the alleged breach, and the nonbreaching party has actual notice of the breach, yet continues performing thereunder, "that party waives the right to sue the breaching party ... " (*AM Cosmetics, Inc. v Solomon*, 67 F Supp 2d 312, 317 [SD NY 1999]; *see also Melnitzky v Sotheby Parke Bernet*, 300 AD2d 201, 202 [1st Dept 2002] [party who "continue[s] to actively affirm the contract's validity by accepting benefits thereunder," waives the right to sue for breach to which it failed to object]).

In the matter at hand, Associates never informed plaintiff that plaintiff's alleged refusal to permit Associates to exercise a contractual option to prepay the loan was a breach of the loan agreements. That is, Associates failed to give plaintiff timely notice of the alleged breach. Instead, Associates proceeded to perform under the contract as if nothing had passed between the parties in July 2007, until December 2007. Plaintiff, on the other hand, stressed during that period its position that it was due the entire amount of the loan, due to Associates alleged breach in relation to the Option Agreement. *See* Aff. of Arffa, Ex. 13. Associates' response was to reiterate that they were performing under the terms of the Loan Agreement, with interest constituting payment in full of amounts due and owing. *Id.*, Ex. 14.

In the above referenced letter, and in other correspondence between the parties, Associates concluded with words to the effect that "[n]othing in this letter shall be deemed a waiver or relinquishment of any of Associates' rights, remedies, claims or defenses, all of which are specifically reserved (*id.*). However, this boilerplate was not notice to plaintiff of its alleged breach in July 2007, and does not suffice to give Associates access to remedies they would have had had they provided notice to plaintiff before resuming performance under the Loan Agreements. Thus, Associates' seventh affirmative defense and counterclaim must be dismissed, and their motion denied.

CONCLUSION

As a result of the foregoing, plaintiff has established that Associates have no right to sue for plaintiff's alleged breach of the Loan Agreement when it did not accept Associates' terms for prepayment of the loan. In fact, the documentary evidence does not even show that plaintiff refused to allow Associates to repay. Rather, it disputed the terms Associates offered, and offered another way out of the impasse, which Associates accepted.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's second amended complaint (mot. seq. no. 006) is denied; and it is further

ORDERED that plaintiff 1166 Junior Mezzanine Lender LLC's motion to dismiss defendants' seventh affirmative defense and counterclaim (mot. seq. no. 007) is granted, and the seventh affirmative defense and counterclaim are dismissed.

Dated: February 23, 2009

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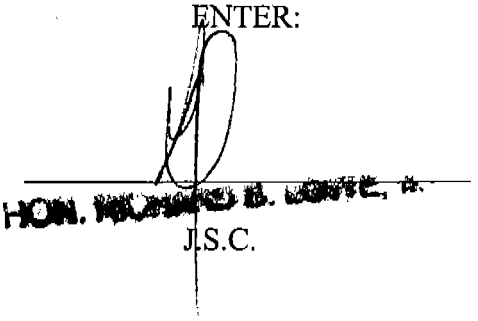

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J.S.C.