RBC Tax Credit Equity, LLC v Slane Co., Ltd.
2009 NY Slip Op 32136(U)
September 8, 2009
Supreme Court, Nassau County
Docket Number: 021843/2008
Judge: Ira B. Warshawsky
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[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

RBC TAX CREDIT EQUITY, LLC,

Plaintiff,

INDEX NO.: 021843/2008
MOTION DATE: 05/22/2009
MOTION SEQUENCE: 001 and 002

-against-

THE SLANE COMPANY, LTD.,
THE ADER PARTNERS, LLC,
CHARLES SLANE, DANIEL SLANE
and ISRAEL NEIMAN,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affidavit of Kenneth L. Lohiser	2
Memorandum of Law in Support of RBC Tax Credit Equity, LLC's Motion for Summary Judgment	3
Affirmation of Matthew T. McLaughlin in Support of Request to Assignment to Commercial Division & Exhibits Annexed	4
Affirmation in Opposition of William J. Garry, Esq. , Affidavit in Opposition of Israel Neiman & Exhibits Annexed	5
Reply Memorandum of Law in Further Support of RBC Tax Credit Equity, LLC's Motion for Summary Judgment	6
Plaintiff's Commercial Division Rule 19-a Statement of Material Facts	7
Notice of Motion, Affidavit, Affirmation & Exhibit Annexed	8

PRELIMINARY STATEMENT

Plaintiff moves for an order granting summary judgment awarding $8,654,810.11, together with prejudgment interest, together with costs, disbursements and attorney fees. The

claim is based upon funds invested with a non-party, Park Avenue Owners, LLC, for the purpose of the acquisition, rehabilitation, leasing and operating 176 low income residential housing units and 21,623 square feet of retail space, (the "Project"), located at 3160 Park Avenue, Bronx, New York. Defendants Ader Partners and Slane Company, Ltd. (the "Company Defendants") were to complete the project with financing from tax exempt bonds issued by New York City Housing Development Corporation ("NYCHDC) and by receiving tax credits under the Low Income Housing Tax Credit Program ("LIHTCP"). This program was created by the Tax Reform Act of 1986.

Plaintiff, formerly known as Apollo Housing Capital, L.L.C. ("RBC/Appollo") seeks recovery of $7,000,000 based upon a Note from Park Avenue Owners, LLC ("Company"), which was formed to acquire, improve , develop and construct the project. The development was never commenced and this action is against individual guarantors of the Note. Plaintiffs claim damages in the amount of $8,339,457.39, including the amount of the note, interest and liquidated damages.

Defendants oppose the motion, alleging breach of contract, breach of covenant of good faith and fair dealing, commercial impracticability and frustration of purpose. The basis for these claims is that New York City Housing Development Corp. ceased issuing Housing Tax Credits, which were a fundamental component of the underlying agreement, and without which the project could not go forward.

In Motion Sequence 2, Plaintiff moves the admission of Stephen M. LaRose, of the law firm of Nixon Peabody, LLP pro hac vice. This motion is unopposed.

BACKGROUND

The Amended and Restated Operating Agreement of Park Avenue Owners, LLC [1] is dated June 14, 2007. It is by and among Park Avenue Partners, LLC, the Managing Member, Apollo Housing Capital, L.L.C., the Investor Member, and Apollo Housing Manager II, Inc., the Special Member. The stated purpose of the Company was to construct, rehabilitate, lease, operate, finance and manage 176 housing units for rental to low, or very low income persons, and

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[1] Exh. "B" to Affirmation in Oppositon.

21,623 gross commercial square feet, at 3160 Park Avenue, Bronx, New York. As opposed to the Investor or Special Member, the Managing Member was to engage in no other activity other than being the Manager of the Company.

The Investor Member acquired a 99.99% of the Investor Member interest, and Apollo Housing Manager II, Inc. acquired the other .01%. Apollo was to pay a total of $22,119,035 for its Membership Interest. The Project anticipated a total contribution from LIHTC in the amount of $22,011,190 payable in installments commencing January 2009 and terminating in 2019. As a condition to Apollo's funding, the Managing Member was to obtain financing in the forms of mortgages from New York City Housing Development Corporation and New York Department of Housing Preservation and Development, Reso A Funds and a pre-development loan provided by Apollo in the amount of $7,000,000 for payment of acquisition and other costs. The interest rate from the date of closing to August 31, 2007 was a rate equal to LIBOR plus 200 basis points, and from September 1, 2007 to October 31, 2007 at LIBOR plus 225 basis points. It is this pre-development loan which is the subject of this action.

On the same date as the Amended Operating Agreement, the Company executed a Promissory Note in favor of RBC/Apollo in the amount of $7,000,000. It was payable on the earlier of the date on which RBC/Apollo made its first capital contribution to the Company pursuant to the Binding Commitment Letter dated March 27; the dated on which the Company is terminated or dissolved; the acceleration of the amounts due in the Event of Default; or October 31, 2007. The note was executed by Ader Partners, LLC, the managing member of Park Avenue Partners, LLC, which in turn was the managing member of Park Avenue Owners, LLC.[2]

In order to induce RBC/Apollo to make the pre-development loan and accept a Note from Park Avenue Partners, LLC, The Ader Partners, LLC, The Slane Company, Ltd, Israel Neiman, Charles Slane and Daniel Slane guaranteed the prompt payment of the indebtedness. [3]

Plaintiff's position is that the $7,000,000 was a straightforward loan by RBC/Apollo to the Company, and the terms of the note dictate that repayment is required. Defendants, on the

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[2] Exh. "A" to Motion.

[3] Exh. "B" to Motion.

other hand, take the position that the opportunity to obtain Federal Tax Credits is a valuable one, that the Plaintiff was selected from a number of suitors who sought to be the Syndicator/Investor, and that the Defendants surrendered a substantial right to obtain financing from any other source, having given RBC/Apollo the exclusive right to invest in the project. This, they assert, was essentially a quid pro quo, irrespective of the language of the Promissory Note and the Guaranty.

They claim that Plaintiff was fully aware that the repayment of the $7,000,000 was dependent upon the approval and allocation of tax credits to the Company so as to enable them to complete the project. Upon Plaintiff's admission as a Member, the Company Defendants commenced work on the project, obtaining approval of building plans, selecting a General Contractor, and were ready to close with New York City Housing Preservation and Development on loans when, on or about June 8, 2008, in response to economic conditions which were previously unanticipated, and beyond the control of the Company, New York City stopped issuing low income housing tax credits and exempt bonds, which stopped financing for the Project. The Plaintiff withdrew from the Project in or about July 28, 2008, and now seeks reimbursement of the $7,000,000 advance, together with accumulated interest, and costs.

DISCUSSION

Motion Sequence 1

While the development of low-income housing, with financing provided through the issuance of Low Income Housing Tax Credits, and tax exempt bonds issued by New York City Housing Development Corporation, requiring the cooperation of the Internal Revenue Service acting in concert with local housing agencies, is a highly complex undertaking, the facts underlying Plaintiff's claim for the refund of $7,000,000 are not.

Plaintiff loaned Park Avenue Owners, LLC $7,000,000 for acquisition costs in conjunction with the Project. Ader Partners, LLC, the managing partner of Park Avenue Partners, signed a promissory note on behalf of the Company. The note, was payable on the happening of any one of four events, one of which was the maturity date of October 31, 2007. The parties agreed to extend the maturity date to June 30, 2008. As added security for repayment, Defendants in this action, The Slane Company, Ltd., The Ader Partners, LLC,

Charles Slane, Daniel Slane, and Israel Neiman executed a guaranty of the Company's obligation. The Company has defaulted in its obligation to repay the principal amount of the loan together with accumulated interest and costs. Plaintiffs seek to recover on the guarantees.

The terms of the note and the guaranty are unambiguous; but Defendants raise the issue of commercial impracticability. They essentially claim that the parties could not have reasonably envisioned such a change in economic and political circumstances as would cause the New York City Department of Housing Preservation and Development Agency to terminate a long-standing arrangement of financing low-income housing projects. They view Plaintiff as an investor rather than as a lender; one whose investment in the project has failed due to circumstances beyond either of their control.

While such circumstances may excuse performance in the delivery of goods, [4] they are not adequate in the face of a promissory note and guaranty which are clear on their face. Although Apollo is described as an "Investor Member", the obligations of each member are defined under the Agreement. For example, the terms "Apollo Loan" and "Apollo Loan Documents" make it abundantly clear that the purpose of Apollo's membership was to advance a pre-development loan to the Company.[5] The term "Guarantor" means the Managing Member; the Ader Partners, LLC; the Slane Company, Ltd.; and their respective principals, including Israel Neiman, Charles Slane, and Daniel Slane.[6] Apollo's role as a lender is further amplified in Article V of the Agreement. [7]

While the termination of the low-income housing tax credits by New York City Housing Preservation and Development Corporation has certainly halted the Project, the Agreement among the parties, together with the Promissory Note and Guaranty executed in furtherance of the Project, make it clear that Plaintiff was not to bear the risk of failure. Plaintiff is a lender entitled to repayment in accordance with the terms of the Note and Guaranty.

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[4] Uniform Commercial Code § 2-615.

[5] Exh. 2-A to Motion at p. 4.

[6] *Id.* at p. 6.

[7] *Id.* at p. 12, ¶ 5.1.

It is, therefore, ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment against Defendants, jointly and severally, in the amount of $7,000,000, together with interest at the rates set forth in the note and extension agreement, including the Default Rate, together with a late charge in the amount of 12% as provided for in the Note, and costs and expenses, including reasonable attorney's fees and court costs incurred in connection with the collection of the amounts due, all as provided for in the Promissory Note.

Submit Judgment.

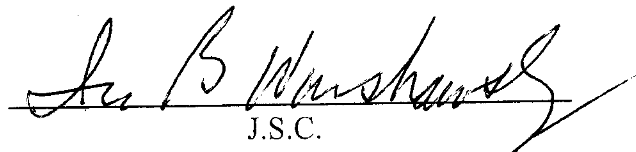
Motion Sequence 2

The affirmation of Matthew T. McLaughlin, Esq., a member of the New York State Bar, shows Mr. LaRose to be a member in good standing of the bar of the Commonwealth of Massachusetts.

Admission of attorneys admitted in foreign states, territories or countries is governed by 22 NY ADC 520.11. Courts of record are given wide discretion in the admission of such persons for a particular matter, provided that they associate themselves with an attorney licensed to practice in New York, are members in good standing of the bar of another state, territory or country, and agree to be bound by the disciplinary rules of the State of New York

The applicant is in compliance with these requirements and has submitted current certificates of good standing from the State Bar of Massachusetts. The motion to admit Stephen M. LaRose to the bar of the State of New York pro hac vice is granted.

Dated: September 8, 2009



J.S.C.

ENTERED

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