

Archer Capital Fund, L.P. v Eagle Realty, LLC

2010 NY Slip Op 33226(U)

November 1, 2010

Supreme Court, Queens County

Docket Number: 27400/2008

Judge: Augustus C. Agate

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

ARCHER CAPITAL FUND, L.P.

- against -

EAGLE REALTY, LLC, et al., etc.

INDEX NO. 27400/2008

MOTION DATE: AUGUST 16, 2010

MOTION CAL. NO. 1

BY: AGATE, J.

Plaintiff Archer Capital Fund, LP has moved for, inter alia, summary judgment on its complaint. This motion was referred to the undersigned pursuant to a memorandum by the Honorable Martin E. Ritholtz.

On August 28, 2006, plaintiff Archer loaned \$7,400,000 to defendant Eagle Realty, LLC for the purpose of financing the development of property located at 178-02/178-18 Hillside Avenue, 178-20/178-36 Hillside Avenue, and 88-10/88-16 179th Street, Queens, New York (the original Eagle loan). On March 8, 2007, plaintiff Archer loaned GEL, LLC and GRL, LLC \$2,600,000 which was secured by a mortgage on the above mentioned property and other properties (the GEL loan). The borrowers defaulted on the repayment of the two loans.

On February 28, 2008, plaintiff Archer loaned \$25,250,000 to Eagle Realty (the Hillside loan), which consisted of (1) an acquisition loan of \$13,016,455.67 secured by a CME mortgage and (2) a building loan of \$12,233,544.33 secured by a BLA mortgage

(collectively the Hillside mortgage). Eagle Realty again mortgaged 178-02/178-18 Hillside Avenue, 178-20/178-36 Hillside Avenue, and 88-10/88-16 179th Street, Queens, New York to plaintiff Archer. Emmanuel Lambrakis, George Lambrakis, Alexander Lambrakis, and Gregory Lambrakis also executed guarantees to secure the Hillside loan. The guarantors made their obligation “primary, absolute, and unconditional” and not “limited or impaired by . . . (vii) the invalidity, irregularity or unenforceability . . . of any of the loan documents, this guarantee . . . or (viii) any other action or circumstance whatsoever which constitutes . . . a legal or equitable discharge or defense of Borrower . . . or of Guarantor under this Guarantee” Eagle Realty used the Hillside loan to repay the original Eagle loan and to repay \$1,000,000 on the GEL loan, leaving a balance of \$1,600,000.

On April 1, 2008, GEL and GRL defaulted on the payment of the balance of the GEL loan, thereby cross defaulting on the Hillside loan. Eagle Realty also defaulted on the repayment of the Hillside loan.

By notice of default dated October 13, 2008, plaintiff Archer notified Eagle Realty that its default on the GEL mortgage has caused a default under the cross default provisions of the Hillside mortgage and that it was also in default on the payment of the CME note. Eagle Realty and the Hillside guarantors have not made the payments due on the Hillside loan.

On or about November 10, 2008, ACF Hillside, LLC, apparently an affiliate of plaintiff Archer, began an action for specific performance in the New York State Supreme Court, County of Queens, against defendant George Lambrakis (*ACF Hillside, LLC v*

Lambrakis, Index No. 27393/08). ACF Hillside had made a \$900,000 capital contribution to Eagle Realty and had been granted the status of a “special member.” Pursuant to Eagle Realty’s operating agreement, if the company defaulted on its loans, it had to pay the special member a “redemption amount,” and, if the company failed to do so, “the Managing Member [George Lambrakis] shall immediately and automatically have no further right to act on behalf of the Company, (ii) from and after such time, the Special Member shall have the sole authority with respect to the management and control of the Company” ACF Hillside, alleging that Lambrakis had breached the operating agreement by failing to surrender management and control of the company, moved for summary judgment in its action for specific performance. This court granted the motion pursuant to a decision dated July 8, 2010.

On or about November 10, 2008, plaintiff Archer began an action to foreclose on the GEL mortgage in the New York State Supreme Court, County of Queens (*Archer Capital Fund, L.P. v GEL, LLC*, Index No. 27397/08.) This court granted the plaintiff’s motion for summary judgment pursuant to a decision dated July 6, 2010. By order dated August 23, 2010, this court appointed a temporary receiver for the mortgaged property.

On or about November 10, 2008, plaintiff Archer began this action for the purpose of, inter alia, foreclosing on the Hillside mortgage. Pursuant to this court’s decision in *ACF Hillside, LLC v Lambrakis* (Index No. 27393/08), ACF Hillside LLC assumed the management and control of Eagle Realty, and, acting on behalf of Eagle Realty, entered into a stipulation dated August 16, 2008 pursuant to which the debtor, inter alia, (1) consented to

the dismissal “of all defenses and counterclaims with prejudice,” and (2) consented to the entry of summary judgment in favor of plaintiff Archer “for all of the relief requested in the complaint including summary judgment on Archer’s first and second causes of action to foreclose the mortgages and declare Archer’s interest in the property to be superior to all defendants”

Plaintiff Archer now seeks summary judgment on the first cause of action (foreclosure on the building loan mortgage) and on the second cause of action (foreclosure on the CME mortgage). The court notes that the complaint also seeks to impose liability on the guarantors of the Hillside loan for the amount of any deficiency judgment. “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Plaintiff Archer successfully carried this burden through the production of the mortgage, the unpaid note, the guarantees, and evidence of default. (See, *Petra CRE CDO 2007-1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856; *Red Tulip, LLC v Neiva*, 44 AD3d 204; *Republic Nat. Bank of New York v O’Kane*, 308 AD2d 482.) The burden on this motion shifted to the defendants to produce evidence showing that there is an issue of fact which must be tried (see, *Alvarez v Prospect Hospital, supra*) or to demonstrate the existence of a defense warranting the denial of summary judgment. (See, *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347.) The defendants failed to carry this burden. Defendant Eagle Realty consented to the entry of summary

judgment against it pursuant to the stipulation dated August 16, 2008. The defendant guarantors waived their right to assert defenses to the enforcement of the guarantee by agreeing, inter alia, that their obligations were “primary, absolute, and unconditional” and not subject to “any other action or circumstance whatsoever which constitutes . . . a legal or equitable discharge or defense of Borrower . . . or of Guarantor under this Guarantee” (See, *Preferred Equities Corp. v Ziegelman*, 190 AD2d 784.) In any event, as this court has already held in the two related cases, the defense of fraud raised by the defendant mortgagor and defendant guarantors has no merit: “the defendants' allegations of a conspiracy to commit fraud involving the attorney representing them on the financing transactions rest on surmise, conjecture, and suspicion, and the allegations are thus insufficient to withstand a motion for summary judgment. (See, *Marino v Parish of Trinity Church*, 67 AD3d 500.)” (See decision dated July 6, 2010 and decision dated July 8, 2010.) In sum, the plaintiff is entitled to summary judgment on its complaint and to summary judgment dismissing the counterclaims.

The plaintiff is also entitled to a default judgment against the New York State Department of Taxation and Finance and the New York City Environmental Control Board. (See, CPLR 3215; *DeVivo v Sparago*, 287 AD2d 535; *Hann v Morrison*, 247 AD2d 706; *Zelnik v Bidermann Industries U.S.A., Inc.*, 242 AD2d 227.)

Accordingly, the motion is granted.

Settle order.

DATED: November 1, 2010

AUGUSTUS C. AGATE, J.S.C.

