

**General Elec. Capital Corp. v Madison 92nd St.  
Assoc., LLC**

2010 NY Slip Op 33679(U)

December 6, 2010

Sup Ct, New York County

Docket Number: 603324/2009

Judge: Lucy Billings

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

LUCY BILLINGS

PRESENT: J.S.C.  
*Justice*

PART 46

GENERAL ELECTRIC CAPITAL CORP.

INDEX NO. 603324/2004

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

- v -

MADISON 92<sup>ND</sup> STREET ASSOCIATES, LLC, et al.

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to 5 were read on this motion ~~to~~ for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3-4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants plaintiff's motion for summary judgment against defendant Madison 92<sup>nd</sup> Street Associates, LLC, only to the extent set forth, otherwise denies plaintiff's motion for summary judgment, and grants defendant Courtyard Management Corp.'s cross-motion for summary judgment dismissing the claims against this defendant, C.P.L.R. §3212(b) and (c), pursuant to the accompanying decision.

**FILED**

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/6/10

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 46

-----x

GENERAL ELECTRIC CAPITAL CORP.,  
Plaintiff

Index No. 603324/2009

- against -

DECISION AND ORDER

**FILED**

MADISON 92ND STREET ASSOCIATES, LLC;  
92ND STREET HOTEL ASSOCIATES LLC;  
ROBERT GLADSTONE; LOUIS TAIC; JKNY LLC;  
COURTYARD MANAGEMENT CORPORATION; PPI  
NEW YORK, LLC; 92ND & FIRST RESIDENTIAL  
TOWER LLC; and JOHN DOES NOS. 1-12,

Defendants

NEW YORK  
COUNTY CLERK'S OFFICE

-----x

LUCY BILLINGS, J.S.C.:

Plaintiff seeks foreclosure of a mortgaged hotel due to nonpayment of the underlying promissory note. Defendants PPI NY LLC and 92nd & First Residential Tower LLC have not appeared. Plaintiff now moves to discontinue its complaint against the Doe defendants, for summary judgment against the answering defendants, and for a determination by the court or through appointment of a referee of the sum due. C.P.L.R. §§ 3212(b), 3217; R.P.A.P.L. § 1321. Defendant Courtyard Management Corp. cross-moves for summary judgment dismissing all claims against this defendant. C.P.L.R. § 3212(b).

Absent any party's opposition, the court grants plaintiff's motion to discontinue the complaint against the Doe defendants. C.P.L.R. § 3217. For the reasons explained below, the court grants plaintiff's motion for summary judgment against defendant Madison 92nd Street Associates, LLC, only as to the hotel's

foreclosure; otherwise denies plaintiff's motion for summary judgment against that defendant; and denies plaintiff's motion for summary judgment against defendants 92nd Street Hotel Associates LLC, Gladstone, Taic, JKNY LLC, and Courtyard Management Corp. C.P.L.R. § 3212(b) and (e). The court also grants Courtyard Management Corp.'s cross-motion for summary judgment dismissing the claims against this defendant. C.P.L.R. § 3212(b).

I. UNCONTESTED FACTS

Beginning in 2001, Madison 92nd Street, of which JKNY is a member, and Courtyard Management began developing a hotel at 410 East 92nd Street, New York County, which became known as the Upper East Side Courtyard by Marriot. On October 7, 2002, Madison 92nd Street and Courtyard Management entered an agreement that Courtyard Management would manage the premises and would do so without employing union labor.

On May 12, 2008, Madison 92nd Street entered a loan agreement with plaintiff. In conjunction with that loan agreement, Madison 92nd Street executed a promissory note for the principal amount of \$62 million and mortgaged the hotel to plaintiff. On the same day, defendants Gladstone and Taic, Madison 92nd Street's co-managers, executed a joinder agreement jointly and severally guaranteeing Madison 92nd Street's performance under the loan agreement. Around the same date Madison 92nd Street and plaintiff also entered a Subordination Non-Disturbance and Attornment (SNDA) Agreement with Courtyard

Management, permitting it to remain as manager of the hotel even in the event of a default under the mortgage. For purposes of summary judgment, the appearing parties consent to the authentication and admissibility of the loan agreement, promissory note, joinder agreement, and assignment of rents, all dated May 12, 2008, and presented by the motion, cross-motion, and opposition.

## II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving party satisfies this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of plaintiff's motion and Courtyard Management's cross-motion for summary judgment, the court construes the evidence in the light most favorable to the opponents. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

"Should it appear from affidavits submitted in opposition to

the motion that facts essential to justify opposition may exist but cannot then be stated," the court may deny or order a continuance of the motion for summary judgment to permit disclosure or other appropriate relief. C.P.L.R. § 3212(f). Mere hope that disclosure might uncover useful evidence, however, will not warrant such a denial or continuance. Kent v. 534 East 11th Street, \_\_ A.D.3d \_\_, 2010 WL 4238151 at \*5 (1st Dep't 2010); Barnes-Joseph v. Smith, 73 A.D.3d 494 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Chalk & Vermillion v. Thomas F. McKnight, LLC, 303 A.D.2d 225, 226 (1st Dep't 2003).

### III. CLAIMS FOR RELIEF OTHER THAN FORECLOSURE

Plaintiff concedes the absence of any basis to affect the rights of Courtyard Management and does not seek to do so. The court therefore grants Courtyard Management's cross-motion for summary judgment dismissing the claims against this defendant. C.P.L.R. § 3212(b).

Nor does plaintiff currently seek to determine any defendant's liability beyond foreclosure of the hotel. The court therefore makes no determination now regarding liability for a deficiency if the foreclosure sale does not cover the full debt. Since plaintiff moves for a judgment of foreclosure against only the mortgagor of the hotel, the court denies plaintiff's motion for summary judgment against defendants other than Madison 92nd Street. Id.

Similarly, because plaintiff does not currently seek to

determine Madison 92nd Street's liability beyond the foreclosure, the court need not now consider the loan agreement's provision that Madison 92nd Street would not be "personally liable for amounts due under the Loan Documents," Gladstone Aff., Ex. A. § 13.1(1), referring to the borrower's liability for any deficiency beyond the mortgaged collateral's value, as reflected in the following subsection. Id. § 13.1(2). Madison 92nd Street maintains only that § 13.1(1) eliminates the borrower's liability for a deficiency due, not all liability for the debt, as such a construction of § 13.1(1) would contradict the remainder of the loan agreement and completely negate the loan transaction, converting it to a gift. Plaintiff retains its claim in its complaint, however, that the borrower also may be liable for a deficiency, in the event a deficiency becomes due after the collateral is sold, and Madison 92nd Street's actions or other specified circumstances trigger this additional liability under § 13.1(2) or (3) in the future.

#### IV. FORECLOSURE OF THE HOTEL AGAINST MADISON 92ND STREET

Plaintiff establishes its prima facie claim for foreclosure of the hotel against Madison 92nd Street by presenting the loan agreement, promissory note, mortgage, and the affidavit of plaintiff's Senior Asset Manager Varsha Thakarar, on personal knowledge, that the borrower failed to pay the amount due. Madison 92nd Street neither disputes its nonpayment of the debt, nor alleges facts to support its affirmative defenses. This defendant also does not allege facts to support its affirmative

defenses. As the owner and developer of a Manhattan hotel, owning real property and transacting business in New York, Madison 92nd Street is subject to this court's jurisdiction, C.P.L.R. § 302(a)(1) and (4), and presents no evidence to raise a factual question regarding jurisdiction over this defendant or plaintiff's failure to join a necessary party. R.P.A.P.L. § 1311.

In opposition to plaintiff's motion for summary judgment, Madison 92nd Street instead claims plaintiff breached the implied covenant of good faith and fair dealing by signing the SNDA Agreement with Courtyard Management and Madison 92nd Street, without disclosing information about hotel employees' unionization. Madison 92nd Street further claims that unionization would increase the hotel's operating costs dramatically and adversely affect its financial performance and its financing. Gladstone, Madison 92nd Street's co-manager, attests that plaintiff was more sophisticated than his entity and knew or could have learned the extent of the hotel's unionization, while his entity had no such knowledge or capability to acquire the information. Similarly, plaintiff knew or should have known that unionization would hinder Madison 92nd Street's financial capability to repay the loan severely and thus cause a default on the loan and mortgage, as has occurred.

Madison 92nd Street's failure to plead this defense previously does not prevent defendant from raising the defense in opposition to plaintiff's motion for summary judgment. Hansen &

Co. v. Everlast World's Boxing Headquarters Corp., 2 A.D.3d 266, 267 (1st Dep't 2003); Feliciano-Delgado v. New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr., 281 A.D.2d 312, 316 (1st Dep't 2001); NAB Constr. Corp. v. Consolidated Edison Co. of N.Y., 242 A.D.2d 480 (1st Dep't 1997). The contracts on which plaintiff relies, like all contracts, imply a covenant of good faith and fair dealing that each party to the contract will not prevent the other parties from receiving the benefit of their bargain. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002); Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1995). Here, the benefit of the loan agreement is not merely that Madison 92nd Street receives the loan, but that the borrower has a meaningful opportunity to keep its collateral by repaying the loan with required interest, as the agreement, after all, provides for a loan, not a sale.

Regardless what plaintiff may have known or been able to learn, Madison 92nd Street, based on its own evidence, was well aware of unionization at the hotel. Courtyard Management informed Madison 92nd Street in June 2005 that the hotel would become unionized "at some point," likely "rather soon after hotel opening," Gladstone Aff. ¶ 29; in December 2006 and again in February 2007 that staff counts were increasing, id. ¶¶ 43-44; and after March 2007 that employees actually had unionized. Id. ¶ 47. Even if Madison 92nd Street was not aware of details of the unionization, the owner and developer was aware that unionization was occurring and could have refused to take the

loan, give the mortgage, or enter the SNDA Agreement, before acquiring more information. While Gladstone attests that no one at Madison 92nd Street saw the actual agreements between the hotel and the union, Madison 92nd Street principals at least (1) knew of those agreements, because the hotel pressured the owner and developer to consent to the agreement's terms, id. ¶ 48, and (2) knew that unionization would increase the hotel's operating costs. Id. ¶ 27.

Because Madison 92nd Street by its own admission was already aware of unionization at the hotel, the court need not consider whether plaintiff in fact knew or could have learned such information and whether the implied covenant of good faith and fair dealing imposed any obligation on plaintiff to disclose that information. Therefore Madison 92nd Street does not raise a factual issue to rebut plaintiff's prima facie claim.

It may well be theoretically possible that disclosure would reveal plaintiff's knowledge and withholding of crucial facts beyond what Madison 92nd Street admits it already knew and that the undisclosed facts would have dissuaded it from executing the loan agreement, mortgage, or SNDA Agreement on their current terms. Such a mere hope of possibly finding such facts, however, absent any threshold indication, beyond speculation, of plaintiff's further, undisclosed knowledge that would have made the crucial difference in Madison 92nd Street's contractual dealings, does not justify denying or postponing summary judgment. Kent v. 534 East 11th Street, 2010 WL 4238151 at \*5;

Barnes-Joseph v. Smith, 73 A.D.3d 494; MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d at 405; Chalk & Vermillion v. Thomas F. McKnight, LLC, 303 A.D.2d at 226.

V. CONCLUSION

For the foregoing reasons, the court grants plaintiff's motion to discontinue its complaint against the Doe defendants; grants plaintiff's motion for summary judgment against defendant Madison 92nd Street Associates, LLC, for foreclosure of the hotel only; and otherwise denies plaintiff's motion for summary judgment against defendant Madison 92nd Street. C.P.L.R. §§ 3212(b) and (e), 3217. The court also denies plaintiff's motion for summary judgment against the other defendants and grants defendant Courtyard Management Corp.'s cross-motion for summary judgment dismissing the claims against this defendant. C.P.L.R. § 3212(b).

Upon the granting of summary judgment to plaintiff, no factual questions prevent a reference simply to compute the amounts due to plaintiff and any defendants and examine whether the mortgaged hotel premises may be sold in parcels or must be sold as a whole. Champion Mtge. Co. v. Elmore, 5 A.D.3d 140 (1st Dep't 2004); Vermont Fed. Bank v. Chase, 226 A.D.2d 1034, 1036-37 (3d Dep't 1996); Bank of E. Asia v. Smith, 201 A.D.2d 522, 523 (2d Dep't 1994); New York State Mtge. Loan Enforcement & Admin. Corp., 187 A.D.2d 955, 956 (4th Dep't 1992). See Hypo Holdings v. Chalasani, 280 A.D.2d 386 (1st Dep't 2001). Although R.P.A.P.L. § 1321(1) provides for appointment of a referee for

those purposes when defendants fail to answer, admit plaintiff's claimed rights, consent, or are minors or absentees, summary judgment establishes that no factual questions bear on liability for the promissory note or the mortgage's validity. Bank of E. Asia v. Smith, 201 A.D.2d at 523. See, e.g., Scharaga v. Schwartzberg, 149 A.D.2d 578, 579 (2d Dep't 1989). This relief equates to defendants' admission or consent and similarly permits the reference. Vermont Fed. Bank v. Chase, 226 A.D.2d at 1036-37.

Consequently, the court appoints Paul Victor Esq. (212-841-0575), at Phillips Nizer LLP, 666 5th Avenue, New York, NY 10103, as a Referee, to ascertain and compute the amounts due to plaintiff and any defendants on plaintiff's mortgage and any other encumbrances and for related charges, and to examine and report to the court with all convenient speed whether the mortgaged premises may be sold in separate parcels. If required, the Referee may take testimony in New York County relating to the amount due or to separate parcels pursuant to R.P.A.P.L. § 1321. Bank of E. Asia v. Smith, 201 A.D.2d at 523.

By accepting this appointment the Referee certifies that hee is in compliance with 22 N.Y.C.R.R. Part 36, including, but not limited to § 36.2(c) and (d). Plaintiff shall pay the Referee's fees as determined by the court.

DATED: December 6, 2010

**FILED**

DEC 10 2010

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*Lucy Billings*  
LUCY BILLINGS, J.S.C.