CIT Lending Servs. Corp. v 654 Broadway Partners LLC
2010 NY Slip Op 34103(U)
September 29, 2010
Supreme Court, New York County
Docket Number: 112833/09
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CIT LENDING SERVICES CORPORATION,

Plaintiff,

- against -

Index No. 112833/09
Motion 008

654 BROADWAY PARTNERS LLC,
KYLE RANSFORD, TREVOR STAHELSKI,
GRUBB & ELLIS NEW YORK, INC., NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
NEW YORK CITY DEPARTMENT OF FINANCE,
AND JOHN DOE #1 THROUGH JOHN DOE #10,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies allegedly owed under a guaranty, defendants Kyle Ransford and Trevor Stahelski ("defendants") move (I) pursuant to CPLR 2221 for leave to reargue the previous motion for summary judgment filed by the plaintiff, CIT Lending Services Corporation ("plaintiff" or "CIT") on the ground that the Court overlooked or misapprehended a matter of fact and/or law and upon reargument, (ii) for an order denying said summary judgment motion as to the defendants.

Factual Background

In the prior Order, the Court stated, in relevant part, that

> "it is hereby ORDERED that CIT's motion for summary judgment is granted against defendants Broadway Partners, Ransford and Stahelski on the issue of liability . . ." (Order at 5-6). The Order also states that Ransford and Stahelski, "jointly and severally guaranteed the performance of Broadway Partners' obligations under the Note and Mortgage" pursuant to the Recourse Obligation Guaranty, and that CIT made a written

demand for payment thereunder by the Default Notice (Order at 2).

Defendants argue that in an action on a mortgage or a note secured by property, when the mortgagee elects to foreclose on the property securing the mortgage or note, it is not permitted to simultaneously move for a deficiency against the guarantor or obligor on the note until the mortgagee has foreclosed on the property, the property has been sold and a deficiency, if any, remained. Here, plaintiff's motion sought to foreclose on the Mortgage. Because plaintiff had already elected to proceed with the remedy of foreclosure upon the Mortgage, this election precluded plaintiff from proceeding against the Guaranty until after the property has been sold and a deficiency, if any, resulted. Thus, the Court's decision was erroneous because it granted plaintiff summary judgment against defendants based on the Recourse Obligation Guaranty.

Defendants further argue that since the Recourse Obligation is limited in nature, the Court should have permitted discovery to continue in order to determine the extent of the obligations triggered thereby. The Recourse Obligation Guaranty is not a simple unconditional guaranty; it guarantees only the "Guaranteed Obligations" as defined in Section 1.2 therein. That definition includes four subparts, which subparts themselves include 35 additional subparts. Issues exist as to whether, and to what extent, the "Guaranteed Obligations" have been triggered by the defaults claimed by CIT. In addition, fact finding is required with respect to the defaults claimed in the Default Notice, and whether the sections cited therein to the "Loan Documents" trigger payment of all or a portion of the Guaranteed Obligations, and the numerous sub-parts included within those definitions. Assuming that CIT did not elect to proceed with foreclosure, and that defendants' liability on the Recourse Obligation Guaranty was indeed triggered, then fact-finding should take place with respect to the applicability of the Guaranteed Obligations, *i.e.*, which ones

were impacted, in which manner, and was the Default Notice appropriately specific.

In opposition, CIT argues that in defendants' previous opposition to CIT's summary judgment motion, defendants did not specifically dispute that defendants were each individually liable pursuant to the terms of the Recourse Obligations Guaranty (the "Guaranty"). Instead, defendants argued that CIT's demand for a judgment of liability against Ransford and Stahelski "rises and falls" with the summary judgment motion against defendant 654 Broadway Partners LLC ("654 Broadway") because their obligations under the Guaranty cannot exceed those of 654 Broadway under the Loan Documents (as defined in the Motion for Summary Judgment). After considering and rejecting Defendants' arguments, the Court granted plaintiff's motion as to liability against 654 Broadway, Ransford and Stahelski. Now, for the first time, defendants argue that: (i) summary judgment should not have been entered against them because it was premature and (ii) the Guaranty is not unconditional and therefore further fact finding is needed. These arguments should be rejected as they are improperly raised for the first time in this motion to reargue.

CIT argues that in any event, such arguments regarding the propriety of the entry of summary judgment against defendants fail as a matter of law.

Further, the finding of liability against defendants on the Guaranty was not erroneous. Defendants cite case law which stands for the proposition that if a party elects the remedy of foreclosure, that party may not simultaneously seek a deficiency judgment against the guarantor until the mortgagee has foreclosed on the property, the property has been sold, and a deficiency remains. However, defendants' argument is flawed because the order does not grant CIT both the remedy of mortgage foreclosure and a deficiency judgment against defendants on the Guaranty.

In fact, nowhere in the order does the Court expressly order both foreclosure on the mortgage and a deficiency judgment against defendants on the Guaranty; rather, the order grants summary judgment against defendants on the issue of liability, and states that upon "a successful motion to confirm the referee's report, CIT may move for summary judgment on damages and a final judgment of foreclosure." Furthermore, the proposition of law cited by defendants in support of their motion to reargue does not apply to the case at bar. CIT did not seek a "deficiency judgment" against defendants. Rather, CIT sought a finding of liability as to defendants on the Guaranty. This finding of liability under the Guaranty is not the equivalent of a "deficiency judgment" and, therefore, is not prohibited by the case law cited by defendants.

And, additional discovery is not needed to determine the extent of the obligations under the Guaranty. Defendants' second argument, also raised for the first time in their motion, also fails because CIT did not previously seek summary judgment as to all of the "Guaranteed Obligations." Instead, CIT detailed exactly which Guaranteed Obligation had been triggered by defendants' defaults, *i.e.*, §§ 1.2(A)(iii), 1.2(D), and sought summary judgment as to those two Guaranteed Obligations. Yet, argues CIT, defendants did not refute CIT's argument regarding this "Guaranteed Obligation" and did not argue that additional discovery was needed concerning this "Guaranteed Obligation." Since CIT specifically detailed in its previous motion which Guaranteed Obligation it was relying upon, and since the Court has already been presented with, and entered an order based upon, the undisputed facts relating to the triggering of that "Guaranteed Obligation," additional discovery as to any other "Guaranteed Obligations," which were not at issue in the previous motion, is irrelevant.

In reply, defendants argue motions to reargue are addressed to the discretion of the court,

and the granting of reargument is permitted in the interests of justice even where the movant had not technically met the requirements for reargument.

Defendants also argue that CIT's argument that the Court did not prematurely and erroneously grant summary judgment because it issued a judgment only "on the issue of liability" raises a distinction without a difference. Contrary to plaintiff's assertion, plaintiff's summary judgment motion sought a deficiency judgment against defendants as guarantors on the Recourse Obligation Guaranty. The Order granted just that relief, and thus, was erroneous. By electing to foreclose on the Mortgage, plaintiff was precluded from obtaining any judgment, for liability or otherwise, against defendants as guarantors, until after the Mortgagee has been foreclosed, the Property has been sold and a deficiency, if any, remained.

Further, defendants' Guarantee is not unconditional and therefore discovery is required to determine their liability, if any, under this limited guarantee. The Recourse Obligation Guaranty is clearly a conditional guarantee. Indeed, even the provision that plaintiff points to in support of its assertion that the Recourse Obligation Guaranty is an unconditional guarantee contains numerous exclusions. And, plaintiff identification of two Guaranteed Obligations that defendants allegedly breached, namely § 1.2(A)(iii) and § 1.2(D), was insufficient. Section 1.2(A)(iii) discusses a breach of the Mortgage but CIT does not state in what regard defendants breached the Mortgage and Section 1.2(D) contains numerous exceptions which CIT does not address. Thus, discovery is needed to determine the extent of defendants' obligations, if any, pursuant to the Recourse Obligation Guaranty.

Discussion

The motion to reargue simply states that the Court overlooked or misapprehended the

facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.' (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], rearg. denied 81 NY2d 782 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Reargument is denied as defendants raise new arguments which were not presented in their opposition to the initial motion for summary judgment. In the prior motion, plaintiffs argued that it was entitled to summary judgment against (1) 654 Broadway on CIT's action to foreclose on the mortgage (Memorandum of Law pages 9-16) and (2), "upon entry of summary judgment against defendant 654 Broadway," against defendants based on the Recourse Obligation Guaranty, pursuant to §§ 1.2(A)(iii), 1.2(D) therein (see Plaintiff's Memorandum of Law, pp. 17-18). CIT argued that defendants were liable under the Guaranty because they guaranteed "[t]he prompt and unconditional payment by Borrower of any and all amounts that may be due and payable from time to time under the Loan Documents" and any damages arising out of "any breach of any representation, warranty, covenant . . . in any Mortgage" pursuant to §§

1.2(A)(iii), 1.2(D). In opposition, defendants argued that with respect to "Summary Judgment Against the Guarantors," plaintiff's demand for judgment was "premised solely upon its claim against defendant 654 Broadway" and thus, "rises and falls with that motion" (Defendants' Memorandum of Law, p. 12). Defendants continued that because "for the reasons detailed above [*i.e.*, outstanding discovery as to CIT's representations regarding waiver of payments and estoppel], summary judgment against defendant 654 Broadway would be premature, it is similarly inappropriate against [defendants]." And, defendants argued, the defenses of unclean hands, waiver, estoppel, bad faith and unconcionable conduct, were equally applicable to defendants (Defendants' Memorandum of Law, p. 13).

Defendants now argue, for the first time, herein that: (i) summary judgment should not be entered on the issue of liability because CIT elected to proceed with the remedy of foreclosure on the mortgage; and (ii) the Guaranty is limited in nature and further discovery is needed to determine whether the obligations under Section 1.2(A)(iii) and Section 1.2(D) were triggered.

Although, as pointed out by defendants, a motion to reargue is addressed to the discretion of the court (*see Sheridan v Very, Ltd.*, 56 AD3d 305, 867 NYS2d 88 [1st Dept 2008]; *Belrose Fire Suppression, Inc. v Stack McWilliams, LLC*, 51 AD3d 485, 858 NYS2d 126 [1st Dept 2008]; see also *see F & G Heating Co., Inc. v Board of Educ. of City of New York*, 103 AD2d 791, 477 NYS2d 665 [2d Dept 1984]), a motion for reargument is not an appropriate vehicle for raising new questions "which were not previously advanced" (*Simpson v Loehmann*, 21 NY2d 990, 990, 290 NYS2d 914 [1968]; *see also Mariani v Dyer*, 193 AD2d 456, 458 [1st Dept 1993] *citing Foley*, 68 AD2d at 567-68 (a motion to reargue is not an appropriate vehicle "to advance arguments different from those tendered on the original application")). The cases cited by

defendants, *Ruggiero v Long Island RR.* (161 AD2d 622 [2d Dept 1990]) and *Foxwood Run Condominium v Goller Place Corp.* (166 Misc 2d 216, 642 NYS2d 758 [Sup Ct Richmond County 1995]) (which cites to *Ruggiero*), for the proposition that the Court may consider their new arguments are neither controlling nor persuasive *Ruggiero* and *Foxfood* each fail to mention in what manner the reargument motions were technically deficient. Thus, leave to reargue is denied.

Further, having relied upon new arguments not previously raised, defendants failed to articulate any caselaw or fact that the Court overlooked or misapprehended (*see North Am. Van Lines, Inc. v Am. Int'l Companies*, 11 Misc 3d 1076, 819 NYS2d 849 [Sup Ct, New York County 2006] (denying leave to reargue where movants "merely restate the same arguments that [were] already rejected in the Decision, or set forth new arguments that are not appropriate for resolution on reargument)).[1]

Notably, since the Court's previous order was based upon the undisputed facts relating to the triggering of that "Guaranteed Obligation," additional discovery and a "fact finding" as to any other "Guaranteed Obligations," which were not at issue in the previous summary judgment, is irrelevant.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Kyle Ransford and Trevor Stahelski (I) pursuant to CPLR 2221 for leave to reargue the previous motion for summary judgment filed by

[1] In any event, it is noted that the cases cited by defendants to support their new arguments are factually distinguishable, especially in light of the fact that this Court's order limited judgment against defendants to the issue of liability pursuant to the Guaranty and no final monetary judgment on the debt against defendants was ordered.

the plaintiff, CIT Lending Services Corporation on the ground that the Court overlooked or misapprehended a matter of fact and/or law and upon reargument, (ii) for an order denying said summary judgment motion as to said defendants, is denied; and it is further

ORDERED that defendants Kyle Ransford and Trevor Stahelski shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 29, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD