SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

U.S. BANK NATIONAL ASSOCIATION

-v-

LIGHTSTONE HOLDINGS LLC, et al

INDEX NO. 651951/10

MOTION DATE

MOTION SEQ. NO. 020

The following papers, numbered 1 to ____, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s).

Answering Affidavits — Exhibits ____ No(s).

Replying Affidavits ____ No(s).

Upon the foregoing papers, it is ordered that this motion by defendant to dismiss claims for fraudulent concealment and for negligent omission and misrepresentation is GRANTED with prejudice per the attached Decision and Order.

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

Dated: November 7, 2013

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-ESH, acting by and through its Special Servicer, CW Capital Asset Management LLC,	:	
Plaintiff,	:	Index No. 651951/10
-against-	:	DECISION AND ORDER
LIGHTSTONE HOLDINGS LLC, DAVID LICHTENSTEIN, LINE TRUST CORPORATION, LTD, DEUCE PROPERTIES LTD, BANK OF AMERICA, N.A., WACHOVIA BANK, N.A., MERRILL LYNCH MORTGAGE LENDING, INC., U.S. BANK NATIONAL ASSOCIATION, as Trustee for MAIDEN LANE COMMERCIAL MORTGAGE BACKED SECURITIES TRUST 2008-1, DEBT II ESH, L.P., DEBT-U ESH, L.P., KEYBANK NATIONAL ASSOCIATION, and ASHFORD HOSPITALITY FINANCE LP,	:	Motion Sequence Nos. 019 and 020
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this long running litigation, plaintiff has suddenly shifted gears to add fraudulent concealment and negligent omission and misrepresentation claims to what has been a pure contract dispute. Defendants move to dismiss the newly minted allegations.

Background

Plaintiff alleges that on June 11, 2007, Bank of America, N.A. (Bank of America), Wachovia Bank, N.A. (Wachovia) and Bear Stearns Commercial Mortgage, Inc. (Bear Stearns), as the Original Lenders, extended $7.4 billion in commercial loans to finance the purchase of

Extended Stay Hotels LLC (ESH), for approximately $8 billion. The $7.4 billion in financing was divided into a $4.1 billion senior mortgage loan (the Senior Loan) to ESH and ten tranched mezzanine loans (designated A through J) in the aggregate amount of $3.3 billion to a chain of companies that indirectly owned ESH (collectively, the Mezzanine Loans).

As of June 11, 2007, Lightstone Holdings LLC and its managing principal David Lichtenstein (the Guarantors) executed substantively identical Guaranty Agreements in connection with both the Senior and Mezzanine Loans (the Senior Loan Guaranty Agreement, the Mezzanine Loan Guaranty Agreements and, collectively, the Guaranty Agreements). The Guaranty Agreements provided that the guaranties would be triggered under certain circumstances, one of which was a bankruptcy filing by ESH or the other borrowers. In that event, the aggregate guaranty amount owed by Guarantors to all lenders (the Senior Lender and Mezzanine Lenders combined) was capped at $100 million (the Capped Guaranty). To establish priorities of recovery on the loans and the guaranties, including with respect to the Capped Guaranty, the Original Lenders, in their then capacities as Senior and Mezzanine Lenders, entered into an Intercreditor Agreement dated as of June 11, 2007 (Intercreditor Agreement).

Plaintiff further alleges that on May 21, 2008, the Original Lenders assigned to Wells Fargo Bank, N.A. (Wells Fargo), as Trustee of the Senior Loan Securitization Trust, all of their right, title and interest in the Senior Loan Agreement and other Loan Documents, and on March 31, 2009, Wells Fargo assigned to plaintiff all of Wells Fargo's right title and interest in the Senior Loan Agreement and other Loan Documents. Both assignments were made "without recourse, representation or warranty, express or implied." Plaintiff does not dispute that Wells

Fargo and the plaintiff were aware of and received a copy of the Intercreditor Agreement at the time of the assignments.

In June 2009, Bank of America and several other Mezzanine Lenders filed an action against Guarantors to enforce the Mezzanine Loan Guaranty Agreements triggered by the bankruptcy filings by ESH and the Mezzanine Borrowers (the Bank of America Action). The plaintiffs in the Bank of America Action (i.e. the Mezzanine Lenders holding the vast majority of the Mezzanine Debt) sought judgment in the amount of $100 million, the Capped Guaranty amount, plus interest, costs and attorneys' fees. It was not until seventeen months later that plaintiff here, purportedly acting on behalf of the securitization Trustee as Senior Lender, filed this action against Guarantors seeking recovery of the same Capped Guaranty under the Senior Loan Guaranty Agreement. In both its initial and now Amended Complaint, plaintiff alleges it has priority over Mezzanine Lenders with respect to the Capped Guaranty under the Intercreditor Agreement.

On July 14, 2011, this court issued a Decision and Order granting summary judgment in lieu of complaint to the plaintiffs in the Bank of America Action. *See Bank of Am., N.A. v Lightstone Holdings, LLC*, 32 Misc 3d 1244(A), No. 601853/09, 2011 WL 4357491 (Sup. Ct. N.Y. County July 14, 2011). Plaintiff did not seek to intervene in the Bank of America Action and does not challenge Mezzanine Lenders' entitlement to judgment against the Guarantors.

On January 10, 2010, Bank of America and other Mezzanine Lenders (the defendants) filed a motion to dismiss the instant action, arguing that the clear and unambiguous terms of the Intercreditor Agreement created an exception to the Senior Lender's general priority rights such that Mezzanine Lenders were entitled to priority over the Senior Lender with respect to the

Capped Guaranty. In a Decision and Order entered September 6, 2011, this court denied plaintiff's motion in this action seeking declaratory relief that it was entitled to priority with respect to the Capped Guaranty, and in a Decision entered on September 7, 2011, granted defendants' motion to dismiss. Plaintiff appealed.

The Appellate Division affirmed the denial of plaintiff's request for a declaratory judgment. But it reversed this court's decision granting the defendants' motion to dismiss the Original Complaint, holding that "because the [Intercreditor] Agreement's clauses concerning the lenders' rights to prosecute and collect on Guaranty claims are ambiguous, [they] cannot be construed as a matter of law. . . ." *See* Feb. 14, 2013 Decision and Order at 20-21, 23 (the Decision) (internal citations omitted). The Appellate Division held that this court "correctly found that the [Capped] Guaranty Claims were excluded from the general subordination provisions of the [Intercreditor Agreement]" by virtue of the Mezzanine Lenders' right to exercise their rights under their Guaranty Agreements pursuant to Section 15(q) of the Intercreditor Agreement. The Appellate Division nonetheless also observed, for purposes of the motion to dismiss, that the parties' differing interpretations of Section 15(q) were "equally plausible." Accordingly, the Appellate Division remanded the case to this court for further proceedings to determine the parties' respective rights under the Intercreditor Agreement.

On June 3, 2013, plaintiff filed its Amended Complaint, in which it again asserted the causes of action it had asserted in the Original Complaint, and added a fourth cause of action for breach of the Intercreditor Agreement. Plaintiff also added two "alternative" causes of action, which are the subject of this motion to dismiss. The first is a claim for fraudulent concealment

and the second is a claim for negligent "omission and misrepresentation," both against Bank of America and Wachovia as the Original Lenders.

Discussion

Each of these alternative claims is premised on the same allegations. Plaintiff first asserts that there is no language in the Intercreditor Agreement that could support the Mezzanine Lenders' position that they have priority over the Senior Lender with respect to the Capped Guaranty. This assertion is completely at odds with the Appellate Division's holding that the parties' differing positions regarding the Intercreditor Agreement are "equally plausible." Plaintiff then alleges that since there is no supporting language in the Intercreditor Agreement, Bank of America and the other Mezzanine Lenders must be relying on some undisclosed waiver of plaintiff's priority right to the Capped Guaranty that is not contained in the Intercreditor Agreement. According to plaintiff, Bank of America and Wachovia must have concealed this side waiver, not contained in the Intercreditor Agreement, when they assigned the Senior Loan Agreement and related loan documents, including the Intercreditor Agreement, to Wells Fargo as Trustee, which later assigned those agreements to plaintiff.

Plaintiff's allegation that Bank of America and the other defendants are relying on an undisclosed side waiver not contained in the Intercreditor Agreement is demonstrably false. Bank of America does not and has never alleged the existence of an agreement extraneous to the Intercreditor Agreement. Neither has any other Mezzanine Lender in this case. To the contrary, Bank of America maintains, and has always maintained, that the Mezzanine Lenders' priority rights are based on the Intercreditor Agreement.

The Appellate Division remanded this case for a determination on the facts of which parties' interpretation of the Intercreditor Agreement is correct. This is a pure contract case and plaintiff's attempt to turn it into a fraud case is utterly baseless. Plaintiff's fraudulent concealment and negligent omission and misrepresentation claims are frivolous and are dismissed, with prejudice.

Dated: November 7, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER