

**German Am. Capital Corp. v Sochin Downtown  
Realty LLC**

2014 NY Slip Op 30308(U)

January 27, 2014

Sup Ct, New York County

Docket Number: 850007/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: J.S.C. Justice

PART 11

Index Number : 850007/2013
GERMAN AMERICAN CAPITAL
vs.
SOCHIN DOWNTOWN REALTY LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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 is consolidated for determination with motion sequence nos. 002 + 003 and the consolidated motions are determined in accordance with the annexed decision and order.

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

Dated: January 27, 2014

HON. JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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 11

-----X

GERMAN AMERICAN CAPITAL CORPORATION,

Plaintiff,

Index # 850007/13

-against-

SOCHIN DOWNTOWN REALTY LLC,  
MORGANS HOTEL GROUP MANAGEMENT  
LLC, MORGANS GROUP LLC, HAPPY BAR LLC,  
MGMT LLC,

JOHN DOE #1 through JOHN DOE #100 (said  
names being fictitious, it being the intention of  
Plaintiff to designate any parties, corporations or  
entities, if any, having or claiming an interest or  
lien upon the mortgaged premises.),

Defendants.

-----X

JOAN A. MADDEN, J.:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In this mortgage foreclosure action, defendant Morgans Hotel Group  
Management LLC (MHG Management) moves, pursuant to CPLR 3211 (a) (1), (2), and  
(7), to dismiss the complaint as against it (motion sequence 001). In motion sequence  
002, plaintiff German American Capital Corporation (German American or plaintiff)  
moves, pursuant to CPLR 3211 (c) and CPLR 3212, for summary judgment in its favor  
against MHG Management on the first cause of action.<sup>1</sup> In motion sequence 003, MHG

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<sup>1</sup>German American's motion is incorrectly denominated as a cross-motion.

Management moves to strike portions of the affirmation of Robert Weigel, Esq. submitted in support of German American's motion.

### **BACKGROUND**

In June 27, 2007, defendant Sochin Downtown Realty LLC (Sochin), the owner of the Mondrian Soho Hotel (hotel) and nonparty Capital Source Finance LLC (CSF), plaintiff's predecessor in interest, executed several loan agreements for the development of the hotel in downtown Manhattan. On the same day, MHG Management, a hotel management company, entered into a long-term hotel management agreement (HMA) with Sochin which gave MHG Management the right to develop and manage the hotel. In addition, Sochin, MHG Management, CSF and defendant Morgans Group LLC entered into a subordination agreement under which MHG Management subordinated all of its rights with respect to the mortgaged property to CSF. On July 1, 2011, CSF assigned the mortgages to plaintiff.

The complaint alleges that Sochin failed to pay the amount due under the mortgages when it became due, and that the entire principal amount of the balance of the loans secured by the mortgages is now due and owing.

The complaint states, on information and belief, that all of the defendants have an interest in or a lien upon the mortgaged property and that defendants' claims are inferior to plaintiff's mortgages (complaint, ¶ 25). Plaintiff seeks a judgment of foreclosure and "[t]hat the mortgaged premises be sold free and clear of any rights of MHG Management and all other defendants in the Mortgaged Premises, including but not limited to any right to manage the Mortgaged Premises" (complaint, prayer for relief, [iv]).

## THE HMA AND SUBORDINATION AGREEMENT

Section 22.16 of the HMA, captioned “Not an Interest in Real Estate”, states that:

“[MHG Management] and [Sochin] agree that it is not the intention of the parties to the Agreement to convey or create an interest in real property. Neither party shall have the right to record this agreement or any memorandum thereof without obtaining the prior written consent of the other party hereto.”

(Goldstein aff, exhibit A).

Section 6 (a) of the Subordination Agreement states that Sochin and MHG Management agree that the HMA and “all right, title and interest, if any, of Manager in and to the Property . . . shall be subordinate to the Loans, Mortgage, and the lien thereof, and all right, title and interest of Lender in and to the Mortgaged Property” (Goldstein aff, exhibit B).

Section 1.6 (c) of that agreement defines “subordinated obligations” to mean, “the obligations of [Sochin] . . . to pay [MHG Management] any and all fees, reimbursable expenses and other sums under or provided for in the management agreement . . .”

(Goldstein aff, exhibit B).

## CONTENTIONS

MHG Management argues that the complaint must be dismissed, as to it, because it is not a proper party to the foreclosure action. It is MHG Management’s position that it does not possess a real property interest in the hotel which is subject to foreclosure and that Real Property and Procedure Law (RPAPL) §§ 1311 and 1313, which delineate necessary and permissible parties to foreclosure actions, expressly provide that only parties holding a property interest are necessary or permissible parties to a foreclosure

action. MHG Management contends that the HMA is a personal services contract not a property interest and, as such, it cannot be foreclosed upon.

Moreover, MHG Management argues that the loan documents at issue explicitly limit the lender's foreclosure rights to the property and other interests pledged to it by the owner. Here, Sochin never pledged the HMA to the lender.

In opposition to dismissal and in support of the cross motion for summary judgment, German American contends that MHG Management is a proper party to this foreclosure action under RPAPL §1311 (1) and/or (3) because the HMA is an incumbrance on the property and/or that MHG Management has a possessory interest in the property. Alternatively, German American argues that MHG Management is a permissive party because the court has the right to order persons who are so connected with the controversy, although not strictly necessary or indispensable, to be brought into the foreclosure for the protection of the parties whom the decree will directly affect.

### **DISCUSSION**

On a motion to dismiss, the “court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003], citing *McGill v Parker*, 179 AD2d 98, 105 [1<sup>st</sup> Dept 1992]); *see also Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [other citations omitted]; *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1<sup>st</sup> Dept 2009])). However, “[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one . . . (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Matter of White Plains Plaza Realty, LLC v Cappelli Enters, Inc.*, 108 AD3d 634, 636 [2d Dept 2013]).

“However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames*, 1 AD3d at 250).

RPAPL § 1311, which delineates the necessary defendants in a mortgage foreclosure action, “codifies the equitable principle that persons holding title to the premises or acquiring any right to or lien on the property subsequent to the mortgage should be made defendants” (*Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 403 [2d Dept 1983]). “The rationale for joinder of these interests derives from the underlying objective of foreclosure actions – to extinguish the rights of redemption<sup>2</sup> of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale” (*id.* at 404). Entities that do not possess any property interest in the mortgaged premises are not necessary defendants within the scope of RPAPL § 1311<sup>3</sup> (*418 Trading Corp. v Moon Realty Corp.*, 285 AD 444, 445 [1<sup>st</sup> Dept 1955] [“those interested in the ownership of the lien to be foreclosed must be joined” as necessary parties]).

RPAPL § 1313, which governs permissible defendants to a foreclosure action, further clarifies that “[a]ny person who is liable to the plaintiff for payment of the debt

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<sup>2</sup> The equity of redemption is an implied right of an owner to redeem its property upon discharge of the mortgage debt secured by collateral (West’s Encyclopedia of American Law, 2d ed. 2008)

<sup>3</sup> RPAPL 1311 (1) and (3) respectively, state that “[e]very person having an estate or interest in possession” and “[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff” are necessary parties to the foreclosure action.

secured by the mortgage may be made a defendant in the action.” Here, plaintiff does not allege, and the documentary evidence fails to establish, that MHG Management was liable to plaintiff for the payment of the debt secured by the mortgage.

In this case, the complaint, as framed, when considered in conjunction with the documentary evidence, fails to establish that MHG Management is a proper party to this foreclosure proceeding. Rather, the documentary evidence establishes that MHG Management did not possess a property interest in the mortgaged premises. In paragraph 13 of the complaint, plaintiff states that MHG Management subordinated all its rights with respect to the mortgaged property to the lender. However, the subordination agreement, by its terms, provides that MHG Management merely subordinated its right to be paid by Sochin. Moreover, plaintiff’s allegation, on information and belief, that MHG Management had an interest in or lien upon the mortgaged property is belied by the HMA which explicitly states that the HMA is not meant to create an interest in real property. Thus, the documentary evidence refutes the allegations in the complaint and establishes that MHG Management did not have a property interest in the mortgaged premises (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1<sup>st</sup> Dept 2001] [where the documentary evidence contradicts the factual allegations, the question becomes whether plaintiff has a cause of action, not whether he or she has stated one]).

Moreover, plaintiff concedes that the HMA is a personal services contract. It is well settled that a personal services contract does not create a property interest in the mortgaged premises. Without a property interest, MHG Management has no equity of redemption in those premises (*see Marriott Intl. Inc. v Eden Roc, LLLP*, 104 AD3d 583,

584 [1<sup>st</sup> Dept 2013] [management agreement “is a classic example of a personal services contract . . . .”]; *Citibank, N.A. v Nyland (CF8) Ltd.*, 692 F Supp 1488, 1491 [SD NY 1987] *affd* 878 F2d 620 [2d Cir 1989] [management agreement is a personal services contract that does not run with the land]). Thus, plaintiff can achieve its goal of extinguishing the rights of redemption of all those who have a subordinate interest in the property without MHG Management’s presence in this foreclosure action.

Although, in certain cases, a court may exercise its discretion to order permissive joinder of a party for the protection of those who the decree will directly affect (*Dye v Lewis*, 67 Misc2d 426, 429 [Sup Ct, Monroe County 1971] *affd* 39 AD2d 828 [4<sup>th</sup> Dept 1972]), here, MHG Management has asserted a contractual right pursuant to the HMA that is unrelated to the foreclosure, and “there are no common questions of law and fact relating to the issue of plaintiff’s right to foreclose” which would make permissive joinder advisable (*Nomura Home Equity Loan Inc. v Vacchio*, 21 Misc 3d 333, 337 [Sup Ct Nassau County]; CPLR 1013). Indeed, permissive joinder may well unduly delay the determination of this action (CPLR 1013).

Accordingly, the documentary evidence when considered within the contextual framework of the complaint establishes that MHG Management is not a proper party to this foreclosure action. Specifically, the relief sought in the complaint is foreclosure and plaintiff’s attempt to frame the issue of whether the HMA, a contractual agreement between Sochin and MHG Management survives foreclosure, as encompassed within the cause of action to foreclose, is without legal basis. Neither the factual underpinnings nor the legal issues raised with respect to the HMA and the subordination agreement

establish that MHG Management had a property interest so as to warrant a determination that MHG Management is a proper party to this action.

While plaintiff may have legitimate concerns regarding MHG Management's allegations with respect to its rights to manage the hotel post-foreclosure, the complaint, as framed, fails to state a legally cognizable cause of action as to MHG Management. In reaching this conclusion, I reach no determination as to whether plaintiff has a potentially viable cause of action against MHG Management.

Because I find that the complaint must be dismissed as against MHG Management, plaintiff's cross motion for summary judgment and MHG Management's motion to strike are denied as moot.

Therefore, it is

ORDERED that defendant Morgans Hotel Group Management LLC's motion to dismiss the complaint as against it is granted (motion sequence 001) and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly, in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support

Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

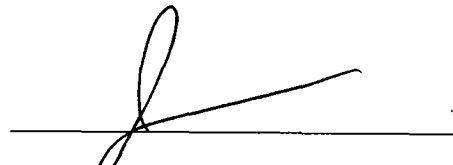
ORDERED that plaintiff German American Capital Corporation's motion for summary judgment is denied as moot (motion sequence 002); and it is further

ORDERED that defendant Morgans Hotel Group Managment LLC's motion to strike portions of counsel's affirmation is denied as moot (motion sequence 003); and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on February 27, 2014 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

Dated: January 27, 2014

ENTER:

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
**J.S.C.**