Nexbank, SSB v Soffer
2014 NY Slip Op 31433(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 652072/13
Judge: Shirley Werner Kornreich

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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NEXBANK, SSB,

Plaintiff,

DECISION & ORDER

-against-

JEFFREY SOFFER and JACQUELYN SOFFER,

Index No. 652072/13

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Jeffrey and Jacquelyn Soffer move (Motion Seq 001) to dismiss the complaint based upon documentary evidence, res judicata, collateral estoppel and failure to state a cause of action. CPLR 3211(a)(1), (5) and (7).

Factual Background

The facts in this section are drawn from the verified complaint and the documentary evidence submitted, as well as documentary evidence submitted in a related action pending in this court before Justice Ramos (Prior Action).[1] As this is a motion to dismiss, the facts in the complaint are accepted as true and given the benefit of every favorable inference. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005).

Plaintiff Nexbank, SSB (Plaintiff), as agent for a consortium of senior lenders (Lenders),[2] brought this action to recover attorneys' fees, pursuant to a non-recourse

[1] The Prior Action is entitled *Nexbank, SSB v Soffer*, Index No. 650866/2011.
[2] Nexbank is the Lenders' successor agent to The Bank of Nova Scotia, New York Agency, which succeeded the initial agent, Deutsche Bank Trust Company Americas (for convenience, Plaintiff and its predecessors will be referred to in this decision as Plaintiff).

carve out guaranty, dated as of October 25, 2006 (Guaranty). Doc 5, Ex 9.[3] The Guaranty was executed by defendants Jeffrey Soffer and his wife, Jacquelyn Soffer (collectively, Defendants). *Id.* Paragraph 28 of the Guaranty provides that Defendants' liability under the Guaranty is joint and several. *Id*, §28.

Non-party Turnberry/Centra Sub, LLC (Turnberry or Borrower) entered into a construction loan agreement, dated as of October 25, 2006, between Plaintiff, as Agent, and Turnberry, as Borrower (CLA). Doc 5, Ex 2. Pursuant to the CLA, Turnberry borrowed $475,000,000.00 (Loan) to construct a 1,500,000 square foot, mixed use development in Las Vegas, Nevada (Property). The CLA recited that Jeffrey Soffer and Jacquelyn Soffer executed the CLA:

> for the purpose of agreeing to comply with, perform and observe all obligations, covenants, obligations [sic] and duties and make, as and when required, all representations and warranties, hereunder and under any other Loan Document that purport to bind it or apply to it, including those provisions of the Loan Documents that apply to a "Borrower Party" or the "Borrower Parties".

Id, p S-3. Mrs. Soffer also executed the CLA as Managing Member of Turnberry. *Id.* The CLA defines "Borrower" as Turnberry and "Borrower Parties" as including the Defendants-Guarantors. *Id*, pp 1, 5 & 16. A CLA recital states that Turnberry owned fee simple title to the Land where the development was to be built. *Id*, p 1. "Mortgaged Property" is defined as including "the Land" and has "the meaning given to such term in the Deed of Trust." Doc 5, Ex 2, p 24.

The Loan matured on March 2, 2009, and Turnberry failed to pay it on the Maturity Date or thereafter. Compliant, ¶13. Under the CLA, failure to pay the Loan on

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[3] References to "Doc" refer to the New York State Electronic Filing System number.

the Maturity Date was a default. Doc 5, Ex 2, §11.1(a)(i). The remedies for default included bringing an action to foreclose, pursuant to the Deed of Trust. *Id*, §11.1(b).

Prior to the Loan's Maturity Date, on February 25, 2011, Mr. Soffer and non-party Turnberry Development, LLC (Turnberry Development), a Florida limited liability company, commenced an action against Plaintiff, in the District Court of Clark County, Nevada, entitled *Soffer v The Bank of Nova Scotia, New York Agency*, No. A-11-635777-C (Nevada Action). Complaint, ¶14. The Nevada Action complaint admitted that Jeffrey Soffer and Turnberry Development are agents of Turnberry, a principal and managing agent, respectively (for convenience, Turnberry Development, Jeffrey Soffer and Turnberry will be referred to collectively as Turnberry). Doc 5, Ex 3, ¶¶ 1-3.

Subsequently, also in Nevada, Plaintiff brought a non-judicial foreclosure of the Mortgage, pursuant to the Deed of Trust. See Prior Action, Doc 5 & Exs thereto. Less than twenty-four hours before the foreclosure sale scheduled for March 1, 2011, Turnberry, filed an ex parte application in the Nevada Action for a temporary restraining order and preliminary injunction enjoining the foreclosure sale of the Property. Complaint, ¶15. On March 1, 2011, Turnberry recorded a lis pendens against the Property, dated February 28, 2011 (Lis Pendens). *Id*, ¶16.

One of the claims made by Turnberry in the Nevada Action was that Plaintiff breached an agreement to extend or restructure the Loan by commencing the foreclosure proceeding. See Nevada Action Second Amended Complaint, Doc 5, Ex 3. The third and fifth causes of action sought, respectively, a preliminary injunction enjoining Plaintiff from transferring the Property and specific performance compelling Plaintiff to

transfer the Property to Soffer and/or his new business entity. *Id.*[4] In its answer to the Nevada, second amended complaint, Plaintiff prayed for an award of reasonable attorneys' fees incurred in defending the action. Doc 5, Ex 4, p 11.

On March 4, 2011, an affiliate of the Lenders acquired title to the Property at the foreclosure sale. Complaint, ¶19. Plaintiff alleges that the pendency of the Nevada Action and the Lis Pendens clouded the title and impaired the value of the Property. *Id.*

Turnberry withdrew the application for the preliminary injunction after Plaintiff submitted its opposition to the motion. Complaint, ¶18. The Nevada Action continued for more than seventeen months, causing Plaintiff to incur attorneys' fees in the amount of $3,200,000.00 (Fees). Complaint, ¶20.

On August 31, 2012, Plaintiff's motion for summary judgment in the Nevada Action was granted and the second amended complaint was dismissed. Doc 5, Ex 5. On September 6, 2012, the Nevada District Court granted an order cancelling and expunging the Lis Ppendens. Doc 5, Ex 6. In this action, pursuant to the Guaranty, Plaintiff seeks to recover the Fees it paid for the defense of the Nevada Action.

The parties agree that the purpose of the Guaranty, commonly referred to as a "bad boy" guarantee, was to discourage borrowers and guarantors from committing certain "bad boy" acts. Doc 6, p1; Doc 11, p 3. Thus, unlike a payment guarantee, which is triggered when a borrower fails to pay an amount when due, a bad boy guarantee is triggered when one of the enumerated bad acts occurs.

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[4] Paragraph 17 of the complaint in this action alleges that on March 21, 2011, Soffer filed a first amended complaint in the Nevada Action seeking injunctive relief and specific performance, but the record contains only a copy of the second amended complaint, which was filed in November, 2011.

The Guaranty provides that undefined, capitalized terms in the Guaranty have the meaning set forth in the CLA. Doc 5, Ex 9, §29, p 12. The obligations guaranteed by Defendants pursuant to the Guaranty, defined as the "Guaranteed Obligations", include, *inter alia*:

> [a]ny Loss (which may include … reasonable attorneys' fees … incurred by Agent [Plaintiff] … and arising out of or connected with any of the following circumstances …. (G) ***the placing voluntarily of a Lien on any portion of the Mortgaged Property by Borrower***….[emphasis supplied]

Id, §1(a), pp 1-2. As previously noted, the plaintiffs in the Nevada Action, who filed the Lis Pendens, were agents of Turnberry, the Borrower. Doc 5, Ex 3, ¶¶ 1-3. The CLA defines "Loss" as including "reasonable legal fees."

The CLA defined "Lien" as follows:

> "Lien" shall mean any mortgage, deed of trust, lien (statutory or other), pledge, hypothecation, assignment, preference, priority, security interest or other encumbrance or charge on or affecting the Collateral, Borrower or any Borrower Party … , the filing of any statement or similar instrument under the Uniform Commercial Code or comparable Law or Regulation of any other jurisdiction, domestic or foreign, and mechanics', materialmen's and other similar liens or encumbrances.

Doc 5, Ex 2, p 21.

After submission of the motion, Defendants submitted a letter to this court stating that the Prior Action pending before Justice Ramos had rejected Plaintiff's claim for a deficiency judgment against the Soffers based upon a separate payment guaranty of $40,000,000, dated as of October 25, 2006, as amended on January 24, 2007 (Payment Guarantee). The Payment Guaranty was issued as security for the Loan, pursuant to the CLA. In the Prior Action, Plaintiff alleged that on March 4, 2011, the Property was sold at a non-judicial foreclosure sale to the Lenders' agent, TSLV LLC, for $276,500,000.

Prior Action, Doc 5, ¶¶ 27 & 41 and Exs 25-27. On May 14, 2014, Justice Ramos granted Defendants' motion to confirm the amended report of Judicial Hearing Officer Gammerman, dated December 16, 2013 (Report). Prior Action, Doc 131. The Report found that, at the time of the foreclosure sale, the fair market value of the Property was $527,000,000.00, which exceeded $516,126,358.42, the highest amount allegedly due on the Loan.[5] Prior Action, Doc 112. Hence, the Report recommended that the Soffers were not liable on the Payment Guarantee because there was no deficiency left after the foreclosure sale of the Property to the Lenders' affiliate. Justice Ramos confirmed that finding.

Defendants now argue that the decision on the Payment Guarantee forecloses the relief sought in this action because it established that the Loan was more than fully satisfied. For the reasons that follow, Defendants' motion to dismiss is denied.

Discussion

I. Choice of Law

The court must determine whether the Lis Pendens filed by Turnberry was an act that triggered the Guaranty. However, a threshold question is whether New York or Nevada governs the definition of a Lien under the CLA.

With respect to choice of law, the CLA provides that:

> IN ALL RESPECTS, INCLUDING MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE

[5] The Report found that the principal balance due on the Loan, as of March 2, 2009, was $448, 645,203.42, late charges amounted to $22,432,260, and "claimed" default interest was $45,048,895, which including default interest totaled $516,126,358.42. Prior Action, Doc 112, p 2.

> STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE AND ANY APPLICABLE LAW OF THE UNITED STATES, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAWS OF THE STATE IN WHICH THE MORTGAGED PROPERTY IS LOCATED [NEVADA]....

Doc 5, Ex 2, p 136. The CLA defined the "Deed of Trust" as one of the "Loan Documents". Doc 5, Ex 2, p 21. The definition of "Mortgaged Property" in the CLA "includes the Land" and has "the meaning given to such term in the Deed of Trust". *Id*, p 24. "Collateral" is defined as:

> All property of Borrower ... in which Agent [Plaintiff] has ... a security interest for the benefit of the Lenders hereunder, under the Deed of Trust ... and the other Loan Documents.

Id, p 7. Hence, the Collateral includes the Land secured by the Mortgage described in the Deed of Trust, i.e., the Property.

The choice of law issue turns on whether the definition of Lien relates to a provision for the "creation, perfection and enforcement of" the liens and security interests created pursuant to the CLA or under any of the Loan Documents. Nevada law applies to that issue because it relates to a provision for the enforcement of the Deed of Trust, i.e., the right to foreclose the Mortgage for non-payment of the Loan. The Deed of Trust was defined in the CLA as one of the Loan Documents and the Mortgage was a security interest created by the Deed of Trust. The clear import of the choice of law provision was to apply the law of the forum where the Property was located to the enforcement of

the collateral for the Loan, including foreclosure of the Mortgage pursuant to the Deed of Trust.

Further, it is undisputed that in the Nevada Action, Turnberry filed the Lis Pendens because it claimed title to the Property and sought to enjoin the foreclosure proceeding. Both of those actions were directed at stalling the enforcement of the Mortgage that stood as security for the Loan. Therefore, the definition of Lien is governed by Nevada law because whether or not it included the lis pendens relates to the enforcement of security for the Loan.

II. Triggering of the Guaranty

There is no dispute that the filing of the Lis Pendens was a voluntary act. Turnberry did not have to file the Nevada Action. However, Defendants admit that once they brought the case, they had to file the Lis Pendens pursuant to a Nevada statute that requires a plaintiff to file a lis pendens in any action "affecting the title or possession of real property." Nev. Rev. Stat. Ann. § 14.010. Defendants' memorandum of law states that the Nevada Action "necessarily concerned title to the mortgaged property and under Nevada law a *lis pendens* was proper (and required)." Doc 6, p 2.

The Guaranty was triggered because the lis pendens was an encumbrance under Nevada law. *Uranga v. Montroy Supply Co.*, 125 Nev 1085, 281 P3d 1227 (Nev. Sup Ct 2009) (lis pendens encumbered personal residence); *Levinson v The Eight Judicial Court of the State of Nevada*, 109 Nev 747, 857 P.2d 18 (Nev. Sup Ct 1993). Therefore, it was a Lien as defined in the CLA that was filed voluntarily by agents of the Borrower, and was an enumerated "bad boy" act under the Guaranty. It is unnecessary to consider

Plaintiff's alternative argument that allegations made by the complaint in the Nevada Action constituted misrepresentations that triggered the Guaranty. As liability under the Guaranty is joint and several, when Turnberry voluntarily filed the Lis Pendens, it triggered the liability of both Defendants, Mr. and Mrs. Soffer.

III. Res Judicata & Collateral Estoppel

Defendants' res judicata argument is based on the fact that Plaintiff asked for, could have, but did not, recover the Fees in the Nevada Action. In addition, Defendants claim that under Nevada's compulsory counterclaim law, Plaintiff had to counterclaim for the Fees, citing Nevada Rule of Court 13(a). Defendants also urge that because the Prior Action determined that there was no deficiency left, this action is moot, i.e., after the Loan was satisfied, the Guaranteed Obligations under the Guaranty were satisfied.

In opposition, Plaintiff asserts the following: 1) the issues determined in the Nevada Action were not the same as the issues presented by this action for Fees under the Guaranty; 2) there is no proof that the court in the Nevada Action considered the Fees; 3) Fees could not have been considered in the Nevada Action because there was no jurisdiction over Mrs. Soffer; 4) Fees under the Guaranty were not a compulsory counterclaim under Nevada Rule of Civil Procedure 13(a); 5) Defendants waived the defense of res judicata in §§ 2 and 4 of the Guaranty; 6) the Prior Action did not moot this one because the Guaranteed Obligations are broader than payment of the Loan; and 7) the purpose of a "bad boy" guarantee would be frustrated if payment of the Loan was a defense. The court agrees that Defendants waived the defenses of res judicata and collateral estoppel and that the Prior Action did not moot liability for the Guaranteed Obligations, which are broader than payment of the amount due under the Loan.

Section 2 of the Guaranty provides that:

> This is an irrevocable, absolute, continuing guaranty of payment, and not a guaranty of collection.... It is the intent of the Guarantors ... that the obligations and liabilities of the Guarantors hereunder are absolute and unconditional under any and all circumstances and that until the Guaranteed Obligations are fully and finally satisfied or there is no continuing liability or obligations of Borrowers under the Loan Documents, such obligations and liabilities of the Guarantors shall not be discharged or released in whole or in part, by any act or occurrence which might ... be deemed a legal or equitable discharge or release of the Guarantors.

Doc 5, Ex 9, §2. While §2 uses the disjunctive "or", i.e., the obligations of Defendants would be discharged when the Guaranteed Obligations were fully satisfied or there were no obligations of the Borrowers under the Loan Documents, that general provision is overridden by the more specific §18, stating that the liability under the Guaranty is broader than liability under the other Loan Documents. *Aguirre v City of New York*, 214 A.D.2d 692 (2d Dept 1995) ("Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls."). Section 18 provided:

> The Guarantors agree that this Guaranty is separate from, independent of and in addition to the Guarantors' undertakings under the other Loan Documents. The Guarantors agree that, at Agent's election, a separate action may be brought to enforce the provisions of this Guaranty which shall in no way be deemed to be an action on the Notes, the Deed of Trust or any of the other Loan Documents.

Doc 5, Ex 9, §18, p 10. Thus, Defendants' obligations under the Guaranty were broader than their liability under the Payment Guaranty or the Loan, and the Guaranty can be enforced in this separate action.

Section 4, also makes it clear that the Guaranteed Obligations were broader than payment of the Loan, as does the purpose of the "bad boy" guarantee, which was to deter certain acts, not to ensure payment. Pursuant to §4 of the Guaranty, entitled "No Limitation of Liability", Defendants waived all defenses, except full payment of the Guaranteed Obligations, including res judicata and collateral estoppel. They agreed that their obligations under the Guaranty would not be:

> Released, limited diminished, impaired, reduced or adversely affected by any of the following, and waive any rights which they might have otherwise as a result of or in connection with any of the following:
>
> (f) Any sale, … or foreclosure of the …Deed of Trust …; …
>
> (j) The …unenforceability of any part of the … Guaranteed Obligations … for any reason whatsoever, including … the … repayment of the Guaranteed Obligations is … unenforceable … or Borrower has valid defenses … (whether at law, in equity or otherwise), which render the …Guaranteed Obligations … uncollectible from the Borrower; …
>
> (k) The taking or accepting of any other security, collateral or guaranty, … for all or any part of the Loan or Guaranteed Obligations; …
>
> (q) The failure of [Plaintiff] … to exercise … any right or remedy or take any action against Borrower or any collateral or security available to it; …
>
> (s) Any existing or future offset, claim or defense of Borrower or any other Person against [Plaintiff] or Lenders or against payment or performance of the Guaranteed Obligations …' …
>
> (v) Any circumstance which might in any manner or to any extent constitute a defense available to the Borrower, or vary the risk of the Guarantors, or might otherwise constitute a legal or equitable discharge or defense available to … the Guarantors, whether similar or dissimilar to the foregoing.
>
> ***It is the unambiguous and unequivocal intention of the Guarantors that the Guarantors shall be obligated to pay … the Guaranteed Obligations when due, notwithstanding any other occurrence, circumstance, event, action or omission whatsoever, whether contemplated or uncontemplated, and whether or not otherwise or particularly described herein, except for the full and final payment and satisfaction of all Guaranteed Obligations.***

Doc 5, Ex 9, §4, pp 3-4 [emphasis supplied]

Section 5 of the Guaranty says that Plaintiff did not have to pursue the enforcement of the Guaranteed Obligations and that its failure to do so was not a defense. It provides that the Guaranteed Obligations shall be paid by Guarantors to Plaintiff "immediately on written demand" and:

> neither [Plaintiff] nor Lenders shall be required to … take any other action to reduce, collect or enforce the …Guaranteed Obligations. No … defense of any kind or nature which Guarantors have or may hereafter have … shall be available hereunder to the Guarantors.

Section 8, provided that Plaintiff could sue under the Payment Guarantee without impairing its rights under the Guaranty:

> The Guarantors agree that [Plaintiff] … in its sole discretion, may bring suit against any other guarantor… without impairing the rights of Plaintiff… against the Subject Guarantors.

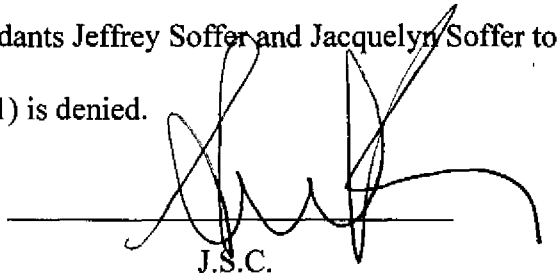
As previously noted, the Guaranteed Obligations includes the Fees arising out of the "***placing voluntarily of a Lien on any portion of the Mortgaged Property by Borrower***". Doc 5, Ex 9, §1 (a).

As the Guaranty unequivocally provides that Defendants cannot raise defenses other than full payment of the Guaranteed Obligations, including the Fees, they cannot raise res judicata or collateral estoppel. An agreement to waive those defenses is enforceable. *Stoner v. Culligan, Inc.*, 32 A.D.2d 170, 174 (3d Dep't 1969) (since object is to protect party from multiplicity of actions, he may waive the protection). Further, the Guaranty clearly provides that Plaintiff had the discretion to choose not to enforce any remedy. Thus, it did not have to enforce the Guaranty in the Nevada Action or in the Prior Action before Justice Ramos.

Finally, the determination in the Prior Action concerned only payment of the amount due under the Loan, while the "bad boy" Guarantee is broader. It encompasses payment of the Fees for the voluntary placing of an encumbrance on the Property, separate and apart from the amount due on the Loan or the Payment Guaranty. Plaintiff is correct that preventing enforcement of the Guaranty because the Loan was satisfied would undermine the purpose of preventing the enumerated bad acts. As a result, the Guaranty is not fully paid, can still be enforced and was not mooted by the Prior Action. It is unnecessary to consider the remaining arguments of the parties. Accordingly, it is

ORDERED that the motion by defendants Jeffrey Soffer and Jacquelyn Soffer to dismiss the complaint (Motion Sequence 001) is denied.

Dated: May 30, 2014



J.S.C.