

Nexbank, SSB v Soffer
2015 NY Slip Op 30167(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 652072/2013
Judge: Shirley Werner Kornreich
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**SHIRLEY WERNER KORNREICH
J.S.C.**

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

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NEXBANK, SSB,

Index No.: 652072/2013

Plaintiff,

DECISION & ORDER

-against-

JEFFREY SOFFER and JACQUELYN SOFFER,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff Nexbank, SSB moves, pursuant to CPLR 3212, for partial summary judgment on liability against defendants Jeffrey Soffer and Jacquelyn Soffer. Defendants oppose and cross-move for summary judgment. Plaintiff's motion is granted and defendants' cross-motion is denied for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with its decision on defendants' motion to dismiss, which is set forth in an order dated May 30, 2014 (the MTD Decision). *See* Dkt. 21.¹ The MTD Decision discusses the allegations and relevant contracts, which are not repeated here. Simply put, the court held that the lis pendens (the LP) defendants filed in Nevada is an encumbrance that triggers defendants' obligations under the Guaranty. Though defendants have not moved for reargument of this holding, their brief on the instant motion contains arguments attacking the MTD Decision. Such arguments, however, rehash issues expressly considered and rejected on the motion to dismiss. The court does not believe the MTD Decision was wrongly decided, and

¹ All capitalized terms have the same meaning as in the MTD Decision.

will not repeat its rationale here, as the MTD Decision provides a clear explanation for the court's holding.

The only point worth reemphasizing is the court's holding that one must look to Nevada law to determine if the LP is an encumbrance. The relevant inquiry *is not* whether New York law would define an LP as an encumbrance (in any event, plaintiff has the better argument), but rather that one cannot discern the impact an LP has on a property unless one looks to the jurisdiction where that property is located (here, Nevada). Thus, even if an LP might not have the same impact on a New York property under New York law, what matters is whether the LP *actually encumbers* the subject property in Nevada. Nevada law is the only law that can provide an answer to that question. Under Nevada law, the LP impacted the property in the manner discussed in the MTD Decision and, hence, the court held the LP to be an encumbrance under the Guaranty. Here, the court will limit its discussion to issues raised for the first time on the instant motion and subsequent procedural developments.

After the MTD Decision was issued, plaintiff stated it would move for summary judgment. In an order dated July 1, 2014, the court stayed discovery pending determination of that motion. *See* Dkt. 30. On July 25, 2014, plaintiff moved for (1) summary judgment on liability on its claim that the LP *and* all of its Nevada litigation costs are covered by the Guaranty; and (2) an inquest on damages. On September 3, 2014, defendants opposed and cross-moved for summary judgment and dismissal of all of plaintiff's claims or, in the alternative, requested that the court (as opposed to the Referee) oversee any and all discovery if an inquest is ordered. Oral argument was held on December 9, 2014. *See* Dkt. 57 (12/9/14 Tr.).

Given the court's decision on plaintiff's LP claim, plaintiff is entitled to summary judgment on liability as to that claim. It should be noted, however, that since plaintiff is not moving for summary judgment on the disputed issue of whether its damages are limited to litigation costs or other expenses incurred due to the LP (e.g., extra financing costs) [*see* Dkt. 57 at 3-4], an inquest is premature. The parties will address this issue at a conference, which is ordered below.

As for the Nevada litigation which gave rise to this lawsuit, the procedural history is important. At the trial court level, plaintiff sought (1) vacator of the LP; (2) dismissal of defendants' claim for specific performance of the term sheet; (3) dismissal of defendants' claim for unpaid management fees; and (4) prevailing-party costs. *See* Dkt. 55² at 107-08. The Nevada trial court granted plaintiff all of its requested relief. *Id.* at 108. Defendants did not appeal the vacator of the LP, but appealed the balance of the trial court's decisions.

In an order dated July 25, 2014 (the very day plaintiff filed the instant motion), the Supreme Court of Nevada affirmed in part and reversed in part. The Court affirmed the dismissal of defendants' claims to enforce the term sheet, holding it to be unenforceable. *See id.* at 108-12. However, defendants' claims for unpaid management fees were reinstated and, therefore, the award of prevailing-party costs was vacated as premature. *See id.* at 112-13. On August 18, 2014, *en banc* review was ordered. *See id.* at 116.

² Exhibits should be e-filed as separate documents, as opposed to one pdf that includes an attorney's affirmation and all of the exhibits.

II. *Legal Standard*

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. *Discussion*

The parties dispute two issues: (1) whether the Nevada litigation triggers liability under the Guaranty; and (2) the viability of defendants' affirmative defenses.

A. *The Nevada Litigation*

Plaintiff argues that all of the Nevada litigation, not only the LP litigation at the trial-court level, triggers liability under the Guaranty. Plaintiff is concerned that if it is only entitled to costs from the portion of the litigation where it persuaded the Nevada trial court to vacate the LP, this would be a pyrrhic victory since, as defendants' chose not to appeal that ruling, the significant expense plaintiff incurred on appeal of the other portions of the litigation would not be recoverable. Defendants, in contrast, maintain that none of the litigation costs are recoverable. As with the LP, the relevant inquiry is whether the Nevada litigation is an encumbrance under the Guaranty (the meaning of which has been ruled on in the MTD Decision).

The starting point is plaintiff's and defendants' agreement that the LP does not, on its own, impact the ability to convey or refinance the property. Rather, the LP simply notifies parties interested in doing so that litigation is pending. It is that awareness, caused by the LP, which encumbers the property. In other words, an LP plus litigation is an encumbrance – especially where, as here, defendants' position in the Nevada litigation is that the term sheet is binding and enforceable against plaintiff. If a prospective purchaser knows, via the LP, that defendants are currently suing plaintiff over its right to sell to another purchaser based on an allegedly enforceable term sheet, the prospective purchaser will either opt out of the sale or the terms of the sale will be impacted. It follows, therefore, that if (as the court has already ruled) the LP is an encumbrance because it publicizes the litigation, the litigation itself must also be an encumbrance because its existence is what actually creates the fear and uncertainty that clouds

title. Consequently, the Nevada litigation is an encumbrance under the Guaranty, and defendants must pay for plaintiff's costs in that litigation.

That being said, defendants correctly maintain that certain portions of the Nevada litigation are not covered by the Guaranty. The court, nonetheless, rejects defendants' argument that only the motion practice to vacate the LP is covered, since the term sheet litigation (both at the trial court and appellate level) is, at bottom, what encumbered the property. In contrast, plaintiff has no right to recover for the portions of the Nevada litigation that do not constitute such an encumbrance, such as defending defendants' management fees claim. A mere breach of contract claim that does not cloud title does not encumber the property. The determination of how much of plaintiff's legal fees are attributable to that portion of the litigation will be determined at the inquest.

B. Defendants' Set-Offs

There is no merit to defendants' argument that the judgment in another action in this court over enforcement of the Guaranty of the construction loan can be used as an equitable set-off to the legal claims asserted by plaintiff in this action. The other action, also styled *Nexbank, SSB v Soffer* (Index No. 650866/2011) (Ramos, J.), involves the same parties and the same attorneys, and familiarity with that case is presumed. In that case, J.H.O. Gammerman held that the value of the property which secured the construction loan exceeded the loan by approximately \$11 million and, therefore, no deficiency judgment existed; hence, plaintiff could not recover any money under the Guaranty. *See* Index No. 650866/2011, Dkt. 112. That ruling was confirmed by Justice Ramos, and judgment was entered on September 12, 2014. *See* Index No. 650866/2011, Dkt. 130 (4/7/14 Tr.), Dkt. 134 (order), Dkt. 139 (judgment).

Defendants argue that plaintiff's approximately \$11 million of an "equitable windfall" in Justice Ramos' case should be used to set off any potential liability in this case. In opposition, plaintiff contends that New York law does not permit such an equitable set-off and, in any event, the Guaranty waives all defenses except "full payment of the Guaranteed Obligations."³ See MTD Decision at 11. Plaintiff is correct.

Plaintiff's "windfall" is simply a hypothetical one whose purpose is strictly limited to computing liability for the mortgage default. A market-value credit under the RPAPL used to deny a deficiency judgment in a mortgage default proceeding is inapposite in a separate action at law. See *Stochastic Decisions, Inc. v Wagner*, 34 F3d 75, 79-80 (2d Cir 1994) ("Where the action 'is on a debt separate and apart from the mortgage debt,' [RPAPL § 1371] is inapplicable."), quoting *Commercial Trading Co. v Freidus*, 114 AD2d 292, 296 (1st Dept 1986). That is why, as is the case here, "a separate action may be brought against the guarantors for any money ultimately owed to [the bank] under the 'bad-boy non recourse carveouts.'" *Wachovia Bank v 75 Schermerhorn LLC*, 2009 WL 2574370 (Sup Ct, Kings County 2009), citing *P.T. Bank Cent. Asia v Wide Motion Corp.*, 233 AD2d 151 (1st Dept 1996) (RPAPL inapplicable "on a debt that is separate and distinct from the mortgage debt"); see *Minin v 2494 Amsterdam Ave. LLC*, 2011 WL 5295204 (Sup Ct, NY County 2011) (bank may maintain "a separate action to enforce the guaranty because the guaranty represented a debt separate and

³ For this reason, defendants' only remaining defenses are the scope of damages (i.e., non-litigation costs) and the amount of damages, the latter of which will be determined at an inquest. Defendants' other affirmative defenses, which are pled in the answer in a boilerplate manner, are dismissed. Even if such defenses were not waived or waiveable, the court has considered defendants' arguments as to why these defenses are viable [*see* Dkt. 54 at 28-29] and finds them unavailing.

apart from that secured by the mortgage”), citing *Crossland Savings, FSB v Sackman Enterprises, Inc.*, 181 AD2d 432 (1st Dept 1992).

As defendants themselves explain, the very point of a “bad-boy” guaranty is to deter bad acts that cloud title to the property and which cause actual pecuniary harm. That is precisely what occurred here when defendants commenced meritless litigation over the term sheet in Nevada and caused plaintiff to suffer very real and substantial legal bills and expenses. The appraised increase in the property’s value does not provide plaintiff with a real world set-off to those expenses. Allocating defendants an equitable set-off based on money that does not line plaintiff’s pockets provides no solace. Ergo, such a set-off is not equitable.

Whatever judgment is entered in this action may be recovered in full if the deficiency judgment ruling is affirmed by the New York appellate courts. However, should the appellate courts award a recovery to plaintiff that exceeds the limits of the Guaranty, that judgment might moot this action. Such a ruling would only impact the enforceability (or the collectible amount) of a judgment in this case, and that possibility does not warrant a stay in the interim.⁴ The parties, therefore, shall appear in court on the date set forth below for a conference.

Accordingly, it is


ORDERED that the motion by plaintiff Nexbank, SSB for partial summary judgment on liability against defendants Jeffrey Soffer and Jacquelyn Soffer is granted to the extent set forth in this decision, and defendants’ cross-motion for summary judgment is denied; and it is further

⁴ Unless, of course, the parties agree to a conditional settlement that depends on the outcome of the appeal. See *In re Electronic Books Antitrust Lit.*, 2014 WL 3798764, at *1 (SDNY 2014).

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County,
60 Centre Street, Room 228, New York, NY, for a preliminary conference on February 19, 2015
at 11:00 in the forenoon.

Dated: February 3, 2015

ENTER:



SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.