

AC I Ledgewood Mezz LLC v DMR CRE Opportunity Fund I LP
2015 NY Slip Op 30198(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 153809/2014
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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AC I LEDGEWOOD MEZZ LLC,

Plaintiff,

-against-

Index No. 153809/2014
Motion Seq. No. 003
Motion Date: 9/17/2014

DMR CRE OPPORTUNITY FUND I LP,
DECLARATION MANAGEMENT & RESEARCH
LLC, BCM CRE OPPORTUNITY FUND I, LP,
BALTORO CAPITAL MANAGEMENT, LLC and XL
LEDGEWOOD LLC,

Defendants.

-----X
BRANSTEN, J.:

Plaintiff AC I LedgeWood Mezz LLC (“Borrower”) brings this action to vacate the October 21, 2013 sale of its membership interests in AC I LedgeWood LLC (“LedgeWood” or the “Collateral”) to defendant XL LedgeWood LLC (“XL”). In addition, the Borrower seeks to halt the imminent sale by XL of LedgeWood’s sole asset: real property consisting of the commercial shopping center known as the LedgeWood Mall located at 461 Route 10 West, LedgeWood, New Jersey 07852 (the “Property”). Plaintiff contends that, in conducting the sale, defendant BCM CRE Opportunity Fund I, LP (“BCM”) acted in a commercially unreasonable manner, resulting in an absence of bidders, which permitted defendant XL, BCM’s affiliate, to acquire the Collateral and the Property for far below actual value.

This action, however, is virtually identical to plaintiff’s prior failed attempt to interfere with XL’s ownership of the membership interests in LedgeWood. This Court

previously found that the Uniform Commercial Code (“UCC”) foreclosure sale of LedgeWood was noticed and otherwise conducted in accord with the New York UCC, and therefore allowed the UCC foreclosure sale to proceed on October 31, 2013. Nevertheless, plaintiff duplicates verbatim arguments in this case that this Court rejected over a year ago. Indeed, the only difference is one of semantics. Plaintiff is now claiming that the Sale was “manifestly unreasonable,” as that term is defined by UCC 602, as opposed to “commercially unreasonable,” as that term is defined in UCC 610, which was its argument in the prior action.

Defendants now move, pursuant to CPLR 3211, to dismiss the amended complaint in its entirety. For the reasons set forth below, defendants’ motion to dismiss is granted.

I. Background

A. The Loan

Plaintiff entered into a mezzanine loan with BCM in the original principal amount of \$10,000,000 (the “Mezzanine Loan”). (Am. Compl. ¶ 17). As security for the Mezzanine Loan, plaintiff granted a first priority security interest in all of its membership interests in LedgeWood to BCM through a Pledge and Security Agreement dated May 9, 2011 (the “Pledge”). *Id.* ¶ 19; *see also* Affidavit of Michael Kelley (“Kelley Aff.”) Ex. A (Pledge).

Upon any default of the Mezzanine Loan, the Pledge allows BCM to “exercise all rights and remedies of a secured party” under the Uniform Commercial Code. (Pledge §

10(i.) The Pledge also contains a contractually agreed-upon manner in which to notice and hold a “public sale,” as that term is defined by the New York UCC. Specifically,

Section 11(e) of the Pledge states:

Without in any way limiting Mezzanine Lender’s rights to conduct a foreclosure sale in any manner which is commercially reasonable (so long as Lender has given Pledgor at least ten (10) days’ written notice of the same and Pledgor has had an opportunity to bid at such sale), Pledgor hereby agrees that any foreclosure sale conducted in accordance with the following provisions shall be considered a commercially reasonable sale and hereby irrevocably waives any right to contest any such sale:

- (i) Mezzanine Lender conducts the foreclosure sale in the State of New York;
- (ii) The foreclosure sale is conducted in accordance with the law of the state of New York;
- (iii) Not more than ten (10) days before, and not less than five (5) days in advance of the foreclosure sale, Mezzanine Lender notifies Pledgor at the address set forth herein of the time and place of such foreclosure sale;
- (iv) The foreclosure sale is conducted by an auctioneer licensed in the State of New York and is conducted in front of the New York Supreme Court located in New York City or such other New York State Court having jurisdiction over the Collateral on any Business Day between the hours of 9 a.m. and 5 p.m.;
- (v) The notice of the date, time and location of the foreclosure sale is published in the New York Times or Wall Street Journal (or such other newspaper widely circulated in New York, New York) and the Wilmington News Journal (or such other newspaper widely circulated in Delaware) for seven (7) consecutive days prior to the date of the foreclosure sale; and
- (vi) Mezzanine Lender sends notification of the foreclosure sale to all secured parties identified as a result of a search of the UCC financing statements in the filing offices located in the States of

Delaware and New Jersey conducted not later than twenty (20) days and not earlier than thirty (30) days before such notification date.

BCM contends that it properly noticed a public sale for October 21, 2013, in accordance with these terms and conditions.

The Pledge also requires notice to the Pledgor at least ten days prior to such sale, and such notice is “deemed reasonable and proper”:

If any notice of a proposed sale or other disposition of Collateral shall be required by law, such notice shall be deemed reasonable and proper if given at least ten (10) before such sale or other disposition. Notwithstanding anything herein to the contrary, Mezzanine Lender shall provide written notice to Pledgor of any proposed sale or other disposition of any Collateral (any such notice shall be given to Pledgor, with a copy to its counsel, in accordance with the terms of Section 19 [d] hereof) ten (10) days prior to such sale of disposition.

(Pledge, § 10(iv).) BCM asserts that it similarly complied with this notice requirement.

B. *Plaintiff's Default*

In the amended complaint, plaintiff acknowledges that it failed to make its required monthly payments for April, June, and July 2013. Due to this default, on April 13, 2013, BCM sent a Notice of Default to plaintiff. *See Kelley Aff. Ex. B.*

C. *October 21, 2013 Sale*

BCM noticed a public sale (the “Sale”) of the membership interest in AC I LedgeWood for October 17, 2013 at 11 a.m. on the first floor under the Rotunda of the New York Supreme Court, 60 Centre Street, New York, New York, to be conducted by a

licensed New York auctioneer. *See* Affirmation of Armando Batastini (“Batastini Affirm.”) Ex. A & Am. Compl. ¶ 32. The Notice contained the following:

- Identification of the subject of the Public Sale as, *inter alia*, “[t]he legal and beneficial ownership of 100% of the membership interests in the Debtor in AC I LedgeWood LLC, a Delaware limited liability company and the fee owner of the LedgeWood Mall, an approximately 441,424-square-foot enclosed mall plus approximately 75,727 square feet of retail space in two out parcel buildings, all situated on approximately 46.46 acres located in Roxbury, New Jersey.”
- Notice that ‘The Debtor is entitled to an accounting of the unpaid indebtedness secured by the Collateral intended to be sold, and the accounting may be requested by telephone from the undersigned.’”

(Batastini Affirm. Ex. A.)

By notice dated October 9, 2013, BCM later continued the Sale to October 21, 2013. *See* Batastini Affirm. Ex. B-1 & Am. Compl. ¶ 32.

BCM also advertised the Sale in accordance with Section 11(e) of the Pledge. Specifically, advertisements of the Notice ran in the New York Times and The Wilmington News Journal, on seven consecutive days, from October 14 through 20, 2013. *See* Kelley Aff. Exs. C-1 & C-2. BCM additionally ran the Notice in the Newark Star-Ledger on October 15 and 16, 2013. *See* Kelley Aff. Exs. D-1 & D-2. Additionally, BCM provided notice to the Borrower and all other required parties on October 11 and 15, 2013, via email and Federal Express. *See* Batastini Affirm. Ex. B-2 & B-3.

On September 24, 2014, BCM also conducted a UCC lien search in Delaware and New Jersey, in accordance with Section 11(e)(vi) of the Pledge. The search did not

disclose any lienors other than CapitalSource Bank, to whom notice was sent on October 9, 11, and 15, 2013. *See* Batastini Affirm. ¶ 4 & Ex. C.

D. *Plaintiff's Attempt to Enjoin the Public Sale*

On October 31, 2013, plaintiff filed an amended verified complaint in the matter of *AC I Ledgewood Mezz LLC v. DMR CRE Credit Opportunity Fund I LP*, Index No. 653255/2013 (the "10/21/13 Complaint") in an attempt to enjoin the October Sale, alleging that BCM had acted in a commercially unreasonable manner in preparing for and noticing the Sale. *See* Batastini Affirm. Ex. F. That complaint alleged that:

- seven days business notice was insufficient (10/21/13 Complaint ¶¶ 44, 48);
- an "all cash" transaction was commercially unreasonable (*Id.* ¶ 47);
- the demand that prospective bidders execute confidentiality agreements to access due diligence materials was commercially unreasonable (*Id.* ¶ 49); and,
- BCM's failure to engage a broker was commercially unreasonable (*Id.* ¶ 51).

Plaintiff's Memorandum in Support of Order to Show Cause for a Temporary Restraining Order repeated and embellished upon its allegations. *See* Batastini Affirm. exhibit E). Specifically, plaintiff further alleged that BCM was seeking to "seize and profit from the \$7 million of equity vested in the shopping mall." *See id.* at 1, 3.

At the October 21, 2013 hearing on its TRO motion, plaintiff further argued that BCM lacked standing because it had not submitted proof that it is the holder of the Mezzanine Loan and because it allegedly was a different entity from defendant DMR

CRE Opportunity Fund I LP as a result of a change to its corporate structure. *See* Bastastini Affirm. Ex. F at 4-5. Plaintiff also argued that the Sale should be adjourned and re-noticed because the injunctive relief hearing had pushed past the noticed time of 11:00 a.m. for the Sale. *Id.* at 18-19. Plaintiff also repeated its argument that it required injunctive relief to protect its alleged \$7,000,000 in equity in the Mall. *Id.* at 8. This Court responded that: “They shouldn’t have defaulted then. . . . [I]n order to tell me [about] that [equity] interest, you can’t be here as a defaulting person.” *Id.* at 8.

Plaintiff again repeated its argument that BCM’s notices failed to provide reasonable time. *Id.* at 12. With respect to that contention, the Court noted that propriety of notice “entirely depends on what the contract says.” *Id.* at 12. The Court then compared the notice and advertising requirements contained in the Pledge with BCM’s notices and concluded that BCM had complied (with the exception of advertising in the New York Times). *Id.* at 13-15. The Court adjourned the hearing so that BCM could provide proof that it had advertised in the New York Times for seven consecutive days in advance of the public sale, pursuant to the terms of the Pledge. *Id.* at 16-17. After the break, BCM provided the Court with the proof of advertising in the New York Times. *Id.* at 23.

The Court also confirmed that verbal notice was provided to all persons attending the Sale that the Sale would proceed later that same day. Accordingly, the Court rejected LedgeWood’s arguments and refused to reschedule the argument for a later date. The

Court then denied LedgeWood's application for a temporary restraining order and ordered that the public sale proceed that afternoon. *Id.* at 23-24.

At approximately 3:00 p.m. on October 21, 2013, the Sale, conducted by an auctioneer licensed in the State of New York, took place in the Rotunda of the New York State Supreme Court, 60, Centre Street, New York, New York. *See* Am. Compl. ¶ 64. BCM's nominee, XL, was the high bidder at the sale, with a credit bid of \$6,000,000. *Id.* XL subsequently acquired the rights of plaintiff in the Membership Interests. On October 22, 2013, pursuant to Section 9-619 of the Delaware Commercial Code, BCM filed a Transfer Statement with the Delaware Department of State, thereafter affecting transfer of the Membership Interests to XL. *See* Kelley Aff. Ex. E. Borrower did not have a bidder attend the sale.

E. ***Borrower's Attempt to Vacate the UCC Sale***

LedgeWood filed this action on April 18, 2014, along with an Order to Show Cause for a Temporary Restraining Order. LedgeWood then filed an Amended Complaint in response to BCM's motion to dismiss. The Amended Complaint and associated injunctive relief motion repeat verbatim almost all of the same allegations and arguments that LedgeWood raised (and this Court rejected) in October 2013. In fact, the central allegations challenging the October 2013 sale are virtually identical (and appear to be "cut and pastes") from the 10/21/13 Complaint. The repeat allegations include:

- the notice provided was insufficient (Am. Compl. ¶ 53);

- an “all cash” transaction was commercially unreasonable (*Id.* ¶ 55);
- the demand that a prospective bidder execute confidentiality agreements to access due diligence materials was commercially unreasonable (*Id.* ¶ 58);
- BCM’s failure to engage a broker was commercially unreasonable (*Id.* ¶ 60);
- the delay of the Sale to 2:30 p.m. caused a loss in bidders (*Id.* ¶ 63); and
- that BCM is engaged in an “equity grab” (*Id.* ¶ 70).

The Amended Complaint adds one new allegation. Specifically, it alleges that “[u]pon information and belief, Defendants did not conduct a UCC filing search in both Delaware and New Jersey between September 9 and September 19, 2014.” *Id.* ¶ 41. Ledgewood further alleges that this purported failure means that BCM failed to comply with Section 11(e)(vi) of the Pledge.

The Amended Complaint interposes one count for declaratory judgment and one count for injunctive relief based upon these allegations. Count I seeks a declaration that the Sale is “null and void” and sets forth the identical allegation and arguments that plaintiff presented on October 21, 2013. Count II derivatively seeks injunctive relief based upon Count I.

II. Discussion

Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction,” and “the facts as alleged in the complaint [are presumed] as true.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

“[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration.” *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dep’t 1991) (citation omitted); *see also Kenny v. Immelt*, 41 Misc.3d 1225[A] at *3 (Sup. Ct. N.Y. Cnty. 2013) (court will not afford “preferential consideration” to “bare legal conclusions and inherently incredible facts,” nor to facts and theories belied by documentary evidence submitted with the complaint).

On a motion to dismiss pursuant to CPLR 3211(a)(1), “the Court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (internal quotation marks and citation omitted). “[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’ in the proper case.” *Fontanetta v. John Doe I*, 73 A.D.3d 78, 84-85 (2d Dep’t 2010) (citation omitted).

Likewise, a motion based upon CPLR 3211(a)(5) should be granted where documentary evidence and other appropriate bases demonstrate that, *inter alia*, collateral estoppel precludes a litigant’s claims or defenses. *See id.* at 84. Significantly, in the context of a defense of collateral estoppel, judicial records qualify as documentary evidence, *id.* at 85, and “it is well established that a court may take judicial notice of undisputed court records and files.” *Alliance Network LLC v. Sidley Austin LLP*, 43

Misc.3d 848, 852 n.1 (Sup. Ct. N.Y. Cnty. 2014) (internal quotation marks and citation omitted).

Construing the complaint in the generous manner to which it is entitled, this Court nevertheless concludes that defendants' motion to dismiss must be granted as the amended complaint is barred by collateral estoppel.

A. *Collateral Estoppel*

Collateral estoppel is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue that has already been decided against it. *See Pinnacle Consultants v. Leucadia Nat'l Corp.*, 94 N.Y.2d 426, 431-432 (2000) (internal quotation marks and citation omitted) ("Collateral estoppel, or issue preclusion, prevents a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party.").

There are two requirements governing the application of collateral estoppel: (1) the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action; and (2) the party to be precluded from re-litigating an issue must have had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 445-446 (1985).

Plaintiff's claims in the current case are substantially identical to the claims in the 2013 action, and virtually all of the allegations in the present case were also made in the

2013 action. Additionally, plaintiff has already had a full and fair opportunity to contest this Court's determination. Thus, plaintiff's claims are barred by collateral estoppel, and the complaint must be dismissed pursuant to CPLR 3211(a)(5). *See Pinnacle Consultants*, 94 N.Y.2d at 431-432 (dismissing shareholder derivative action on collateral estoppel grounds where issues had been raised and decided against plaintiff in a prior federal court action).

More specifically, Count I of the Amended Complaint relies entirely on allegations and arguments that this Court previously rejected on October 21, 2013. This Court already has determined that BCM properly conducted the Sale in accordance with the UCC and the Pledge, so that plaintiff's claims to the contrary fail as a matter of law. Under these circumstances, "the doctrine of collateral estoppel . . . precludes a party from relitigating an issue previously decided against it in a proceeding where there was a fair opportunity to fully litigate the matter." *Alliance Network LLC*, 43 Misc.3d at 871 (citation omitted). Borrower may not, therefore, seek to relitigate those matters for a second time. Thus, Count I of the Amended Complaint must be dismissed. Count II's request for an injunction likewise must be dismissed, as it is admittedly "[b]ased on the declarations sought in Plaintiff's First Cause of Action." (Am. Compl. ¶ 81.)

Plaintiff opposes the motion on the ground that it did not have an opportunity to fully adjudicate its objection to the UCC sale during the prior proceeding because it was made on a motion for a temporary restraining order. *See* Pl.'s Opp. Br. at 10. The Court rejects this argument.

“Collateral estoppel is a doctrine based on general notions of fairness involving a practical inquiry into the realities of the litigation; it should never be rigidly or mechanically applied.” *Matter of Halyalkar v. Bd. of Regents of State of N.Y.*, 72 N.Y.2d 261, 268-269 (1988) (internal citation omitted). Consequently, New York courts have applied the doctrine of collateral estoppel and given preclusive effect to administrative rulings, *see Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 504 (1984), arbitration decrees, *see Alliance Network LLC*, 43 Misc.3d at 870, and rulings on interlocutory motions in Bankruptcy Court, *see J.P. Morgan Chase Bank, N.A. v. Luxor-Capital, LLC*, 32 Misc.3d 1245[A] (Sup.Ct. N.Y. Cnty. 2011), *aff’d* 101 A.D.3d 575 (1st Dep’t 2012).

Moreover, in order for a claim to have been fully litigated, “it must have been properly raised in a pleading or otherwise placed in issue and actually determined in the prior proceeding.” *Halyalkar*, 72 N.Y.2d at 268. There is no requirement that a matter be reduced to judgment in order for collateral estoppel to be obtained.

Plaintiff bears the burden of establishing this lack of opportunity. *See Kaufman*, 65 N.Y.2d at 456 (“[T]he party attempting to defeat [the] application [of collateral estoppel] has the burden of establishing the absence of a full and fair opportunity to litigate”). Here, plaintiff placed these claims at issue through a verified complaint and affidavit, fully briefed those claims, and extensively argued its position in the previous litigation. Thereafter, plaintiff affirmatively elected to discontinue that litigation after the Court denied its injunctive relief motion. Given these circumstances, plaintiff cannot credibly argue that it did not have a full opportunity to litigate its claims in the 2013 action.

Indeed, plaintiff presents the identical facts and arguments here that it did in the prior litigation, demonstrating that it could have fully pursued the instant claims in the context of the previous litigation.

Plaintiff also claims that the prior litigation “did not address the question of the manifest unreasonableness of Section 11(e) of the Pledge.” *See* Pl.’s Opp. Br. at 10. This argument completely lacks merit.

Although plaintiff now re-labels its argument regarding the terms of sale from “commercially unreasonable” to “manifestly unreasonable,” this is a distinction without a difference. In this action, plaintiff repeats almost verbatim the same allegations and arguments that it raised, and this Court rejected, in October 2013. *Compare* 10/21/13 Complaint ¶¶ 41-52 *with* 5/15/14 Amended Complaint, ¶¶ 56-64.) Specifically, the Amended Complaint repeats allegations contained in the 10/21/13 Complaint to the effect that the foreclosure sale was “commercially unreasonable”: (1) notice was insufficient (*Am. Compl.* ¶ 53); (2) an “all cash” transaction was commercially unreasonable (*id.* ¶ 55); (3) the demand for confidentiality agreements to access due diligence materials was commercially unreasonable (*id.* ¶ 58); (4) failure to engage a broker was commercially unreasonable (*id.* ¶ 60); (5) delay of the sale to 2:30 p.m. caused lost bidders (*id.* ¶ 63), and (6) BCM engaged in an “equity grab” (*id.* ¶ 70).

Plaintiff does not explain how this recasting results in a different outcome than its previous, unsuccessful litigation. In fact, the former standard appears more stringent than the latter. Yet, this Court has already found that the foreclosure sale was commercially

reasonable in response to plaintiff's arguments that the sale was commercially unreasonable, so that the same result should obtain with reference to the lesser standard of "manifestly unreasonable." And, irrespective of the label that plaintiff applies, it relies on the same underlying facts and arguments. Thus, the "practical . . . realities of the litigation" are that current matter is an impermissible "do-over" of the prior litigation. *Halyalkar*, 72 N.Y.2d at 268-269.

B. *Allegations Regarding the UCC Search*

Plaintiff's new claim, asserted on information and belief, also fails. Plaintiffs contend that the Pledge requires that the UCC search be conducted no later than 20 days and not earlier than 30 days before the notice of the UCC sale to Borrower. Defendants dispute that the Pledge requires this. Moreover, defendants present documentary evidence that the UCC search was conducted on September 24, 2013, and that the search did not disclose any lienors who should have received notice of the Sale, other than CapitalSource Bank. Defendants also present documentary evidence that BCM sent notices to Borrower on October 9, 11, and 15, 2014. Any alleged de minimis departure from this time frame does not constitute a basis to vacate the Sale as a matter of law, especially given the fact that this Court has already determined that the UCC foreclosure sale of LedgeWood had been noticed and otherwise conducted in accord with the New York UCC. *See DeRosa v. Chase Manhattan Mortg. Corp.*, 10 A.D.3d 317, 322 (1st

Dep't 2004) ("the aggregate of circumstances . . . rather than specific details of the sale taken in isolation" determine commercial reasonableness of UCC sale) (citation omitted).

The Court has considered the remaining arguments and finds them to be without merit.

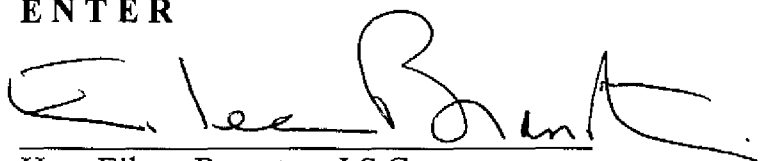
III. Conclusion

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is granted, and the Clerk is directed to enter judgment in favor of defendants dismissing the amended complaint, together with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs.

Dated: New York, New York
February 3, 2015

ENTER



Hon. Eileen Bransten, J.S.C.