GSMC II 2006-GG6 Bridgewater Hills Corporate Ctr., LLC v Lexington Realty Trust
2016 NY Slip Op 32258(U)
November 2, 2016
Supreme Court, New York County
Docket Number: 653117/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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GSMSC II 2006-GG6 BRIDGEWATER HILLS CORPORATE CENTER, LLC,

Plaintiff,

-against-

LEXINGTON REALTY TRUST,

Defendant.

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Index No.: 653117/2015

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

In this action to recover pursuant to a mortgage loan guaranty, defendant Lexington Realty Trust ("defendant") moves, pursuant to CPLR 3211(a)(1) and (7), for an order dismissing the complaint.

Background

On or about February 10, 2006, NK-Bridgewater Property, LLC ("Borrower") signed and delivered to Greenwich Capital Financial Products, Inc. ("Greenwich Capital"), a promissory note in the principal amount of $14,805,000 (the "Note"). To secure payment on the Note, Borrower signed a "Mortgage, Assignment of Leases and Rents and Security Agreement (the "Mortgage") to Greenwich Capital in the above-noted principal amount. Borrower and Greenwich Capital entered into a loan agreement (the "Loan Agreement") concerning the mortgage loan. Newkirk Master Limited

Partnership ("Newkirk Master" or the "Guarantor"), the indirect 100% owner of Borrower, signed a guaranty of recourse obligations, dated as of February 10, 2006, in connection with the mortgage loan (the "Guaranty") (Compl., ¶ 11; Loan Agreement, § 4.18, Sherwin Affirm., Ex. 2). The Loan agreement listed Newkirk Realty Trust, Inc. ("Newkirk Trust"), the sole general partner of Newkirk Master, as a key principal (Loan Agreement at p. 4, Sherwin Affirm., Ex. 2).

All of the loan documents were assigned multiple times, and were ultimately assigned to plaintiff, GSMSC II 2006-GG6 Bridgewater Hills Corporate Center (the "GSMSC Assignment"), who assumed the role as the successor Lender. As of December 31, 2006, Newkirk Trust merged into defendant (the "2006 Merger") (Compl., ¶¶ 46, 47; 61). Pursuant to the 2006 Merger, Newkirk Trust shareholders received 46.8% of the resulting entity, with defendant's shareholders owning the remainder (Compl., ¶¶ 48-57). Defendant controlled the post-merger entity's board and management (Id.).

On or about January 3, 2007, Newkirk Master changed its name to Lexington Master Limited Partnership ("Lexington Master") (Compl., ¶ 25). On or about December 29, 2008, Lexington Master merged with defendant (Compl., ¶¶ 26-27). By virtue of the

merger, defendant succeeded to the position of Lexington Master and its obligations under the Guaranty (Compl., ¶ 28).

In the Guaranty, Guarantor irrevocably, absolutely and unconditionally guaranteed to Lender the "full, prompt and complete payment when due of the Guaranteed Obligations" (Guaranty, § 2[a], Sherwin Affirm., Ex. 3). "Guaranteed Obligations" are defined in the Guaranty as:

> (i) Borrower's Recourse Liabilities and (ii) from and after the date that any Springing Recourse Event occurs, payment of all the Debt as and when the same is due in accordance with the Loan Documents (and whether accrued prior to, on or after such date). Notwithstanding the foregoing, Guarantor's liability for the Guaranteed Obligations shall not exceed $10,000,000.

(Guaranty, ¶ 1[b], Sherwin Affirm., Ex. 3).

The Loan Agreement defines "Borrower's Recourse Liabilities" to include, inter alia, fraud, physical waste, condemnation, misappropriation of security deposits and failure to pay taxes (Loan Agreement at § 10.1, Sherwin Affirm., Ex. 2).

The Loan Agreement defines "Springing Recourse Event" as, inter alia, an Event of Default described in Section 8.1(d) (Loan Agreement, § 10.1[b][i], Sherwin Affirm., Ex. 2). Section 8.1(d) of the Loan Agreement, in turn, defined "Event of Default" to include, inter alia, any "Transfer" (i.e., any sale, conveyance,

or transfer) of any direct or indirect interest in Borrower or change in control of Borrower that was not a "Permitted Transfer" (Loan Agreement at 8.1[d], Sherwin Affirm., Ex. 2).

Section 8.1(d) of the Loan Agreement sets forth eight separate categories of "Permitted Transfers" (Loan Agreement at pp. 8-10, Sherwin Affirm., Ex. 2). Two categories are at issue here, namely category (iv) and (vi). Category (iv) and category (vi) involve the following Permitted Transfers:

> (iv) a Transfer or pledge of publicly traded shares in Key Principal; provided that (A) such stock is listed on the New York Stock Exchange or such other nationally recognized stock exchange, (B) after giving effect thereto, Key Principal shall continue to own not less that 30% of all equity interests (direct or indirect) in Borrower and (c) Key Principal shall continue to Control (in the sense of clause (ii) of the defined term "Control") Borrower and the day to day operations of the Property;
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> * * *
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> (vi) a Transfer of an interest in Borrower, which shall cause the transferee to increase its direct or indirect interest in Borrower to an amount which equals or exceeds 49% or which results in a change of Control of Borrower, provided that [...] (B) such Transferee is a Qualified Transferee and (1) <u>Borrower shall give Lender notice of such Transfer together with copies of all instruments effecting such Transfer no less than 10 days prior to the date of such Transfer</u>, (2) Borrower shall have reimbursed Lender for all reasonable expenses incurred by it in connection with such Transfer, (3) Borrower shall give Lender notice of such

> Transfer together with copies of all instruments effecting such Transfer not less than 10 days prior to the date of such Transfer and (4) the Property is managed by a Qualified Manager

(Loan Agreement at pp. 8-9, Sherwin Affirm., Ex. 2 [emphasis added]).

"Control" is defined as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, through the ownership of voting securities, by contract or otherwise" (Id. at p. 2, "Control" [ii]).

By letter dated March 13, 2015, Lender's counsel sent Borrower and defendant a notice of Events of Default (the "Notice") which stated:

> Events of Default have occurred under the Loan Documents by virtue of the November 2014 through and including March 2015 mortgage payments not being made. As a result, Noteholder has elected to declare all the monies secured by the Mortgage to be immediately due and payable.

(Notice, Sherwin Affirm., Ex. 4).

On September 16, 2015, Lender commenced an action against Borrower in New Jersey state court, seeking to foreclose on the mortgage, recover possession of the property, and for an appointment of a receiver (the "New Jersey Action"). According

to the complaint in the New Jersey Action, "Events of Default occurred under the Loan Documents by virtue of the monthly payments due under the Loan Documents not being made from November 2014 to date" (New Jersey Action Complaint, ¶ 28, defendant's exhibit 5).

On the same day, Lender commenced the instant action arguing that the 2006 Merger constitutes an Event of Default under section 8.1(d) of the Loan Agreement triggering defendant's obligations under the Guaranty (Complaint, ¶¶ 5, 41-44, 58).

Discussion

Plaintiff contends that the 2006 Merger was an Event of Default under the Guaranty because it did not fall within the fourth category of "Permitted Transfers" set forth in the Loan Agreement. Category (iv) makes "a Transfer or pledge of publicly traded shares in Key Principal" (i.e., Newkirk Trust) a Permitted Transfer provided that, inter alia, "Key Principal shall continue to control ... Borrower and the day to day operations of the Property" (Loan Agreement at pp. 8-9, Sherwin Affirm., Ex. 2 [emphasis added]). There is no dispute that after the 2006 Merger Newkirk Trust's shareholders received less than 50% of the shares in the surviving entity and, as a result, no longer maintained control in the surviving entity (Defendant's Mem. of

Law at p. 5). Therefore, as plaintiff contends, defendant has not satisfied the requirements of category (iv).

Defendant responds that each category of Permitted Transfer is "an independent safe harbor for any transfer that falls within its scope" (Id. at 13) and no Event of Default occurred because the 2006 Merger was a Permitted Transfer under category (vi).

Category (vi) contemplates "a Transfer of an interest in Borrower, which [caused] the transferee to increase its direct or indirect interest in Borrower to an amount which equals or exceeds 49% or which results in a change of Control of Borrower" (Loan Agreement, § 1.1 (vi) at 9, Sherwin Affirm., Ex. 2). Defendant argues that the 2006 Merger resulted in just such a change of control because, prior to the 2006 Merger, Newkirk Trust controlled Borrower through its position as the general partner/30% owner of Newkirk Master -- Borrower's 100% indirect owner -- and that defendant acquired that control when it absorbed Newkirk Trust in the 2006 Merger (Loan Agreement § 1, Sherwin Affirm., Ex. 2). As defendant notes, "[b]y its own terms, [category (vi)] is not limited to direct transfers of membership interests in Borrower (a limited liability company) ... [but instead] is broadly worded to cover transfers of an interest in Borrower ... [including] direct or indirect interest

in Borrower" (Def. Mem. of Law at p. 8 [internal citations and quotations omitted] [emphasis added]).

While the initial requirement of category (vi) was met, category (vi) also states the transfer described above will be a Permitted Transfer provided that, inter alia:

> Borrower shall give Lender notice of such Transfer together with copies of all instruments effecting such Transfer not less than 10 days prior to the date of such Transfer

(Loan Agreement at p. 9, category [vi][B][1], Sherwin Affirm., Ex. 2 [emphasis added]).

Defendant concedes that it did not provide plaintiff with the required notice of the merger, but argues that notice was not a condition precedent. This argument is unavailing. "The notice requirement follows the word 'provided,' which indicates the creation of a condition" (Natl. Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co., 28 AD3d 1169, 1170 [4th Dept 2006]).

Defendant argues in the alternative that strict compliance with the notice provision is not required in commercial contacts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation, relying on J.C. Studios, LLC v Telenext Media, Inc., 32 Misc 3d 1211[A], *9, 2011 NY Slip Op 51251[U] (Sup Ct, Kings County 2011), and claims that

plaintiff had actual notice of the 2006 Merger because it was covered in the business press and disclosed in public SEC filings. While plaintiff does not dispute these claims (Compl. ¶¶ 45-59), plaintiff maintains that it did not have notice of the merger until January 2015 (Compl., ¶ 63; Coutts Aff., ¶¶ 7-12).

On defendant's motion to dismiss, plaintiff's assertion that it did not receive actual notice is presumed to be true unless it is inherently incredible or flatly contradicted by documentary evidence (Beattie v Brown & Wood, 243 AD2d 395, 395 [1st Dept 1997]).

Here, defendant relies on two pieces of purported documentary evidence that it believes belie plaintiff's claim. Defendant first points to an email it sent to plaintiff on June 24, 2008, which came from defendant's email address, contained defendant's signature block, and provided a new address for defendant (See Coutts Aff. Ex. G.) Defendant argues that given there is no mention of any of the Newkirk entities in this document plaintiff therefore had notice as of this date that defendant had replaced Newkirk as Guarantor.

Defendant also points to a March 13, 2015 Notice of Default that plaintiff sent to defendant which did not include the 2006 Merger as one of the events of default, and argues that this

omission demonstrates that plaintiff did not view the 2006 Merger as an Event of Default at the time the Notice of Default was sent.

Contrary to defendant's argument, both of these documents provide, at best, circumstantial evidence that plaintiff had notice within the meaning of the loan documents of the 2006 Merger prior to 2015. As such, these documents, without more, are insufficient to overcome plaintiff's allegation in its complaint that it did not receive actual notice of the 2006 Merger until January 2015.

Defendant next argues that to permit defendant's failure to comply with the notice provision to serve as grounds for default would cause a "disproportionate forfeiture" and the Court should therefore "excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange" (Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 691 [1995]). "[I]nterpretation as a means of reducing the risk of forfeiture cannot be employed," however "if the occurrence of the event as a condition is expressed in unmistakable language (Id. [internal citations omitted]).

Here, the relevant documents clearly expressed that the notice requirement was a condition precedent for a transfer to be

a Permitted Transfer under category (vi). Thus, defendant's argument is unavailing.

In a similar vein, defendant argues that allowing its failure to comply with the notice provision to trigger the guaranty would lead to a commercially unreasonable and absurd result because the mere failure to provide notice is a minor breach compared to the trigger of the Guarantor's obligation to pay Borrower's Recourse Liabilities set forth in the Loan Agreement (i.e., Borrower's fraud, physical waste, condemnation, misappropriation of security deposits, and failure to pay taxes). This argument is also unavailing as a contract must be construed in accordance with its plain terms (IDT Corp. v Tyco Group, 13 NY3d 209, 214 [2009]). Here, the loan documents clearly contemplated that the failure to provide notice was a condition precedent for satisfying category (vi) and that a transfer that was not a Permitted Transfer would be an Event of Default triggering the Guaranty.

Finally, defendant argues that plaintiff should be equitably estopped from asserting that the guaranty was triggered by the 2006 Merger. "The elements of equitable estoppel are, with respect to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2)

intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts" (First Union Natl. Bank v Tecklenburg, 2 AD3d 575, 577 [2d Dept 2003] [internal quotation marks and citation omitted]).

Defendant argues that plaintiff's conduct satisfies these elements because plaintiff: (1) had actual notice of the 2006 Merger; (2) failed to inform defendant that the 2006 Merger triggered the Guaranty; and (3) continued to accept mortgage payments from Borrower for almost nine years following the 2006 Merger.

As discussed, supra, plaintiff's claim that it did not discover the 2006 Merger until January 2015 must, for purposes of this motion, be taken as true. As defendant has failed to establish the requisite knowledge on the part of plaintiff, its estoppel argument fails. Moreover, even if plaintiff knew of the 2006 Merger prior to January 2015, under the Loan Agreement plaintiff was not obligated to commence an action on a loan that was being paid (Loan Agreement at §§ 8.2.4, Sherwin Affirm., Ex. 2). As such, the equitable estoppel defense is not available.

Accordingly, it is

ORDERED that the motion by defendant Lexington Realty Trust to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 48, Room 242 on November 23, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/2/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.