Nexbank, SSB v Soffer
2017 NY Slip Op 32251(U)
October 18, 2017
Supreme Court, New York County
Docket Number: 652072/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH — Justice PART 54

Index Number : 652072/2013
NEXBANK, SSB.,
vs
SOFFER, JEFFREY
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 8/11/17
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). 109-113
Answering Affidavits — Exhibits | No(s). 163-222
Replying Affidavits | No(s). 239

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 10/18/17

____, J.S.C.
SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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
☒ Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
NEXBANK, SSB,

Plaintiff,

-against-

JEFFREY SOFFER and JACQUELYN SOFFER,

Defendants.
---X

Index No.: 652072/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Familiarity with this action and the court's prior decisions, both of which were affirmed by the Appellate Division, is assumed. *See Nexbank, SSB v Soffer*, 2015 WL 458287 (Sup Ct, NY County 2015), *aff'd* 144 AD3d 457 (1st Dept 2016); *Nexbank, SSB v Soffer*, 2014 WL 2451357 (Sup Ct, NY County 2014), *aff'd* 129 AD3d 485 (1st Dept 2015). In short, in this action, plaintiff was granted summary judgment on liability on its claim that defendants breached a Non-Recourse Carveout Guarantee of a loan secured by real property in Las Vegas, Nevada. *See* Dkt. 119 (the Bad Boy Guarantee).[1] The court also assumes familiarity with the related action that was before Justice Ramos, which concerned defendants' payment guarantee. *See NexBank, SSB v Soffer*, 142 AD3d 911 (1st Dept 2016) (affirming Justice Ramos' confirmation of JHO's ruling that unencumbered value of property was $527 million).

Currently before the court are the parties' competing motions for partial summary judgment on the proper measure of plaintiff's damages and defendants' cross-motion to strike an

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF).

affidavit and certain submissions in plaintiff's moving papers. The court reserved on the motions after oral argument. *See* Dkt. 260 (8/8/17 Tr.). For the reasons that follow, plaintiff's motion is granted in part and denied in part. Defendants' motion and cross-motion are denied.

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. After examining all of the documents submitted in connection with a summary judgment motion, the court must deny the motion 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).

Here, the following facts are undisputed:

> Defendants Jacquelyn Soffer and her brother Jeffrey Soffer are principals of the real estate development business the Turnberry Group of Companies ("Turnberry"), which is engaged in the acquisition, development, and operation of commercial real estate projects. Turnberry acquired, developed, owned and operated the Town Square Mall in Las Vegas, Nevada ("Town Square" or the

"Property"). On October 25, 2006, Turnberry/Centra Sub, LLC ("Borrower"), as Borrower, Deutsche Bank Trust Company Americas, as Administrative Agent, and Deutsche Bank Securities Inc., as Sole Book-Running Manager and Sole Lead Arranger, entered into a construction loan agreement ("Construction Loan Agreement"). Pursuant to the Construction Loan Agreement, Lenders agreed to extend a loan of up to $475 million to the Borrower (the "Loan") to fund, in part, the construction of a shopping and lifestyle center in Las Vegas, Nevada, known as Town Square. As one of the components of the security for the Loan, Defendants entered into a Non-Recourse Carveout Guaranty, pursuant to which Defendants guaranteed payment in full of, among other things: "Any loss (which may include loss of principal or interest and reasonable attorneys' fees and collection cost) incurred or to be incurred by Agent or Lenders and arising out of or connected with any of the following circumstances ... (G) the removal or disposal of any portion of the Mortgaged Property other than items of personal property permitted to be removed under any Loan Document or the placing voluntarily of a Lien on any portion of the Mortgaged Property by Borrower (except to the extent permitted by the Construction Loan Agreement)." Deutsche Bank originated the Loan, and syndicated the Loan to approximately fifteen additional lenders (collectively, the "Lenders").

On March 2, 2009 (the "Maturity Date"), the Loan matured. Initially, Deutsche Bank served as administrative agent for the syndicate of Lenders. On June 15, 2009, Bank of Nova Scotia, New York Agency ("Bank of Nova Scotia") succeeded Deutsche Bank as administrative agent for the Lenders. In early 2011, agent Bank of Nova Scotia began the process of foreclosing on the deed of trust, and taking title to the Property. A non judicial foreclosure sale was scheduled for March 1, 2011. Beginning in February 2011, affiliates of Five Mile Capital Partners (Five Mile"), Oaktree Capital Management, ("Oaktree") and Centerbridge Partners ("Centerbridge") purchased interests in the Loan from several of the Lenders. Through their respective debt purchases on the secondary market, Five Mile, Oaktree, and Centerbridge (through affiliates) collectively acquired a majority of the interest in the Loan.

On February 25, 2011, Jeffrey Soffer and Borrower filed an action against Bank of Nova Scotia in the District Court, Clark County, Nevada, captioned *Soffer v. The Bank of Nova Scotia, New York Agency*, Case No.: A-11-635777-C (the "Nevada Action"). In the original complaint in the Nevada Action, Jeffrey Soffer sought to enforce what he alleged to be a binding commitment by the Lenders to restructure the Loan. On March 1, 2011, Defendant Jeffrey Soffer recorded a lis pendens, dated February 28, 2011, on the property records for Town Square in connection with the Nevada Action. Meister Seelig & Fein and Carbajal & McNutt represented the Soffers in the Nevada Action. Katten Muchin Rosenman LLP and Ballard Spahr LLP represented the Lenders in the Nevada Action.

On March 4, 2011, TSLV LLC, ("TSLV") acquired title to the Property at a non

> judicial foreclosure sale in Nevada (the "Foreclosure Sale"). After the Foreclosure Sale, Jeffrey Soffer and Turnberry Development, LLC ("Turnberry Development"), which served as the property manager and leasing agent for Town Square until the Foreclosure Sale, filed a First Amended Complaint on March 21, 2011, and a Second Amended Complaint on November 3, 2011 in the Nevada Action. The Bank of Nova Scotia, the defendant in the Nevada Action, denied Jeffrey Soffer's and Turnberry Development's claims. On September 16, 2011, Nexbank succeeded the Bank of Nova Scotia as the administrative agent for TSLV. Nexbank was selected by Five Mile, Centerbridge, and Oaktree — the controlling stakeholders in TSLV — to replace the Bank of Nova Scotia as agent.
>
> On August 31, 2012, the Nevada District Court granted the Bank of Nova Scotia/Nexbank's motion for summary judgment in the Nevada Action. On September 6, 2012, the Nevada District Court entered an order cancelling and expunging the Lis Pendens. Jeffrey Soffer and Turnberry Development appealed the dismissal of all of the causes of action in the Nevada Action, but did not appeal the September 6, 2012 order expunging the Lis Pendens. On June 11, 2013, Nexbank filed the present action in the Supreme Court of the State of New York to enforce the Non-Recourse Carveout Guaranty. On June 25, 2014, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part, and Remanding the Nevada Action for further proceedings. The Nevada Supreme Court held: "we affirm that portion of the district court's judgment dismissing Soffer's and Turnberry Development's first five causes of action, and we reverse that portion for the district court's judgment dismissing the remaining three causes of action for Turnberry Development's management fees, and we remand this matter to the district court for proceedings consistent with this order."

Dkt. 111.

The parties seek summary judgment on the proper measure of damages. Plaintiff, as noted above, is the agent of TSLV's controlling stakeholders. TSLV took title to the Property after making a $276.5 million credit bid, which allegedly was below the encumbered market price and was done to minimize transfer taxes. An issue raised is whether plaintiff's damages may include the difference between the unencumbered and encumbered value of the Property as of the date of its March 4, 2011 sale to TSLV. Questions also are raised as to whether (1) defendant's liability includes damages after the March 4, 2011 sale or September 6, 2012, when the lis pendens was expunged; and (2) plaintiff's recovery of its reasonable attorneys' fees in the

Nevada Action must be calculated based on prevailing rates in Nevada or New York.

The temporal scope of liability does not warrant serious discussion because, as plaintiff correctly contends, both this court and the Appellate Division have already ruled that plaintiff may seek damages that accrued after both the sale of the Property and the vacatur of the lis pendens. That is because the Nevada Action was an encumbrance on the Property within the meaning of the Bad Boy Guarantee. *See Nexbank*, 144 AD3d at 460-61. There also is no question of fact that the unencumbered value of the Property, as of March 4, 2011,[2] is $527 million. That determination, made in the related action, is res judicata.

Plaintiff, moreover, argues that there is no question of fact that the encumbered value of the Property (i.e., its worth in an arm's length sale while being encumbered by the lis pendens and the Nevada Action) was $276.5 million, the amount of TSLV's credit bid. Plaintiff seeks $250.5 million in damages based on the difference between the $527 million valuation and the $276.5 million sale price.

Plaintiff is not entitled to summary judgment on this issue.[3] There are material questions of fact about the Property's true encumbered value. To be sure, as plaintiff correctly contends, it is well settled that in the absence of a bona fide basis to believe the market was inefficient and where the sale process is beyond reproach, courts assume the best evidence of value is the sale price itself. *See CF HY LLC v Hudson Yards LLC*, 124 AD3d 490 (1st Dept 2015), *aff'g* 2013

[2] Evidence of the subsequent sale in early 2017 is irrelevant, regardless of when evidence of such sale was produced in discovery. Real estate prices fluctuate, and thus the amount the Property was sold for in 2017 is not probative of the Property's value in 2011.

[3] Since summary judgment is denied, the court denies defendants' motion to strike as academic. The question of what evidence may be introduced at trial (e.g., disputes over documents supposedly produced after the close of fact discovery) shall be addressed in the parties' *in limine* motions.

WL 12185838 (Sup Ct, NY County 2013), citing *Plaza Hotel Assocs. v Wellington Assocs., Inc.*, 37 NY2d 273, 277 (1975) ("the purchase price set in the course of an **arm's length transaction** of recent vintage, if not explained away as **abnormal in any fashion**, is evidence of the 'highest rank' to determine the true value of the property at that time.") (emphasis added); *see also DFC Glob. Corp. v Muirfield Value Partners, L.P.*, 2017 WL 3261190, at *15 (Del Sup Ct Aug. 1, 2017) ("the price of a merger that results from **a robust market check**, against the back drop of a rich information base and **a welcoming environment for potential buyers**, is probative of the company's fair value.") (Strine, C.J.) (emphasis added).

DFC Global, it should be noted, deals with mergers, and not real estate. Nonetheless, Chief Justice Strine's thorough explanation of why deference to the purchase price makes sense and when market conditions warrant such deference is compelling and ought to inform New York's approach to this issue. Simply put, when facts indicate the process was problematic, deference to the purchase price is not warranted. Compare *In re PetSmart, Inc.*, 2017 WL 2303599, at *2 (Del Ch 2017) ("Based on my review of all relevant factors, as found in the evidence, I am satisfied that the deal price of $83 per share, 'forged in the crucible of objective market reality,' is the best indicator of the fair value of PetSmart as of the closing of the Merger."), with *In re of SWS Group., Inc.*, 2017 WL 2334852, at *1 (Del Ch 2017) ("the sale of SWS was undertaken in conditions that make the price thus derived unreliable as evidence of fair value.").

Here, the court has concerns about the reliability of TSLV's credit bid as definitive evidence of market value, and is troubled by the process by which the Property was marketed. There are red flags here. The purchaser is not a disinterested third party but is affiliated with plaintiff. Moreover, the sale price was calculated as a percentage of an appraisal that was

rejected as unreliable in the related action (by the JHO, Justice Ramos, and the Appellate Division). Further, it is common knowledge that the sale price in a foreclosure proceeding is assumed to be below what the Property would sell for in an arm's length transaction on the open market in the ordinary course. Indeed, that is why in foreclosure litigation, there is a battle of the experts over the calculation of a deficiency judgment and fair market value credit.

For these reasons, the court is not convinced from the record on this motion that the way in which the Property was marketed permits the court to conclude that a more robust marketing process would not have led to a higher offer.[4] Summary judgment on the Property's encumbered value is denied. Plaintiff will be required to prove such value at trial through proper expert testimony, which it did not proffer on the instant motion.

That said, defendants are not entitled to dismissal of plaintiff's claim for the spread between the Property's unencumbered and encumbered value. Plaintiff cites to cases that have held that "damages for a breach of covenant against encumbrances or a breach of a warranty of title are measured by subtracting the value of the property after the defect is discovered from its value before the defect existed." *Yonkers City Post No. 1666, Veterans of Foreign Wars of the U.S., Inc. v Josanth Realty Corp.*, 67 NY2d 1029, 1031 (1986). Plaintiff further notes that section 1(a) of the Bad Boy Guaranty defines "Guaranteed Obligations" to include "**Any Loss** … incurred or to be incurred by Agent or Lenders and arising out of or connected with … **the placing voluntarily of a Lien** on any portion of the Mortgaged Property by Borrower.". *See*

[4] Plaintiff avers that the cloud on the Property's title dissuaded prospective purchasers and makes the appropriate encumbrance discount difficult to calculate. That is precisely why an expert is needed here (e.g., to explain the degree to which pending litigation over title affects the sale price in a foreclosure). This surely cannot have been the only instance of a property being sold while title litigation was pending.

Dkt. 119 at 1 (emphasis added). Plaintiff argues that if the Property was indeed sold for less money due to the existence of encumbrances placed on it by defendants, that loss would fall squarely within the parameters of the definition of Guaranteed Obligations. Hence, it was foreseeable that by encumbering the Property and clouding its title, the sale price would be depressed. Consequently, plaintiff claims these losses are compensatory damages that flow from defendants' breach of contract, and are not lost profits or a species of consequential damages, and that defendants' reliance on case law that prohibits the latter is misplaced.

The court agrees. Seeking to avoid this seemingly straightforward conclusion, defendants misconstrue the definition of Loss in the Construction Loan Agreement. *See* Dkt. 116 at 16, citing Dkt. 118 at 37-38. That definition not only includes "out-of-pocket losses", but also "all losses, liabilities, [and] damages," and even includes "punitive damages." *See* Dkt. 118 at 37. Moreover, in the Bad Boy Guaranty, defendants agreed to "unconditionally, absolutely and irrevocably guarantee to Lenders the punctual and complete payment in full of the Guaranteed Obligations." *See* Dkt. 119 at 1. Those Guaranteed Obligations include losses that clearly are beyond mere out-of-pocket losses. For instance, while not implicated here, losses caused by "fraud or willful material misrepresentation committed by any Borrower Party or any of its Affiliates" [*see id.*] are covered by the Bad Boy Guaranty. Compensation for this sort of loss, like the encumbrance-caused losses at issue here, clearly requires more than reimbursement of out-of-pocket expenses such as attorneys' fees.

Also, the amount recovered in the payment guaranty action and that guaranty's $40 million cap is not dispositive because section 18 of the Bad Boy guaranty provides:

> The Guarantors' liability hereunder **shall not be subject to, limited by or affected in any way** by any non-recourse provisions contained in the Notes, the Deed of Trust or any other Loan Document. The Guarantors agree that this

> Guaranty is separate from, **independent of and in addition to** the Guarantors' undertakings under the other Loan Documents.

Dkt. 119 at 10 (emphasis added). It makes commercial sense that the parties would agree to cap defendants' payment guaranty obligations at $40 million in the absence of bad boy acts, but not have a such a cap if plaintiff suffered losses that resulted from bad boy acts. Indeed, the cause of loss that triggers the payment guaranty is mere nonpayment (which does not require a nefarious predicate), while the intentional and prohibited placement of encumbrances increased the losses plaintiff suffered by lengthening the period of nonpayment and possibly depressing the sales price.

Finally, defendant seeks summary judgment on whether New York or Nevada hourly billable rates should be used to calculate plaintiff's reasonable attorneys' fees in the Nevada Action. Defendants rely on the well-settled rule in federal court that "[a] reasonable hourly rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Marchuk v Faruqi & Faruqi LLP*, 104 FSupp3d 363, 369 (SDNY 2015), quoting *Blum v Stenson*, 465 US 886, 896 n.11 (1984); *see Simmons v New York City Transit Auth.*, 575 F3d 170, 174 (2d Cir 2009) ("According to the forum rule, courts should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee.") (citations and quotation marks omitted). They also cite Appellate Division cases that appear to have adopted this rule. *See Gamache v Steinhaus*, 7 AD3d 525, 527 (2d Dept 2004) ("As a general rule, the 'reasonable hourly rate [for an attorney] should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented.'"), quoting *Getty Petroleum Corp. v G.M. Triple S. Corp.*, 187 AD2d 483

(2d Dept 1992).

There are, however, exceptions to this rule, such as where "the special expertise of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed." *Simmons*, 575 F3d at 175, quoting *In re Agent Orange Prod. Liab. Lit.*, 818 F2d 226, 232 (2d Cir 1987). To avail itself of these exceptions, "a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result." *Id.*; *see Restivo v Hessemann*, 846 F3d 547, 590 (2d Cir 2017).

Leaving aside the fact that this action is not in federal court, and, thus, the Second Circuit's standard does not strictly apply, the court finds that plaintiff has articulated a highly plausible reason why hiring New York white-shoe lawyers was necessary. The litigation was complex, it involved hundreds of millions of dollars, and defendants chose to be represented by one of the premiere real estate litigators in New York. Simply put, if your adversary hires Stephen Meister, and millions of dollars are at stake, you would be crazy not to hire equally competent New York counsel (if you have the means). It is unfair to insist that plaintiff, unlike defendant, should have hired less sophisticated counsel in the Nevada case simply because the case was in Nevada. This is not a situation where defendants "should not be required to pay for a limousine when a sedan could have done the job." *See Simmons*, 575 F3d at 177.

That said, the question of whether the quantum of work performed or whether unreasonable duplication occurred (e.g., multiple lawyers attending depositions) is best left, as usual, to be decided with the benefit of a complete factual record. The usual factors shall be considered as part of a holistic reasonableness analysis. *See In re Freeman's Estate*, 34 NY2d 1, 9 (1974); *Bd. of Managers of Cent. Park Place Condo. v Potoschnig*, 136 AD3d 441 (1st Dept

2016). Accordingly, it is

ORDERED that plaintiff is granted partial summary judgment on (1) its entitlement to damages in the amount of the difference between the encumbered and unencumbered value of the Property as of March 4, 2011; (2) the fact that the unencumbered value of the Property as of March 4, 2011 is $527 million; (3) its entitlement to damages consistent with the prior decisions of this court and the Appellate Division; and (4) the fact that New York's hourly rates will be used when calculating plaintiff's reasonable attorneys' fees expended in the Nevada litigation; and it is further

ORDERED that the parties' summary judgment motions are otherwise denied; and it is further

ORDERED that defendants' cross-motion to strike is denied with leave to readdress such issues on a motion *in limine*; and it is further

ORDERED that the parties shall jointly call the court within three weeks of the entry of this order on NYSCEF to discuss the scheduling of a pre-trial conference.

Dated: October 18, 2017

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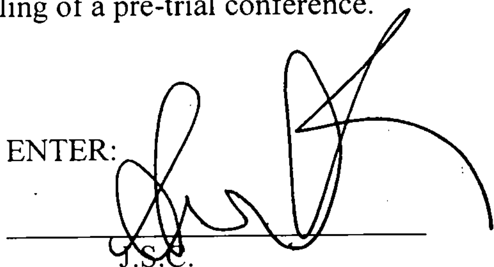

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C