166/75 Ventures LLC v Besen
2018 NY Slip Op 30408(U)
March 8, 2018
Supreme Court, New York County
Docket Number: 650043/2014
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

166/75 Ventures LLC, As Successor In Interest To GE Business Financial Services, Inc. F/K/A Merrill Lynch Capital,

Plaintiff,

-against-

Michael M.R. Besen and Jonathan Zich,

Defendants.

Index No.: 650043/2014
Mot. Seq. No.: 002

Hon. Andrea Masley
Decision and Order

Masley, J:

This action was commenced by plaintiff 166/75 Ventures LLC (Ventures) against defendants Michael M.R. Besen and Jonathan Zich for breach of a loan agreement by which the purchase of property at 166 West 75 Street in New York (the Property) was financed. Defendants move, pursuant to CPLR 3212, for an order summarily dismissing the complaint on the ground that the action is untimely under the six-year limitation period provided under CPLR 213.

Background

On July 9, 2007, 166 West 75th Street, LLC (Borrower) and Ventures' predecessor in interest, GE Financial Services, Inc., formerly known as Merrill Lynch Capital (Lender), executed a series of agreements, including a loan agreement (the Loan), a limited joinder agreement (Limited Joinder), a mortgage (the Mortgage), and a promissory note to finance Borrower's purchase of the Property. Borrower intended to convert the Property's existing Class B single room occupancy (SRO) units into Class A apartments for rent.

After Borrower defaulted on the Mortgage, a foreclosure action was commenced by Lender in 2009, which ultimately resulted in a $30,163,754.30 judgment of foreclosure against Borrower. Following a referee's sale of the Property, a deficiency judgment was entered against Borrower in the amount of $12,949,809.30. Lender assigned its interest to Ventures during the pendency of the foreclosure action.

On January 8, 2014, Ventures commenced this action against Mr. Besen and Mr. Zich, each of whom is a designated "Principal" in the Limited Joinder. As principals under the Loan and Limited Joinder (collectively, the Agreements), Mr. Besen and Mr. Zich each guaranteed the Loan in his individual capacity (defendants' exhibit G [Agreements], at 20, 52-57 [binding each defendant to joint, several, and personal liability for "Repayment of the Loan, the Exit Fee, and all Expenses of Lender, and all other obligations of Borrower" in the event of an uncured default]). In its complaint, containing a single cause of action for breach of the Agreements, Ventures seeks to recover damages—including the balance of the deficiency judgment, costs, fees, and expenses—for Borrower's uncured failure to make timely Mortgage payments.

Mr. Besen's Involvement with the Property

Mr. Besen was the sole owner of the building management company, New York City Management, Inc. (NYCM), which managed the Property prior to the July 9, 2007 closing of the underlying transaction (*see generally* aff of Besen). In support of this motion, Mr. Besen states that, from 1999 to July 2007, he "was managing the property with a view toward converting" the existing SRO units to Class A apartments, and that he "set the policy for rentals" (aff of Besen, ¶¶ 3-4).

Defendants assert that the July 9, 2007 purchase of the Property was negotiated by Richard DeCesare, and that Mr. DeCesare made practically all business decisions for the project after the closing until some point in 2008 (*see generally* aff of Besen.; aff of Zich; defendants' exhibit C [DeCesare tr]). Mr. Besen was "asked [] to continue running the property" after it had closed, and he "was under the impression that DeCesare would allow [him] to follow the policies [he] had created" and implemented at the Property (aff of Besen, ¶¶ 6-9). However, Mr. Besen states that he "was taken out of the loop and [his] policies on how to run the building were simply ignored by DeCesare and his team" after closing (*id.* ¶¶ 9-11 [stating that Mr. DeCesare "jettisoned" Mr. Besen's "entire business strategy and underlying policies" to "rapidly" convert the existing units into condominiums]).

Mr. Zich's Involvement with the Property

Mr. Zich, a real estate consultant and attorney, states in his affidavit in support of this motion that he was approached by Mr. DeCesare in Winter 2006 for assistance with "specific aspects of the transaction and [to] provide certain financial information to [Mr. DeCesare's] mortgage brokers" (aff of Zich, ¶¶ 3-4). Further, Mr. DeCesare "handl[ed] all of the negotiations for the acquisition and the financing," and the documents associated with the transaction were "done by DeCesare's attorneys, in conjunction with [Borrower's] majority owner," L & B Realty Advisors, LLP (L & B) (*id.* ¶¶ 4-7).

Although the Loan is signed on Borrower's behalf by Mr. Zich in his capacity as president of Borrower's Managing Member—166 West 75th Manager, LLC—Mr. Zich states that "[c]ertain documents were presented to [him] for signature without any particular explanation," and he simply signed the documents he was asked to sign (*id.* ¶

7). Mr. Zich asserts that Mr. DeCesare "led [him] to believe" that his post-closing role would include "assisting in setting the overall policies regarding the running of the building;" however, after closing, Mr. Zich's "primary role[s were] communicating with the controlling investor DeCesare had brought in" and "coordinat[ing] document flows" (*id.* ¶ 8).

Mr. Zich further states that Mr. DeCesare "occasionally" asked for his opinion "on certain issues," but he was not involved in any operational or financial decisions, which were reserved for Mr. DeCesare and L & B (*id.* ¶¶ 10-11). Moreover, Mr. Zich "saw that Michael Shah," a potential investor "whom DeCesare was courting," "was becoming more involved . . . in making decisions and setting policy regarding the building" during "the latter part of 2007" (*id.* ¶ 18).

Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In support of their motion, defendants argue that the complaint is barred by the six-year statute of limitation because defendants jointly breached the Agreements at

"some point during the year 2007"—more than six years prior to the commencement of this action on January 8, 2014—since neither Mr. Besen nor Mr. Zich retained "Control" over the project within the meaning of the Agreements. They assert that "Control" is an unambiguous and narrowly defined term referring to policy-making authority, and that each defendant was stripped of any such authority shortly after closing.

In response, Ventures argues that the term "Control," as defined in the Agreements, is susceptible of more than one interpretation, precluding summary judgment. Alternatively, Ventures responds that summary judgment is precluded by triable issues of fact as to the date on which defendants lacked "Control."

1. The Agreements Are Unambiguous

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008] [alteration in original] [quotation marks omitted]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The court is "not to add, excise or distort the meaning of the terms [the contracting parties] chose to include, thereby creating a new contract under the guise of construction," particularly "in a case . . . involving interpretation of documents drafted by sophisticated, counseled parties and involving the loan of substantial sums of money" (*NML Capital v Republic of Argentina*, 17 NY3d 250, 260 [2011]).

Here, the Agreements are unambiguous as a matter of law. The provisions pertaining to defendants' obligations as Principals are not susceptible to more than one reasonable interpretation. Schedule I of the Loan defines the term "Control" as follows:

> "As such term is used with respect to any person or entity, including the correlative meanings of the terms 'controlled by' and 'under common control with[,'] shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such person or entity, whether through the ownership of voting securities, by contract or otherwise."

Section 4.2 (b) (i) of the Loan, regarding "Other Borrower Covenants," provides:

> "(b) Prohibition of Assignments and Transfers by Borrower.
>
> (i) Generally. Borrower shall not assign or attempt to assign its rights under this Agreement and any purported assignment shall be void. . . . In addition, either or both Principals shall at all times Control the day-to-day management and operation of Borrower's business and all material business decisions (including a sale or refinance) for Borrower until the Indebtedness is repaid in full."[1]

Contrary to Ventures' argument, the Agreements are not rendered ambiguous by the Loan's lack of specific definitions for the terms "day-to-day management and operation of Borrower's business" and "material business decisions." Indeed, the Loan sets forth in detail the nature and purpose of the Loan amount, and contains extensive provisions, conditions, and exhibits describing Borrower's business, project, construction plans, and budget. According to the Agreements executed on July 9, 2007, Borrower's business was operating a 16-story residential building, buying out the tenants of the SRO units, and converting the vacated units into market rate apartments.

[1] Likewise, in Section 4.2 (b) (iii) of the Loan, Borrower—and, through the Limited Joinder, the defendants—agreed that, following consummation of a permitted transfer of membership interest, "either or both Principals[] . . . shall at all times Control the Project, Managing Member and the day-to-day management and operation of Borrower's business and all material business decisions (including a sale or refinance) for Borrower . . . ."

Accordingly, there is no significant ambiguity arising from the provision requiring that "either or both" defendants "Control" the "day-to-day management and operation of Borrower's business." The plain meaning of those terms is clear, and the only reasonable interpretation is that either Mr. Besen or Mr. Zich must always possess, in directly or indirectly, the authority to make or influence policy decisions regarding the daily management and operation of the business, that is, managing, converting, and renting the units in the building.

Likewise, there is no significant ambiguity as to the terms "material business decisions." The word "material" is defined in Black's Law Dictionary as "[i]mportant; more or less necessary; having influence or effect; . . . having to do with matter, as distinguished from form" (Black's Law Dictionary [5th ed.]). Affording the term "material business decisions" its plain meaning, the Agreements are clear that one of Mr. Besen or Mr. Zich is required to possess, directly or indirectly, the authority to make or influence the Borrower's important business decisions at all times.

Accordingly, the court declines to find that the above provisions are susceptible of more than one reasonable interpretation. Any other conclusion would "add, excise or distort the meaning of the terms" that the participating parties—all sophisticated entities and individuals—chose to include in these contracts, which were drafted at arms' length and concerned substantial sums of money (*see NML Capital*, 17 NY3d at 260).

2. There Are Issues of Fact as to Defendants' Loss of "Control"

Defendants argue that the evidence demonstrates that Mr. Besen and Mr. Zich each lost "Control" at some point prior to January 2008; therefore, defendants had

breached the Agreements more than six years before this action was commenced, and the action is untimely under the applicable limitation period provided by CPLR 213.

While the Agreements are unambiguous, the court agrees with Ventures that there are issues of fact as to the date or dates by which defendants were divested of the "Control." The court notes that, while defendants were required to "Control" "the day-to-day management and operation of Borrower's business and all material business decisions," the Agreements neither required defendants to "possess[] . . . the power to direct or cause the direction of the management policies" to the exclusion of others, nor to exercise such power.

Defendants urge the court to find that they were jointly in breach of the Agreements at some unspecified time between July 9, 2007 and December 31, 2007 on the basis that Mr. DeCesare and L & B, the 95% owner of the Property, prevented defendants from exercising any policy-making power whatsoever. Mr. Besen and Mr. Zich depict their roles in the project prior to January 2008 as those of puppets limited to administering the policies and business decisions of other persons and entities—namely, Mr. DeCesare, L & B and its attorneys, and, later, Mr. Shah (*see e.g.* aff of Besen, ¶¶ 6-9; aff of Zich, ¶¶ 3-18; *see generally* Besen tr; Zich tr). Indeed, Mr. DeCesare's testimony at deposition tends to support those depictions (*see* DeCesare tr at 45-47 [stating that defendants did not have "Control" within the meaning of Section 4.2 (b) of the Loan "from day one"]).

Nonetheless, defendants have failed to carry their initial burden of demonstrating the absence of triable issues of fact. Their evidence establishes, among other things, that: (1) Mr. Zich executed the Loan in his capacity as vice president of the Borrower's

managing member corporation, and was, together with Mr. DeCesare, "executing the business plan" of buying out the SRO occupants and converting the apartment units; (2) Mr. Besen and his management company, NYCM, operated and managed the building, and aspects of the project, until or beyond May 2008; (3) both defendants attended and participated in "all of the ownership meetings," and had some role in making business decisions; and (4) Mr. Shah and his investor group replaced Mr. Besen, Mr. Zich, and Mr. DeCesare's "team" in May 2008 (Shah tr at 10-12, 17-18, 30, 27-42; *see generally* aff of Besen.; aff of Zich). Accordingly, there are issues of fact as to whether and when defendants no longer retained "Control," and the date on which the limitation period began to toll.

Additionally, even if defendants had eliminated all triable issues of fact as to the date by which they were divested of "Control," summary judgment is precluded by issues of fact raised by Ventures' evidence. Mr. Shah's affidavit and deposition testimony indicate that he became involved with the project at some point in 2007, his investment group replaced the original Borrower as the managing member in May 2008, and, also in May 2008, defendants were replaced as managers of the Property (*see* aff of Shah, ¶ 1; Shah tr at 11, 15-16, 20-23). That evidence is supported in part by letters—signed by Mr. Besen, dated in 2008-2009, and drafted on NYCM letterhead—which authorized withdrawal of funds from the Property's operating bank account to facilitate tenant buy-outs (*see* plaintiff's exhibits 5-8; Besen tr at 52-54).

Ventures also submits an undated confidential financing memorandum that was prepared under the direction of Mr. Shah's investment group, as the new sponsor entity, in 2008 or 2009 (Shah tr at 19; plaintiff's exhibit 1). The memorandum indicated that the

new sponsor sought $14 million to recapitalize the project and convert the existing building of SRO units into a boutique hotel (plaintiff's exhibit 1). It further stated that the project, under the new sponsor, "is led by the team of Jonathan Zich, Michael Besen, and Peter Jaques," and explained that Mr. Besen's management company, NYCM, "has overseen the leasing and management of the Property since 1998" (*id.*). Mr. Shah testified that he believed that the defendants, as well as Mr. Jaques, were involved with the creation of the memorandum; in fact, he testified that Mr. Zich was "intimately involved" (Shah tr at 21-23).

In any event, the issue of when defendants were divested of "Control" is not suited for resolution on a motion for summary judgement, as such resolution requires the evaluation of credibility and apportionment of weight to inconsistent evidence (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [1st Dept 2002] ["Any inconsistencies in the several accounts . . . go to the weight of the evidence, . . . and the value to be accorded to the evidence is a matter for resolution by the trier of fact."]).

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Michael M.R. Besen and Jonathan Zich is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference at 60 Centre Street, Room 242, New York, NY 1007 at 10:00 a.m. on May 8, 2018.

Dated: 3/8/18

ENTER:

Hon. Andrea Masley, J.S.C.
HON. ANDREA MASLEY