

LMezz 250 W90 LLC v Ringel
2018 NY Slip Op 30471(U)
March 6, 2018
Supreme Court, New York County
Docket Number: 654469/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LEON F. ROSENKRANTZ
Justice

PART 54

LMezz 250 W 90th & LC

INDEX NO. 654469/2016

Benjamin Ringel

MOTION DATE 11/13/2017

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

71-116

122-133

134-139

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision and order

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

Dated: 3/6/18

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

-----X
LMEZZ 250 W90 LLC,

Index No.: 654469/2016

DECISION & ORDER

Plaintiff,

-against-

BENJAMIN RINGEL,

Defendant.

-----X
HON. SHIRLEY WERNER KORNREICH:

Plaintiff LMezz 250 W90 LLC (LMezz) moves, pursuant to CPLR 3212, for summary judgment on its claim for breach of contract and for dismissal of defendant’s counterclaims. Defendant Benjamin Ringel opposes. For the reasons discussed below, plaintiff’s motion is granted in part.

*I. Procedural History & Factual Background*¹

Defendant Ringel is the personal guarantor on a defaulted loan (the Mezz Loan), currently held by plaintiff LMezz. The Mezz Loan was originally made by Ladder Capital Finance LLC (Mezz Lender), a commercial mortgage financing company and sole member of LMezz, to AC NW Retail Investment LLC (Mezz Borrower), of which Ringel is the sole equity member. Ringel negotiated the Mezz Loan with Mezz Lender in 2015 to avert foreclosure on a property located at 250 W 90th Street in Manhattan (Property), which had previously been owned by Ringel’s wholly-owned entity, AC I Southwest Broadway LLC (Original Borrower). Mezz Borrower’s only asset is its sole membership in Armstrong New West Retail LLC (Mortgage Borrower, with Mezz Borrower, Borrowers), a single asset real estate entity that now

¹ The facts in this section are derived from documentary evidence and affidavits submitted by the parties (including that of Michael DiOrio, an employee of Mezz Lender), and are undisputed unless otherwise noted.

owns the Property. Mezz Lender assigned its rights under the Mezz Loan to LMezz in March 2016.

When Ringel refinanced the loan on which Original Borrower had defaulted in July 2015, Mortgage Borrower took title to the Property. Mezz Lender provided two interest-only bridge loans: 1) a \$21 million mortgage loan secured by the Property to Mortgage Borrower (Mortgage Loan, with Mezz Loan, Loans), pursuant to a contract titled “Loan Agreement”, dated July 20, 2015 (Dkt. 79,² Mortgage Agreement); and 2) the \$5.85 million Mezz Loan to Mezz Borrower pursuant to a contract titled “Mezzanine Loan Agreement,” also dated July 20, 2015 (Dkt. 80, Mezz Agreement, with Mortgage Agreement, Agreements). Both Agreements are governed by New York law and set forth a maturity date of August 6, 2016. Dkt. 79 (Mortgage Agreement) at 61-62, 90, 97; Dkt. 80 (Mezz Agreement) at 60, 92, 98. Mezz Borrower also executed promissory notes evidencing the Loans. Dkt. 81 (Mezz Note); *see* Dkt. 80 (Mezz Agreement) at 10 (referring to a “Mortgage Note”). As collateral for the Mezz Loan, Mezz Borrower pledged its ownership interest in Mortgage Borrower (in effect, Armstrong New West Retail LLC, the owner of the Property and Mezz Borrower’s only asset) pursuant to a pledge and security agreement with Mezz Lender. Dkt. 82 (Pledge Agreement).

The day before the Loans closed, the Property’s then-tenant, Shopwell, Inc., d/b/a, Food Emporium, Inc. (A&P), filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). Dkt. 74 (DiOrio Aff.) ¶¶ 24-25; *see* Dkt. 86 (2/29/16 Bankruptcy Court order) at 1. The lease between A&P and Original Borrower (A&P Lease, Dkt. 85), now at risk under bankruptcy proceedings, was Mezz Borrower’s sole revenue source. Dkt. 74 (DiOrio Aff.) ¶ 26. Nevertheless, the Loans closed.

² References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

The Mortgage Agreement specifies that proceeds from Property lease payments are to be deposited in a “Clearing Account” at Wells Fargo Bank, N.A. (Wells Fargo) and swept daily by Wells Fargo into a “Cash Management Account” (CMA) controlled by Mezz Lender. Dkt. 79 (Mortgage Agreement) at 44. On each monthly payment date, amounts in the CMA are to be applied to payment of tax deposits,³ insurance deposits, Mortgage Loan debt service and default interest, operating expenses, and monthly Mezz Loan debt service (in that order). *Id.* at 48.

Remaining funds in the CMA—called “Excess Cash Flow”—are treated as follows:

[O]n each Monthly Payment Date during the Term, except during the continuance of an Event of Default, *all funds deposited* into the Cash Management Account *during the immediately preceding Interest Period* shall be applied on such Monthly Payment Date [to the payments listed as items (a) to (h)] ... (i) then, *all amounts remaining in the Cash Management Account* after deposits for items (a) through (h) above (the “Excess Cash Flow”) *into the Excess Cash Flow Account* as required under Section 6.9; (j) then, if Lender has received notice that a *Mezzanine Loan Event of Default* has occurred and is continuing, *payment to Mezzanine Lender*, as a distribution permitted under applicable law, *of all Excess Cash Flow*.

Id. at 48 (emphasis added); *see also id.* at 47 (§ 6.9) (“So loan [sic] as any portion of the Indebtedness remains outstanding, Borrower shall deposit or cause to be deposited with or on behalf of Lender all Excess Cash Flow, which amounts shall be transferred by the Cash Management Bank into an Account established to hold such funds (the “**Excess Cash Flow Account**”) and held as additional security for the Loan. Amounts deposited from time to time into the Excess Cash Flow Account pursuant to this Section 6.9 are referred to herein as the “**Excess Cash Flow Funds.**”).⁴

³ The Mortgage Agreement suspends Mortgage Borrower’s monthly tax deposit obligation so long as, *inter alia*, the tenant is paying taxes directly. Dkt. 79 at 44-45.

⁴ Following a Mortgage Loan default, the Mortgage Agreement allows Mezz Lender to apply ECFA funds to the Mortgage Loan. *Id.* at 48-49 (“[U]pon the occurrence of an Event of Default,

Section 4.1.10 of the Mortgage Agreement restricts Mortgage Borrower's ability to lease the Property. For example, "[a]ll Leases⁵ and all renewals of Leases executed after the date hereof shall ... (ix) not contain ... any requirement for a non-disturbance or recognition agreement" *Id.* at 25 (footnote added). Further, § 4.1.10 restricts Mortgage Borrower's ability to renew, modify, or replace the A&P Lease without Mezz Lender's prior approval:

Further, all Major Leases⁶ and all renewals, amendments and modifications thereof and waivers thereunder executed after the date hereof shall be subject to Lender's prior written approval, which approval shall not, so long as no Event of Default shall exist, be unreasonably withheld or delayed.

Id. (footnote added). Mezz Lender, however, agreed to execute its standard non-disturbance agreement⁷ under any approved lease, subject to "commercially reasonable changes" requested by tenant that were "reasonably acceptable" to Mezz Lender. *Id.*

Lender shall be under *no obligation* to release or disburse any of the Reserve Funds and *may, at its option, ... apply such funds ... to the payment of the Debt in such order, proportion and priority as Lender may determine in its sole discretion.*"; *id.* at 83, 89 (defining "Debt", "Loan", and "Loan Documents" to refer to the Mortgage Loan); *id.* at 96 (defining "Reserve Funds" to include excess cash flow deposited into the ECFA). The analogous provision in the Mezz Loan does not permit or allow Mezz Lender to use ECFA funds to satisfy Mezz Loan debt service. *Compare* Dkt. 79 (Mortgage Agreement) at 48-49 *with* Dkt. 80 (Mezz Agreement) at 47 ("[U]pon the occurrence of an Event of Default, Lender shall be under no obligation to release or disburse any of the Reserve Funds and may, at its option, withdraw the Reserve Funds ... and apply such funds ... to the payment of the Debt in such order, proportion and priority as Lender may determine in its sole discretion.") *and id.* at 97 (defining "Reserve Funds" as "all funds deposited by Borrower with Lender pursuant to Article 6 of *this [Mezz] Agreement*").

⁵ "Lease" shall mean any lease, sublease ... or other agreement ... pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of any space in the Property, and every modification, amendment or other agreement relating to such lease [or] sublease" Dkt. 79 (Mortgage Agreement) at 87.

⁶ "Major Lease" shall mean the Food Emporium Lease or any replacement or substitute for the Food Emporium Lease." Dkt. 79 (Mortgage Agreement) at 89.

⁷ A non-disturbance agreement ensures a tenant's right to occupy leased premises—often on condition that tenant continues to perform under its lease—vis-à-vis, for example, the holder of a mortgage loan secured by the premises. *See, e.g., KVR Realities, Inc. v Treasure Star, Inc.*, 58 NY2d 793, 795 (1983); 49 Am. Jur. 2d *Landlord and Tenant* § 999 (2018).

Mezz Borrower's debt service obligations on the Mezz Loan are as follows:

On each Monthly Payment Date throughout the Term, Borrower shall make a payment to Lender monthly in arrears of interest accruing on the Outstanding Principal Balance during each Interest Period⁸ (each such payment, a "**Monthly Debt Service Payment**"), which payments shall be applied to accrued and unpaid interest.

Dkt. 80 (Mezz Agreement) at 12 (§ 2.3.1(b)) (footnote added).⁹ "Event[s] of Default" include "if (1) any monthly installment of principal and/or interest due under the Note ... or (2) the payment of the Obligations due on the Maturity Date, is not paid when due". *Id.* at 54-55 (§ 10.1(i)).¹⁰

Section 10.1(b) of the Mezz Agreement specifies Mezz Lender's right to accelerate the Mezz Loan upon default. Dkt. 80 at 57 ("Upon the occurrence of an Event of Default ... Lender may, ... declar[e] the Obligations to be immediately due and payable").¹¹ These Obligations include Mezz Borrower's obligations for payment of "the Outstanding Principal Balance together with all interest accrued and unpaid thereon and all other sums, including the Minimum

⁸ The "Interest Period" is the 6th day of the calendar month through and including the 5th day of the following month. Dkt. 80 (Mezz Agreement) at 12.

⁹ *See also* Dkt. 80 (Mezz Agreement) at 12 ("The accrual period for calculating interest due on each Monthly Payment Date shall be the Interest Period immediately prior to such Monthly Payment Date."). Interest on the Outstanding Principal Balance is calculated

by multiplying (a) the actual number of days elapsed in the period for which the calculation is being made by (b) a daily rate based on a three hundred sixty (360) day year (that is, the Interest Rate or the Default Rate, as then applicable, expressed as an annual rate divided by 360) by (c) the Outstanding Principal Balance.

Id.

¹⁰ "Event of Default" also includes "if any of the Taxes or Other Charges are not paid when due, unless contested in accordance with this Agreement." Dkt. 80 at 45-46 (Mezz Agreement § 10.1(iii)). The Mezz Agreement separately obligates Mezz Borrower to "cause Mortgage Borrower to pay all Taxes ... prior to delinquency." *Id.* at 28 (§ 4.1.3).

¹¹ Article 2 of the Mezz Note similarly specifies that "[t]he Debt shall without notice become immediately due and payable at the option of Lender if any payment required is not paid on or prior to the date when due ... or on the happening of any other Event of Default." Dkt 81 at 1.

Interest Required Payment and the Additional Interest” *Id.* at 85 (defining “Debt”); *see id.* at 94 (defining “Obligations” to include “Borrower’s obligations for the payment of the Debt”).

The Minimum Interest Required Payment is defined as \$5,850,000.00 (the Mezz Loan principal) times the Interest Rate (15% per annum), less certain (non-default) interest payments already made. *Id.* at 82 (defining Applicable Minimum Interest Amount), 88 (defining Interest Rate), 92 (defining Minimum Interest Required Payment). Additional Interest is defined as 2% of Mezz Loan principal and described as “additional consideration” for the Mezz Loan. *Id.* at 17-18, 81.

Mezz Agreement § 2.3.2 specifies: “In the event that, and for so long as, any Event of Default shall have occurred and be continuing, ***the Outstanding Principal Balance and ... overdue interest in respect of the Loan, shall, at Lender’s election, accrue interest at the Default Rate, calculated from the date the Default occurred*** which led to such Event of Default” Dkt. 80 at 11 (emphasis added). The Default Rate is five percent (5%) above the Interest Rate (15% per annum), or 20% per annum total. *Id.* at 85, 88.

Defendant Ringel personally guaranteed Mezz Borrower’s performance under the Mezz Agreement by executing a guaranty for Mezz Lender’s benefit (Guaranty, Dkt. 83). Under the Guaranty, Ringel made an “***irrevocable, absolute***, continuing guaranty of payment and performance,” (Dkt. 83 at 2, § 1.3), accepting personal liability for Mezz Borrower’s obligations under the Mezz Agreement and for repayment of the Mezz Note. *Id.* at 1-2. The Guaranty states, in relevant part:

Guarantor hereby ***irrevocably and unconditionally*** guarantees to Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, ***by acceleration of maturity*** or otherwise. Guarantor hereby ***irrevocably and unconditionally*** covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor. ... Guarantor hereby

assumes liability as a primary obligor for, hereby ***unconditionally guarantees payment*** to Lender of, the Obligations

Dkt. 83 (Guaranty) at 1-2 (§§ 1.1, 1.2) (emphasis added). The “Guaranteed Obligations” and “Obligations” include Mezz Borrower’s obligations under the Mezz Agreement, Mezz Note, and Pledge Agreement. *Id.* at 2 (§ 1.2) (referring to “Obligations []as such term is defined in the [Mezz] Agreement”); Dkt. 80 (Mezz Agreement) at 90-91, 94. The Guaranty requires Ringel to immediately pay Mezz Lender, upon demand, any post-due amounts on the Guaranteed Obligations. Dkt. 83 (Guaranty) at 2 (§ 1.5). It further designates Ringel as a ***primary obligor*** and releases Mezz Lender from enforcement obligations against Mezz Borrower or collateral. *Id.* at 3 (§ 1.6).

Moreover, under Article I, “[t]he Guaranteed Obligations and the liabilities and obligations of Guarantor to Lender hereunder shall not be reduced, discharged or released because or by reason of any existing or future offset, claim or defense of Borrower or any other party against Lender or against payment of the Guaranteed Obligations” *Id.* at 2 (§ 1.4). Pursuant to Article II, Ringel agreed that his obligations under the Guaranty “shall not be released, diminished, impaired, reduced or adversely affected by[,] ... and waives any common law, equitable, statutory or other rights” resulting from various scenarios, such as bankruptcy of Mezz Borrower, “[a]ny adjustment, indulgence, forbearance or compromise that might be granted or given by Lender” to Mezz Borrower, and “any existing or future right of offset, claim or defense of [Mezz] Borrower against Lender, or any other party.” *Id.* at 4, 6 (Art. II preamble, §§ 2.2, 2.3, 2.11). Ringel further waived his “common law, equitable, statutory or other rights” in connection with

[a]ny other action taken or omitted to be taken with respect to the Loan Documents, the Guaranteed Obligations, or the security and collateral therefor, ... it being the unambiguous and unequivocal intention of Guarantor that Guarantor shall be

obligated to pay the Guaranteed Obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, ... which obligation shall be deemed satisfied only upon the full and final payment and satisfaction of the Guaranteed Obligations.

Id. at 4, 6 (Art. II preamble, § 2.14) (emphasis added).

As the A&P bankruptcy proceeded, AF Norwich, LLC (Norwich) successfully bid to purchase the A&P Lease pursuant to a lease/sale agreement dated January 11, 2016 (Norwich Agreement). Dkt. 86 (2/29/16 Bankruptcy Court order) at 1-2; Dkt. 122 (Ringel Aff.) ¶ 8. On February 29, 2016, the Bankruptcy Court approved the sale and extended the deadline for assumption or rejection of the A&P Lease to March 4, 2016 on condition—at Ringel’s insistence—that Norwich promptly pay A&P’s March 2016 rent. Dkt. 86 (2/29/16 Bankruptcy Court order) at 12, 22; Dkt. 122 (Ringel Aff.) ¶¶ 10-11. The sale was not consummated by or on the deadline, neither Norwich nor A&P paid March 2016 rent, and the A&P Lease was deemed rejected on March 4, 2016. Dkt. 74 (DiOrio Aff.) ¶ 25; Dkt. 122 (Ringel Aff.) ¶ 11. Ringel claims that Mezz Lender’s refusal to grant automatic non-disturbance protection to Norwich’s sub-lessees resulted in Norwich’s failure to close. Dkt. 122 (Ringel Aff.) ¶ 12. He posits that the lack of automatic protection would have placed Norwich at the mercy of Mezz Lender’s unfettered discretion, on a subtenant-by-subtenant basis, to grant non-disturbance protection that Mezz Lender could, according to Ringel, withhold for any reason. *Id.* The Bankruptcy Court held that Mezz Lender’s execution of a non-disturbance agreement that covered future subtenants was not a precondition to closing under the Norwich Agreement. Dkt. 139 (3/3/2016 Bankruptcy Court Hr’g Tr.) 52:18-25.

Following A&P's failure to make its March 2016 lease payment, Mezz Borrower did not pay debt service on or by the March 6, 2016 deadline. *See* Dkt. 74 (DiOrio Aff.) ¶ 26.¹² On March 7, 2016, LMezz sent Mezz Borrower a letter noticing the default and declaring acceleration of the entire amount due and owing under the Mezz Loan. Dkt. 91 (Notice of Default). The Notice of Default stated, *inter alia*, "Borrower has failed and refused to pay to Lender the monthly payment of interest due on March 4, 2016,"¹³ pursuant to Section 2.3.1 of the Loan Agreement." *Id.* at 1 (footnote added).¹⁴

By letter to Mezz Lender on March 9, 2016, Ringel purported to reject the Notice of Default. Dkt. 92 (Rejection Letter) at 1. The Rejection Letter asserted that no default existed with respect to March debt service because \$142,000 that had been deposited to the CMA upon closing of the Loans should have been used to pay March debt service. *Id.* Ringel indicated that he had "already wired" April 2016 debt service, and that he intended to sign a lease with a new tenant and to close on refinancing prior to the deadline for May 2016 debt service. *Id.*¹⁵

On March 10, 2016, Mezz Lender sent Ringel a "Reservation of Rights" letter. Dkt. 93 (Reservation Letter). The Reservation Letter acknowledged a \$136,000 deposit into the Clearing Account (the March 10 Payment) and stated that Mezz Lender reserved the right to apply the

¹² A&P and Mezz Borrower also failed to pay a \$355,458.56 property tax bill due January 4, 2016. Dkt. 74 (DiOrio Aff.) ¶¶ 26-27; Dkt. 87 (Nov. 20, 2015 tax bill); Dkt. 88 (Feb. 19, 2016 tax bill). Following application of a credit on April 13, 2016, more than \$90,000 in real estate taxes on the Property remained unpaid and past due as of the June 2016 tax bill. Dkt. 98 at 2 (4/13/2016 email from Leo Levya to Kevin Nash); Dkt. 90 (6/3/2016 property tax bill) at 1; Dkt. 122 (Ringel Aff.) ¶ 24.

¹³ The Mezz Agreement indicates a March 6 deadline. Defendant does not argue that ambiguity (if any) in the Notice of Default rendered its declaration of acceleration inoperative.

¹⁴ The Notice of Default further noted that "Borrower also failed to pay the real estate taxes due on the Property as of January 1, 2016." Dkt. 91.

¹⁵ Defendant further claimed that applying his \$270,000 tax credit to the outstanding property tax bill would have saved \$23,000 in late fees. Dkt. 92 (Rejection Letter) at 2.

payment to amounts due on the accelerated Mezz Loan in its sole discretion under § 10.2(d) of the Mezz Agreement. *Id.*¹⁶

Mezz Lender assigned its right, title and interest in the Mezz Loan, Mezz Agreement, Pledge Agreement, and Guaranty pursuant to an Assignment and Assumption Agreement dated March 21, 2016 (Assignment, Dkt. 84), endorsing the Mezz Note to the order of plaintiff LMezz. Dkt. 81 (Mezz Note) at 7 (Allonge). Pursuant to the Pledge Agreement, LMezz noticed an April 20, 2016 public sale of Mezz Borrower's rights in Mortgage Borrower. Dkt. 94 (3/21/2016 notice of sale).

Following the notice of sale, Ringel requested an extension of time to lease the Property to a new tenant. Dkt. 95 at 1 (3/31/2016 Ringel email). In a series of extensions,¹⁷ LMezz pushed off the sale to June and then July, and Ringel made payments of \$250,000 on June 3 (the June 3

¹⁶ Section 10.2(d) states: "Any amounts recovered from the Collateral or any other collateral for the Loan after an Event of Default may be applied by Lender toward the payment of any interest and/or principal of the Loan and/or any other amounts due under the Loan Documents, including the Additional Interest and the Minimum Interest Required Payment, if applicable, in such order, priority and proportions as Lender in its sole discretion shall determine." Dkt. 80 at 57-58. "Collateral" is defined to include "all other real or personal property of Borrower or any Guarantor that is at any time pledged or otherwise given as security to Lender for the payment of the Debt under the Pledge Agreement, this Agreement or any other Loan Document." *Id.* at 84.

¹⁷ At plaintiff's insistence, and as a precondition for a 45-day extension, defendant signed a pre-negotiation agreement on April 15, 2016 (PNA) waiving his and Mezz Borrower's counterclaims and defenses relating to the Loans. Dkt. 95 (3/31/2016 emails to Ringel); Dkt. 96 (4/15/16 Ringel email); Dkt. 97 (PNA). The PNA's waiver of defenses was made subject to certain Reservations, defined as follows:

[N]othing contained herein shall preclude Borrower or Guarantor from raising or asserting defenses specifically related to challenging: (i) the Lender's notice of default pursuant to the Lender's Notice of Default, Acceleration and Reservation of Rights dated March 7, 2016 ("Notice of Default"); (ii) acceleration of the Loans pursuant to the Notice of Default; and (iii) the specific amounts due to Lender (items (i), (ii) and (iii) are collectively the "Reservations").

Dkt. 97 (PNA) at 3 (emphasis added).

Payment) and \$100,000 on July 6 (the July 6 Payment) toward accrued, but unpaid interest.¹⁸ On July 11, LMezz noticed a public sale for August 10, for the final time. Dkt. 104 (notice of August sale). On July 28, 2016, to assist Ringel in refinancing, Mezz Lender provided a statement of amounts owed on the Mezz Loan as of August 5, 2016. Dkt. 110 (Payoff Statement). Ringel objected to the application of default interest and late fees, claiming that both would hinder his efforts to refinance. Dkt. 109 (8/3/2016 email from Ringel to DiOrio). The evening before the noticed August sale, both Borrowers filed voluntary Chapter 11 petitions for bankruptcy, with Ringel signing the bankruptcy papers on their behalf. Dkts. 75-77 (bankruptcy papers). During the pendency of the bankruptcy proceedings, Borrowers successfully executed a lease of the Property with Bed, Bath & Beyond. Dkt. 63 (lease).¹⁹

On August 24, 2016, LMezz filed the instant suit, asserting a single cause of action for breach of the Guaranty. Dkt. 1 (summons and complaint). Ringel asserts two counterclaims for breach of the implied covenant of good faith and fair dealing, the first of which alleges that Mezz Lender and LMezz conducted predatory lending practices vis-à-vis the Mezz Loan; defendant seeks \$10 million in damages and nullification of his liability under the Guaranty. Dkt. 4 (answer) at 3-8, 11. The second counterclaim alleges that Mezz Lender conducted predatory lending practices vis-à-vis a property in Carmel, NY (Carmel Property); defendant seeks \$2.775 million in damages. *Id.* at 8-11.

Plaintiff LMezz filed the instant summary judgment motion on June 6, 2017, prior to the fact discovery deadline. Seq. 002. The parties submitted their papers by July 31, 2017. The

¹⁸ See Dkt. 74 (DiOrio Aff.) ¶¶ 45, 48; Dkt. 100 (notice of June sale); Dkt. 101 (6/3/2016 emails between McCormack and Ringel); Dkt. 102 (6/3/2016 email from DiOrio to Ringel); Dkt. 102 (6/27/2016 DiOrio email); Dkt. 103 (notice of July sale).

¹⁹ Ringel claims that the repeated public notices of sale hampered his efforts to lease the Property, including to Bed, Bath & Beyond.

motion was marked fully submitted on the papers on November 13, 2017, without oral argument. That day, defendant's counsel moved to withdraw. Seq. 003. On November 16, 2017, the court granted defendant's counsel's motion to withdraw and ordered defendant to retain new counsel within 30 days from the date of the decision or appear *pro se*. Dkt. 145 (order).²⁰ New counsel has not filed a notice of appearance.

II. Discussion

A. Legal Standard – Summary Judgment

Summary judgment may be granted only in the absence of any triable issue of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The movant bears the burden of prima facie showing 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). The motion must be “supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.” CPLR 3212(b). Failure to show prima facie entitlement to summary judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The evidence submitted on the motion must be examined in the light most favorable to the parties opposing summary judgment. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

Once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). Failure to contradict facts is an admission. *Costello Assocs., Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d

²⁰ Due to administrative delay, the order was not entered on NYSCEF until November 24, 2017.

at 562. One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate an acceptable excuse for his failure to offer admissible evidence. *Id.* Nor can summary judgment be defeated by the “shadowy semblance of an issue.” *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). Hearsay evidence may be considered in opposition, but it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact following the court’s examination of the documents submitted in connection with the motion. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Defendant’s Breach of Guaranty

1. Liability

Plaintiff moves for summary judgment on its sole cause of action for defendant’s breach of the Guaranty. Defendant opposes, contending as follows: that Mezz Lender’s declaration of default and acceleration was improper because there was no default; that Mezz Lender and plaintiff impaired defendant’s ability to generate funds to stave off default; and that satisfaction of the underlying Mezz Loan debt will be accomplished through Mezz Borrower’s pending bankruptcy.

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” *City of NY v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998) (emphasis added). Defendant does not dispute that he executed an absolute and

unconditional Guaranty, that Mezz Borrower owes repayment of the Mezz Loan,²¹ or that he failed to perform under the Guaranty. Nonetheless, he argues that the Notice of Default and acceleration of the Mezz Loan were invalid.²² As discussed below, Mezz Borrower's failure to tender March 2016 debt service on or prior to the March 6, 2016 deadline was an unexcused Event of Default,²³ providing proper ground for Mezz Lender's declaration of acceleration.

Defendant claims that although March 2016 rent was never deposited to the Clearing Account, sufficient funds remained in the CMA to timely pay March 2016 Mezz Loan debt service.²⁴ However, under the Mortgage Agreement, funds in the CMA exceeding monthly obligations under the Loans were to be swept, on each monthly payment date, into a *separate* account—the *ECFA*—and *held as additional security* for the Loans. Defendant's unsupported conjecture that adequate funds remained in the CMA—contrary to the payment waterfall under the Mortgage Agreement—is insufficient to defeat plaintiff's motion. *See Zuckerman*, 49 NY2d at 562 (“expressions of hope or unsubstantiated allegations or assertions are insufficient” to avoid summary judgment).

²¹ Absent acceleration or an agreement by the parties to renew the loan, the Mezz Loan would have matured on August 6, 2016, rendering Mezz Borrower (and defendant, upon demand) liable for repayment of principal, non-default interest (15% per annum), and Additional Interest (2% of Mezz Loan Principal). *See* Dkt. 80 (Mezz Agreement) at 13 (§ 2.3.2), 92, 98.

²² The court notes that the PNA—which defendant fails to address—reserved defenses “specifically related to challenging” the Notice of Default and the acceleration. Dkt. 95 (PNA) at 3-4.

²³ The court addresses nonpayment of debt service, but failure to pay the Property's real estate taxes in January 2016 also was an Event of Default.

²⁴ Defendant argues that existence of these funds precludes default because the Mortgage Agreement states that “if adequate funds are available in the [CMA] for *such payments* [required under § 6.11.1(a)-(f)], and an Event of Default is not otherwise in existence, the failure by the Cash Management Bank to allocate such funds into the appropriate Accounts shall not constitute an Event of Default.” Dkt. 79 (Mortgage Agreement) at 48 (§ 6.11.2) (emphasis added). This provision does not apply to payment of Mezz Loan debt service, which is allocated by § 6.11.1(h). *Id.* More importantly, the *Mortgage Agreement* does not govern whether an Event of Default exists under the *Mezz Agreement*.

Defendant next contends that Mezz Lender breached the implied covenant of good faith and fair dealing by impairing Mezz Borrower's ability to secure funds to pay off the loan, thereby excusing the default. Specifically, defendant claims Mezz Lender and plaintiff interfered with efforts to secure a new tenant to the Property by, among other things, refusing to provide automatic non-disturbance protection to Norwich's sub-tenants and by noticing repeated public sales of Mezz Borrower's interest in Mortgage Borrower. Additionally, defendant alleges that Mezz Lender and plaintiff interfered with defendant's attempts to refinance the Loans by providing an inaccurate Payoff Statement on July 28, 2016 (Dkt. 110).

These allegations are trumped by the absolute, unconditional terms of the Guaranty, which waived all defenses to Mezz Borrower's obligations under the Mezz Agreement and Mezz Note. *See* Dkt. 83 (Guaranty) at 4-6 ("Guarantor hereby ... waives any common law, equitable, statutory or other rights ... which Guarantor might otherwise have as a result of or in connection with ... [a]ny other action taken or omitted to be taken with respect to the Loan Documents, the Guaranteed Obligations, or the security and collateral therefor"). Courts routinely enforce express waivers in an absolute guaranty against defenses to liability under the guaranty, including alleged breaches of the implied covenant of good faith and fair dealing. *See Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 (1st Dept 2009); *see also Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 (1st Dept 2010); *Sterling Nat. Bank v Biaggi*, 47 AD3d 436, 437 (1st Dept 2008). The Guaranteed Obligations include Mezz Borrower's debt service obligations as well as its obligations in the event of Mezz Loan acceleration. *See* Dkt. 83 (Guaranty) at 1-2. Thus, even if plaintiff's conduct could excuse Mezz Borrower's default and void the Mezz Loan acceleration—whether prospectively, i.e., through the failed Norwich sale,

or retroactively, i.e., through the notices of sale or the Payoff Statement—defendant waived any such defense under the Guaranty.

In any event, defendant’s argument is to no avail, even as to plaintiff’s alleged conduct preceding the Notice of Default. Contracts interpreted under New York law include an implied covenant of good faith and fair dealing, which “embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002), quoting *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995). The covenant does not “imply obligations ‘inconsistent with the other terms’” of the contract; rather, it “encompass[es] ‘any promises which a reasonable person in the position of the promisee would be justified in understanding were included.’” *Id.*, quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978).

Defendant’s allegation that Mezz Lender derailed the Norwich sale by unreasonably refusing automatic non-disturbance protection for sublessees—which he bases on his “understanding” of negotiations between Mezz Lender and Norwich—is insufficient to create an issue of material fact. To begin, defendant presents no evidence that Mezz Lender’s refusal was unreasonable apart from his bare statement that it caused the sale to collapse. *See Fortress*, 78 AD3d at 577 (affirming grant of summary judgment for liability under guaranty where “defendant’s allegations of [tortious] interference lack[ed] evidentiary support.”). Indeed, the Bankruptcy Court held that the Norwich sale closing did not require Mezz Lender to execute a non-disturbance agreement to cover future subtenants. Dkt. 139 (3/3/2016 Bankruptcy Court Hr’g Tr.) 52:18-25. Next, defendant’s allegations that Mezz Lender *unreasonably* refused automatic non-disturbance protection contradicts § 4.1.10 of the Mortgage Agreement, which

protects Mezz Lender by restricting new leases from requiring a non-disturbance agreement. *See* Dkt. 79 (Mortgage Agreement) at 25; *Jennifer Realty*, 98 NY2d at 153 (“[T]he duties of good faith and fair dealing do not imply obligations ‘inconsistent with other terms of the contractual relationship’”), quoting *Murphy*, 58 NY2d at 304. Lastly, defendant’s assertion that Mezz Lender’s refusal placed Norwich at Mezz Lender’s unfettered mercy to grant or deny non-disturbance protection “for *any* reason” contradicts the portion of § 4.1.10 that requires Mezz Lender to execute its own standard non-disturbance agreement under any approved sublease that includes any tenant-requested “commercially reasonable changes” that are “*reasonably acceptable*” to Mezz Lender.²⁵ *See* Dkt. 79 (Mortgage Agreement) at 25 (emphasis added); *accord* Dkt. 139 (3/3/2016 Bankruptcy Court hearing transcript) at 39-41 (statements by counsel for Mezz Lender agreeing to negotiate commercially reasonable non-disturbance agreement for “qualified” subtenants in good faith).

Defendant also argues that plaintiff’s “unclean hands” bar its recovery under the Guaranty. “The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages.” *Manshion Joho Ctr. Co. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 (1st Dept 2005), citing *Hasbro Bradley, Inc. v Coopers & Lybrand*, 128 AD2d 218, 220 (1st Dept 1987). The argument, therefore, has no merit.

As a final argument, defendant asserts that the underlying Mezz Loan debt will be satisfied through Borrowers’ pending bankruptcy proceedings and should not be adjudicated here. Where the terms of a guaranty permit enforcement of the underlying debt without resort to the debtor, the original debtor’s pending bankruptcy does not affect the guarantor’s liability. *See*

²⁵ Mezz Lender was also prohibited, by the implied covenant of good faith and fair dealing, from arbitrarily or irrationally exercising any discretion conferred by the contract. *See Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995).

Milliken & Co. v Stewart, 182 AD2d 385, 386 (1st Dept 1992); *Fleet Nat. Bank v Marrasso*, 23 AD3d 337, 338 (2nd Dept 2005). Defendant acknowledged that he was “liable for the Guaranteed Obligations as a primary obligor” and agreed to “assume[] liability as a primary obligor” for the Mezz Borrower’s obligations under the Mezz Note and Mezz Agreement. Dkt. 83 (Guaranty) at 1-2 (§§ 1.1, 1.2). In point of fact, the Guaranty releases Mezz Lender and plaintiff from any obligation to enforce these obligations against Mezz Borrower or against any collateral. *Id.* at 3 (§ 1.6). Moreover, defendant agreed that his obligations “shall not be released, diminished, impaired, reduced or adversely affected by ... bankruptcy ... of Borrower” Dkt. 83 (Guaranty) at 3-4 (§ 2.3). For all of these reasons, summary judgment on liability is granted on the Guaranty for amounts owed following Mezz Lender’s acceleration of the Mezz Loan on March 7, 2016.

2. Damages

Plaintiff seeks a monetary judgment of \$7,900,968.77, plus interest and fees recoverable pursuant to the Mezz Agreement, and all other costs, fees, expenses and attorneys’ fees and costs incurred by plaintiff in enforcing the terms of the Mezz Loan and Mezz Guaranty.²⁶ Plaintiff’s calculations diverge from the terms of the Mezz Agreement, and plaintiff fails to supply certain necessary information (e.g., the Minimum Interest Required Payment). An inquest, consequently, is ordered to determine the amounts owed under the Loan Agreement and Guaranty, including Servicer Fees and reasonable attorneys’ fees.

On March 7, 2016, plaintiff accelerated the Mezz Loan pursuant to the Notice of Default. The Mezz Agreement specifies the “Payment on Maturity Date” as follows: “The Loan shall mature on the Maturity Date. Borrower shall pay to Lender on the Maturity Date (a) the

²⁶ Taxes on the Property were paid in connection with Mortgage Borrower’s bankruptcy proceedings. Dkt. 74 (DiOrio Aff.) ¶ 57.

Outstanding Principal Balance, (b) all accrued and unpaid interest, (c) any portion of the Minimum Interest Required Payment that remains unpaid after application of all interest paid, (d) the Additional Interest, if any, and (e) all other amounts due under the Loan Documents.” Dkt. 80 at 13. The “Maturity Date” is “the date on which the final payment of principal of the Note becomes due and payable as herein and therein provided, whether at the Stated Maturity Date, *by declaration of acceleration*, or otherwise.” Dkt. 80 (Mezz Agreement) at 92 (§ 2.3.2) (emphasis added). The Mezz Loan, consequently, matured on March 7, 2016.

Despite maturity on March 7, 2016, plaintiff fails to calculate the Payment on Maturity Date as directed by the Mezz Agreement, including the Minimum Interest Required Payment (item c of Payment on Maturity Date).²⁷ The “Minimum Interest Required Payment” is “the difference between (x) the Applicable Minimum Interest Amount and (y) the sum of the amount of Monthly Debt Service Payments made by Borrower to Lender from the Closing Date through and including the date of prepayment of the Loan as provided herein (but excluding any interest paid at the Default Rate), inclusive of any Minimum Interest Required Payments made in respect of any partial repayments and any payment of interest made in respect to the initial Interest Period” Dkt. 80 at 92. The “Applicable Minimum Interest Amount” is defined as “as of *any date* of determination, the product of (i) \$5,850,000.00 and (ii) the Interest Rate [i.e., 15% per annum],” and is therefore \$877,500. Dkt. 80 at 82, 88 (emphasis added). Plaintiff never calculates the Minimum Interest Required Payment, nor provides information necessary to calculate this amount (i.e., item y).

Instead, plaintiff bases its damages calculations on so-called “Minimum Interest”—a term that is neither present in nor defined by the Mezz Agreement outside the phrase “*Minimum*

²⁷ Plaintiff does not indicate whether interest accrued from February 6, 2016 to March 5, 2016 (item b of the “Payment on Maturity Date) was deemed paid by, e.g., the March 10 Payment.

Interest Required Payment”—that plaintiff asserts accrued *after* acceleration. *See* Dkt. 74 (DiOrio Aff.) at 15-18. But the Mezz Agreement states that the “Minimum Interest Required Payment” immediately becomes due *on the Maturity Date* (March 7, 2016). Moreover, the “Minimum Interest Required Payment” definition eschews reference to the elapsed number of days. Dkt. 80 (Mezz Agreement) at 82, 88. Instead, the calculation, “as of *any date* of determination”, incorporates an amount made certain by multiplying the Mezz Loan principal by the interest rate ($\$5,850,000 \times 15\% = \$877,500$), deducting any non-default interest previously tendered by Mezz Borrower since Mezz Loan inception—a matter on which plaintiff’s papers are silent. *Id.* Due to plaintiff’s failure to calculate the Minimum Interest Required Payment and the lack of necessary information to perform such calculation, as noted, an inquest is required.

Mezz Agreement § 2.2.2 further entitles plaintiff to default interest, as follows: “In the event that, and for so long as, any Event of Default shall have occurred and be continuing, *the Outstanding Principal Balance and*, to the extent permitted by law, *overdue interest in respect of the Loan*, shall, at Lender’s election, accrue interest at the Default Rate [20%], *calculated from the date the Default occurred* which led to such Event of Default” Dkt. 80 at 11, 85, 88. Under these provisions, on March 7, 2016, 20% default interest began accruing on unpaid components of the “Payment on Maturity Date” reflecting principal or overdue interest. Without accounting for the March 10 Payment (\$136,000), the June 3 Payment (\$250,000), and the July 6 Payment (\$100,000), default interest is: (a) on the Outstanding Principal Balance (\$5,850,000), 20% per annum from March 7, 2016 until paid or to the date of judgment, whichever comes first; (b) on any unpaid and overdue non-default interest accrued by March 7, 2016,²⁸ 20% per annum

²⁸ I.e., any unpaid amounts of the March 2016 debt service on the Mezz Loan. Plaintiff’s motion does not seek default interest on such amounts. Should plaintiff wish to recover such default interest, plaintiff must make clear how the March 10 Payment was applied, what amount of

from March 7, 2016 until paid or to the date of judgment, whichever comes first; (c) on any unpaid amounts of the Minimum Interest Required Payment, 20% per annum from March 7, 2016 until paid or to the date of judgment, whichever comes first; and (d) on any unpaid amounts of the Additional Interest (2% of \$5,850,000, i.e., \$117,000), 20% per annum from March 7, 2016 until paid or to the date of judgment, whichever comes first. To the extent plaintiff allocated the March 10, June 3, and July 6 Payments toward default interest accrued as of such date and/or the underlying owed amounts, these payments reduce default interest owed on (a) through (d).

Mezz Agreement § 2.3.3 also entitles plaintiff to a “Late Payment Charge”: “*If any principal, interest or any other sum due under the Loan Documents, including the payment of principal due on the Maturity Date, the Additional Interest and the Minimum Interest Required Payment, as applicable, is not paid by Borrower on the date on which it is due ..., Borrower shall pay to Lender upon demand an amount equal to the lesser of five percent (5%) of such unpaid sum*” Dkt. 80 at 13 (emphasis added). As Mezz Borrower and defendant failed to pay the Mezz Loan principal, the Minimum Interest Required Payment, and the Additional Interest when it became due on March 7, 2016, pursuant to the Notice of Default and declaration of acceleration therein, Mezz Borrower incurred a Late Payment Charge of 5% of each of those sums, for which defendant, as guarantor, is liable.²⁹

In addition, plaintiff claims \$291,508.82 in attorneys’ fees under the Mezz Agreement. A “promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” *Hooper*

March 2016 Mezz Loan debt service remained unpaid following the March 10 Payment, and when (if ever) such amount was paid.

²⁹ Defendant also failed to pay the March 2016 debt service when due on March 6, 2016. Plaintiff’s motion does not request a late fee for that sum.

Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-92 (1989). Guaranty § 1.8 entitles plaintiff to recover its costs and expenses, including attorneys' fees, incurred toward enforcement of the Guaranty. *See* Dkt. 83 (Guaranty) at 3 ("In the event that Guarantor should breach or fail to timely perform any provisions of this Guaranty, Guarantor shall, immediately upon demand by Lender, pay Lender all costs and expenses (including court costs and attorneys' fees) incurred by Lender in the enforcement hereof or the preservation of Lender's rights hereunder"); *see also* Dkt. 80 (Mezz Agreement) at 64 (§ 11.3(a)) ("Borrower shall pay or, if Borrower fails to pay, reimburse Lender upon receipt of notice from Lender, for all reasonable costs and expenses (including reasonable attorneys' fees and disbursements) incurred by Lender in connection with ... (vi) enforcing any Obligations of or collecting any payments due from Borrower or Guarantor under the Loan Documents"). A promise to indemnify plaintiff for its costs in enforcing its rights under the Guaranty and Mezz Agreement, including in Mezz Borrower's pending bankruptcy proceedings, is clearly implied from the language and purpose of those agreements (i.e., to secure timely payment of the amounts owed thereunder). However, as plaintiff provides no evidence as to reasonableness of the claimed attorneys' fees, the court will refer the determination of reasonable attorneys' fees to an inquest.

Finally, plaintiff claims "servicer fees" of \$390 per month from March 2016 to June 2017, for a total of \$6,240. Mezz Agreement §11.24 (a) provides:

[a]t the option of Lender, the Loan may be serviced by a ... "**Servicer**"[] selected by Lender and Lender may delegate all or any portion of its responsibilities under the Loan Documents to the Servicer pursuant to a ... "**Servicing Agreement**"[] between Lender and Servicer. In addition, Borrower shall pay (i) any fees and expenses of Servicer ... in connection with any release of the Collateral or a portion thereof, any prepayment, defeasance, transfer, assumption, amendment or modification of the Loan, any documents or other matters requested by Borrower or Guarantor,

any special servicing or workout of the Loan or enforcement of the Loan Documents

Dkt. 80 (Mezz Agreement) at 72. The record lacks any detail regarding servicer fees and expenses.

Accordingly, an inquest is ordered to determine damages owed by defendant under the Mezz Agreement and Guaranty, consisting of (a) unpaid Mezz Loan principal; (b) unpaid overdue interest accrued until March 7, 2017; (c) unpaid amounts of the Minimum Interest Required Payment; (d) unpaid amounts of the Additional Interest; (e) unpaid Late Payment Charges on items a, b, c, and d; (f) unpaid default interest on items a, b, c, and d (after applying the March 10, June 3, and July 6 Payments); (g) reasonable attorneys' fees incurred by plaintiff in enforcing Mezz Borrower's and defendant's obligations under the Mezz Agreement and Guaranty; and (h) servicer fees.

C. Defendant's First Counterclaim

Plaintiff seeks dismissal of defendant's first counterclaim for breach of the implied covenant of good faith and fair dealing as to the Mezz Loan. On defendant's first counterclaim, in addition to seeking nullification of his obligations under the Guaranty, defendant further contends that he was damaged by \$10 million. As previously noted, defendant waived all such counterclaims under the "absolute and unconditional" Guaranty. *See Citibank, N.A. v Plapinger*, 66 NY2d 90, 93 (1985); *Sterling*, 47 AD3d at 437; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-10 (1st Dept 2007).

Moreover, to the extent that defendant was damaged by plaintiff's conduct *other than* by the increase in defendant's liability under the Guaranty, such harms accrued to *Mezz Borrower*, the defaulting debtor on the Mezz Loan. *Mezz Borrower's* ownership interest in Mortgage Borrower—*not defendant's*—was clouded by issuance of the public sale notices, and *Mezz*

Borrower's ability to obtain substitute financing was allegedly hampered by the Payoff Letter. Defendant cannot assert Mezz Borrower's claims against plaintiff. *See Citibank*, 66 NY2d at 93 (noting that shareholder-guarantor lacked standing to counterclaim for injury to corporation); *Hotel 71*, 63 AD3d at 448 (“[D]efenses sounding in breach of contract are premised on allegations of misconduct by plaintiff vis-à-vis [borrower] alone and therefore belong to and may be asserted by [borrower] alone.”). Defendant's first counterclaim is dismissed.

D. Defendant's Second Counterclaim

Plaintiff seeks dismissal of defendant's second counterclaim for breach of the implied covenant of good faith and fair dealing as to Mezz Lender's conduct regarding the Carmel Property, including alleged breaches of agreements between defendant and Mezz Lender and between defendant and Brian Harris (Mezz Lender's principal) to share profits from the sale of the Carmel Property. Barring the alleged misconduct, defendant alleges that he would have received proceeds from the sale of the Carmel Property and applied them to his Mezz Loan obligations. Defendant argues that plaintiff, by assuming Mezz Lender's rights and obligations with respect to the Mezz Loan, is liable for Mezz Lender's alleged misconduct in connection with the Carmel Property.

Defendant bases this claim on Mezz Agreement § 2.5:

In the event the Carmel Property is sold or otherwise disposed of or divested by Carmel Borrower while any portion of the Obligations hereunder are outstanding (the “Carmel Sale”), ... Lender shall have the right, **but not the obligation**, in Lender's sole and absolute discretion, to have the **net sales proceeds, if any**, from the Carmel Sale (i.e., after payment to Ladder Capital Finance LLC (together with any of its affiliates or designees, for purposes of the Carmel Sale, “Ladder”) of all amounts due to Ladder from such sale) (the “Carmel Proceeds”) applied to all or a portion of the Obligations.

Dkt. 80 at 16 (emphasis added). This provision *expressly absolves* Mezz Lender of the obligation to apply net proceeds from sale of the Carmel Property and, therefore, cannot be used to imply a duty to apply or generate such proceeds. *See Jennifer Realty*, 98 NY2d at 153 (“[T]he duties of good faith and fair dealing do not imply obligations ‘inconsistent with other terms of the contractual relationship’ ...”), quoting *Murphy*, 58 NY2d at 304. Defendant presents no other basis for holding plaintiff liable for Mezz Lender’s misconduct relating to a transaction to which he has not alleged that plaintiff was a party.³⁰ Plaintiff’s motion for summary judgment on defendant’s second counterclaim is granted, and the second counterclaim is dismissed.

Accordingly, it is

ORDERED that plaintiff LMezz 250 W 90 LLC’s motion for summary judgment against defendant Benjamin Ringel for breach of the Guaranty, is granted as to liability, and the issue of damages is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine, and within twenty days of the date of this decision and order, plaintiff shall serve a copy with notice of entry, as well as a completed information sheet,³¹ on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee’s part for the earliest convenient date, and notify the parties of the time and date of the hearing; and it is further

ORDERED that plaintiff LMezz 250 W 90 LLC’s motion for summary judgment dismissing defendant’s counterclaims is granted, and the counterclaims are hereby dismissed;

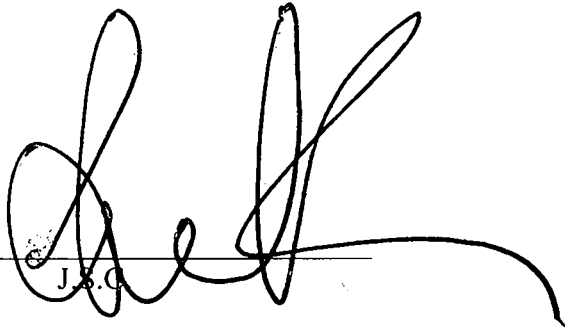
³⁰ Defendant also presents no basis for piercing the corporate veil. *See Morris v NY State Dep’t of Taxation & Fin.*, 82 NY2d 135, 141 (1993) (“[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.”).

³¹ Copies of the Information Sheet are available at:
<http://www.nycourts.gov/courts/1jd/suptmanh/SR-JHO/SRP-InfoSheet.pdf>

ORDERED that within 10 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendant by overnight mail.

Dated: March 6, 2018

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.