

NRES Holdings, LLC v Almanac Realty Sec. VI, LP
2018 NY Slip Op 31389(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 652365/2015
Judge: Andrea Masley
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NRES Holdings, LLC v Almanac Realty Securities VI, LP
Index No. 652365/15 Motion Sequence Number 003

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

-----X
NRES HOLDINGS, LLC

Plaintiff,

Index No. 652365/2015

-against-

ALMANAC REALTY SECURITIES VI, LP,
-----X
Defendant.

Masley, J.:

In motion sequence number 003, defendant Almanac Realty Securities VI, LP (Almanac) moves, pursuant to CPLR 3212, for summary judgment dismissing NRES Holdings, LLC's (NRES) remaining cause of action for breach of contract.

Almanac is an investor providing growth capital to real estate companies. NRES is a real company engaging in the business of acquiring and managing multi-family properties in the Midwest and Southwest. On July 19, 2012, Almanac, as lender, and NRES, as borrower, entered into a credit agreement (the Credit Agreement). Pursuant to the Credit Agreement, Almanac agreed to make loans to NRES. NRES was obligated to borrow at least \$85 million (the Commitment)¹ by January 19, 2015. Pursuant to Section 2.1 of the Credit Agreement, Almanac agreed to "make advances" to NRES in an amount not to exceed the Commitment (the Advances) and evidenced by promissory notes. The initial Advance was required to be in the amount of at least \$10 million and each subsequent Advance was to be in the amount of at least \$4 million. Pursuant to Section 2.5 of the Credit Agreement, NRES could not prepay any of the Advances, in whole or in part, prior to the maturity date (June 30, 2019) unless

¹Initially, this requirement was \$125 million with an option to decrease to \$85 million, which NRES elected to exercise by letter dated May 16, 2014.

Almanac approved.

By December 2013, NRES had borrowed a total of \$69.8 million of the Commitment and remained obligated to borrow an additional \$15.2 million (the Unfunded Commitment). On January 30, 2014, Andrew Silberstein, partner and vice president of Almanac, sent Paul Fingersh, manager of NRES, a "Proposed Summary of Restructure Terms," which outlined the terms and conditions upon which Almanac would accept an early termination of the Credit Agreement and a prepayment of all Advances (the Proposal). The Proposal provides that the \$69.8 million in outstanding Advances, and the \$1.08 million of deferred interest owed by NRES, would be converted to a \$95 million note due within 18 months bearing interest rates ranging from 6.35% to 11% depending on when the note was paid off. The note could be prepaid, in whole or in part, without fees or penalties provided that any prepayment in part be at least \$1 million.

On March 23, 2014, Fingersh sent Silberstein an email explaining his concerns with the Proposal. Fingersh asked for a refined proposal or, in the alternative, he would respond with a proposal. On March 24, 2014, Silberstein replied, informing Fingersh that Almanac is "happy to pursue that proposal or live with our current deal" (Silberstein aff, ex 6). He also stated that "if [NRES] want[s] to respond to our term sheet with a specific proposal, please do so. Otherwise lets [sic] fine tune the plan for the rest of the almanac capital" (*id.*). On April 2, 2014, Fingersh emailed Silberstein a counterproposal, proposing that NRES pay Almanac "35m by July 31th" and "46m by Dec 31" (Silberstein aff, ex 7). Silberstein responded that "the price is not in the ballpark for us to pursue as a buyout number" (*id.*). On May 15, 2014, Fingersh sent Silberstein a "Proposed Summary of Restructure Terms" (the NRES Proposal). The

NRES Proposal provided that the \$69.8 million in outstanding Advances, and the approximately \$1.1 million of deferred interest owed by NRES, would be converted to a \$82.1 million note; \$36 million would be due by October 31, 2014 and the remaining balance by March 31, 2015. Under the NRES Proposal, there would be no prepayment fees or penalties as long as any prepayment in part be at least \$1 million. Almanac never agreed to the NRES Proposal. The parties continued to negotiate.

On July 11, 2014, the parties entered into a First Amendment to Credit Agreement (First Amendment), whereby they agreed that NRES would make a payment of \$3,992,562 to Almanac to prepay and retire \$3,194,050 of the Advances, retiring that sum of the Advances at a 25% premium. The First Amendment specifically provides the Amendment shall not in any way be deemed an agreement to accept any future prepayments and/or retirements and maintained the full force and effect of Section 2.5 of the Credit Agreement. On September 17, 2014, the parties entered into another amendment to the Credit Agreement (the Third Amendment)², whereby Almanac agreed to accept a payment of \$3,750,000 and that this payment prepays and retires \$3 million of the Advances, retiring the Advance at a 25% premium. The Third Amendment also provides that Section 2.5 of the Credit Agreement was in full force and effect.

On October 24, 2014, Fingersh and Silberstein had a conference call to discuss the Unfunded Commitment of \$15.2 million. NRES was given the option to borrow the remaining \$15.2 million and pay it back at a 25% premium of \$3.8 million or add \$3.8

² A draft of a second amendment is submitted as evidence, but not an executed copy.

million to the outstanding balance of the Advances.³ NRES selected the latter and added \$3.8 million to its outstanding balance in order to terminate its obligation to borrow the additional \$15.2 million from Almanac (the \$3.8 million Fee). The parties entered into a Fifth Amendment to the Credit Agreement (the Fifth Amendment) to memorialize this agreement.

The Fifth Amendment provides that Almanac agreed to accept payment of \$23,945,234.30 and that this payment prepays and retires \$19,156,187.43 of the Advances as set forth in Schedule 1, which is attached to the Amendment. It also provides that Section 2.5 of the Credit Agreement remained in full force and effect and that any agreement to the prepayment and retirement set forth in Schedule 1 is not deemed an agreement to accept any future prepayments and/or retirements.

The Fifth Amendment further provides,

“Unused Commitment. [Almanac] hereby agrees that it is willing to waive the obligation under the Existing Credit Agreement that [NRES] request Advances (and accept if advanced) in the aggregate principal amount of the Commitment prior to the Commitment Termination Date, such that on the Commitment Termination Date the Unused Commitment is equal to zero in exchange for a payment by [NRES] to [Almanac] representing a portion of the amount of interest [Almanac] is foregoing by waiving the obligation of [NRES] to request Advances equal to the Commitment pursuant to this Section 2 in the amount of Three Million Eight Hundred Thousand Dollars (\$3,800,000) to [Almanac’s] Designated Account in same day funds on or prior to 2:00 p.m. (New York City time) on the date of this Agreement (see Schedule 1).”

Schedule 1 provides,

Payment by Borrower to Lender (10/24/2014)	5,291,341.91
Payment by Borrower to Lender (10/27/2014)	10,514,494.32
Payment by Borrower to Lender (10/28/2014)	8,321,622.41
Less: Accrued and Unpaid Interest Expense	(118,051.88)

³ Almanac alleges that Silberstein presented Fingersh with a total of four options. These are the two options that parties agree were presented.

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<u>Less: Prepayment Penalty on Retirement of Advances</u>	<u>(4,789,046.87)</u>
Prepayment and Retirement of Advances on 10/30/2014	<u>\$19,156,187.43</u>
Outstanding Balance of the Advances as of 12/31/2013	69,800,000.00
Less: Prepayment and Retirement of Advances on 7/11/2014	(3,194,050.00)
Less: Prepayment and Retirement of Advances on 9/17/2014	(3,000,000.00)
Less: Prepayment and Retirement of Advances on 10/30/2014	(19,156,187.43)
<u>Plus: Interest Make-Whole Payment Related to Cancellation of Unused Commitment</u>	<u>3,800,000.00</u>
Outstanding Balance of the Advances as of 10/30/2014	<u>\$48,249,762.57</u>
Remaining Unused Commitment Obligation	\$ 0
Lender Legal Costs	\$64,172.46

In November 2014 and December 2014, the parties entered into three more amendments to the Credit Agreement, respectively, the Sixth, Seventh and Eighth Amendments. Each of these Amendments provides for further pay-downs of the Advances and provides, as in the previous Amendments, that Section 2.5 of the Credit Agreement is still in full force and effect. Each of these Amendments also contained a Schedule I indicating the prepayment and retirement of Advances and the outstanding balance.

Schedule I of the Sixth Amendment provides,

Payment by Borrower to Lender (11/10/2014)	12,273,967.91
Payment by Borrower to Lender (11/13/2014)	3,368,290.88
Payment by Borrower to Lender (11/14/2014)	5,896,734.00
Less: Accrued and Unpaid Interest Expense	(165,502.56)
<u>Less: Prepayment Penalty on Retirement of Advances</u>	<u>(4,274,698.05)</u>
Prepayment and Retirement of Advances on 10/30/2014	<u>\$17,098,792.18</u>
Outstanding Balance of the Advances as of 12/31/2013	69,800,000.00
Less: Prepayment and Retirement of Advances on 7/11/2014	(3,194,050.00)
Less: Prepayment and Retirement of Advances on 9/17/2014	(3,000,000.00)
Less: Prepayment and Retirement of Advances on 10/30/2014	(19,156,187.43)
Less: Prepayment and Retirement of Advances on 11/14/2014	(17,098,792.18)
<u>Plus: Interest Make-Whole Payment Related to Cancellation of Unused Commitment</u>	<u>3,800,000.00</u>
Outstanding Balance of the Advances as of 11/14/2014	<u>\$31,150,970.39</u>
Remaining Unused Commitment Obligation	\$ 0

Schedule I of the Seventh Amendment provides,

Payment by Borrower to Lender (12/12/2014)	8,000,000.00
Payment by Borrower to Lender (12/19/2014)	7,000,000.00
Less: Accrued and Unpaid Interest Expense	(207,419.57)
<u>Less: Prepayment Penalty on Retirement of Advances</u>	<u>(2,958,516.09)</u>
Prepayment and Retirement of Advances on 12/19/2014	<u>\$11,834,064.34</u>

Outstanding Balance of the Advances as of 12/31/2013	69,800,000.00
Less: Prepayment and Retirement of Advances on 7/11/2014	(3,194,050.00)
Less: Prepayment and Retirement of Advances on 9/17/2014	(3,000,000.00)
Less: Prepayment and Retirement of Advances on 10/30/2014	(19,156,187.43)
Less: Prepayment and Retirement of Advances on 11/14/2014	(17,098,792.18)
Less: Prepayment and Retirement of Advances on 12/19/2014	(11,834,064.34)
Plus: <u>Interest Make-Whole Payment Related to Cancellation of</u>	
<u>Unused Commitment</u>	<u>3,800,000.00</u>
Outstanding Balance of the Advances as of 12/19/2014	<u>\$19,316,906.05</u>

Remaining Unused Commitment Obligation \$ 0

Finally, Schedule I of the Eighth Amendment provides,

Payment by Borrower to Lender (12/22/2014)	8,238,750.39
Less: Accrued and Unpaid Interest Expense	(123,967.20)
<u>Less: Prepayment Penalty on Retirement of Advances</u>	<u>(1,622,956.64)</u>
Prepayment and Retirement of Advances on 12/19/2014	<u>\$6,491,826.55</u>

Outstanding Balance of the Advances as of 12/31/2013	69,800,000.00
Less: Prepayment and Retirement of Advances on 7/11/2014	(3,194,050.00)
Less: Prepayment and Retirement of Advances on 9/17/2014	(3,000,000.00)
Less: Prepayment and Retirement of Advances on 10/30/2014	(19,156,187.43)
Less: Prepayment and Retirement of Advances on 11/14/2014	(17,098,792.18)
Less: Prepayment and Retirement of Advances on 12/19/2014	(11,834,064.34)
Less: Prepayment and Retirement of Advances on 12/22/2014	(6,491,826.55)
Plus: <u>Interest Make-Whole Payment Related to Cancellation of</u>	
<u>Unused Commitment</u>	<u>3,800,000.00</u>
Outstanding Balance of the Advances as of 11/14/2014	<u>\$12,825,079.50</u>

Remaining Unused Commitment Obligation \$ 0

On December 29, 2014, Almanac sent NRES a payoff letter (the Payoff Letter), which states that, as of that date, the unpaid principal on the Advances was \$12,825,079.50, the unpaid interest was \$265,812.94, and the prepayment penalty was

\$3,206,269.88, totaling \$16,297,162.32 owed. Both Fingersh and Silberstein signed the Payoff Letter. In March 2015, an audit of NRES was completed and it revealed that NRES allegedly overpaid Almanac by approximately \$1 million. NRES determined that it paid an additional 25% premium on the \$3.8 million Fee. On March 25, 2015, Fingersh emailed Silberstein, stating that “we now recognize a mistake was made, please send us the overpayment asap” (Silberstein aff, ex 41). Silberstein responded that no mistake was made.

On July 2, 2015, NRES commenced this action against Almanac seeking damages for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and for a declaratory judgment. In January 2016, this court dismissed NRES' claims for breach of the duty of good faith and fair dealing, unjust enrichment, and for a declaratory judgment as duplicative of the breach of contract claim, a decision affirmed by the Appellate Division, First Department (*NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 A.D.3d 640 [1st Dept 2016]). Almanac now moves for summary judgment dismissing that remaining claim.

Analysis

The central issue in this case is whether the parties agreed that the \$3.8 million Fee would be subject to a 25% prepayment penalty. Almanac argues that the parties memorialized their intent in the executed Amendments and the Payoff Letter and NRES understood that the \$3.8 million Fee was part of the outstanding principal balance of the Advances subject to a 25% prepayment penalty. NRES argues that it would never have agreed to pay a prepayment penalty on the \$3.8 million Fee, as that would be a penalty on a penalty and that the calculations in the Amendments and Payoff Letter were a mistake and do not prove that it agreed to pay a penalty on the Fee.

Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see 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]). Once 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, or summary judgment will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

Almanac's motion for summary judgment is denied. The Amendments and the Payoff Letter are not clear as to whether the parties agreed to subject the \$3.8 million Fee to a 25% prepayment penalty, treating it as an Advance. While the Schedule 1s do add the \$3.8 million Fee to the outstanding balance of the Advances, neither the Amendments nor the Payoff Letter, refer to the \$3.8 million Fee as an Advance. Rather, Section 2 of the Fifth Amendment, the section providing for the Fee, simply refers to the Fee as a payment by NRES to Almanac in exchange for a waiver of an obligation to request "Advances equal to the Commitment." As the court (Oing, J.) previously pointed out at oral argument on Almanac's motion to dismiss, the \$3.8 million Fee is not money coming from the lender to the borrower, and thus, is not an Advance as defined in the Credit Agreement (Larson aff, ex 3 at 22:21-25 and 23:13-24:5). Further, the Amendments and Payoff Letter do not specifically state that the

\$3.8 million Fee was subject to the 25% prepayment penalty. However, the Amendments are ambiguous, because the Schedule 1s clearly add the \$3.8 million Fee to the outstanding balance of the Advances, adding it to the amount subject to the 25% prepayment penalty.

It cannot be conclusively determined on this motion whether the parties did, in fact, agree to subject the \$3.8 million Fee to the prepayment penalty. "Where ... the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008] [internal quotation marks and citation omitted]). Although a "court's preference [is not] to find triable issues of fact concerning the terms of a written agreement between two sophisticated contracting parties, [the] options are limited where the contractual provisions at issue are drafted in a manner that fails to eliminate significant ambiguities" (*id.*). The evidence presented by Almanac does not resolve the ambiguity.

Almanac argues that NRES was the party that calculated the payoff amount provided in the Payoff Letter and this evidences an agreement to pay a penalty on the Fee. In response, NRES argues that Almanac's attorney drafted the Fifth Amendment and its Schedule 1, which inaccurately added the \$3.8 million Fee to the "Outstanding Balance of Advances" listed on the Schedule 1, and this inaccurate description was mistakenly repeated and carried forward into every subsequent Amendment, and ultimately, the Payoff Letter. NRES further asserts that it mistakenly overlooked this error and never intended or agreed to pay a prepayment penalty on the \$3.8 million Fee. Whether NRES and Almanac agreed to add the \$3.8 million Fee to the outstanding balance of Advances subject to the penalty is an issue of fact that cannot

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be determined on this motion.

Accordingly, it is

ORDERED that defendant Almanac Realty Securities VI, LP's motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a conference, already scheduled, on March 1, 2018 at 60 Centre Street, Room 242 at 11 AM.

Dated: January 11, 2018

ENTER:



J.S.C.
HON. ANDREA MASLEY