

Axa Equit. Life Ins. Co. v 200 E. 87th St. Assoc., L.P.
2019 NY Slip Op 30069(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 657488/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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AXA EQUITABLE LIFE INSURANCE COMPANY,

Plaintiff,

- v -

200 EAST 87TH STREET ASSOCIATES, L.P., THE ESTATE OF SYLVIA OLNICK, BARBARA LANE, NANCY OLNICK SPANU, THE DALTON SCHOOL, INC., 1535 THIRD AVENUE BAKERY, LLC., MODELL'S NY II, INC., NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION, JOHN DOE NOS. 1-10

Defendant.

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INDEX NO. 657488/2017

MOTION DATE 08/15/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, 50, 51, 52, 61, 72, 74

were read on this motion to/for DISMISS.

In this action to foreclose on a mortgage, defendants the Estate of Sylvia Olnick, Barbara Lane, and Nancy Olnick Spanu (“Guarantors”) move, pursuant to CPLR 3211(a)(1) and 3211(a)(7), to dismiss the complaint insofar as asserted against them.

Background

Plaintiff commenced this action to foreclose on a mortgage underlying a note that encumbers defendant 200 East 87th Street Associates, L.P.’s (“Borrower”) leasehold interest in a property located at 200 and 206 East 87th Street in Manhattan (“Note and Mortgage”). In January 2006, the Guarantors executed three agreements in connection with the Note and Mortgage: (1) the “General Indemnity Agreement;” (2) the “Environmental Indemnity Agreement;” and (3) the “Guaranty of Note and Mortgage.”

Pursuant to paragraph 1(g) of the General Indemnity Agreement,

“[Guarantors] unconditionally and absolutely indemnif[y] the Lender from and against any and all liabilities, claims, losses, deficiencies, judgment, damages, costs and expenses of every kind and nature (including, without limitation, reasonable attorneys’ fees and disbursements and court costs) arising out of or in connection with . . . the enforcement of Lenders rights, remedies or recourse under the Loan Documents after default, including, but not limited to, foreclosure[.]”

In a separate agreement, the Environmental Indemnity Agreement states that Guarantors agree “to indemnify the Lender, defend the Lender (with attorneys reasonably acceptable to the Lender), and hold the Lender harmless from and against any and all Environmental Losses[.]”

Moreover, pursuant paragraph 1 of the Guaranty of Note and Mortgage, Guarantors

“[u]nconditionally and absolutely guarantee[], jointly and severally, the due and punctual payment of the principal of the Note, the interest thereon and any other moneys due or which may become due thereon . . . , and the due and punctual performance and observance by the Borrower of all the other terms, covenants and conditions of the Note and Mortgage[.]”

However, the Guaranty of Note and Mortgage

“shall only be effective upon (and, accordingly, Guarantor shall have no obligations or liabilities under this Guaranty unless and until) (A) a voluntary transfer in whole or in part, of Borrower’s leasehold interest in the Property in violation of Paragraph 2.16 of the Mortgage or a transfer (directly or indirectly) of control of Borrower in violation of Paragraph 2.16 of the Mortgage, or (B) the Borrower voluntarily files for bankruptcy or, if the bankruptcy proceedings are initiated involuntarily (other than by Lender), Borrower fails in good faith and with diligence to seek their dismissal and fails to secure such dismissal within one (1) year from the date such proceedings are initiated.”

In 2010, 2011, and 2012, Guarantors signed “Ratification of Guaranties,” ratifying and confirming their obligations under the foregoing documents. According to the complaint, in May 2014, the Note and Mortgage were assigned to plaintiff. On December 1, 2017, Borrower allegedly defaulted on its obligation, and plaintiff’s counsel sent a letter that same day to Borrower and Guarantors, stating that the maturity date passed and plaintiff would collect all indebtedness due.

Plaintiff subsequently commenced this action and seeks to foreclose upon the Mortgage. In addition, plaintiff alleges in the third cause of action that, pursuant to the General Indemnity Agreement, Guarantors agreed to indemnify plaintiff for attorney’s fees and costs arising out of, or in connection with, the enforcement of plaintiff’s rights and remedies under the loan documents after default. The third cause of action further seeks, in general terms, that Guarantors be adjudged to pay all losses and deficiency amounts under the Ratification of Guaranties.

Guarantors now move to dismiss the complaint insofar as asserted against them based upon the language of the guaranties which, they assert, preclude the claim asserted against them.

Discussion

On a motion to dismiss directed at the sufficiency of the complaint, the pleading is to be afforded a liberal construction, and I must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory[.]”

Leon v Martinez, 84 N.Y.2d 83, 87-88 (1994). Dismissal is warranted pursuant to CPLR

3211(a)(1) “only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law.” *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 433 (1st Dep’t 2014) (internal quotation marks and citations omitted).

General Indemnity Agreement

Guarantors argue that before plaintiff may assert a claim against them under the General Indemnity Agreement, it had to comply with a condition precedent, which they contend is included in paragraph 5 of the General Indemnity Agreement. That paragraph states:

“Indemnitor agrees that all obligations of Indemnitor hereunder shall be payable ten (10) days following written demand therefore and any amount due and payable hereunder to the Lender by Indemnitor which is not paid within ten (10) business days after written demand therefor from the Lender shall bear interest from the date of such demand at the rate applicable under the Note after default.”

Guarantors also rely on the following language in paragraph 13(c) of the General Indemnity Agreement: “No notice given by any party hereto shall be of any force or effect unless such notice is given in accordance with all of the provisions hereof.”

Guarantors argue that plaintiff failed to satisfy the purported demand/notice requirement as a condition precedent to instituting this action and therefore, are entitled to dismissal.

Contrary to plaintiff’s position, there is no language in the General Indemnity Agreement making the existence of the Guarantors’ obligations conditional on first receiving a written demand. *See DirectTV Latin Am., LLC v RCTV Intl. Corp.*, 115 AD3d 539, 540 (1st Dep’t 2014). Rather, the plain language indicates that Guarantors’

obligations exist regardless of the written demand, and the demand only serves as a time frame for Guarantors' payment. In accordance with that plain meaning, the provisions relied upon by Guarantors will not be construed as a condition precedent to the commencement of an action against them. Therefore, dismissal of the Guarantors is denied, and the third cause of action for recovery under the General Indemnity Agreement may proceed.

Environmental Indemnity Agreement and Guaranty of Note and Mortgage

Guarantors additionally seek dismissal from the complaint because plaintiff failed to state a cause of action under the Environmental Indemnity Agreement and the Guaranty of Note and Mortgage.

Although plaintiff's third cause of action generally asserts recovery under the Guaranty Ratifications, the complaint fails to allege claims under either the Environmental Indemnity Agreement or Guaranty of Note and Mortgage. Regarding the Environmental Indemnity Agreement, the complaint fails to allege that plaintiff has sustained or incurred any losses that would entitle them to indemnification thereunder. As for the Guaranty of Note and Mortgage, the complaint fails to allege that one of the conditions needed to trigger Guarantors' obligations under the Guaranty of Note and Mortgage has transpired – *i.e.*, either a voluntary transfer of the leasehold interest or the Borrower filing for bankruptcy.

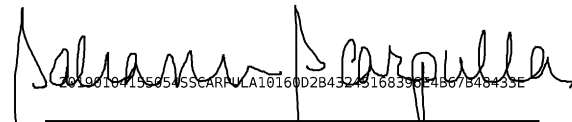
In any event, Guarantors remain defendants in this action because the complaint states a claim against them under the General Indemnity Agreement. Plaintiff can, of course, move for leave to amend the complaint to reflect any facts revealed through

discovery indicating that Guarantors’ obligations under the Guaranty of Note and Mortgage were triggered or would entitle plaintiff to indemnification under the Environmental Indemnity Agreement.¹

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants the Estate of Sylvia Olnick, Barbara Lane, and Nancy Olnick Spanu to dismiss the complaint insofar as asserted against them is denied. These defendants are directed to answer the complaint within twenty (20) days of this decision and order.

This constitutes the decision and order of the Court.


SALIANN SCARPULLA, J.S.C.

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CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

¹ Plaintiff correctly points out that pursuant to RPAPL 1301, a mortgagor is required to bring all claims to recover on the mortgage debt in the same action and cannot bring a separate action to recover amounts related to the same mortgage debt “without leave of court.” This rule benefits Guarantors because they will have the opportunity to defend themselves from potential liability.