

**BSPRT 2018-FL3 Issuer, Ltd. v 96 Wythe Acquisition  
LLC**

2020 NY Slip Op 30918(U)

April 9, 2020

Supreme Court, New York County

Docket Number: 653396/2019

Judge: Barry R. Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

BSPRT 2018-FL3 ISSUER, LTD., Plaintiff,

- v -

96 WYTHE ACQUISITION LLC, TOBY MOSKOVITS, YECHIEL MICHAEL LICHTENSTEIN, RENT A UNIT NY INC., ADVANCED PLUMBING MECHANICAL & SPRINKLERS CORP., MA2 FLAGS CONTRACTING CORP., ROCK GROUP NY CORP., CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, and JOHN DOE #1 THROUGH JOHN DOE #50, Defendants.

Table with 2 columns: Field Name (INDEX NO., MOTION DATE, MOTION SEQ. NO.) and Value (653396/2019, blank, 003)

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

BSPRT 2018-FL3 Issuer, Ltd. ("BSPRT") and its alleged successor Benefit Street Partners Operating Partnership, L.P. ("Benefit") (collectively, "Lender") have moved in this commercial mortgage foreclosure action for an order granting (i) summary judgment against defendants 96 Wythe Acquisition LLC ("Borrower"), Toby Moskovits and Yechiel Michael Lichtenstein (the "Guarantors," and together with Wythe, "the Borrowers"); (ii) dismissing the Borrowers' affirmative defenses and counterclaims; (iii) directing computation of amounts due from the Borrowers and a determination whether the subject property should be sold as a single parcel, or in the alternative, appointment of a Referee to determine these issues, pursuant to RPAPL §§ 1321 and 1325; (iv) entry of default judgments, pursuant to CPLR § 3215, against defendants Rent A Unit NY Inc., Advanced Plumbing Mechanical & Sprinklers Corp., Rock Group NY Corp., MA2 Flags Contracting Corp., Criminal Court of the City of New York; New York State Department of Taxation and Finance, and Environmental Control Board of the City of New York; and (v) amendment of the caption to delete the "John Doe #1" through "John Doe #50" defendants and substitute Benefit Street Partners Operating Partnership, L.P. for BSPRT as

plaintiff. The Borrowers oppose the motion insofar as it relates to them but take no position with respect to the relief requested as to the defaulting parties or the amendment of the caption. For the reasons stated below, the motion is granted in part and denied in part.

### **Background Facts**

The Lender in support of its motion submits an affidavit on personal knowledge from Tanya Mollova, a managing director of both plaintiff BSPRT and its alleged successor Benefit (NYSCEF Doc. No. 138). Also submitted are voluminous exhibits attached both to the Mollova affidavit and to the affirmation from the Lender's counsel (NYSCEF Doc. No. 138). The documents establish that on December 13, 2017, the Borrower and Benefit Street Partners Realty Operating Partnership, L.P. executed a Consolidation, Extension and Restatement of Notes Agreement (the "Consolidated Note") and a Promissory Note in the original principal amount of \$68,000,000, secured by the Consolidated Mortgages that are recorded and attached as exhibits to the Complaint (NYSCEF Doc. No. 2). Those same parties on that same date also executed a Loan Agreement (Complaint Ex 44), and the Guarantors simultaneously executed a Guaranty of Recourse Obligations (Mollova Aff Ex B). The Lender contends that the Consolidated Note, the Loan Agreement, and the Guarantees were assigned to plaintiff BSPRT and later to Benefit, and Mollova claims that BSPRT was in actual possession of the original Consolidated Note, "through its custodian or counsel," when this foreclosure action was commenced (Aff ¶¶ 17-19).

The Loan's original Maturity Date was June 7, 2019. On June 5, the Loan's servicer sent a payoff letter to the Borrower claiming that \$70,770,543.01 was due in principal, interest, and various charges (Mollova Aff Ex H). A few days later, on June 11, 2019, the Lender commenced this foreclosure action by Summons and Complaint, claiming the Maturity Date had not been extended and that the Borrower had failed to pay the amount due (NYSCEF Doc. Nos. 1 and 2). The Borrowers filed an Answer with Counterclaims on August 30, 2019, disputing the claimed

default (NYSCEF Doc. No. 32). By decision dated October 18, 2019, this Court granted the Lender's motion for the appointment of a Receiver based on the terms of the lending documents, and on February 21, 2020, after many conferences with counsel to resolve various disputes relating to the Receiver's selection and powers, the Court issued a long-form order appointing Constantino Sagonas as the Receiver (NYSCEF Doc. No. 155).<sup>1</sup> This motion was filed shortly thereafter.

### **Discussion**

As indicated earlier, two aspects of the motion are unopposed. The first seeks the entry of default judgments, pursuant to CPLR § 3215, against defendants Rent A Unit NY Inc., Advanced Plumbing Mechanical & Sprinklers Corp., Rock Group NY Corp., MA2 Flags Contracting Corp., Criminal Court of the City of New York; New York State Department of Taxation and Finance, and Environmental Control Board of the City of New York. The Lender has established proper service on those parties and their failure to appear. Therefore, the Lender is entitled to a default judgment against those parties, but as to liability only at this time for the reasons discussed below.

As to the amendment of the caption, the deletion of any reference to John and Jane Doe is appropriate. The Lender has also provided sufficient documentation, referenced above, to allow for the substitution of Benefit Street Partners Operating Partnership, L.P. as the plaintiff in place of BSPRT 2018-FL3 Issuer, Ltd.

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<sup>1</sup> The Court is aware that the Lender has attempted to file a motion to compel the Receiver to comply with the Order of Appointment, but the motion was not processed due to restrictions on non-essential filings. As the Receiver has a duty to fulfill his obligations under the Order of Appointment, the parties are directed to meet and confer to resolve the issues raised by the putative motion, taking changed circumstances into account.

The balance of the motion, seeking summary judgment in favor of the Lender, the dismissal of all of the Borrowers' affirmative defenses and counterclaims, and the appointment of a Referee to compute the amount due under the mortgage, is more complex. As the Court of Appeals explained in *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986), "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 .... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action ..." (citations omitted).

In this case, the Lender has established a prima facie case for summary judgment in foreclosure through Mollova's affidavit based on personal knowledge and voluminous documentary evidence. However, the Borrowers in opposition have produced sufficient evidence to establish the existence of triable issues of fact precluding summary judgment. Not only does the Borrower respond to the Lender's 19-a Statement of Material Facts by disputing many of the asserted facts in detail (NYSCEF Doc. No. 171), but the Borrowers offer a detailed affidavit on personal knowledge from defendant Toby Moskovits, the manager for the defendant Borrower 96 Wythe Acquisition LLC and a Guarantor on the Loan (NYSCEF Doc. No. 162).

Moskovits vigorously disputes the Lender's claim of a default. He explains that the Loan was collateralized by the Williamsburg Hotel (the "Hotel") and had a "completion component" (see Loan Agreement, Ex A, at pp. 4, 6). Section 1.1 of the Loan Agreement defined "Completion" as the "substantial completion of the Business Plan Work" by December 31, 2018. The Loan Agreement also allowed the Lender to charge a substantial Rate Increase, amounting

to about \$29,000 per month as of May 31, 2018, if the construction was not substantially complete by the deadline.

The default claimed in this case by the Lender is based in part on the Borrower's failure to pay the Rate Increase charged by the Lender due to the Borrower's failure to substantially complete the construction in a timely fashion. For example, the Lender claims the construction was not complete because the Borrower had not completed the "Rooftop Restaurant Structure" (see Mollova Aff at ¶¶ 84-87). But Moskovits in his affidavit disagrees with the Lender's reading of the requirement, contending, for example, that the Borrower was not obligated to construct a retractable roof for the restaurant enclosure.

Moskovits also details in his Affidavit the work that was complete as of July 1, 2018, and he has provided photographs purportedly corroborating that claim (NYSCEF Doc. Nos. 164 and 165). For example, the Borrower asserts that: "By the end of June 2018, the Hotel, with all amenities, was operating and open for business. The guestrooms were all complete, operational and in use. As of June 22, 2018, the roof, pool and rooftop bar, were all in use and operational .... As of July 1, 2018, the water tower bar was in use and operational." (Moskovits Aff at ¶¶ 8 – 11). Although the Lender replies by, for example, citing other aspects of the Business Plan Work not substantially completed in a timely fashion, the Borrower has, though its evidence and disputed reading of the documents, created an issue of fact as to whether the Lender properly charged the Rate Increase and defaulted the Borrower for its nonpayment.

In the 91-paragraph Affidavit from Moskovits and the other papers submitted, the Borrower has also raised triable issues of fact as to whether the Lender properly credited the Borrower for overpayments and whether the Lender's conduct interfered with the Borrower's ability to fully comply with the Loan documents. Although the Lender in reply disputes these

claims as well, the Court agrees with the Borrower that, under the prevailing law, the Borrower's papers sufficiently raise issues of fact precluding summary judgment in foreclosure. As the Court of Appeals emphasized in the frequently cited case of *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (citations omitted):

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented ... This drastic remedy should not be granted where there is any doubt as to the existence of such issues... or where the issue is "arguable"; ... "issue-finding, rather than issue-determination, is the key to the procedure..."

Although this conclusion mandates the denial of the Lender's request for summary judgment in its favor and the appointment of a Referee to Compute the amounts due in this foreclosure action, it does not bar completely the Lender's request for dismissal of some of the Borrower's affirmative defenses and counterclaims. The Court finds that the Borrower has failed to state a basis for seven of its affirmative defenses and therefore grants the Lender's motion to dismiss the following Affirmative Defenses: the Second related to the assignment of the Loan, as the amendment discussed above based on an assignment was not opposed; the Fourth based on the statute of limitations, as none of the alleged conduct occurred outside the six-year period for breach of contract; the Fifth based on laches, as there is no evidence of undue delay by the Lender; the Eleventh based on the statute of frauds, as all the agreements are covered by a writing; the Twelfth based on the covenant of good faith and fair dealing, as it relates to the counterclaim dismissed below, and the Thirteenth based on issue and claim preclusion, as no basis has been stated. The Court also dismisses the Sixteenth Affirmative Defense of culpable conduct, which is really a tort concept, but the dismissal is without prejudice to related claims alleging, for example, wrongful conduct by the Lender that interfered with the Borrower's ability to perform or that constituted a breach of contract by the Lender

limiting its right to strictly enforce the terms of the Loan Agreement documents.

Dismissal of the remaining ten Affirmative Defenses is denied at this time. The Mollova Affidavit attesting to the possession of the critical documents by the Lender's custodian or counsel is too vague to establish standing related to the First Affirmative Defense; the Third related to failure to state a claim and the Seventeenth for reservation of rights are generic defenses that can be asserted at any time; the Sixth, Seventh, and Eighth claiming waiver, estoppel, and unclean hands are all fact-intensive; and the Ninth, Tenth, Fourteenth and Fifteenth related to conditions precedent, breach of contract, partial satisfaction, and setoff all related to the Lender's contract claim and involve issues of fact, as indicated above.

The Court also dismisses some, but not all, of the Borrower's counterclaims asserted in the Answer (NYSCEF Doc. No. 32). In the First Counterclaim sounding in breach of contract, the Borrower claims that the Lender wrongfully refused to accept certain payments and give the Borrower all credits due, and that it violated the contract by continuing to charge default interest and denying the Borrower's right to extend the Maturity Date for the Loan. The Court declines to dismiss or sever that counterclaim, as the Borrower has stated a cause of action under the Loan documents, and the counterclaim is inextricably intertwined with the Lender's claims such that the claim and counterclaim should be heard together, notwithstanding any language in the Loan documents that arguably limits the Borrower's right to assert certain defenses and counterclaims. However, the Court grants dismissal of the Second Counterclaim sounding in a breach of the covenant of good faith and fair dealing, as that claim is duplicative of the breach of contract counterclaim. Similarly, the Third Counterclaim for a declaratory judgment is dismissed as duplicative.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied insofar as it seeks summary judgment against defendants 96 Wythe Acquisition LLC, Toby Moskovits and Yechiel Michael Lichtenstein; and it is further

ORDERED that plaintiff's motion to dismiss the Borrowers' affirmative defenses and counterclaims is granted to the extent of dismissing the Second, Fourth, Fifth, Eleventh, Twelfth, Thirteenth and Sixteenth Affirmative Defenses and the Second and Third Counterclaims, and is otherwise denied; and it is further

ORDERED that plaintiff's motion is denied insofar as it seeks an order directing computation of amounts due from the Borrowers and a determination whether the subject property should be sold as a single parcel, or in the alternative, appointment of a Referee to determine these issues, pursuant to RPAPL §§ 1321 and 1325; and it is further

ORDERED that plaintiff's motion is granted to the extent of awarding a default judgment as to liability only, pursuant to CPLR § 3215, against defendants Rent A Unit NY Inc., Advanced Plumbing Mechanical & Sprinklers Corp., Rock Group NY Corp., MA2 Flags Contracting Corp., Criminal Court of the City of New York; New York State Department of Taxation and Finance, and Environmental Control Board of the City of New York; and it is further

ORDERED that plaintiff's motion is granted insofar as it seeks the amendment of the caption to delete the "John Doe #1" through "John Doe #50" defendants and substitute Benefit Street Partners Operating Partnership, L.P. for BSPRT as plaintiff, and plaintiff shall notify the County Clerk and the General Clerk's Office, pursuant to E-filing protocols when circumstances permit, that the caption shall read as follows:

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BENEFIT STREET PARTNERS OPERATING PARTNERSHIP, L.P.,  
Plaintiff,

- against -

96 WYTHE ACQUISITION LLC, TOBY MOSKOVITS, YECHIEL MICHAEL LICHTENSTEIN, RENT A UNIT NY INC., ADVANCED PLUMBING MECHANICAL & SPRINKLERS CORP., MA2 FLAGS CONTRACTING CORP., ROCK GROUP NY CORP., CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,  
Defendants.

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Counsel shall confer to agree upon a schedule for discovery to continue on the remaining open issues and appear for a status conference in Room 232 on June 30, 2020 at 9:30 a.m.

Dated: April 9, 2020

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: