

<b>Oaks Propects Inc. v Borovinsky</b>
2020 NY Slip Op 32529(U)
July 31, 2020
Supreme Court, New York County
Docket Number: 657403/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

OAKS PROSPECTS INC.

Plaintiff,

- v -

RON BOROVINSKY,

Defendant.

-----X

INDEX NO. 657403/2019

MOTION DATE 01/20/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant's motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1), (a)(2), (a)(3), (a)(7) and (a)(10) is denied.

THE RELEVANT FACTUAL BACKGROUND

This is an action to recover on an Amended and Restated Completion Guaranty (the Guaranty) dated December 14, 2018, and executed by the defendant Ron Borovinsky for the benefit of plaintiff Oaks Prospects Inc. (Oaks) (NYSCEF Doc. No. 9). Mr. Borovinsky is the sole member of Arbie Development LLC (Arbie). Oaks and Arbie are former co-owners of and members in an entity known as 141 4th Ave LLC (the Company), which was formed to develop a property located at 344 Butler Street, Brooklyn, New York (the Property) into residential condominiums (the Project).

Arbie and Oaks entered into an Operating Agreement for 141 4<sup>th</sup> Ave LLC dated April \_\_, 2016 (the **Original Agreement**; NYSCEF Doc. No. 7), as amended by an Amended and Restated Operating Agreement (**Amended Agreement**), dated December 12, 2018, by and between Arbie and Oaks and, for so long as the Class C Membership Interest remains outstanding, SKW 344 Butler Lender LLC (**SKW**) (the Original Agreement and the Amended Agreement, together, the **Operating Agreement**). Under the terms of the Operating Agreement, Arbie and Oaks were each designated a Class A Member of the company, with Arbie having a 90% ownership interest and having made an initial capital contribution of \$1,000,000 (**Arbie's Capital Contribution**) and Oaks having a 10% ownership interest and having made an initial capital contribution of \$2,800,000 (**Oaks' Capital Contribution**; NYSCEF Doc. No. 6, ¶¶ 15-19; NYSCEF Doc. No. 8, § 4.1). SKW, as lender, was designated a Class C Member of the Company with no ownership interest (*id.*, ¶ 20). Upon execution of the Operating Agreement, SKW made a single capital contribution of \$2,925,000 in exchange for its Class C membership interest.

In addition, SKW extended three loans, together in the principal amount of \$6,300,000 (the **Loan**) to the Company to refinance certain existing indebtedness on the Property and to finance the development of the Project (*id.*, ¶ 22). Pursuant to Section 8.2 of the Operating Agreement, entitled "Distributions of Available Cash," the Company was to make payments on Oaks' Capital Contribution, and interest thereon, at a rate of 12% per annum, after paying operating expenses relating to the Property, the Loan, payments to SKW on its capital contribution and other loans which constituted liens on the Property, and before any payments to Arbie:

**8.2 Distributions of Available Cash.** The Managers shall cause Available Cash to be distributed to the Members in accordance with the following, notwithstanding any other provisions of the Agreement:

- (a) First, to the extent not already paid, to the payment of any and all costs related to the holding, marketing and selling of the Property, such as transfer taxes, brokerage fees, reasonable legal fees and costs incurred, and any other items of expense or which may constitute a lien against the Property that is required to be satisfied prior to entering into the contemplated loan or transfer transaction;
- (b) Second, to the extent not already paid, to the payment of the Mortgage Loan;
- (c) Third, 100% to the Class C Member in return of its capital contribution, until the cumulative amount distributed to Class C Member under this Section equals its total capital contribution in the amount of \$2,925,000, plus its Preferred Return, provided that for so long as the Class C Membership Interest remains outstanding, the Class C Member shall have the right to require the distributions under this Section 8.2(c) to be paid before the payments due under Section 8.2(b); and
- (d) Fourth, to the extent not already paid, to the payment of any loans which constitute liens on the Property;
- (e) Fifth, 100% to Oaks in return of its capital contributions, until the cumulative amount distributed to Oaks under this Section 8.02(e) equals its total capital contribution in the amount of \$2,800,000, or as otherwise adjusted in accordance with Additional Capital Contributions, and;
- (f) Sixth, 100% to Oaks to satisfy such sum that shall constitute the realization by Oaks of interest on Oak's Capital Contributions constituting a Twelve Percent (12%) per annum annual percentage rate, compounded annually, calculated from the date such Capital Contributions were made until returned, and the payment of which shall also be personally guaranteed by Ron Borovinsky;
- (g) Seventh, 100% to pay in full all accrued principal and interest on any Member Loan made by Arbie or Oaks as contemplated by and subject to Section 7.08 hereof;
- (h) Eighth, 100% to Arbie in return of its Capital Contributions, until the cumulative amount distributed to Arbie under this Section 8.02(h) equals its initial Capital Contribution in the amount of \$1,000,000.00, or as otherwise adjusted in accordance with Additional Capital Contributions; and
- (i) Ninth, 100% to Arbie.

(NYSCEF Doc. No. 8, § 8.2).

Both Oaks and Arbie executed a Pledge and Security Agreement (the **Security Agreement**), dated December 12, 2018, in favor of SKW, pledging their respective membership interest as

further security for the Loan (NYSCEF Doc. No. 10). Pursuant to Section 16 of the Amended Operating Agreement, in the event of a foreclosure, sale or other transfer of membership interests pursuant to the Security Agreement, SKW (or other holder) shall automatically be admitted as a member of the Company, and the transferor member (i.e., Oaks, Abrie, or both) shall cease to be a member of the LLC (NYSCEF Doc. No. 8, § 16).

Pursuant to Section 1 of the Guaranty, Mr. Borovinsky “unconditionally guarant[eed]” to Oaks certain “Guaranteed Obligations,” including:

- (a) that [Mr. Borovinsky] will complete all construction, rehabilitation, and/or repairs to the Project and all work required under the [Operating Agreement] (collectively, the “Work”) in all material respects by June 1, 2020, in substantial accordance with any plans and specifications or scope of work and budget approved by Members of the Company;
- (b) that [Mr. Borovinsky] will pay and discharge, or otherwise bond or release, the Loan, and all mechanic's and materialmen's liens or claims therefor imposed or alleged against the Property, to the end that there shall be no un-bonded mechanic's, materialmen's or other like liens or claims outstanding against the Property;
- (c) that [Mr. Borovinsky] shall cause the Work at all times to comply with all applicable existing building, zoning, use and environmental protection laws and ordinances as may be necessary to enable the use and occupancy of the Property for its intended purposes;
- (d) the prompt payment of the contractors, materialmen, and other professionals for their services to the Project under the respective contract duly executed by the Company and authorized under the Agreement;
- (e) if, at the time of the completion of the Project, Oaks is not paid the total amounts (the “Oaks Payments”) set forth in Section 8.02 (e), (f) & (g) of the Agreement, Oaks shall have the right, upon reasonable written notice, to conduct an audit of the books and records maintained by the Company and/or by Arbie, including but not limited, copies of all agreements, construction contracts and subcontracts, and financial instruments entered into by or for the Company and/or Arbie and/or the Guarantor as the developer of the Project. In the event of any findings that shows any unfair dealings or profit, unreasonable payments or misappropriation of funds to or by Arbie and/or the Guarantor, the prompt payment to Oaks of such fund, payment and/or profit obtained or derived therefrom; and

(f) if Oaks is not paid the Oaks Payments, the prompt payment to Oaks of such deficit.

(*id.*, § 1).

Section 2 of the Guaranty provides that Mr. Borovinsky's obligations thereunder survive foreclosure (*id.*, § 2). Section 3 makes clear that Mr. Borovinsky's obligations:

constitute an unconditional and continuing guaranty of payment and performance and not merely a guaranty of collection.

(*id.*, § 3).

In 2019, the development of the Project "stalled" (NYSCEF Doc. No. 6, ¶ 33). The Company notified the lender, SKW, that it was \$2,000,000 short of funds to complete construction and, on May 29, 2019, SKW delivered a written notice to the Company identifying an Event of Default under the Loan (*id.*, ¶ 34; NYSCEF Doc. No. 11). The Company failed to cure this default, and on July 30, 2018, Arbie Construction, an entity controlled by Mr. Borovinsky, filed a mechanic's lien in the amount of \$967,450.15 with respect to the Property, which constituted a further Event of Default under the Loan (NYSCEF Doc. No. 6, ¶¶ 34-35).

Eventually, after both Oaks and Arbie failed to pay SKW the "redemption price" of its Class C Membership Interest pursuant to the terms of the Operating Agreement, SKW foreclosed on and sold all of Oaks and Arbie's membership interests in the Company (*id.*, ¶¶ 37-41). Accordingly, neither Oaks nor Arbie have any remaining interest in the Company now. Mr. Borovinsky maintains that the foreclosure on the Company was the result of Oaks' failure to invest more money into the Project (*see* NYSCEF Doc. Nos. 12-16).

Oaks now brings this action to collect and recover its capital contribution, along with interest at 12% per annum and all expenses, including attorneys' fees, against Mr. Borovinsky pursuant to the Guaranty. The Complaint asserts a single cause of action for breach of contract.

## DISCUSSION

CPLR § 3211(a)(1) permits dismissal of a claim where a defense is based on documentary evidence and said documentary evidence utterly refutes the factual allegations in the complaint, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314 [2002]).

CPLR § 3211(a)(2) requires dismissal where lacks “jurisdiction of the subject matter of cause of action.”

CPLR § 3211(a)(3) requires dismissal where “the party asserting the cause of action has not legal capacity to sue.”

CPLR § 3211(a)(7) permits dismissal where the complaint fails to state a cause of action.

Finally, CPLR § 3211(a)(10) permits dismissal if “the court should not proceed in the absence of a person who should be a party.”

As an initial matter, there is no question that this court has subject jurisdiction over the instant dispute. Therefore, dismissal under CPLR § 3211(a)(2) is not warranted. Similarly, Oaks has the legal capacity to sue on the Guaranty executed in its favor and dismissal under CPLR § 3211(a)(3) is also not warranted (and, in fact, Mr. Borovinsky makes no argument in respect of this provision beyond his Notice of Motion).

Inasmuch as Mr. Borovinsky maintains that the Company and/or SKW are necessary parties to any action against him, this does not require dismissal because their rights would not be adversely affected by any decision in this action (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [1<sup>st</sup> Dept 2007]; *see also, Lewis v Proctor & Gamble, Inc.*, 18 Misc 3d 1110[A] [Sup Ct NY Cnty 2007] [denying CPLR 3211[a][10] motion where underlying obligor not named as defendant in guaranty action]). In any event, there is simply no showing here that either SKW or the Company are necessary parties to an action to enforce the Guaranty, individually executed by Mr. Borovinsky in favor of Oaks, and to which they are not a party (CPLR § 1001[a]). Even if the Company or SKW were necessary parties, “a finding that a person or entity is a necessary party under CPLR 1001(a) does not mandate dismissal of the action,” i.e., the necessary parties may be joined or the court may permit the action to proceed in their absence if jurisdiction cannot be obtained over them (*L-3 Communications* at 10; CPLR § 1001[b]). Mr. Borovinsky makes no showing that these entities cannot be joined or that jurisdiction cannot be obtained over them. Dismissal under CPLR § 3211(a)(10) is, accordingly, also denied.

Inasmuch as Mr. Borovinsky argues that the Complaint should be dismissed as premature because the deadline to complete the Project (i.e., June 1, 2020, per Section [1][a] of the

Guaranty) has not passed, this argument misses the point and in any event is moot (i.e., in July of 2020) as the deadline has now indisputably passed.

Mr. Borovinsky also argues that recovery by Oaks is barred under the “Distribution Waterfall” set forth in Section 8.2 of the Operating Agreement because Oaks “has failed to allege that any ‘Available Cash’ existed/exists [and] has failed to prove the full and complete satisfaction of the four distributions which have superiority” to Oaks’ distribution rights under Section 8.2(e) (Rebhun Affirm., NYSCEF Doc. No. 5, ¶ 53). Oaks need not “prove” anything at this juncture in order to survive a motion to dismiss.

Pursuant to that Guaranty, Mr. Borovinsky unconditionally guaranteed: “if Oaks is not paid the Oaks Payments, the prompt payment to Oaks of such deficit” (NYSCEF Doc. No. 9, § 1[f]). “Oaks Payments” is defined in Section 1(e) as the “total amount (the ‘Oaks Payments’) set forth in Section 8.02(e), (f) & (g) of the [Operating] Agreement” – i.e., the very payments Oaks seeks in this lawsuit (*id.*, § 1[e]).

The Guaranty makes clear that:

The obligations of Guarantor under this Guaranty shall be performed without demand by [Oaks] and shall be unconditional irrespective of the genuineness, validity, regularity or enforceability, in whole or in part, of the Guaranteed Obligations, and without regard to any other circumstance which might otherwise constitute a legal or equitable discharge of a surety, a guarantor, a borrower or a mortgagor.

Guarantor hereby waives the benefit of all principles or provisions of law, statutory or otherwise, which are or might be in conflict with the terms of this Guaranty and agrees that Guarantor's obligations shall not be affected by any circumstances, whether or not referred to in this Guaranty, which might otherwise constitute a legal or equitable discharge of a surety, a guarantor, a borrower or a mortgagor. Guarantor hereby waives the benefits of any right of discharge under any and all statutes or other laws relating to a

guarantor, a surety, a borrower or a mortgagor, and any other rights of a guarantor, a surety, a borrower or a mortgagor, thereunder. Guarantor hereby waives (a) any defenses that could arise with respect to an amendment or modification of the Guaranteed Obligations by operation of Jaw, action of any court or the amendment of any of the Borrower Loan Documents, (b) any defense that Beneficiary Parties have waived any Guaranteed Obligation by failing to enforce any right or remedy hereunder, or to promptly enforce any such right or remedy and (c) any other event or circumstance that may constitute a defense of Guarantor to payment of the Guaranteed Obligations

(NYSCEF Doc. No. 9, § 4).

The court having considered Mr. Borovinsky’s remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the motion to dismiss is denied and it is further

ORDERED that the defendant is directed to file an answer to the complaint within 30 days of this decision and order; and it is further

ORDERED that the parties appear for a Preliminary Conference on September 16, 2020 at 11:30 AM.

  
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7/31/2020  
DATE

ANDREW BORROK, J.S.C.

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