

FPG Maiden Lane, LLC v Bank Leumi USA
2021 NY Slip Op 30662(U)
March 4, 2021
Supreme Court, New York County
Docket Number: 653584/2020
Judge: Barry 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

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FPG Maiden Lane, LLC; Fortis Property Group, LLC; and
Joel Kestenbaum,

Plaintiffs,

- v -

Bank Leumi USA; Bank Leumi le-Israel BM; Harel-Maiden
Lane-General Partnership; and Harel Insurance Investments
and Financial Services Ltd.,

Defendants.

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INDEX NO.	653584/2020
MOTION DATE	
MOTION SEQ. NO.	001 and 002

**DECISION + ORDER ON
MOTIONS**

HON. BARRY R. OSTRAGER

Before the Court are two motions to dismiss the Complaint filed by FPG Maiden Lane, Fortis Property Group, LLC and Joel Kestenbaum (collectively, "FPG" or "plaintiffs"). Motion 001 is by defendant Bank Leumi USA and Motion 002 is by defendants Bank Leumi le-Israel BM, Harel-Maiden Lane-General Partnership and Harel Insurance Investments and Financial Services Ltd. The Court heard oral argument on these motions, as well as Motion 001 in the related action captioned *Bank Leumi USA v. FPG Maiden Lane, LLC et al.*, Index No. 657252/2020, via Microsoft Teams on February 25, 2021. For the reasons set forth below, Motions 001 and 002 are denied.

Background

This action concerns a construction loan (the "Loan") for FPG's unfinished residential skyscraper at 161 Maiden Lane in Manhattan and two loan agreements: the Project Loan Agreement dated May 26, 2016, as amended (the "Project Loan Agreement") and the Building

Loan Agreement dated May 26, 2016, as amended (the "Building Loan Agreement") (collectively, the "2016 Loan Agreements").

After negotiating with various lenders, FPG agreed to a debt financing arrangement in 2015 with Bank Leumi USA. On May 26, 2016, FPG's debt financing arrangement expanded to include Harel-Maiden Lane General Partnership. The relevant agreements with Bank Leumi USA and Harel-Maiden Lane General Partnership (together "Lenders") are the 2016 Loan Agreements.

Under the terms of the 2016 Loan Agreements, the Lenders agreed to provide \$120 million in debt financing. Bank Leumi USA acted as both a Lender and as the "Administrative Agent" for the Lenders.

The 2016 Loan Agreements provide that FPG can make requests for advances to cover costs of construction and development of the Property ("Requests for Advances" or "RFAs"). The Requests for Advances are delivered to Bank Leumi USA in its capacity as Administrative Agent acting on behalf of both Lenders. Both Bank Leumi USA (in its capacity as Lender and Administrative Agent) and Harel-Maiden (as Lender) are obligated to "fund the Request for Advance within ten (10) business days," subject to certain exceptions. One such exception is the existence of any Event of Default enumerated in Section 4.1 of the Agreements. An Event of Default includes "if [FPG] fails to comply with ... the terms, covenants or conditions of" the 2016 Loan Agreements.

As originally drafted, the 2016 Loan Agreements provided for a completion date for the Property of April 3, 2018. To facilitate the financing, Fortis and Kestenbaum (the "Guaranty Plaintiffs") guaranteed that the Property would be completed by the completion date provided for in the 2016 Loan Agreements pursuant to a Guaranty of Completion dated February 3, 2015. The

Guaranty of Completion sets forth the Guaranty Plaintiffs' obligations in the event that the Property was not substantially completed in accordance with the terms of the 2016 Loan Agreements and the plans for the Property. Those obligations include that the Guaranty Plaintiffs "willfully indemnify and save harmless" the Lenders from costs and damages from untimely completion and pay for certain construction costs.

The Guaranty Plaintiffs also guaranteed the Lenders a portion of FPG's "payment when due" on the Loan pursuant to a Guaranty of Payment dated February 3, 2015, later amended and restated on May 26, 2016. In the Guaranty of Payment's terms, the Guaranty Plaintiffs guaranteed up to a maximum of \$36 million on the Loan, plus interest and certain fees. The Guaranty Plaintiffs also guaranteed the Lender FPG's "prompt payment" of certain expenses relating to the Property pursuant to a Guaranty of Expenses dated February 3, 2015.

FPG alleges that its initial construction manager – Pizzarotti- failed to perform, leading FPG and the Lenders to negotiate Amendments.¹ Due to a host of other problems, the Property was not completed on the anticipated timetable. FPG and the Lenders agreed to modify the terms of the 2016 Loan Agreements to account for the delays.

On September 24, 2018, FPG agreed to and did invest approximately \$6.3 million in additional equity pursuant to amendments to the 2016 Loan Agreements. On June 25, 2019, FPG agreed to invest and did invest another approximately \$16.5 million in additional equity pursuant to further amendments to the 2016 Loan Agreements. The completion date for the Property was thereby extended to April 1, 2020.

By Fall 2019, it was apparent that the construction of the Property would not be completed by April 1, 2020. Plaintiff alleges that the delays were exacerbated by the Lenders'

¹ There is a separate litigation with Construction Manager Pizzarotti pending before another Justice of this Court.

delay of Loan draw requests. In all events, the parties agreed to engage in another renegotiation of the Loans which culminated in the execution of the Third Amendments to the Loans on March 13, 2020.

Plaintiffs allege that in the renegotiation of the Loans, the Lenders had two material requests. First, the Lenders wanted FPG to infuse an additional \$20 million in cash into the Property to cover budget overruns. Second, the Lenders demanded that FPG obtain a Temporary Certificate of Occupancy (“TCO”) by a negotiated deadline from the New York City Department of Buildings. A TCO indicates "that the property is safe for occupancy, but ... has an expiration date." The Lenders proposed May 31, 2020 as the deadline for obtaining the TCO, with a 30-day grace period before an Event of Default could be triggered.

Plaintiffs alleges that Lenders agreed to an amended provision to the 2016 Loan Agreements whereby Lenders would be required to fund the Loan proceeds even if there was a budget overrun in a particular cost category, with FPG and the Guaranty Plaintiffs being responsible for funding expenses exceeding the budgetary cap for that particular line item on an as-needed basis. Thus, even if the budget was not in balance as to particular cost categories, the Lenders were still required to fund all other cost categories.

This round of negotiations continued into 2020. Plaintiffs allege that Lenders continued to point to the unbalanced budget as a reason to refuse funding any Requests for Advances, and construction slowed. FPG alleges it became increasingly concerned it would run out of funds to pay Ray Builders (the new construction manager) and that all parties understood any delay in construction would adversely affect Plaintiffs’ ability to meet the fast-approaching May 31, 2020 TCO deadline that the Lenders were proposing. FPG alleges it was vocal about its concerns and repeatedly raised them from January 2020 through March 2020.

FPG alleges that the Lenders made numerous promises upon which FPG reasonably relied during early 2020. Specifically, FPG alleges that over several telephone conversations in late February and early March 2020, both Avner Mendelson ("Mendelson"), the President and CEO of Bank Leumi USA, and by Chris Gregg ("Gregg"), the National Head of Real Estate for Bank Leumi USA, told Jonathan Landau, the CEO of Fortis, that the May 31, 2020 TCO deadline was merely a formality to appease their Israeli parent entities, and that the banks would be flexible on these and other deadlines in the implementation of the contracts, just as the banks had been in the past with FPG. Mendelson and Gregg allegedly assured Landau that, if FPG agreed to provide the additional \$20 million in equity for the Property, the Lenders (as they had been in the past) would be flexible and would not declare a default based upon the TCO deadline. Mendelson and Gregg allegedly reminded Landau that the Lenders had never asserted an Event of Default for mere technical defaults before, including when FPG had previously missed a TCO deadline. Mendelson and Gregg both allegedly promised Landau that the Lenders would act consistently going forward.

FPG agreed to the third amendments to the 2016 Loan Agreements on March 13, 2020 (the "Third Amendments"), which included the new May 31, 2020 TCO deadline. The Third Amendments extended the completion date for the Property from April 1, 2020 to November 30, 2020 and the maturity date of the Loan from April 1, 2020 to December 31, 2020. The Third Amendments also altered the way the parties would handle budget overruns. Under as-amended Section 8.4 of the 2016 Loan Agreements, the Lenders agreed to fund the cost for any line item in the Property budget even if there were cost overruns on another line item or on the budget as a whole.

FPG invested an additional \$20M in the project. FPG alleges that Lender was then supposed to, but failed to, fund the Requests for Advances. FPG alleges that for work performed in February 2020, FPG requested \$1,215,671.74. A portion of the Request for Advances was funded by FPG's prior \$20 million cash infusion, leaving \$1,179,726 to be fulfilled by the Loan. For work performed in March 2020, FPG requested \$625,040. For work performed in April 2020, FPG requested \$299,372. FPG alleges that the Lenders refused to use the Loan to fund each Request for Advances, thus breaching their obligations under the 2016 Loan Agreements.

FPG alleges that in June 2020, the Lenders for the first time manufactured an excuse to claim that an Event of Default existed as of June 2020. Lenders claimed they did not have to fund any outstanding Requests for Advances because FPG purportedly owed the Lenders \$347,802 in unpaid interest on the Loan as of June 1, 2020. FPG alleges that more than twice this amount was available to the Lenders under the loan budget to cover the unpaid interest. Nevertheless, although FPG disputed that there was any unpaid interest, on June 26, 2020, Landau spoke to Gregg, offering to fund a claimed \$198,167 shortfall through a cash wire, provided that the Lenders immediately funded the outstanding Requests for Advances. FPG alleges that Gregg, on behalf of the Lenders, agreed, and FPG wired \$198,167 to the Lenders.

FPG alleges that the Lender returned the \$198,167 in interest payments the next day. FPG further alleges that the Lenders informed FPG that they were now demanding an additional \$25 million in equity or collateral from FPG before they would consider funding any additional Requests for Advances under the Loan.

Finally, FPG alleges that on June 27, 2020, Mendelson, the CEO and President of Bank Leumi USA, admitted to Landau during a telephone call that the Lenders never had any intention of funding any requests drawn from the Loan if the budget was out of balance. Mendelson

allegedly further stated that the Lenders would not fund any requests drawn from the Loan unless FPG put up additional collateral and brought the budget into balance. Mendelson allegedly stated that he did not care what the Third Amendments said, and never had, because he had never read the Third Amendments.

On July 6, 2020, having gone unpaid for months, the construction manager, Ray Builders, stopped working, which will delay construction for the foreseeable future.

Construction has presently stopped.

Procedural History

On August 4, 2020 FPG filed the present action asserting eight causes of action: (1) Fraudulent Inducement (against all Defendants); (2) Civil Conspiracy to Commit Fraud (against all Defendants); (3) Negligent Misrepresentation (against Harel-Maiden together with Bank Leumi USA, the "Lenders"); (4) Breach of the 2016 Loans Agreements, as Subsequently Amended (against Lenders); (5) Anticipatory Breach of the 2016 Loan Agreements, as Subsequently Amended (against Lenders); (6) Declaratory Relief that the Guaranty of Completion, as Subsequently Amended, is Unenforceable by the Lenders (by Guaranty Plaintiffs against Lenders); (7) Declaratory Relief that the Lenders Have No Basis To Seek Payment Under The Guaranty Of Payment, as Subsequently Amended (by Guaranty Plaintiffs against Lenders); (8) Declaratory Relief that the Lenders Have No Basis to Seek Payment Under The Guaranty Of Expenses, as Subsequently Amended (by Guaranty Plaintiffs against Lenders).

Defendant Bank Leumi USA filed Motion 001 to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5) and (7). Bank Leumi USA's argument focuses on the text of the 2016 Loan Agreements, as Subsequently Amended, and argues that plaintiffs' claims are barred by the language of the Loan Agreements. Defendants Bank Leumi le-Israel BM, Harel-Maiden Lane-

General Partnership and Harel Insurance Investments and Financial Services Ltd. filed Motion 002 to dismiss the Complaint on the same contract-based grounds as Motion 001. Bank Leumi le-Israel and Harel Insurance Investments and Financial Services Ltd. separately argue that the Court lacks personal jurisdiction over them.

Standard on Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff with "the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Goshen v. Mutual Life Ins. Co of NY*, 98 N.Y.2d 314 (2002). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Id.*

Motion 001

Bank Leumi USA points to three contract provisions that purportedly bar plaintiffs' claims: Section 8.7 No Oral Modifications, Section 2.13 Waiver, and Section 14 Releases.

Turning first to the No Oral Modifications clause, Section 8.7 of each Loan Agreement states:

Neither this Agreement nor any provision hereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

Defendants argue that this section bars plaintiffs' fraudulent inducement, conspiracy, and negligent misrepresentation claims. The Court finds that this section does not "utterly refute" plaintiffs' fraudulent inducement, conspiracy, and negligent misrepresentation claims. Plaintiffs' first three causes of action are based on the allegation that plaintiffs were induced to enter into

the Third Amended Agreement by statements made by Bank Leumi USA. Plaintiffs are not alleging that those statements modified the terms of the Agreements, only that plaintiffs would not have entered into the Agreements absent the representations made prior to executing the Third Amendment. Further, as plaintiffs argue, the no oral modification clause is not equivalent to a “merger” or “non-reliance” clause, both of which are included in the Loan Agreements.

Second, Bank Leumi USA argues that plaintiffs’ claims are barred by the Waiver clause.

Section 2.13 of the Building Loan Agreement and Sections 20 of the Third Amendments state:

Section 2.13 – The Loan, the Project Loan and the Phase I Loan are not usurious and Borrower has no offsets, defenses or counterclaims with respect thereto or with respect to this Agreement or any other Loan Document.

Sections 20 – Defaults; Set Offs; Counterclaims. The Borrower acknowledges and agrees that it has no defenses, rights of set off or counterclaims with respect to any of its obligations under the Building Loan Agreement and the other Loan Documents, as amended by this Amendment, and further represents that there are no defaults with respect to any of its obligations under the Building Loan Agreement and the other Loan Documents, as amended by this Amendment.

As plaintiffs argue, these sections bar “offsets, defenses or counterclaims” and here, plaintiff has brought affirmative claims. Defendants argue that this is semantics and to read these clauses as barring “counterclaims” but not affirmative claims would just encourage a race to the courthouse. The Court disagrees. The section could clearly have been drafted to include “all claims,” but instead only says “offsets, defenses and counterclaims” This section does not “utterly refute” plaintiff’s claims.

Finally, defendants argue that plaintiffs released their fraud claims pursuant to Section 14 which says:

[A]s of the Amendment Date, [FPG] has no ... claims or demands of any kind or nature whatsoever ... including, without limitation, any usury or lender liability claims or defenses, in any such case arising out of or relating to the Loans or the Loan Documents, and (b) to the extent that any claim as described above should in fact exist as of the Amendment Date, including, without limitation, any usury

or lender liability claim or defense, such claim is hereby fully, finally, unconditionally and irrevocably released, waived and discharged.

The leading authority on whether a waiver is broad enough to encompass unknown fraud claims is *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269 (2011). Under *Centro*, “[a] release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is ‘fairly and knowingly made.’” *Id* at 276. *Centro* concerned a release that expressly “reache[d] ‘all manner of actions ... whatsoever ... whether past, present or future, actual or contingent ...’” *Id* at 277. Specifically, the Court of Appeals found that “the phrase ‘all manner of actions,’ *in conjunction* with the reference to ‘future’ and ‘contingent’ actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract.” *Id* at 277 (citations omitted) (emphasis added). Here, the release states only that “claims or demands of any kind or nature whatsoever ...” are released.

The Court declines at this stage to rule as a matter of law whether the Release at issue here can encompass an unknown fraud claim. Defendants are free to raise this issue again on a motion for summary judgment. However, it is clear that the Release at issue does not “utterly refute” plaintiffs’ fraud claims, as is required to grant a motion to dismiss pursuant to CPLR 3211. Moreover, even if the Court were to rule at this early stage that the Release does bar unknown fraud claims, there would still be questions of fact regarding whether the Release was “fairly and knowingly made” which cannot be determined on a motion to dismiss.

With respect to plaintiffs’ claims for Breach of Contract and Anticipatory Breach of Contract (Fourth and Fifth Causes of Action), defendants argue that they must be dismissed because plaintiffs fail to cite to any provisions in the Loan Agreements or the Third Amendment that were breached by Bank Leumi USA. The Court disagrees.

Plaintiffs' breach of contract claim is based on the Lenders' alleged failure to fund the Requests for Advances. Defendants argue that under the Loan Agreements, Lenders had discretion not to fund the Requests for Advances, citing Section 1.3(d)(i) "[Bank Leumi USA] shall have no obligation to cause the Lenders to make any advances hereunder: (i) if any Event of Default shall then exist" and Section 1.3(d)(iii) "[Bank Leumi USA] shall have no obligation to cause the Lenders to make any advances hereunder: if Administrative Agent [Bank Leumi USA] shall have reasonably determined that the construction of the improvements cannot be timely completed"). Bank Leumi USA also points to Section 4.3 of the Building Loan Agreement, which allows Bank Leumi USA to cease funding of the Project as a result of an Event of Default specified in Section 4.1 of the Building Loan. Bank Leumi USA argues that under these provisions it has no obligation to fund the Request for Advances.

In opposition, plaintiffs argue Bank Leumi USA first claimed an Event of Default had occurred in June 2020. Plaintiffs' allegation is that Bank Leumi USA had failed to fund Requests for Advances from February, March and April 2020; thus, the alleged Event of Default does not excuse Bank Leumi USA's failure to fund those Requests for Advances. Additionally, whether Bank Leumi USA made a "reasonable determination" pursuant to Section 1.3d(iii), that the construction of the improvements could not be timely completed, involves questions of fact that cannot be determined on a motion to dismiss. The Court agrees.

Likewise, Bank Leumi USA's alleged failure to fund the Requests for Advances forms the basis for plaintiffs' anticipatory repudiation claim and therefore cannot be dismissed for the same reasons stated above.

Lastly, Bank Leumi USA argues that plaintiffs' claims for Declaratory Relief (Sixth, Seventh and Eighth Causes of Action) should be dismissed because the Guaranty Plaintiffs

agreed to “unconditionally and irrevocably” waive the rights to assert any defense, counterclaim or offset of any nature. As explained above, this language does not “utterly refute” plaintiffs’ claims, and the Court declines to dismiss these causes on action on that basis at this time.

Accordingly, defendant Bank Leumi USA’s motion to dismiss the Complaint is denied. Nevertheless, the Court notes that the plaintiffs are not constructing the building and have a large unpaid loan that has matured. Defendants have asserted that this action is a “pre-emptive” tactic designed to attempt to frustrate the Lenders’ ability to foreclose the loan for a maturity default and appoint a receiver. The issues raised in the related foreclosure action are the subject of another opinion that the Court will issue.

Motion 002

To the extent Motion 002 asserts the same contract-based defenses as Motion 001, the motion to dismiss is denied for the same reasons set forth above.

Turning to the jurisdictional defense argued by defendants Bank Leumi le-Israel BM and Harel Insurance Investments and Financial Services Ltd., while the Court is skeptical that it will ultimately find jurisdiction over these defendants, plaintiffs have made a sufficient showing to conduct jurisdictional discovery against these defendants at this time, without prejudice to these defendants’ right to move to dismiss the action against them at a later date.

On a motion to dismiss under CPLR 3211(a)(8), “a plaintiff need not present definitive proof of personal jurisdiction, but only make a ‘sufficient start’ in demonstrating such jurisdiction by reference to pleadings, affidavits, and other suitable documentation.” *Avilon Auto. Grp. v. Leontiev*, 168 A.D.3d 78, 89 (1st Dep’t 2019). Although the plaintiff bears the burden of establishing personal jurisdiction, “[t]hat burden ... does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiffs need only demonstrate that facts ‘may.

exist’ to exercise personal jurisdiction over the defendant.” *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 407–08 (2d Dep’t 2005). Here, plaintiffs have alleged that the foreign defendants encouraged Bank Leumi USA to make the false statements that allegedly induced plaintiffs to enter into the Third Amendment. The Court finds that plaintiffs have demonstrated facts “may exist” to support a finding over personal jurisdiction over the defendants.

Accordingly, Motion 002 is denied.

The parties shall appear for a preliminary conference on May 4, 2021 at 10:00 am. In advance of the conference counsel shall prepare a discovery schedule for approval by the Court using the preliminary conference order form which can be found at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part-61-Preliminary-Conference-Order.pdf>.

Dated: March 4, 2021



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
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