

Acres Loan Org., LLC v Kateshin Gallery LLC

2021 NY Slip Op 30828(U)

March 12, 2021

Supreme Court, New York County

Docket Number: 656193/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 656193/2020

ACRES LOAN ORIGINATION, LLC,
Plaintiff,

MOTION DATE 03/10/2021

MOTION SEQ. NO. 001

- v -

KATESHIN GALLERY LLC, KATE JUNGHEE SHIN
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 11, 12, 13, 14, 15, 16

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment in lieu of complaint is granted.

Background

Plaintiff contends that it loaned \$23 million to a non-party borrower (170 East 80th Mansion LLC) and defendants signed a guaranty in connection with this loan. It argues that the Guarantors breached a provision of the guaranty that required them to replenish an interest reserve account. The guaranty required that each guarantor was required to maintain a certain level of funds on deposit in the interest reserve (equal to 2 monthly interest payments due under the loan agreement). Plaintiff contends that it sent the required ten-day notice and the money was not deposited into the account.

It argues that a motion for summary judgment in lieu of complaint is applicable despite the fact that the guaranty was not for a sum certain. Plaintiff asserts that an unconditional guaranty satisfies the requirement that this action concern an instrument for the payment of money only.

In opposition, defendants claim that CPLR 3213 is unavailable here because plaintiff relies on proof outside the guaranty. They claim that the guaranty imposes numerous non-payment obligations on defendants. Defendants insist that plaintiff left out an amendment to the underlying loan agreement. They also argue that the doctrine of impossibility excuses their non-performance.

Defendants contend that the loan was for two years and had a maturity date of June 4, 2020. The loan was later modified on January 28, 2020 in that the interest rate was lowered in exchange for a \$5 million lump sum payment. They argue that “it was always understood and agreed between ACRES and Borrower that the interest reserve provision that existed under the initial Loan Agreement would not be enforced under the Amendment, and that ACRES would forbear from pursuing such rights” (NYSCEF Doc. No. 13 at 4).

Defendants argue that the record provided by plaintiff is incomplete and that there are issues of fact with respect to the amount claimed. They also maintain that this action is an “end-run” around the governor’s moratorium on foreclosures due to the ongoing pandemic. Defendants insist that this is an effort to do a back-door foreclosure.

In reply, plaintiff emphasizes that it seeks only \$1.4 million in this case as required by the unconditional guaranty that defendants admit they signed. It points out that the 2020 amendment to the loan did not change the terms of the guaranty.

Background

“CPLR 3213 provides for this accelerated relief where the contract allegedly breached was ‘an instrument for the payment of money only.’ But the remedy is not available where there are other issues and considerations presented by the writing. For example, this procedural avenue is foreclosed if the liabilities and obligations can only be ascertained by resort to evidence

outside the instrument, or if more than simple proof of nonpayment or a de minimis deviation from the face of the document is involved” (*Kerin v Kaufman*, 296 AD2d 336, 337, 745 NYS2d 22 [1st Dept 2002]).

“An unconditional guaranty is an instrument for the payment of ‘money only’ within the meaning of CPLR 3213” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492, 15 NYS3d 277 [2015]).

Here, the Court grants the motion. Despite defendants’ efforts to obfuscate the issue, the facts adduced on this motion are clear. Plaintiff claims that the guaranty required defendants to keep a certain amount in interest reserve, defendants failed to do so, and they failed to replenish it after receiving the required notice. That the guaranty refers to the underlying loan is not a bar to relief under CPLR 3213 (*Bank of Am., N.A. v Solow*, 59 AD3d 304, 305, 874 NYS2d 48 [1st Dept 2009]). Moreover, plaintiff is suing only with respect to the interest reserve provision. Although the guaranty may have “non-payment” obligations, plaintiff is not seeking relief based on those portions of the guaranty.

Defendants’ claim that this is a back-door foreclosure is irrelevant; plaintiff seeks only the \$1.44 million it claims is due. Whether plaintiff has other motives is beyond the reach of this decision. And reference to the loan amendment does not establish a valid defense. Defendants did not point to a provision of the amendment that absolved them of their obligation to replenish the interest reserve after receiving the required notice.

The Court also finds that defendants efforts to rely on oral agreements in connection with the loan modification are without merit. Defendants insist that there was some sort of understanding that this provision of the loan agreement would not be enforced and that the \$5 million lump sum payment would “suspend” the interest reserve requirement. But this Court is

unable to deny the instant motion based on a self-serving account about an oral agreement. The parties engaged in a series of sophisticated *written* agreements for a self-described mansion that is worth, according to defendants, \$37.5 million. If defendants wanted to amend the guaranty with respect to the interest reserve, they should have insisted on amending it in writing while the parties were amending the underlying loan. The Court cannot deny the instant motion based on mere assurances.

The Court also rejects defendants' claim that the impossibility doctrine prevents the Court from granting the instant motion. While the ongoing pandemic may have hindered defendants' ability to replenish the interest reserve account, that does not justify ignoring this obligation. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

This case involves a series of agreements related to a townhouse on the Upper East Side of Manhattan. No party argues that the premises no longer exist; rather, defendants' ability to make the required payments may have been diminished. That does evidence that the subject matter of the loan (the mansion) was destroyed or that performance (replenishing the interest reserve) was impossible.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment in lieu of complaint is granted and it is further

ADJUDGED that the Clerk is directed to enter judgment in the amount of \$1.44 million against defendants, jointly and severally, along with costs and disbursements upon presentation of proper papers therefor.



3/12/2021

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE