SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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CF 125 HOLDINGS LLC,

Plaintiff,

- v -

VS 125 LLC,CINDAT USA LLC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION and FINANCE, PLAZA/TIME SQUARE JOINT VENTURE GP, TT MECHANICAL CORP., LEXINGTON MAINTENANCE, LLC, BRUCE SUPPLY CORP., SAV-MOR MECHANICAL INC., DELTA SHEET METAL CORP., GOTHAM DRYWALL, INC., STRUCTURETECH NEW YORK INC., NEMO TILE CO., INC., THYSSENKRUPP ELEVATOR CORP., JANSONS ASSOCIATES INC., KNS BUILIDNG RESTORATION INC., STONEWORK DESIGN & CONSULTING INC., and JOHN DOE,

Defendants.

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INDEX NO. 850143/2019

MOTION DATE 03/24/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 157, 158, 159, 160, 176, 179, 180, 185, 186, 187, 188, 189, 194, 195, 226, 227

were read on this motion to/for DISMISS DEFENSE.

Upon the foregoing documents, it is

In motion sequence number 002, plaintiff CF 125 Holdings LLC[1] moves, pursuant to CPLR 3211(b), to dismiss the affirmative defenses set forth in defendant VS 125 LLC's (VS 125) verified answer.

[1] On July 1, 2019, United Overseas Bank Limited, New York Agency (UOB) filed this action (NYSCEF Doc. No. [NYSCEF] 1, Summons and Complaint). On July 26, 2019, UOB assigned the loan at issue to 125 Greenwich Property LLC (NYSCEF 38, Allonge Endorsement), which was then substituted as plaintiff in place of UOB (NYSCEF 148, Order). On June 30, 2020, pursuant to another assignment, the court ordered that CF 125 Holdings LLC be substituted as plaintiff (NYSCEF 214, Decision and Order). Although many of the events detailed in the background of this decision involved UOB, the court will use the term plaintiff.

Background

VS 125 owns real property located at 125 Greenwich Street, New York, New York (Property) (NYSCEF 162, Verified Second Amended Complaint [SAC] ¶ 6; NYSCEF 187, Answer ¶ 6). In 2018, VS 125, UOB, and other nonparty lenders entered into a Credit Facility Agreement (Credit Agreement) to finance the construction of a sixty-nine story development comprised of retail and residential units (Project) (NYSCEF 162, SAC ¶ 7; NYSCEF 187, Verified Answer ¶¶ 7, 59; *see also* NYSCEF 159, Credit Agreement). Pursuant to the Credit Agreement, VS 125 contracted to borrow funds to finance "cost improvements", as defined in the New York Lien Law, (Building Loan) and to borrow funds to finance all other costs associated with the Project (Project Loan) (NYSCEF 162, SAC ¶ 8; NYSCEF 187, Verified Answer ¶¶ 8, 61).

On September 21, 2018, VS 125 executed a Consolidated, Amended, and Restated Building Loan Promissory Note B (Building Loan Promissory Note B), which is secured by a Consolidated, Amended, and Restated Building Loan Mortgage, Security Agreement, and Assignment of Leases and Rents (Building Loan Mortgage B), and a Project Loan Promissory Note B, which is secured by a Project Loan Mortgage, Security Agreement, and Assignment of Leases and Rents (Project Loan Mortgage B) (NYSCEF 162, SAC ¶¶ 10, 11, 14, 15; NYSCEF 187, Verified Answer ¶¶ 10, 11, 14, 15). Pursuant to Building Loan Mortgage B and Project Loan Mortgage B, VS 125 pledged, assigned, and mortgaged all rights, title, and interest in the Property to plaintiff (*id.* ¶¶ 11, 15). These B Notes were the first tranche. The second tranche, the A Notes would

become available to VS 125 after the B Notes were drawn, and if certain conditions were satisfied (NYSCEF 187, Verified Answer ¶¶ 66, 67).

Section 9.3 of the Credit Agreement required VS 125 to meet certain conditions precedent to receive additional advances beyond the B Notes, including entering into "Approved Sales Contracts" for both residential and retail units representing the gross proceeds of at least $100,000,000 at the "Minimum Sales Price" within fifteen months of the closing date (NYSCEF 162, SAC ¶ 18; NYSCEF 187, Verified Answer ¶ 67). "Approved Sales Contracts are defined as contracts for the purchase or sale in which, subject to certain exceptions, a 15%, non-refundable deposit, in the case of a residential unit, or a 10%, non-refundable deposit, in the case of a retail unit, has been made" (NYSCEF 187, Verified Answer ¶ 68). The Minimum Sales Price is defined as an amount equal to 80% of the agreed upon sales price for each unit set forth in in the Credit Agreement (List Price) unless otherwise approved by the certain lenders in their reasonable discretion (*id*. ¶ 69; NYSCEF 159, Credit Agreement at 16).

VS 125 alleges that, by Fall 2018, the downtown Manhattan real estate market "softened", and by December 2018, the Project's real estate broker recommended advertised price reductions of 20% off of the List Price for certain units (NYSCEF 187, Verified Answer ¶¶ 75, 79). On December 21, 2018, VS 125 requested the lenders' consent to enter into sales contracts with an additional 5% discount (25% discount to List Price) (*id*. ¶ 82). VS 125 alleges that after unreasonably withholding their approval[2],

[2] It is not clear from VS 125's answer how long the approval was withheld, but it appears it was approximately two to three months.

the lenders ultimately granted approval of the price reduction, but it was too late (*id*. ¶¶ 89-91).

In April 2019, VS 125 requested to draw additional funds to pay for Project expenses (*id*. ¶ 96). However, plaintiff informed VS 125 that the draw amount exceeded the funds available under the B Notes (*id*. ¶ 97), and the A Notes were not available to VS 125 because the condition of $100 million in sales was not reached (*id*. ¶ 98). Because of VS 125's alleged failure to satisfy this condition, it faced a shortfall of funds to complete the Project, and the loans were not "in balance" (NYSCEF 162, SAC ¶ 21; NYSCEF 187, Answer ¶ 99). Pursuant to Section 8 of the Credit Agreement, when a shortfall occurs as to the Building Loan or Project Loan, VS 125 was to provide plaintiff with a Building Loan Deficiency Deposit or Project Loan Deficiency Deposit within 5 business days to ensure that the loan remained in balance (NYSCEF 162, SAC ¶ 22; NYSCEF 187, Verified Answer ¶ 101). Based on this alleged imbalance, plaintiff demanded that VS 125 satisfy the deficiency to avoid a default (NYSCEF 187, Verified Answer ¶ 106). Plaintiff declared an Event of Default, and this foreclosure action commenced (*id*. ¶¶ 109, 110).

In the SAC, plaintiff alleges two causes of action: foreclosure of the Property and a declaration that Building Loan Mortgage B and Project Loan Mortgage B are deemed of equal priority and consolidated into a single instrument such that they may be foreclosed upon simultaneously. Plaintiff alleges that, pursuant to the declaration of an Event of Default under the Credit Agreement, it is entitled to acceleration and immediate payment of principal, interest, fees, expenses and foreclosure on the Building Loan Mortgage B and Project Loan Mortgage B. In its answer, VS 125 raises nine affirmative

defenses: failure to state a claim, standing, estoppel, unclean hands, the Event of Default was erroneous, wrongful conduct (hindered contract performance), wrongful conduct (collateral damage and waste), unjust enrichment, and reservation of rights. Plaintiff now moves to dismiss these defenses.

Discussion

Pursuant to CPLR 3211(b), "a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit."

> "In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial"

(*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [internal quotation marks and citations omitted]).

Third, Fourth and Eighth Affirmative Defenses

In the third, fourth, and eighth affirmative defenses, VS 125 asserts that plaintiff's claims are barred by estoppel, unclean hands, and unjust enrichment, respectively.

"[B]are legal conclusions without supporting factual allegations are insufficient to raise affirmative defenses" (*Robbins v Growney*, 229 AD2d 356, 357 [1st Dept 1996] [citation omitted]). As these three affirmative defenses are merely supported by conclusions of law and not facts, they are stricken. Further, the defenses of unclean hands and unjust enrichment fail as a matter of law.

Estoppel

> "In order for estoppel to exist, three elements are necessary: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least,

> which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position"

(*BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985] [internal quotation marks and citations omitted]). Here, VS 125 fails to plead any facts to support this defense. There are no allegations of misrepresentations. Rather, the allegations focus on plaintiff's alleged failure to abide by a provision of the Credit Agreement (*see Falk v Gallo*, 18 Misc 3d 1146[A], 1146A, 2008 NY Slip Op 50451[U], *5 [Sup Ct, Nassau County 2008]).

Unclean Hands

Even if VS 125's defense was supported by more than the conclusory allegation that the complaint is barred by unclean hands, this affirmative defense fails as a matter of law as the doctrine does not apply to mortgage foreclosure actions (*Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, 122 [1969]). In *Jo Ann Homes at Bellmore, Inc.*, the Court of Appeals distinguished foreclosure proceedings from other actions sounding in equity, because "while equity acts only in personam, an action for foreclosure is in the nature of a proceeding in rem to appropriate the land" (*id.* [internal quotation marks and citation omitted]).

Unjust Enrichment

Similarly, the eighth affirmative defense of unjust enrichment is not sufficiently alleged, and nevertheless, fails as a matter of law. To sustain this defense, VS 125 must plead that "(1) the other party was enriched, (2) at that party's expense, and (3)

that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). VS 125 fails to support this defense with any allegations. Furthermore, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987] [citations omitted]). Here, there are extensive loan and security agreements between the parties that are the basis of plaintiff's claims and VS 125's defenses.

Fifth, Sixth and Seventh Affirmative Defenses

The fifth, sixth, and seventh defenses spring from the lenders' alleged conduct in delaying consent for the requested price reductions, precluding VS 125 from reaching the $100 million sales threshold and causing a shortfall of funds, which caused VS 125 to default on its obligations under the financing documents.

Erroneous Declaration of Event of Default

In its fifth affirmative defense, VS 125 alleges that plaintiff's declaration of an Event of Default was erroneous because plaintiff failed to timely approve the price reductions, as they were obligated to under the Credit Agreement, and such failure resulted in the alleged Event of Default claimed by plaintiff.

Plaintiff argues that VS 125 waived this defense by failing to give plaintiff written notice of plaintiff's alleged default pursuant to §20.14 of the Credit Agreement. In opposition, VS 125 opines that the language in §20.14 applies only when VS 125 asserts a claim against the lender or administrative agent as a result of the lender or

administrative agent's default, and here, VS 125 has not asserted a claim. Rather, it is raising a defense to plaintiff's claims against it. VS 125 also asserts that it does not allege a default by either party; implicit in this argument is the question as to whether plaintiff's failure to timely respond to VS 125's request for approval qualifies a default under the Credit Agreement. Further, VS 125 argues that, even if this provision does apply, VS 125 gave written notice to UOB when it inquired about the status of the approval and made note of the lenders' delay.

"Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] [citation omitted]). "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*id.*). "A contract is unambiguous if on its face [it] is reasonably susceptible of only one meaning" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66-67 [1st Dept 2008] [internal quotation marks and citation omitted], *affd* 13 NY3d 398 [2009]). "Conversely, [a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*id.* at 66 [internal quotation marks and citation omitted]). Whether there is an ambiguity "is determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording to be considered in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*id.* at 66-67 [internal quotation marks and citations omitted]).

§20.14 of the Credit Agreement states

> "Claims Against Administrative Agent or Lender. Neither Administrative Agent nor any Lender shall be in default under this Agreement, or under any other Loan

> Documents, unless a written notice specifically setting forth the claim of Borrower shall have been given to Administrative Agent within sixty (60) days after Borrower first had knowledge of the occurrence of the event which Borrower alleges gave rise to such claim and Administrative Agent or such Lender does not remedy or cure the default, if any there be, promptly thereafter. Borrower waives any claim, set-off or defense against Administrative Agent and/or Lenders arising by reason of any such alleged default as to which Borrower does not give such notice timely as aforesaid. Borrower acknowledges that such waiver is or may be essential to Administrative Agent's and/or Lenders' ability to enforce its remedies without delay and that such waiver therefore constitutes a substantial part of the bargain between Administrative Agent and Lenders, on the one hand, and Borrower, on the other, with regard to the Loan. If it is determined in any proceedings that Administrative Agent or any Lender has improperly failed to grant its consent or approval, where such consent or approval is required by this Agreement or any other Loan Documents, Borrower's sole remedies shall be an action for specific performance or injunctive relief, or to obtain declaratory relief determining such withholding to have been improper, and Borrower hereby waives all other claims for damages and all claims for set-off against Administrative Agent and/or Lenders resulting from any such withholding of consent or approval"

(NYSCEF 159, Credit Agreement at 113). The Credit Agreement defines "Default or default" as "any event which, if it were to continue uncured, would, with notice or lapse of time or both, constitute an Event of Default hereunder" (*id*. at 9). Events of Default are enumerated under Section 15.1 of the Credit Agreement. These enumerated Events of Default do not contain events triggered by the plaintiff; mainly, they address events where VS 125 would be in default (*id*. at 96-99). For example, Events of Default include VS 125's failure to "pay any principal payment", "disapproval by Administrative Agent at any time of any construction work not in conformity with the Plans and Specifications and failure to cause the same to be corrected", VS 125's "failure to make a Deficiency Deposit", "receipt of any notice from the Office of the Attorney General of the State of New York to halt the sales or marketing of Units and failure of [VS 125] to cure", VS 125's failure "to provide any Rate Cap", and VS 125's failure "to remain in

good standing in the State of Delaware and the state of its domicile" (*id*. at §15.1 [a], [e], [l], [s], [y], [aa]).

Thus, reading the Agreement as a whole, an ambiguity exists as to the term "default" in Section 20.14. It cannot be determined on this motion whether the lenders' alleged withholding of approval for approximately two months is a "default" under Section 20.14 of the Credit Agreement, and in turn, whether Section 20.14 applies here at all. Plaintiff's motion is denied as to this defense.

Wrongful Conduct (hindered contract performance, collateral damage and waste)

In its sixth affirmative defense, VS 125 alleges that "[p]laintiff's wrongful conduct has hindered and prevented Borrower's performance under the Loan Documents" (NYSCEF 187, Verified Answer ¶ 112). In its seventh affirmative defense, VS 125 alleges that "[p]laintiff's wrongful conduct has materially impaired and damaged the Building, which serves as collateral with respect to the Loan (*id.* at ¶ 113).

Again, plaintiff argues that these defenses are waived as VS 125 did not comply with Section 20.14. For the reasons stated above, the motion to dismiss these two defenses is denied.

Second Affirmative Defense

VS 125 alleges that plaintiff lacks standing as UOB's assignment of the loans required VS 125's consent under Section 14.1 of the Credit Agreement which reads, in relevant part,

> "[a]ny Lender shall have the right to assign or transfer (such Lender an 'Assigning Lender') this Agreement and any of its rights and security hereunder and under the other Loan Documents with the consent, not to be unreasonably withheld, of (a) Borrower (unless (i) the assignee is a Lender, an affiliate of a Lender or a Permitted Assignee, provided that an assignment to an affiliate will

require the assignor to remain liable for its share of advances under the Loan or (ii) an Event of Default has occurred and is continuing)"

(NYSCEF 159, Credit Agreement §14.1 [emphasis added]).

Therefore, the question of whether UOB's assignment of the loan was valid hinges on whether an Event of Default occurred and is continuing. VS 125 asserts that no valid Event of Default exists as it was plaintiff who breached first by withholding approval. Plaintiff argues that VS 125 has waived its right to raise this defense as it did not comply with Section 20.14 of the Credit Agreement. Again, for the reasons stated above, the motion to dismiss this defense is denied.

Ninth Affirmative Defense

The ninth affirmative defense, which asserts the right to state additional affirmative defenses, as they may appear during this litigation, is dismissed as an ineffective catchall provision. "[A] party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party" (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015] [internal quotation marks and citation omitted]). This defense is dismissed.

First Affirmative Defense

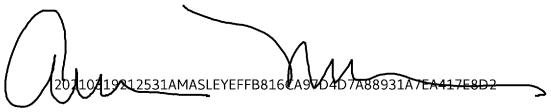
Finally, VS 125's first affirmative defense states that the "complaint fails to state a claim for which relief can be granted" (NYSCEF 187, Verified Answer ¶55). "As to the first affirmative defense alleging that the plaintiff failed to state a cause of action, the principle appears to have become accepted that such a defense may be dismissed only if all the other affirmative defenses are found to be legally insufficient" (*Raine v Allied*

Artists Prods., Inc., 63 AD2d 914, 915 [1st Dept 1978] [citation omitted]). Thus, the motion to dismiss this defense is denied.

Accordingly, it is

ORDERED that the motion is granted, in part, and the first, third, fourth, eight, and ninth affirmative defenses of defendant VS 125 LLC are dismissed; and it is further

ORDERED that the parties are directed to ADR. Counsel shall contact the Part (SFC-Part48@nycourts.gov) for further instruction within 10 days of this decision and order's entry on NYSCEF.



3/19/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE