

**320 W. 115 Realty LLC v Avant Capital 318-320 W.
115th St. LLC**

2021 NY Slip Op 32897(U)

December 30, 2021

Supreme Court, New York County

Docket Number: Index No. 654838/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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320 WEST 115 REALTY LLC

INDEX NO. 654838/2018

Plaintiff,

MOTION DATE 09/20/2021

- v -

MOTION SEQ. NO. 003

AVANT CAPITAL 318-320 WEST 115TH STREET LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for DISMISSAL.

I.

I. INTRODUCTION

In this action, the plaintiff, 320 West 115 Realty LLC (320 West), seeks to recover \$1,037,208.33 in penalties paid to the defendant, Avant Capital 318-320 West 115th Street LLC (Avant), and alleges causes of action sounding in breach of contract and unjust enrichment and pursuant to Uniform Commercial Code § 3-108. Avant asserts a single counterclaim seeking contractual attorneys' fees. Avant now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and for summary judgment on its counterclaim. 320 West opposes the motion. For the reasons that follow, the motion is granted in part.

II. BACKGROUND

On November 25, 2014, 320 West entered into a series of transactions whereby it borrowed a total of \$4,650,000.00 from Avant in connection with the development of real property located at 318-320 West 115th Street, New York, New York 10026 (the loans). Each of the loans was evidenced by a loan agreement (the loan agreements), one or more promissory notes (the notes), and a mortgage (the mortgages), all dated as of November 25, 2014 (collectively, the loan documents). The loan documents were divided into three categories: (1) the acquisition loan documents (the acquisition loan agreement, the acquisition loan note, and the acquisition loan mortgage), (2) the building loan documents (the building loan agreement, the building loan note, and the building loan mortgage), and (3) the project loan documents (the project loan agreement, the project loan note, and the project loan mortgage).

Article IV of each of the loan agreements defines certain “events of default” to include, *inter alia*, (i) failure to pay principal or interest due under the notes, (ii) the making of incorrect or materially misleading representations or warranties by 320 West to Avant in the loan agreements or any loan document, or any certificate or statement delivered in connection with such documents, (iii) the amendment or modification of the contractor agreement without Avant’s prior written consent, (iv) failure to satisfy or bond a mechanic’s lien filed against the subject property for a period of 60 days after receipt of notice of filing of such lien, and (v) a default under any mortgage encumbering the subject premises that is prior to or subordinate to the lien of the loan agreement’s respective mortgage. Each of the notes and mortgages incorporates by reference their corresponding loan agreement’s definition of “event of default,” such that a default under any loan agreement is also a default under the corresponding note and mortgage. For some, but not all, events of default, the loan agreements require Avant to provide

written notice of default and an opportunity to cure prior to becoming entitled to any penalties under the loan agreements. With respect to defaults for which a written notice and cure period is not provided, the loan agreements provide that there shall be no notice requirement or opportunity to cure.

Pursuant to section 2.15 of the building loan agreement, 320 West represented and warranted to Avant that its anticipated hard construction costs did not exceed \$3,313,933 (the hard costs budget). The hard costs budget was based upon a stipulated sum set forth in an agreement between 320 West and its general contractor, All Building Construction Corp. (ABCC), dated November 14, 2014 (the contractor agreement). Nonetheless, by a subsequent agreement between 320 West and ABCC, which was entered into in January 2015 but dated as of November 14, 2014, 320 West increased ABCC's hard costs budget by an additional \$819,525.00 (the second contractor agreement) without the prior consent of Avant.

On August 17, 2015, 320 West submitted to Avant a draw request (the draw request) for the advance of approximately \$368,000.00 from the loan provided for building costs. Pursuant to the draw request, 320 West certified, *inter alia*, that its representations in the building loan agreement, including with respect to the original hard costs budget, were true and correct as of the date of the draw request. Avant approved the draw request and advanced funds to 320 West. Avant contends it was unaware of the second contractor agreement until late 2016. By email dated November 3, 2016, Avant advised 320 West's then-counsel that 320 West's alleged false certification constituted an event of default under the loan agreements and that Avant reserved its right to impose default interest from the date of the first misstatement.

On March 15, 2016, one of the subcontractors on the underlying construction project filed a mechanic's lien on the subject property, alleging failure of payment (the mechanic's lien).

On April 7, 2016, Avant notified 320 West that pursuant to the loan agreements, it was required to resolve the mechanic's lien by May 14, 2016, or be held in default. On May 31, 2016, approximately 78 days later, ABCC filed a notice that the mechanic's lien was bonded.

The loans became due and payable by 320 West on the maturity date of May 31, 2016. On May 24, 2016, Avant sent 320 West a letter (the May 24 letter) attaching three unsigned "draft" note modification agreements (the draft note modification agreements) providing for two three-month loan extensions upon 320 West's payment of certain extension fees. The May 24 letter states that "one of the conditions to your ability to extend the term of the Loans is that there are no defaults." The May 24 letter states that Avant agreed that 320 West's failure to resolve the outstanding mechanic's lien, although an event of default, would not impede the first three-month extension but would prevent the second three-month extension. On May 27, 2016, 320 West returned the signed note modification agreements to Avant by email. On June 3, 2016, 320 West emailed Avant proof that the mechanic's lien was bonded. Avant responded to that email with a series of questions that needed to be addressed "prior to approving the extension." The parties dispute whether 320 West responded to the questions in July 2016, whether any extension fees were satisfied, and whether the maturity date was actually extended.

The parties further dispute whether Avant sent a notice of default to 320 West on July 6, 2016. However, by letter agreement dated October 21, 2016, the parties agreed to commence certain discussions concerning the loans (the pre-negotiation agreement). Pursuant to the pre-negotiation agreement, 320 West acknowledged receipt of the notice of default and demand for payment dated July 6, 2016.

The parties remained in communication with respect to the loans and the construction project through late 2017. In their communications, 320 West contends that Avant's partner

assured it that the loans were being extended. Further, Avant offered to extend additional loans to 320 West in connection with the project and remitted payments for insurance invoices provided by 320 West.

On October 2017, 320 West requested closing documents for the loans, based on its anticipating closings on four apartments. On October 23, 2017, Avant sent 320 West a letter containing a loan payoff information for the construction project including \$1,037,208.33 as a default interest penalty accruing from August 17, 2015. 320 West paid the default interest penalty “without prejudice to such reservation of rights, pursuant to Uniform Code § 1-308 and relevant caselaw” because Avant would not permit closing on the construction project without the payment. This action ensued.

III. LEGAL STANDARD

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

IV. DISCUSSION

In support of its motion, Avant submits, *inter alia*, the loan agreements, the notes, the mortgages, the contractor agreement, the second contractor agreement, the original hard costs budget breakdown, the draw request, the May 24 letter, the draft loan modification agreements, email correspondence between the parties beginning on June 3, 2016, the July 6, 2016, default notice, the pre-negotiation letter, the October 23, 2017, payoff letter, the mechanic's lien, and the affidavit of Adam Luysterborghs, manager of Avant.

Avant's submissions demonstrate that its collection of default interest from August 17, 2015, was contractually authorized. Specifically, 320 West represented in its draw request dated August 17, 2015, that

“To [320 West's] knowledge, the undersigned is not in default under any of the terms and conditions of the Loan Documents ... and all representations in Article II of the Building Loan Agreement and the Project Loan Agreement are true and correct as of the date hereof.”

As referenced above, Article II of the building loan agreement contains a representation that the anticipated construction costs “do not as of the date hereof exceed the amount of the Budget.”

The Budget is attached to the building loan agreement and provides that hard construction costs are not to exceed \$3,313,933. Nonetheless, when it submitted its draw request, 320 West had already entered into the second contractor agreement with ABCC, whereby 320 West agreed to pay an additional \$819,525.35 in hard construction costs. 320 West did not disclose the second contractor agreement to Avant until over a year after the draw request had been submitted and approved.

Pursuant to section 4.1(c) of the building loan agreement, 320 West's representations in the draw request were an “event of default” insofar as they constituted materially incorrect or

misleading statements as of the date they were made or remade. Luysterborghs confirms in his affidavit that 320 West's representations with respect to the hard costs budget were a significant factor in Avant's decision to approve the draw request. Moreover, 320 West's attestation that it was not in default under any of the loan documents at the time of the draw request was itself false. By entering into the second contractor agreement in January 2015, 320 West "amended or modified" in a "material respect" the "Construction Contract," defined in the building loan agreement as the original contractor agreement, "without the prior written consent of [Avant]." This constituted an event of default under section 4.1(d)(ii) of the building loan agreement.

Inasmuch as events of default occurred under the building loan agreement, they also occurred under the building loan note and the building loan mortgage pursuant to the terms of those documents. Additionally, since the acquisition loan agreement and project loan agreement identically define misrepresentations made in any loan document or any certificate or statement delivered in connection with a loan document as events of default, 320 West defaulted under the acquisition loan documents and the project loan documents. Lastly, because 320 West defaulted under the building loan mortgage, which is prior to or subordinate to the lien of the acquisition loan mortgage and the project loan mortgage, it defaulted under the acquisition loan documents and the project loan documents.

With respect to the foregoing "events of default," no notice of default or opportunity to cure was required by any of the loan agreements. Nor is there any requirement in the loan documents that Avant affirmatively notify 320 West that default interest continued to accrue. Accordingly, Avant has established, *prima facie*, the absence of any cognizable claim for recovery of the default penalty it properly charged to 320 West.

In response to Avant's motion, 320 West fails to raise a triable issue of fact as to Avant's entitlement to judgment. 320 West submits, *inter alia*, email correspondence between the parties, the bond discharging the mechanic's lien, and the affidavit of 320 West's manager, Steven Kirschenbaum. In these submissions, 320 West concedes that it entered into the second contractor agreement in January 2015, that such agreement increased the hard construction costs for the project, that it did not seek Avant's consent with respect to the second contractor agreement, and that it certified in the draw request that its prior representations with respect to budget remained accurate. 320 West further fails to rebut Avant's representation that it was not aware of the second contractor agreement until late 2016 or that 320 West's misrepresentations were material.

While 320 West cites section 4.2 of the loan agreements for the proposition that notice of default and an opportunity to cure was required, it fails to address the fact that the specified "events of default" pursuant to which Avant sought default interest were carved out of any such notice and cure period requirements. To be sure, section 4.2(iv) of the loan agreements confirms that notice is not a condition precedent to collection of a default penalty under the circumstances presented. Additionally, 320 West acknowledges that Avant did notify 320 West's counsel via email that Avant considered the representations in the draw request an event of default when it learned of the second contractor agreement. Avant's communications with 320 West in the year following that email nowhere indicate that Avant waived the event of default or that default interest was not accruing.

Because 320 West's draw request was a sufficient event of default justifying the imposition of default interest from August 17, 2015, the court need not reach the parties' arguments with respect to subsequent defaults under the loan agreements and any purported

extension of the maturity date. However, the court notes that insofar as extension of the maturity date would have been premised on the absence of any defaults by 320 West, it could not have been effective in light of the August 17, 2015, draw request.

To the extent 320 West includes in its memorandum of law boilerplate descriptions of the equitable concepts of estoppel, waiver, laches, and unclean hands, with minimal, if any, attempt to apply them to the issues of this case, the court notes that the complaint and 320 West's response to Avant's counterclaim are each devoid of any reference to such concepts, whether as claims or defenses. 320 West may not raise new theories of recovery for the first time in opposition to a motion for summary judgment. See Ostrov v Rozbruch, 91 AD3d 147, 154 (1st Dept. 2012). Moreover, 320 West's arguments with respect to the applicability of estoppel, waiver, laches, and unclean hands to the facts of this case are without merit.

In regard to its counterclaim, Avant has also established that it is entitled to attorneys' fees pursuant to the loan agreements, which provide for Avant's fees incurred in connection with the repayment and collection of the loans. However, it has not established the amount due.

V. CONCLUSION

Accordingly, it is

ORDERED that the defendant's motion pursuant to CPLR 3212 for summary judgment dismissing the complaint and for summary judgment on its counterclaim for attorneys' fees is granted to the extent that the complaint is dismissed and the defendant is awarded judgment on the issue of liability on its counterclaim; and it is further

ORDERED that the defendant may submit supplemental papers with respect to the issue of damages on its counterclaim within 60 days and shall notify the Part 42 Clerk of any such filing.

This constitutes the Decision and Order of the court.

DATED: December 30, 2021



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON