Ladder Capital Fin. VIII REIT LLC v 1917 ACP Owner LLC
2022 NY Slip Op 32330(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 850188/2020
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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LADDER CAPITAL FINANCE VIII REIT LLC,

Plaintiff,

- v -

1917 ACP OWNER LLC,120 W 116 LLC,110 W 116 LLC,ACP ST. NICHOLAS LLC,ISAAC KASSIRER, EMERALD EQUITY GROUP LLC,IL PORTFOLIO LENDER 2, LLC,E&M 116TH STREET LLC,ACP PORTFOLIO MEMBER LLC,DMT PLUMBING & HEATING CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE NO. I THROUGH JOHN DOE NO. XXX,

Defendant.

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INDEX NO. 850188/2020

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a consolidated, amended and extended mortgage encumbering four parcels of real property located at 1917 Adam Clayton Powell Jr. Blvd., 120 W 166th St., 110 W. 116th St., and 110th St. Nicholas Ave., New York, New York 10026. Defendants answered Plaintiff's complaint jointly and raised no affirmative defenses.

The mortgage, dated April 5, 2019, secures a consolidated, amended and restated promissory note of the same date with an original principal amount of $30,600,000.00. The note and mortgage were given by Defendants 1917 ACP Owner LLC, 120 W 116 LLC, 110 W 116 LLC, and ACP St. Nicholas LLC ("Mortgagors"). The note and mortgage were executed by Defendant Isaac Kassirer ("Kassirer") as Authorized Signatory of all the Mortgagor Defendants. Concomitantly with the note and mortgage, Defendant Kassirer and Emerald Equity Group LLC ("Emerald") executed an unconditional guaranty of repayment payment with a stated monetary limit. Kassirer and Emerald also executed a guaranty of recourse obligations and a guaranty of completion. Under the recourse guaranty, unlimited liability for certain "Guaranteed Obligations" was assumed by Kassirer and Emerald. All the documents are governed by a loan agreement, also of April 5, 2019.[1]

Now, Plaintiff moves for summary judgment on its foreclosure cause of action and on the issue of liability under the guarantees, the appointment of a referee to compute and to amend the caption. Defendants

[1] Plaintiff inexplicably and carelessly filed this 1023-page behemoth as a single document on NYSCEF. This rendered the document repeatedly inaccessible and, when it was, frustratingly cumbersome review. Any further similar submissions may result in summary denial of the application.

oppose only that portion of the motion for summary judgment on the issue of Defendants' liability under the guarantees.

In moving for summary judgment on its foreclosure cause of action, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Mortgagor Defendants' default in repayment (*see U.S. Bank, N.A., v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Plaintiff's motion was supported with an affidavit from Robert Perelman ("Perelman"), an employee of Plaintiff. The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). Defendants failed to proffer any opposition on this issue.

Accordingly, the branches of Plaintiff's motion for summary judgment on the foreclosure cause of action and the appointment of a referee to compute are granted.

As to the branch of the motion for summary judgment on the issue of liability under the guarantees, "'all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty'" (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], *quoting City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Section 1.1 of the payment guarantee provides as follows:

> Guarantor hereby assumes liability as a primary obligor for, hereby unconditionally, absolutely, irrevocably guarantees payment to Lender of, and Guarantor shall be personally and jointly and severally liable for the complete and prompt payment of (x) the outstanding principal amount of the Loan evidenced by the Note and the other Loan Documents when and as the same shall become due, whether at the stated maturity thereof, by acceleration, demand, or otherwise, (y) any and all interest accrued and to accrue on the principal amount of the Loan (including, without limitation, interest at the Default Rate), and (z) late charges, reasonable attorneys' fees, costs, expenses, and all other indebtedness, obligations and liabilities of Borrower with respect to the Loan as provided in Loan Documents (all of the obligation and liabilities of Guarantor set forth in this Section 1.1 shall be collectively referred to as the "Guaranteed Obligations"). Notwithstanding anything to the contrary contained herein, (i) the liability of Guarantor under clause (x) of this Section 1.1 shall not, at any time, exceed Three Million Sixty Thousand and No/100 Dollars ($4,060,000.00).

Plaintiff demonstrated, with Perelman's affidavits and the annexed documentation, a *prima facia* case of liability under the payment guaranty against Defendants Kassirer and Emerald (*see TD Bank, N.A. v Clinton Ct. Dev., LLC*, 105 AD3d 1032 [2d Dept 2013]). In opposition, Defendants only contest the amount of the payment guarantee alleging it is $1,000,000.00 less. Defendants are correct that the copy of the payment guaranty annexed to the motion provided for a limit of "3,060,000.00". However, in reply Plaintiff proffered a further affidavit from Perlman who averred that an earlier fourth version of the guarantee was mistakenly submitted and annexed the fifth version which contained the limit of $4,060,000.00.

Concerning the guaranty of recourse obligations, liability is triggered upon the occurrence of certain events specified under section 1.2 of the guaranty. Plaintiff argues in the moving papers that section 1.2[a], [b][3] and [4] were violated by the guarantors "creating, incurring, or permitting to exist certain liens on the

Property including those of defendants IL Portfolio Lender 2, LLC, E&M 116th Street LLC, DMT Plumbing & Heating Corp, and the New York City Environmental Control Board".

The incidence of events under section 1.2[a], defined by romanettes [i] – [vii], can result in liability for certain actual losses and damages. However, Plaintiff's affidavits and memorandum of law in support of this argument are entirely silent as to which section was triggered and by which lien and fail to explain how the proffered documents prove same (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]). Moreover, to the extent Plaintiff attempted to cure this defect in it reply papers, it is inappropriate (*see eg Henry v Peguero*, 72 AD3d 600 [1st Dept 2010]).

The Occurrence of certain events defined under section 1.2[b] may cause the Guarantor to be fully liable for the indebtedness. Sections 1.2[b][3] and [4] provide, in pertinent part, that:

> In addition to, and without limiting the generality of, the foregoing clause (a), and notwithstanding anything to the contrary set forth in this Guaranty or in any of the other Loan Documents, Guarantor hereby acknowledges and agrees that the Obligations shall be fully recourse to Guarantor in the event that:
>
> . . .
>
> (3) Borrower fails to obtain Lender's prior written consent to any Indebtedness or any voluntary Lien encumbering the Property or any portion thereof or interest therein, except to the extent expressly permitted by the Loan Documents;
>
> (4) Borrower fails to obtain Lender's prior written consent to any Transfer (including, without limitation, any change in Control), except for any Transfer to Lender or to the extent expressly permitted by the Loan Documents;

As to section 1.2[b][3], although proof that certain liens were filed on the property by Defendants DMT Plumbing & Heating Corp and the New York City Environmental Control Board, there is no evidence that the guarantors "voluntarily" assented to same. The four memorandums of restrictions proffered and the balance of the moving papers neither established these documents were liens nor what "Indebtedness" the "Borrower" allegedly incurred.

Plaintiff also posits that permitting the liens constituted a "Transfer" in violation of section 1.2[b][4] of the recourse guaranty. Schedule I of the loan agreement provides that "Transfer" "shall have the meaning as set forth in Section 4.2.1" of the loan document. Section 4.2.1 of the loan agreement states as follows:

> 4.2.1 Due on Sale and Encumbrance; Change of Control; Transfers of Interests.
>
> Except to the extent permitted pursuant to Article 8 hereof, neither Borrower nor any other Restricted Party shall, without the prior written consent of Lender (a) sell, transfer, convey, mortgage, grant, bargain, encumber, pledge, assign, alienate, lease (except to Tenants under Leases that are not in violation of Section 4.1.10 hereof), grant any option with respect to or grant any other interest in the Property or any part thereof or interest therein, including any legal, beneficial, economic or voting interest in Borrower or any other Restricted Party, whether directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise or (b) permit or suffer any change in Control of such Restricted Party to occur (each of (a) and (b), a

"Transfer"). A Transfer within the meaning of this Section 4.2.1 shall be deemed to include (i) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof or interest therein for a price to be paid in installments; (ii) an agreement by Borrower for the leasing of all or a substantial part of the Property for any purpose other than the actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any Rents; (iii) if Borrower or any other Restricted Party is a corporation, the voluntary or involuntary sale, conveyance or transfer of such corporation's stock (or the stock of any corporation directly or indirectly Controlling such corporation by operation of law or otherwise) or the creation or issuance of new stock such that such corporation's stock shall be vested in a party or parties who are not now stockholders; (iv) if Borrower or any other Restricted Party is a limited or general partnership, joint venture or limited liability company, the change, removal, resignation or addition of a general partner, managing partner, limited partner, joint venturer, member or non-member manager, the voluntary or involuntary sale, conveyance or transfer of the partnership interest of any general partner, managing partner or limited partner, the creation or issuance of new partnership interests, the voluntary or involuntary sale, conveyance or transfer of the interest of any joint venturer, member or non-member manager, the creation or issuance of new membership interests or interests in any non-member manager, or Borrower dividing into two (2) or more separate entities and allocating any of Borrower's assets, liabilities, rights and/or obligations between or among such entities; (v) if Borrower or any other Restricted Party is a trust or nominee trust, the voluntary or involuntary sale, conveyance or transfer of the legal or beneficial interest in such trust or nominee trust or the creation or issuance of new legal or beneficial interests; (vi) the change, removal, resignation or addition of any manager agent (other than Manager) of Borrower or any other Restricted Party; and (vii) if Borrower enters into, or the Property is subjected to, any so-called property-assessed clean energy or similar loan.

Plaintiff construes the above sections to mean that a "Transfer" includes any lien, including an involuntarily one, permitted by the Borrower on the encumbered property is a violation of section 1.2[b][4] of the recourse guaranty. When interpreting an agreement or associated agreements, the "entire contract must be reviewed and particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009] [internal quotation marks and brackets omitted]). Plaintiff's reading is an overbroad understanding of the recourse guaranty and loan agreement. Had the parties intended this result, then the recourse guaranty could have easily stated that expressly and cited to the section immediately follows the above provision. Section 4.2.2 states the "Borrower shall not create, incur, assume or permit to exist any Lien on any direct or indirect interest in Borrower or Sole Member or any portion of the Property except for Permitted Encumbrances".

Accordingly, the branch of Plaintiff's motion for summary judgment on the issue of liability under the guarantees is granted only as to the payment guaranty.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties and the appointment of a referee to compute is granted; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on the issue of liability under the guarantees is granted only to the extent that Defendants Isaac Kassirer and Emerald Equity Group LLC are liable to Plaintiff under the payment guaranty; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **October 19, 2022, at 10:40 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

7/14/2022
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

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