

**People's United Bank, N.A. v 102-104 Rogers Ave.,
LLC**

2022 NY Slip Op 32634(U)

July 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 528293/21

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-6, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

Index No. 528293/21

102-104 ROGERS AVENUE, LLC, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY DEPT. OF FINANCE, MOSES NEUMAN, "JOHN
DOE ONE" to and including "JOHN DOE TWENTY" the last
twenty names being fictitious and unknown to the plaintiff(s),
the persons or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming an interest
in or lien upon the premises described in the complaint,
known as 102 Rogers Avenue, Brooklyn, New York 11216
& 104 Rogers Avenue, Brooklyn, New York 11216,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Affidavits/ Affirmations in Reply _____

52-54, 70-72
88-89, 105, 112
108

Upon the foregoing papers, defendants 102-104 Rogers Avenue, LLC (Rogers LLC) and Moses Neuman (Neuman) move for an order, pursuant to CPLR 3211 (a) (1), dismissing the complaint of plaintiff People's United Bank, National Association as

against Neuman. Plaintiff cross-moves for an order, pursuant to CPLR 3025, granting leave to file and serve an amended complaint.

Background

Plaintiff commenced this action to foreclose certain commercial mortgages encumbering the property at 102-104 Rogers Avenue in Brooklyn. On or about April 30, 2014, Rogers LLC executed a Multifamily Loan and Security Agreement (2014 Agreement) and mortgage securing repayment of a loan from plaintiff in the amount of \$3,139,784.25. In connection with the execution of the 2014 Agreement, Neuman executed a Guaranty of Non-Recourse Obligations dated April 30, 2014 (2014 Guaranty). On or about March 8, 2015, Rogers LLC executed a Multifamily Loan and Security Agreement (2015 Agreement) and mortgage securing repayment of \$3,675,000. In connection with the execution of the 2015 Agreement, Neuman executed a Guaranty of Non-Recourse Obligations, dated March 8, 2015 (2015 Guaranty). The 2014 Agreement and 2015 Agreement (collectively, the Agreements) each contained a non-recourse provision in Article 3, Section 3.01, which states, in relevant part:

“Except as otherwise provided in this Article 3 or in any other Loan Document, none of Borrower, or any director, officer, manager, member, partner, shareholder, trustee, trust beneficiary, or employee of Borrower, shall have personal liability under this Loan Agreement ... and Lender’s only recourse for the satisfaction of such Indebtedness and the performance of such obligations shall be Lender’s exercise of its rights and remedies with respect to the Mortgaged Property and any other collateral held by Lender as security for the Indebtedness. This limitation on Borrower’s liability shall not limit or impair Lender’s enforcement of its rights against Guarantor under any Loan Document.”

Article 3, Section 3.02 of the Agreements (Section 3.02) provides exceptions to the non-recourse provision, stating, in relevant part:

“Section 3.02 Personal Liability of Borrower (Exceptions to Non-Recourse Provision).

(a) Personal Liability Based on Lender’s Loss.

Borrower shall be personally liable to Lender for the repayment of the portion of the Indebtedness equal to any loss or damage suffered by Lender as a result of:

(1) failure to pay as directed by Lender upon demand after an Event of Default (to the extent actually received by Borrower):

(A) all Rents to which Lender is entitled under the Loan Documents; and

(B) the amount of all security deposits then held or thereafter collected by Borrower from tenants and not properly applied pursuant to the applicable Leases;

(2) failure to maintain all insurance policies required by the Loan Documents;

(3) failure to apply all insurance proceeds received by Borrower or any amounts received by Borrower in connection with a Condemnation Action, as required by the Loan Documents;

(4) failure to comply with any provision of this Loan Agreement or any other Loan Document relating to the delivery of books and records, statements, schedules, and reports;

(5) except to the extent directed otherwise by Lender pursuant to Section 3.02(a)(1), failure to apply Rents to the ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts, as and when each is due and payable, except that Borrower will not be

personally liable with respect to Rents that are distributed by Borrower in any calendar year if Borrower has paid all ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts for the calendar year that such Rents are attributable to;

(6) waste or abandonment of the Mortgaged Property;
or

(7) grossly negligent or reckless unintentional material misrepresentation or omission by Borrower, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Guarantor, or Key Principal in connection with on-going financial or other reporting required by the Loan Documents, or any request for action or consent by Lender.”

The 2014 Guarantee and the 2015 Guarantee (the Guarantees) each set forth Neuman’s obligations as follows:

“3. Guaranteed Obligations.

Guarantor hereby absolutely, unconditionally and irrevocably guarantees to Lender the full and prompt payment and performance when due, whether at maturity or earlier, by reason of acceleration or otherwise, and at all times thereafter, of:

(a) all amounts, obligations and liabilities owed to Lender under Article 3 (Personal Liability) of the Loan Agreement (including the payment and performance of all indemnity obligations of Borrower described in Section 3.03 (Personal Liability for Indemnity Obligations) of the Loan Agreement and including all of Borrower’s obligations under the Environmental Indemnity Agreement); and

(b) all costs and expenses, including reasonable fees and out-of-pocket expenses of attorneys and expert witnesses, incurred by Lender in enforcing its rights under this Guaranty.”

In its original complaint, plaintiff alleges that Rogers LLC defaulted under the terms of the Agreements and mortgages by failing to pay the aggregate monthly payments in the amounts of \$21,049.00 (owed under 2014 Agreement) and \$16,247.04 (owed under the 2015 Agreement) which became due on January 4, 2021 and monthly thereafter. In addition to its causes of action for foreclosure, plaintiff sets forth a cause of action against Neuman for a deficiency judgment. Plaintiff alleges that “[p]ayment of the indebtedness complained of herein was guaranteed in writing by [Neuman] and by reason thereof [Neuman] is liable for any deficiency judgment herein.” In response to the original complaint, defendants brought the instant motion to dismiss as against Neuman on the ground that under the non-recourse terms of the Agreements, Neuman only personally guaranteed those amounts for which Rogers LLC was personally liable. Defendants contend that since Rogers LLC is not personally liable for repayment for the principal sum and interest or fees and penalties resulting from a default on payment of a monthly installment payment (which are the only liabilities alleged in the original complaint), the Guarantees do not apply to any claim for these amounts and Neuman is not personally liable for the repayment of same.

In response to defendants’ motion to dismiss, plaintiff cross-moves to amend the complaint to add allegations pertaining to Rogers LLC’s (and Neuman’s) personal liability. Plaintiff references Section 3.02 providing that Rogers LLC would be personally liable for loss or damage caused to plaintiff by reason of the failure to “apply Rents to the ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts, as and when each is due and payable” and alleges

that Rogers LLC is personally liable to the extent that it collected rent from the tenants of the property but failed to apply those rents to toward the repayment of the Debt Service Amounts (i.e., monthly installments of principal and interest) and toward the ordinary and necessary expenses of owning and operating the property (i.e. payment of real property taxes). Plaintiff alleges that Neuman is thus personally liable to plaintiff, as guarantor, to repay the amounts collected by Rogers LLC as rent, but which were not thereafter applied directly toward the repayment of the indebtedness and real property taxes.

Discussion

While a motion to dismiss a pleading pursuant to CPLR 3211 may not be defeated by an amended pleading (*Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]), since defendants address the merits of plaintiff's cross motion to amend the complaint, the court will consider the cross motion and deem the motion to dismiss as directed toward the proposed amended complaint (*see 49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 [1st Dept 2004]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]). Leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (*see Caldara v County of Westchester*, 197 AD3d 607, 608 [2d Dept 2021]). A motion to dismiss pursuant to CPLR 3211 (a) (1) based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (*see Leon v*

Martinez, 84 NY2d 83, 88 [1994]; *Lewis & Murphy Realty, Inc. v Colletti*, 187 AD3d 731, 733 [2d Dept 2020]; *25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

A non-recourse loan agreement, such as the one here, “largely exempts the borrower and guarantors from personal liability for the remaining debt in the event of a default and leaves the lender with the sole recourse of repossession of the property which served as security under the loan agreement” (*G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 41 [2d Dept 2012]). However, under the terms of the Agreements, Rogers LLC may be deemed personally liable for repayment of indebtedness under certain defined exceptions to the non-recourse provisions as set forth under Article 3, for which Neuman may likewise be held liable under the Guarantees. In particular, under subsection (a) (5) of Section 3.02, Rogers LLC agreed to be held personally liable to plaintiff for the repayment of the portion of the indebtedness equal to any loss or damage suffered by Lender as a result of “failure to apply Rents to the ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts, as and when each is due and payable.” In the proposed amended complaint, plaintiff cites to the above provisions and alleges that Rogers LLC collected rents from the tenants of the property, but failed to apply those rents to pay ordinary and necessary expenses of owning the property (to wit, real property taxes) and failed to apply those collected rents toward repayment of the indebtedness. Plaintiff alleges that under the abovementioned exception to the non-recourse provisions, it may recover personally from Rogers LLC and Neuman (the guarantor of Rogers LLC’s personal obligations) payments of those

amounts representing rents which were collected by Rogers LLC but not applied toward repayment of the indebtedness, and further be reimbursed for any expenditures made by plaintiff to pay real property taxes which were not paid by Rogers LLC from those collected rents.

Defendants' essential argument in opposition to plaintiff's motion to amend is that Neuman's obligations under the Guarantees are specifically excluded from Section 3.02, which states, in part, that Rogers LLC "shall be liable for the repayment of the portion of the *Indebtedness* equal to any loss or damage suffered by [plaintiff] as a result of [the subsequently listed provisions]" (emphasis added). Defendants cite to the definition of "Indebtedness" in each of the mortgages as "the principal of, interest on, and other amounts due at any time under the Note, the Loan Agreement, this Security Agreement or any other Loan Documents (*other than the Environmental Agreement and Guarantee*)" (emphasis added). Defendants interpret this definition of "Indebtedness," to specifically exclude any amounts owed under the Guarantees.

However, under the clear terms of the Guarantees, Neuman "absolutely, unconditionally and irrevocably guarantee[d] to [plaintiff] the full and prompt payment and performance when due, whether at maturity or earlier, by reason of acceleration or otherwise, and at all times thereafter, of. . . *all amounts, obligations and liabilities owed to [plaintiff] under Article 3 (Personal Liability) of the Loan Agreement*" (emphasis added). Accepting defendants' interpretation of the term "Indebtedness" as used in Section 3.02 to exclude any obligation of Neuman to cover Rogers LLC's personal liability under Section 3.02 would render the aforesaid language of the Guarantees

meaningless. All parts of an agreement must be construed in a manner that avoids inconsistencies and reasonably harmonizes its terms (*see National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]; *James v Jamie Towers Hous. Co.*, 294 AD2d 268, 269 [1st Dept 2002], *affd* 99 NY2d 639 [2003]).

Thus, the proposed amendments are not palpably insufficient nor patently devoid of merit, nor do defendants show that they are prejudiced by the amendments. Further, the amended claims are not utterly refuted by the documentary evidence presented.

As a result, plaintiff's cross motion to amend the complaint is granted and defendants' motion to dismiss the amended complaint as to Neuman under CPLR 3211 (a) (1) is denied.

To the extent defendants seek dismissal of the complaint as to Neuman on the ground of lack of personal jurisdiction or improper service, such part of defendants' motion is likewise denied. At the outset, defendants do not include CPLR 3211 (a) (8) as a ground for dismissal in their notice of motion in contravention of CPLR 2214 (a). Further, "[a] process server's affidavit of service gives rise to a presumption of proper service" (*Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776, 776 [2d Dept 2017]). Only where there is "[a] sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit" will the presumption of proper service be defeated (*id.* at 776-777). "If such a showing is made, the defendant is entitled to a hearing on service" (*US Bank N.A. v Cherubin*, 141 AD3d 514, 516 [2d Dept 2016]). However, "[b]are and unsubstantiated denials are insufficient to rebut the presumption of service" (*HSBC Bank USA, N.A. v Archibong*, 157 AD3d 662, 662-663 [2d Dept 2018]).

[internal quotation marks omitted]). “A minor discrepancy between the appearance of the person allegedly served and the description of the person served contained in the affidavit of service is generally insufficient to raise an issue of fact warranting a hearing” (*PNC Bank, N.A. v Bannister*, 161 AD3d 1114, 1115 [2d Dept 2018]), and “the discrepancies must be substantiated by something more than a claim by the parties allegedly served that the descriptions of their appearances were incorrect” (*US Bank N.A.*, 141 AD3d at 516).

According to the affidavit of plaintiff’s process server, Neuman was served by delivering the summons and complaint to “JANE DOE, NAME REFUSED, CO-TENANT,” a person of suitable age and discretion at Neuman’s place of residence at 547 Flushing Avenue, Apt 3L in Brooklyn.¹ The person receiving the summons and complaint was described as a white female with brown hair, approximately 48 years of age, 5 ft. 4 in. to 5 ft. 7 in. in height and 150 lbs. to 174 lbs. in weight.

In support of his improper service argument, Neuman submits the affidavit of his wife, Brenda Neuman, who states therein that on the date and time specified in the affidavit of service, only she, her husband and her children were at the subject residence, but no process server came to the property on said date and time, and the description of the woman allegedly served does not match her description. Brenda Neuman avers that on the indicated date of service, she was only 42 years old, not 48 years old, and weighed only 120 lbs., not 150 lbs. to 174 lbs. as stated in the affidavit of service. However, while Brenda Neuman’s state-issued identification card submitted on the motion demonstrates

¹ A separate affidavit of service attests to the mailing of the summons and complaint to said address.

her age, the court finds that the single, minor discrepancy in ages is not so significant that it warrants a hearing, and defendants do not submit any further proof to substantiate the alleged discrepancy in weight (*see Deutsche Bank Natl. Trust Co. v Yurowitz*, 181 AD3d 646, 648 [2d Dept 2020]; *US Bank N.A.*, 141 AD3d at 516). Brenda Neuman does not otherwise contend that the remaining physical descriptions in the affidavit of service of the person receiving process do not match her own.

Accordingly, defendants have failed to rebut the presumption of proper service upon Neuman.

Defendants shall electronically file an answer within 30 days of the filing of the notice of entry of this decision and order, and the answer will be deemed served upon its filing.

The foregoing constitutes the decision and order of the court.

ENTER

A handwritten signature in black ink, appearing to be 'L. Knipel', written over the word 'ENTER'.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE