

<b>FPG Maiden Lane, LLC v Bank Leumi USA</b>
2022 NY Slip Op 33742(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 653584/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

FPG Maiden Lane, LLC; Fortis Property Group, LLC; and Joel Kestenbaum,

Plaintiffs,

- v -

Bank Leumi USA; Bank Leumi le-Israel BM; Harel-Maiden Lane-General Partnership; and Harel Insurance Investments and Financial Services Ltd.,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and values: 653584/2020, (blank), 003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on October 31, 2022 on one motion in this action ("the Fortis Action") and one in the related Foreclosure Action Bank Leumi US v FPG Maiden Lane, LLC, et al., Index No. 657252/2020 ("the Foreclosure Action"). In the related Foreclosure Action, the Court heard the motion by defendants FPG Maiden Lane ("FPG"), LLC, Maiden Rental Holdings, LLC, Maiden Rental Holdings II, LLC, Maiden Rental Holdings III, LLC, Fortis Property Group, LLC, and Joel Kestenbaum (collectively, the "Fortis Defendants") to amend their Answer to reflect the changes proposed in NYSCEF Doc. No. 727 (mot. seq. 009) and the motion by plaintiff Bank Leumi USA ("Bank Leumi" or "BLUSA") to amend the First Amended Verified Mortgage Foreclosure Complaint (NYSCEF Doc. No. 251) to substitute "Valley National Bank, as successor by merger to Bank Leumi USA", for Bank Leumi USA(mot. seq. 010). In connection with this Fortis Action, the Court heard the motion by the Fortis Parties to amend their Complaint to reflect the changes in NYSCEF Doc. No. 109 that are similar to those requested in the Foreclosure Action.

In accordance with the October 31, 2022 transcript of proceedings, the motions are granted in part and denied in part as follows. Addressing first Motion Seq. 010 by plaintiff Bank Leumi to substitute Valley National Bank (“Valley”) as party plaintiff in place of Bank Leumi in the Foreclosure Action, the Court grants the motion but also allows the Fortis Parties to maintain their standing defense. Bank Leumi has presented documentation to show that Valley is the successor by merger to Bank Leumi, but Valley still has the burden of proving at trial that it has the requisite documentation and authority to proceed with the foreclosure. It is not inappropriate to allow the Fortis Parties to maintain a standing defense to make clear that they intend to hold Valley to its burden at trial. In light of the timing of Bank Leumi’s motion to amend, the Court declines to find that the Fortis Parties have waived their right to hold Valley to its burden. Nor is the request by the Fortis Parties in this Fortis Action to add Valley as a defendant any type of waiver. In the interest of moving both cases forward expeditiously, Valley should be a party in both actions without prejudice to any party’s claims or defenses.

Addressing next motion sequence 003 by the Fortis Parties as plaintiffs in this Fortis Action against Bank Leumi and others to amend their Complaint to add new allegations, causes of action, and parties, the Court grants the motion in part and denies it in part. As to parties, as indicated earlier, Valley National Bank is the new plaintiff in the Foreclosure Action. As such, Valley is an appropriate new defendant in this Fortis Action. However, the Court denies the request by the Fortis Parties to add Harel Insurance as a new defendant here. Fortis claims that testimony from the 11-f witness for the existing defendant Harel-Maiden Lane General Partnership revealed that Harel Insurance Company Ltd is an appropriate party because Harel Insurance has authority over Harel-Maiden’s decision making with respect to the loan at issue here. However, Harel persuasively argues that this Court lacks jurisdiction over the proposed

new defendant, which is a foreign defendant with no operations or contacts in New York and it is not licensed or authorized to do business in New York. Nor have plaintiffs alleged facts sufficient to pierce the corporate veil or establish agency. The corporate relationship between Harel Insurance and Harel-Maiden General Partnership is not sufficient to establish jurisdiction over the proposed new defendant, particularly at this late stage in the litigation, based on the information presented.

In motion sequence 003 in this action, the Fortis Parties also seek to amend their Complaint to add additional claims. That motion is granted in part and denied in part. To the extent the Fortis Parties seek to add allegations to pre-existing claims, the Court declines to parse through specific allegations to determine whether to permit them or to strike them. The Court grants the Fortis Parties' request to add a cause of action for fraudulent inducement. Fortis claims that it learned during one of the depositions that BLITA, a 50% loan participant, did not approve the amended funding obligations in the Third Amendment. Fortis further claims that BLITA's refusal to fund was a key event that precipitated the alleged default claimed by the Lender. Contrary to the Lender's claim, the proposed fraudulent inducement claim is not impermissibly based upon an insincere promise of future performance. The Court finds the claim has been sufficiently stated to allow leave to amend, without prejudice to a motion for summary judgment upon the conclusion of discovery.

The Court denies the Fortis Parties' request to amend to add a negligent misrepresentation claim. This case involves an arm's length commercial transaction. The parties did not have the type of special relationship that imposes a duty to impart all relevant information. Moreover, the claim is now duplicative of the fraudulent inducement claim.

The Court denies the Fortis Parties' request to add a new cause of action for a declaratory judgment that the Debtor's damages exceed the amount of the loan. The claim is wholly unnecessary. To the extent the Fortis Parties are seeking to use their damages as a setoff of any monies due or as a basis for an affirmative award of damages, that request may be asserted within the context of the existing claims. Declaratory relief is not appropriate.

Addressing finally the Fortis Parties' motion to amend their Answer in the Foreclosure Action (seq. 009), the amendment is granted in part and denied in part to allow the addition of those defenses that mirror the claims permitted by the Court in the Fortis Action. The Fortis Parties shall efile amended pleadings within twenty days that conform to this decision, and the Lender may respond within twenty days thereafter. Although amended pleadings are technically susceptible to a 3211 motion to dismiss, the Court urges the parties to refrain from making further costly motions addressed to the pleadings without prejudice to arguments on summary judgment or trial.

Accordingly, motions 009 and 010 in the related Foreclosure Action and motion sequence 003 in this Fortis Action are granted to the extent provided herein, and the Clerk is directed to amend the caption to add Valley National Bank, as successor by merger to Bank Leumi USA, as an additional defendant in this action upon plaintiff's e filing of NYSCEF Form EF-23 available via the NYSCEF Home Page with a copy of this Decision and Order attached thereto, so that the caption will be amended to read as follows:

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FPG Maiden Lane, LLC; Fortis Property Group, LLC; and Joel Kestenbaum,

Plaintiffs,

- against -

Bank Leumi USA; Valley National Bank as successor by merger to Bank Leumi USA;  
Bank Leumi le-Israel BM; Harel-Maiden Lane-General Partnership; and Harel Insurance  
Investments and Financial Services Ltd.,

Defendants.

With respect to discovery, the parties shall proceed expeditiously in accordance with the October 31, 2022 transcript of proceedings and arrange for the mediator who has been assisting the parties to also serve as a Special Master to resolve discovery disputes. The parties all consented to the referral to the mediator to resolve discovery disputes. In accordance with the parties' proposed schedule (NYSCEF Doc. No. 141), plaintiff shall file the Note of Issue by March 17, 2023. If any counsel seeks to adjust the schedule further, the parties shall confer with one another and the Special Master. A further status conference is scheduled for January 10, 2023 at 11:00 a.m. via Microsoft Teams using the same appearance as today.

Dated: November 1, 2022

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	