

Wilmington Trust, N.A. v Nelson

2022 NY Slip Op 33783(U)

November 3, 2022

Supreme Court, New York County

Docket Number: Index No. 654750/2021

Judge: Barry R. Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS 61EF Justice

WILMINGTON TRUST, National Association, as Trustee, for the benefit of the Holders of COMM 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2,

Plaintiff, - V -

JEFFREY C. NELSON,

Defendant.

Table with 2 columns: Field Name, Value. INDEX NO. 654750/2021, MOTION DATE, MOTION SEQ. NO.

DECISION AFTER HEARING

HON. BARRY R. OSTRAGER

This is an action to enforce the terms of an alleged guaranty executed by attorney Jeffrey C. Nelson, an attorney admitted to practice in the State of California and before the U.S. Supreme Court ("the Guarantor"), in connection with a \$7.8 million Promissory Note and Loan Agreement dated December 31, 2015 between Cinema Square LLC, as Borrower, and Jefferies Loancore LLC, as Lender (Hearing Exhibits 1-2). A condition of the Loan Agreement was that defendant Jeffrey C. Nelson, Esq. execute and deliver to the Lender an unconditional guarantee. The loan was fully documented on December 31, 2015, including a guarantee executed by defendant Nelson dated December 31, 2015 (Hearing Exhibit 5). The loan was subsequently assigned, and plaintiff Wilmington Trust is the servicer of the assigned Loan Agreement.

The Court ordered an evidentiary hearing because defendant Nelson asserts that the guarantee that Wilmington Trust is suing upon was modified from the terms of the guarantee which was originally presented to him (NYSCEF Doc. No. 024). Defendant Nelson testified at length during the hearing. Nelson concedes that the signature on the guarantee is his signature

but claims that the guarantee is not in the form that he signed on December 27, 2015. In support of his position, Nelson claims, and a document supports his claim, that he sent back the signature page to the guarantee to both his attorney and the attorney for the Lender, noting that certain provisions of the guarantee had to be corrected. But, Nelson sent an email to all parties to the transaction, including his attorney, on December 31, 2015 stating: “This is the confirming email you requested as to attaching the existing signatures to this finalized loan document.” (Hearing Exhibit 27) Therefore, there appears to be little doubt that the signature page to the guarantee was affixed to a modified version of the form of guarantee that Nelson saw and signed on December 27, 2015 that contained a free-standing signature page.

No testimony was adduced concerning the differences in the December 27, 2015 version of the guarantee and the guarantee dated December 31, 2015. There is no dispute that on December 31, 2015 Nelson authorized the attorney for the original Lender and/or his counsel to affix his signature page to a guarantee. (Hearing Exhibit 28) It is also clear that Nelson’s own attorney, Robert Gates, had an opportunity to review multiple drafts of the loan agreement, including the final Loan Agreement documents on December 31, 2015. (Hearing Exhibits 25-28) The Court finds it unnecessary to assess either (1) whether the guarantee was changed before defendant Nelson authorized the attorneys for the original lender and/or his own attorney to affix his signature to the guarantee or (2) in what material respects the guarantee was changed. There is a guarantee dated December 31, 2015 that bears defendant Nelson’s signature and he authorized the attorneys for the Lender and his attorney to affix his signature to the guarantee dated December 31, 2015.

Defendant Nelson was provided with the complete Loan Agreement package, including his December 31, 2015 guarantee, under cover of an email dated January 11, 2016 (*i.e.*, 16 days

after the loan transaction was fully consummated).. (Hearing Exhibit 16) Defendant Nelson testified that until the initiation of this lawsuit, he had no recollection of having reviewed the December 31, 2015 version of the guarantee on or after receipt of the January 11, 2016 letter attaching his guarantee. Defendant Nelson also reaffirmed and acknowledged the enforceability of his guarantee on June 26, 2020 in a signed document titled “Guarantor’s Acknowledgement.” (Hearing Exhibit 10)

Cinema Square LLC, the original Borrower, has filed for bankruptcy. As best as the Court can determine, the plaintiff servicer is seeking a punitive recovery against Nelson. However, the evidence adduced at the evidentiary hearing establishes that the December 31, 2015 guarantee that bears the signature of defendant Nelson is valid.

Mr. Nelson is a sophisticated attorney who was represented by an attorney in connection with a significant financing transaction in which Nelson may have had a financial interest. The Court accepts that but for the Covid pandemic, Cinema Square LLC would likely not be in bankruptcy, and therefore enforcing Nelson’s guarantee is a harsh result. Nevertheless, on the sole issue presented to this Court for resolution after the hearing (*i.e.*, did defendant Nelson authorize the execution of his guarantee dated December 31, 2015 – which bears his signature -- and collaterally did Nelson timely and diligently address any issues relating to the guarantee), the Court finds that defendant Nelson cannot be excused from responsibility for the guarantee bearing his signature. Mr. Nelson, as Guarantor of the loan, and his attorney, were responsible for understanding the obligation to which Mr. Nelson was committing. Mr. Nelson had multiple opportunities to review his guarantee prior to the initiation of this case in 2021 and failed to raise any claim relating to the guaranty.

The Court notes that many items of damages sought by the servicer appear to be unconscionable and therefore urges the parties to reach a consensual resolution of this case..

Counsel shall immediately upload to NYSCEF the Exhibits introduced into evidence at the hearing. Each Exhibit shall be efiled as a separate document, and each Exhibit should be marked using the Exhibit Number that was assigned to the document in the Joint Exhibit Book that was provided to the Court for the hearing.

Discovery shall proceed in accordance with the Preliminary Conference Order dated April 20, 2022 (NYSCEF Doc. No. 011). A Status Conference is scheduled for January 27, 2022 at 12:00 p.m. via Microsoft Teams using the appearances provided for the November 3 hearing..

Dated: November 3, 2022


BARRY R. OSTRAGER, J.S.C.