

AREIT WH I LLC v Ashkenazy
2022 NY Slip Op 33970(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 651722/2021
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X INDEX NO. 651722/2021

AREIT WH I LLC, MOTION DATE _____

Plaintiff, MOTION SEQ. NO. 001

- v -

BEN ASHKENAZY, GRANITE COMPANIES LLC **DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT.

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

This action has its origin in a loan agreement between non-parties 17th Street Property Owner LLC (“Property Owner”), the borrower, and Argentic Real Estate Investment LLC (“Argentic”), the lender¹. In the agreement, dated April 17, 2017, Argentic assented to lend Property Owner \$46,200,000.00 to “(i) repay and discharge existing loans relating to the Property, (ii) fund certain of the Subaccounts, and (iii) pay transaction costs.” A significant portion of the funds were to be used by Property Owner to perform a near complete renovation of the premises. As security for repayment, Property owner executed a promissory note and mortgage on the same date.

Concomitantly with the above documents, Defendants in this action Ben Ashkenazy (“Ashkenazy”) and Granite Companies LLC (“Granite”) executed a guaranty of completion whereby the guarantors assured that certain defined construction work would be timely completed as scheduled in the loan agreement. The action the guarantors swore to perform were as follows:

(a) Each Guarantor hereby irrevocably, absolutely and unconditionally guarantees to Lender the full, prompt and complete observance, fulfillment and performance of all of the obligations of Borrower under or pursuant to the Loan Agreement with respect to the following:

(i) the completion of the Renovation Work (including, without limitation, the Sosa Renovation Work and completion of “punch-list items”) in a timely lien free manner on in accordance with the terms and provisions of the Loan Agreement (the “Guaranteed Work”); and

¹ The original loan agreement was amended and modified twice by agreements dated October 12, 2018 and November 30, 2019.

(ii) the payment when due of all hard and soft costs required to complete the Guaranteed Work (the “Guaranteed Costs”), to the extent such costs are not otherwise referred to in clause (i) of this Section 2(a).

(b) Without limiting the generality of the provisions of Section 2(a), Guarantors hereby irrevocably, absolutely and unconditionally guarantee to Lender that Borrower shall, in accordance with the terms of the Loan Agreement, fully and punctually pay and discharge (i) any and all costs, expenses and liabilities for or incurred in connection with the Guaranteed Work; and (ii) all claims, liens (other than Permitted Encumbrances) and demands with respect to labor, materials and services used or incurred in connection with the Guaranteed Work which are or may become due and payable, or, if unpaid, are or may become liens on the Property or any part thereof.

(Guaranty of Completion, Section 2[a] and [b]).

There is no dispute that Property Owner defaulted in repayment under the loan agreement and note. As a result, Plaintiff herein AREIT WH I LLC (“ARIET”) commenced an action to foreclose on the mortgage which secured the note titled *ARIET WH I LLC v 17th Street Property Owner LLC, et al*, NY Cty Index No 850117/2020). By stipulation dated February 3, 2021, ARIET and Property Owner stipulated that summary judgment be granted against Property Owner.² In return, ARIET withdrew its claim for a deficiency judgment against Ashkenazy and Granite subject to ARIET’s commencement of a later action on the guaranty of completion. This is that subsequent action.

Plaintiff commenced this action and pleaded one cause of action for breach of contract and sought a money judgment for damages under the completion guaranty as well as an award of attorney’s fees. Defendants answered jointly and pled no affirmative defenses or counterclaims. Now, Plaintiff moves for summary judgment on liability, damages and attorney’s fees. Defendants oppose the motion.

The proponent of 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 Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once a *prima facie* showing is made, the burden shifts to the opposing party to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

Typically, “[o]n a motion for summary judgment to enforce a written guaranty, 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” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Where the guaranty requires a default notice be sent prior to enforcement, proof of same is also required (*see Superior Fid. Assur., Ltd. v Schwartz*, 69 AD3d 924, 926 [2d Dept 2010]; *cf. Manufacturers & Traders Trust Co. v. International Packaging*, 207 AD2d 982 [4th Dept 1994]).

On the issue of liability under the guaranty, Plaintiff established the existence of the guaranty and that the Defendants failed, pursuant to Section 2[a] of the guaranty, to perform the guaranteed work in a timely manner as well as make payment when due of all hard and soft costs required to complete the

² A judgment of foreclosure and sale was entered in that matter on October 27, 2021, and a sale of the property was held on March 9, 2022. ARIET was the successful bidder at the amount of \$7,000,000.00.

guaranteed work. Moreover, Plaintiff proffered copy of a written default notice, a letter dated March 15, 2021, sufficient in its terms, as well as evidence of its delivery in a timely manner as required. On the issue of attorney's fees, the guaranty clearly provides for the recovery of same for efforts to enforce the agreement (*see Sage Sys., Inc. v Liss*, ___NY3d___, 2022 NY Slip Op 05918 [2022]).

In opposition, on the issue of liability, Defendants do not dispute their default. Rather, they claim that multiple defects in the letter sent by Defendants rendered the default notice defective. Defendants' assertion that Plaintiff's misstatement of the amount due in the default letter renders it defective as a matter of law is without merit. Such notices are a precondition to commencement of litigation, not representative of the litigation itself. Accepting Defendant's argument would elevate the provision from a notice requirement to one determining the litigation altogether (*see Emigrant Bank v Cohen*, 205 AD3d 103, 111 [2d Dept 2022]). The assertion that the letter is "ambiguous and equivocal" is meritless. The correspondence clearly specifies the alleged breaches and states at the end as follows: "This letter shall constitute notice to Borrower under the Loan Agreement and to Guarantor under the Completion Guaranty". No argument was proffered regarding Plaintiff's entitlement to recovery of attorney's fees.

As to the amount due, unlike more common guarantees which contain a fixed amount for the guarantor to pay, this agreement provided in the event of a default, the guarantors would be unconditionally and personally liable to Argentica for the following:

either (A) the aggregate amount of Guaranteed Costs actually incurred by Lender or the owner of the Property in the completion of the Guaranteed Work or (B) on or after the Determination Date (as hereinafter defined), whether or not Lender completes or intends to complete the Guaranteed Work, the estimated amount (calculated as of the Determination Date) of Guaranteed Costs (the "Liquidated Overrun Amount") as determined by Lender or a Person designated and engaged by Lender to inspect the Guaranteed Work and the Property as such work progresses and consult with and to provide advice to and to render reports to Lender, which Person may be, at Lender's option upon notice to Borrower, either an officer or employee of Lender or consulting architects, engineers or inspectors appointed by Lender (the "Consultant").

(Guaranty of Completion, Section 2[c][ii]).

In support of its claim to the amount due, Plaintiff relies almost entirely on a report from AEI Consultants dated July 8, 2020, to establish the "estimated amount" to complete the renovation work. However, the report is unsworn and, therefore, inadmissible (*see eg Accardo v Metro-North R.R.*, 103 AD3d 589 [1st Dept 2013]). Similarly, the report relies on unauthenticated facts, documents, photographs and the like, which are also not admissible (*see Diagne v J.T.S. Trucking, Inc.*, 134 AD3d 558 [1st Dept 2015]; *Wagman v Bradshaw*, 292 AD2d 84 [2d Dept 2002]). To the extent that the authors of the report offer expert opinions, their credentials to proffer such views is not established rendering same inadmissible (*see Romano v Stanley*, 90 NY2d 444 [1997]; *Hamsch v NYCTA*, 63 NY3d 723 723 [1984]).

As Plaintiff failed to establish, *prima facie*, the amount due under the guaranty, that branch of the motion must be denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, summary judgment on this issue is premature

as Defendants have not been afforded the opportunity to conduct discovery on this issue (see CPLR §3212[f]; *Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157 [1st Dept 1996]).

Accordingly, it is

ORDERED that Plaintiff's motion is granted only to the extent that it is awarded partial summary judgment on Defendants' liability for breach of the guaranty of completion and entitlement to attorney's fees, and it is

ORDERED that all parties are to appear in-person for a preliminary conference to set a discovery schedule on the issue of damages on **December 20, 2022, at 10:00am** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street.

11/18/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Francis A. Kahn III

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

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