Rosemark Contrs., Inc. v Liker
2022 NY Slip Op 34128(U)
November 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 506409/2013
Judge: Carl J. Landicino
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At an IAS Term, Part 81 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 21st day of November 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

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ROSEMARK CONTRACTORS, INC.

Plaintiff,

-against-

STANLEY LIKER, LESLIE H. NESS, JOYCE NESS and STEVLI, LLC.

Defendants.

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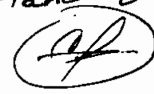
Index No.: 506409/2013

DECISION AND ORDER

Motions Sequence #6, #7 and #8



Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	86-106, 108-129, 131-132,
Opposing Affidavits (Affirmations)	131-132, 133-140,
Reply Affidavits (Affirmations)	133-140, 142-144

After a review of the papers and oral argument the Court finds as follows:

Upon the foregoing papers, plaintiff Rosemark Contractors, Inc. ("Rosemark" or "plaintiff") moves (motion sequence #7) for an order: (1) pursuant to CPLR 3212, granting it summary judgment on its first cause of action against defendants Stanley Liker (Liker) and Leslie H. Ness (Ness); and (2) severing Rosemark's remaining claims pursuant to CPLR 603 and 5012 and entering judgment in its favor on the first cause of action.[1]

[1] By Order dated April 20, 2017 (Knipel, J.S.C.) the Court consolidated actions index numbers 504373/2014, 509257/2014 and 506409/2013 under this index number.

Defendants Liker and Stevli LLC (Stevli) cross-move (motion sequence #8) for an order: (1) pursuant to CPLR 3212, granting them summary judgment dismissing the complaint; and (2) denying Rosemark's summary judgment motion.

Background

The Agreements

Rosemark brings the underlying action for breach of contract concerning purported monies owed pursuant to a November 15, 2007 Construction Management Agreement (the Construction Management Agreement) for development of certain parcels of property located in Belle Harbor, New York (the Parcels). Rosemark was hired by Belle Harbor Washington LLC (BHW), a developer, to serve as a construction manager. Defendant Ness was a member of Defendant BHW. Defendant Liker was the sole member of Defendant Stevli, which was a member of BHW. Rosemark agreed to complete construction of condominium units on the Parcels on certain terms and conditions, including payment of outstanding balances apparently owed to it. Rosemark claims that throughout its performance as construction manager, BHW, Liker, Ness and Stevli owed it in excess of one million dollars. As a consequence of this outstanding debt, agreements were made wherein the defendants acknowledged the debt and promised to pay, but were, according to Rosemark's counsel, merely "kicking the can down the road." Defendants contend that the failure to pay was due to New York Community Bank's (NYCB) failure to fund a construction loan to BHW in the principal amount of $7,300,000.

Pursuant to a July 15, 2008 agreement (the July 2008 Agreement), BHW promised to pay Rosemark the sum of $474,656.63 on the earlier of a certain construction milestone or by

December 1, 2008. The July 2008 Agreement further provided that upon default, the unpaid balance would immediately become due, with interest at a default interest rate of 24% per annum.

In August of 2008, in order to induce Rosemark to make loans and assist BHW, Liker and Ness each executed a personal Guarantee and Waiver (the Guarantee), wherein they "irrevocably and unconditionally guarantee[d] to [Rosemark] payment when due, by acceleration or otherwise, of any and all liabilities of [BHW] to [Rosemark]." In the Guarantee, Liker and Ness also waived "any defense, offset or counterclaim to any liability hereunder." The Guarantee also specifies that the guarantors would be responsible for reasonable attorneys' fees equal to 15% of the amount due. The July 2008 Agreement was subsequently amended by a Rider which limited Liker's guarantee to 25% and Ness's guarantee to 75% of the obligation to pay.

Stevli, along with Ness and co-defendant Joyce Ness, also executed Pledge Agreements in August of 2008 wherein they pledged their interest in BHW, to Rosemark, as security for the payment obligations.

Defendants' Default, the Foreclosure Action, and the Subsequent UCC Sale

It is undisputed that BHW failed to pay the sum of $474,656.63 on or before December 1, 2008. Rosemark then pursued its security interest in the pledged membership interests of BHW. In a separate action, *Belle Harbor Washington LLC v Rosemark Contractors, Inc.*, index Number 2838/2009, Supreme Court Queens County (the "Queens County action"), the defendants herein attempted to obtain an injunction to prevent Rosemark from proceeding with a UCC sale of the pledged interests in BHW. On February 24, 2009, Rosemark filed a mechanic's lien in the amount of $578,288.45 against the Parcels (the "Mechanics Lien"). In a so-ordered Stipulation dated

March 17, 2009 in the Queens County action the parties agreed that the UCC sale would go forward unless Rosemark was paid $111,166.73 (in relation to the default in paying the $474,656.63 that was due by December 1, 2008) on or before March 31, 2009. The Stipulation further stated that the foregoing was without prejudice to any other rights or claims that Rosemark had against the defendants. Defendants apparently failed to make the $111,166.73 payment by March 31, 2009.

As a result, a UCC foreclosure sale was held on April 23, 2009 whereby Belle Harbor Ocean LLC (hereinafter, "Belle Harbor") acquired a 100% membership interest in BHW for $1,000. Belle Harbor's principal, Saul Rosenblum (Rosenblum), is also Rosemark's president and principal. The NYCB construction loan, which was secured by a mortgage on the Parcels, that BHW owned, remained an encumberance, and monthly payments on the outstanding indebtedness were due.

Subsequently, NYCB commenced a foreclosure action in Supreme Court Queens County, under index Number 25410/2009, in relation to its mortgage, naming BHW, Ness and Liker as defendants ("Foreclosure Proceeding"). NYCB also commenced a second action in Supreme Court Queens County under index Number 13620/2010 to vacate the Mechanic's Lien (the "Mechanis Lien Proceeding"). In the Mechanic's Lien Proceeding, Rosemark asserted counterclaims against NYCB for $578,288.75 related to construction work performed on the Parcels on behalf of BHW. The Foreclosure and Mechanic's Lien Proceedings were then consolidated. NYCB's successor-in-interest and assignee, 125 Bell Harbor, LLC, ultimately prevailed in the foreclosure action. In 2013, a referee, assigned to hear and determine the

consolidated action, determined that the market value of the Parcels, if completed, would produce a combined sale price of up to $10,205,000.

On September 19, 2014, Rosemark and BHW (as third-party defendants) entered into a stipulation of discontinuance with prejudice with NYCB (as plaintiff), discontinuing the Mechanic's Lien Proceeding, as well as any and all counterclaims asserted by Rosemark and BHW in that action. On March 7, 2017, the court issued a Judgment of Foreclosure and Sale.

Rosemark's Motion for Partial Summary Judgment

In support of its motion, Rosemark attaches an affidavit from Saul Rosenblum (Rosenblum), Rosemark's president, who states that BHW defaulted in payment of the $474,656.63 on or before December 1, 2008, and that therefore, that full amount, plus interest at 24% per annum from December 1, 2008, as well as reasonable attorney's fees of 15% of the total amount due, is owed by Liker and Ness to Rosemark.

Rosenblum states that he purchased BHW in the UCC sale for $1,000 ($750 for Ness's interests and $250 for Stevli/Liker's interests), but that his interest in BHW was valueless. In that regard, Rosenberg states that BHW had obtained the $7 million loan from NYCB in 2007 secured by its sole asset, and that thereafter, BHW defaulted on the loan and lost the Parcels as a result of foreclosure. Rosenblum alleges, therefore, that the complete debt of $474,656.63 plus interest and attorneys' fees is still owed to Rosemark.

In further support, Rosenblum annexes copies of the Construction Management Agreement, the July 2008 Agreement, the Guarantee, the Pledge Agreement, and the March 17,

2009 So-Ordered Stipulation. Rosenblum states that in paragraph three of the stipulation, BHW, Liker and Ness admitted that they defaulted on the $474,656.63.

Liker's and Stevli's Opposition and Cross Motion for Summary Judgment

In opposition, Liker submits an affidavit stating that upon the UCC sale, Bell Harbor Ocean LLC, Rosenblum's entity, assumed all of BHW's rights and obligations, including BHW's construction loan with NYCB. Liker asserts that upon taking control over the Parcels, "plaintiff" abandoned their construction, and that the full potential of the Parcels were never realized. Liker further asserts that plaintiff never accounted for the proceeds of the UCC sale and upon taking control over BHW, immediately defaulted on the BHW loan. Liker states that at the hearing in the foreclosure action, Rosemark did not offer any evidence as to the value of the Parcels at the time of the UCC sale and did not offer evidence as to the value of the collateral at the time of the UCC sale in the instant motion.

Liker and Stevli contend that Rosemark's claims in the instant action on the Guarantee arise out the same circumstances as those previously litigated in Queens County, and therefore, are barred by the doctrine of collateral estoppel. To that end, Liker and Stevli argue that Rosemark's central claim -- that the pledged collateral that it acquired in the UCC sale did not satisfy BHW's alleged debt -- was previously addressed in the foreclosure action, in which a referee held a hearing to determine the amount owed to NYCB and Rosemark on their respective claims. Liker and Stevli argue that the referee determined that Rosemark failed to prove the value of the Parcels at the time of the UCC sale, and that consequently, Rosemark was not awarded anything as it failed to prove that the pledged collateral was insufficient to cover BHW's alleged

indebtedness. Liker and Stevli contend that the foreclosure proceeding, having been brought to a final judgment, bars Rosemark from making any claims for an alleged deficiency against the debtors.

Liker and Stevli further argue that Rosemark had a full and fair opportunity during the referee's hearing to establish the value of the Parcels and the extent to which it was owed anything. They argue that Rosemark is unable to establish the value of the collateral at any time because it chose to retain ownership and possession of it, which precludes the determination of any deficiency. They contend that as a result, Rosemark cannot establish *prima facie* that the value of the pledged collateral was not sufficient to repay BHW's obligations when plaintiff took ownership and possession of the Parcels.

In addition, Liker and Stevli contend that they are entitled to summary judgment dismissing the complaint because Rosemark failed to comply with UCC § 9-615 in that Rosemark never provided an accounting of the proceeds to BHW, Liker and Stevli before asserting a deficiency claim. Liker and Stevli argue that Rosemark also failed to establish a deficiency for which Liker would be liable, and, even if Rosemark had pleaded a deficiency, the issue of the underlying indebtedness was already determined in the foreclosure proceeding. Liker and Stevli also contend that the court must grant Liker summary judgment limiting any liability to 25% of the damages award. Finally, Liker and Stevli argue that Rosemark's motion for summary judgment on attorneys' fees should be denied as premature, as Rosemark has not established that it is entitled to recover on the guarantee and because 15% of the total amount owed is an unreasonable fee award.

Ness's Opposition to Rosemark's Motion and in Support of Liker's and Stevli's Cross Motion

Ness submits opposition papers to Rosemark's motion and in support of Liker's and Stevli's motion, adopting and incorporating Liker and Stevli's arguments.

Rosemark's Reply and Opposition

In reply, Rosemark contends that the entire basis of Liker's and Ness's arguments are incorrect, as Rosemark does not seek a deficiency judgment against them, because a deficiency judgment can only be sought against an obligor, which in this case is BHW. Rosemark argues that in his affidavit, Liker has admitted all material facts and that defendants have failed to raise an issue of fact. Rosemark contends that Liker and Ness waived defenses in the Guarantee. Rosemark also contends that this action is not barred by collateral estoppel because the issue herein has never been litigated before or determined in its favor in the Foreclosure or Mechanic's Lien Proceeding. In that regard, Rosemark argues that there were no claims between it and defendants in the foreclosure action that form the basis for the application of collateral estoppel. Rosemark argues that it was not a party to the foreclosure action until NYCB commenced an action against it to vacate its mechanic's lien. It argues that the only claims that it asserted were its counterclaim against NYCB for failure to fund the loan, the proceeds from which Rosemark was to be paid, and that action was consolidated into the foreclosure action. In reply, Rosenblum states that after the Parcels were sold at auction to satisfy Rosemark's mechanic's lien, the auction yielded only $745,000, whereas the amount due under the lender's judgment of foreclosure and sale was $3,365,773.91.

Rosemark also contends that the value of the Parcels was not decided against it. Rosemark argues that it had no reason to prove the value of the Parcels in the foreclosure action, it was not required by the referee, and the Parcels' value has no bearing on the instant matter. Rosemark further contends that it is the cash proceeds of $1,000, and not BHW's membership interests' market value, that is applied to the debt when seeking a deficiency judgment against an obligor. Rosemark further argues that the UCC does not require an accounting for a secured party sale if it results in a deficiency.

In addition, Rosemark argues that Liker and Stevli's argument that the referee's hearing in the foreclosure action was to determine the amounts owed by Rosemark was untrue, as the referee was appointed to determine the amount owed to NYCB's successor in interest, 125 Belle Harbor LLC, and to report on whether the Parcels could be separated and sold. Finally, Rosemark notes that Liker and Stevli are incorrect that it did not allege a deficiency as a result of the sale, and points to the Amended Complaint, which alleges that the sale occurred and there was a deficiency.

Liker's and Stevli's Reply

In reply, Liker and Stevli contend that Rosemark has not established that it is entitled to recover under the Guarantee because it has not pled or otherwise demonstrated the amount owed to it. Liker and Stevli argue that Rosemark's claim that the BHW interest that it acquired in the foreclosure sale was "worthless" is conclusory and self-serving, as it has not submitted an appraisal or valuation of that interest or the Parcels at the time that it was acquired. Liker and Stevli also contend that Rosemark is unable to establish the value of the collateral at any time

because it chose to retain ownership and possession of the collateral, which precludes a determination of deficiency.

Discussion

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this *prima facie* showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Rosemark's Motion

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guarantee, the underlying debt, and the guarantor's failure to perform under the guarantee" (*Encore Nursing Ctr. Partners Ltd. Partnership-85 v Schwartzberg*, 172 AD3d 1166, 1168 [2d Dept 2019]; *H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2d Dept 2015]). Here, Rosemark has established its *prima facie* entitlement to judgment as a matter of law by proving the existence of the unconditional Guarantee, the underlying debt, and the defendants' failure to make payment in accordance with the terms of the Guarantee (*Encore Nursing Ctr. Partners Ltd. Partnership-85*, 172 AD3d at 1168). In that regard, Rosemark submits the contracts, the Guarantee and the Pledges, which state Liker's and Ness's obligations to pay. The Guarantee, which is extremely broad, is to be enforced according to its terms (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 493 [2015]). It is also uncontested that defendants defaulted on the $474,656.63 debt obligation. In the Guarantee, Liker and Ness also waived any defenses or counterclaims relating to the underlying debt (*see Hyman v Golio*, 134 AD3d 992, 993 [2d Dept 2015]; *Gannett Co. v Tesler*, 177 AD2d 353, 353 [2d Dept 1991]).

In opposition, Liker and Ness contend that collateral estoppel bars Rosemark's claims here, arguing that these issues were previously litigated in the foreclosure action. "Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity" (*Buechel v Bain*, 97 NY2d 295, 303 [2001]). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is

decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*id.* at 303-304). "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party" while "[t]he party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*id.* at 304). "The doctrine, however, is a flexible one, and the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities" (*id.*).

In opposition, Liker and Ness have failed to raise a question of fact (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). They do not dispute the amount of the debt, the existence of the Guarantee, and the percentages under which each are liable thereunder. In addition, Liker and Ness waived any defenses and counterclaims under the Guarantee, and thus the Guarantee is absolute, unconditional and enforceable (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank*, 25 NY3d at 493; *Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 885 [2d Dept 2013]).

Even if Liker and Ness did not waive defenses, collateral estoppel would not bar Rosemark's claims. The foreclosure actions were brought by NYCB and its successor-in-interest and assignee, to foreclose on the lien of its mortgage and to vacate the mechanic's lien. As such, these actions did not deal with the issues of what was owed to Rosemark by Liker and Ness, based on the Guarantee and Pledge Agreements, upon BHW's default. The issue of what was owed to Rosemark by Liker and Ness was not necessarily decided in the foreclosure action. Moreover, the value of BHW's membership interest and the Parcels, that Rosemark received in the UCC sale, were likewise not decided in the foreclosure action.

Here, the UCC sale realized $1,000, and under the Guarantees, Liker and Ness are liable for the deficiency. Accordingly, Liker and Ness are liable to Rosemark for $474,656.63, plus interest at 24% per annum from December 1, 2008 is owed by Liker and Ness to Rosemark. The issue of attorneys' fees in the amount of 15% of the total amount due, is unenforceable without a finding that the fee is reasonable. In order for the Court to find that a fee is reasonable a hearing is usually required. Counsel to Plaintiff has not provided detailed support that would excuse the need for a hearing. As such a hearing must be held. *See Headquarters Rest Corp. v. Reliance Vending Co.,* 133 A.D.2d 444, 445, 519 N.Y.S.2d 662 [2d Dept 1987]. Liker's portion of the damages award is limited to 25% and Ness's is limited to 75%.

Liker's and Stevli's Cross Motion

In their cross motion, Liker and Stevli contend that they are entitled to summary judgment because Rosemark failed to comply with UCC § 9-615 in that it failed to provide an accounting of the proceeds of the sale to determine if a surplus or deficiency existed. Liker and Stevli also contend that Rosemark failed to plead compliance with UCC § 9-615 and the existence of a deficiency for which Liker would be liable on the Guarantee.

Liker and Stevli have failed to meet their burden of establishing *prima facie* entitlement to summary judgment. Contrary to Liker's and Stevli's argument, by its plain terms, UCC § 9-615 (d) (1) does not require an accounting when the sale results in a deficiency. In addition, UCC § 9-616 requires a secured party to provide an explanation of calculation of a deficiency, but only in a "consumer-goods transaction" (*see* UCC § 9-616 [b]). In addition, contrary to Liker's and Stevli's contention, Rosemark's amended complaint asserted the existence of a sale and the

deficiency (*see* am. compl. in 509257/2014, consolidated into 506409/2013 ¶¶ 34-41, NYSCEF # 92). The complaints in the other consolidated actions likewise allege claims based on the guarantee and Liker's and Stevli's liability for the deficiency. Accordingly, Liker's and Stevli's motion for summary judgment is denied without regard to the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 950 [2d Dept 2020]).

Rosemark's Motion to Sever

As a result of the foregoing, that portion of Rosemark's motion to sever the remaining claims, including attorneys fees, pursuant to CPLR 603 and CPLR 5012 upon granting it partial summary judgment, and to enter judgment in this action on the first cause of action in its favor, is granted.

Conclusion

Accordingly, it is hereby

ORDERED that Rosemark's motion (mot. seq. 7) granting it partial summary judgment on its cause of action on the Guarantee against Liker and Ness is granted in accordance with this decision, and it further

ORDERED that Liker's and Stevli's cross motion (mot. seq. 8) for summary judgment dismissing the complaint is denied.

Plaintiff to settle a judgment, in accordance with this holding, on notice, together with notice of entry of this Decision and Order, within 60 days of entry. Upon such service, the Plaintiff

shall purchase a new index number and RJI in relation to the Plaintiff's remaining claims, including attorney's fees, which shall continue.

The court has considered the parties' remaining contentions and finds them to be without merit. All relief not explicitly granted is denied.

This constitutes the decision and order of the court.

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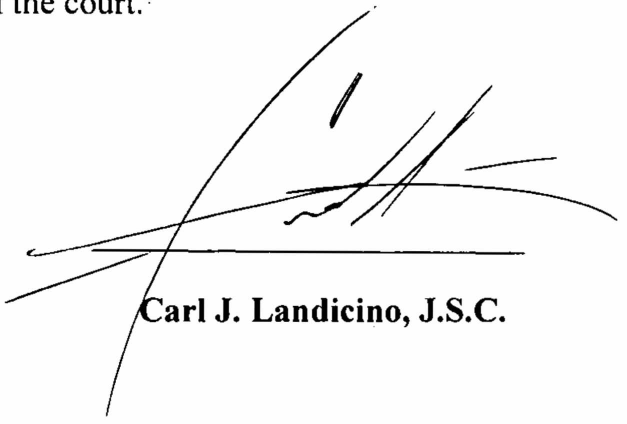

Carl J. Landicino, J.S.C.

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