

**10 Mountainview LLC v RREF IV - D SN Portfolio,  
LLC**

2023 NY Slip Op 32034(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 654207/2022

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MELISSA A. CRANE PART 60M**

*Justice*

-----X

10 MOUNTAINVIEW LLC

Plaintiff,

- v -

RREF IV - D SN PORTFOLIO, LLC,

Defendant.

-----X

INDEX NO. 654207/2022

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

It is undisputed that, on April 1, 2020, Plaintiff Mountainview transferred all right, title and interest in and to the real property and improvements located at 10 Mountainview Road, Upper Saddle River, New Jersey (the "Property") to non-party Viewstar LLC ("Borrower"). On the same day, defendant and Borrower entered into a senior loan agreement (the Senior Loan) in the amount of \$12,600,000.00. Also on that same day, plaintiff issued a \$4,200,000.00 loan to Borrower. In addition, on April 1, 2020, plaintiff and defendant entered into the Subordination Agreement at issue here whereby plaintiff agreed that its loan was subordinate to defendant's Senior Loan. A small mechanics lien that was recorded against the property on April 17, 2020 (the "MCA Lien").

On September 6, 2022, defendant first notified plaintiff that the Borrower was in default under the loan because it had failed to make payments since May of 2022. It also noted other events of default, including the MCA Lien from May 2020 in the amount of \$81,384.00, and

other liens, including a tax lien filed after the August 2020 date of the MCA Lien. Plaintiff does not contest that the MCA Lien was an event of default on the Senior loan.<sup>1</sup>

When plaintiff, who had a purchase option, attempted to exercise its option on September 30, 2022, it received a pay-off letter that included the default interest going back to the date of the MCA lien. Plaintiff claims to be aggrieved because defendant has run interest at the default rate for years based on the MCA Lien when, if plaintiff had notice way back when, it could have paid off the MCA lien thereby avoiding the default interest.

Section 28(a) of the Subordination Agreement (EDOC 81) states:

- (a) **Prior to accelerating the Senior Mortgage Loan or commencing any other enforcement action** by reason of an event of default under the Senior Mortgage Loan Documents, Senior Creditor shall provide written notice of the default which would permit Senior Creditor to accelerate the Senior Mortgage Loan or commence such enforcement action or the circumstances constituting or giving rise to the event of default, as applicable, to Junior Creditor (each, a “Senior Mortgage Loan Default Notice”).

This notice was supposed to provide plaintiff with an opportunity to cure:

- (b) Except in connection with Borrower’s failure to repay the Senior Mortgage Loan in full in cash on the maturity date thereof, Senior Creditor shall permit Junior Creditor an opportunity to cure such default in accordance with the provisions of this Section 28 and shall not accelerate the Senior Mortgage Loan or commence an enforcement action on account of such default unless and until such cure is not effectuated within the applicable cure period provided for in Section 28(c).

---

<sup>1</sup> An Event of Default occurs under the Senior Mortgage if, inter alia: [t]he Property shall become subject (i) to any tax lien, other than a lien for local real estate taxes and assessments not due and payable, or (ii) to any lis pendens, notice of pendency, stop order, notice intention to file mechanic’s or materialman’s lien, mechanic’s lien or materialman’s lien or other lien of any nature whatsoever, or (iii) to forfeiture under applicable laws, and the same shall not either be discharged of record or in the alternative insured over to the satisfaction of the Mortgagee by the title company insuring the lien of this Mortgage within a period of thirty (30) days after the same is filed or recorded, and irrespective of whether the same is superior or subordinate in lien or other priority to the lien of this Mortgage and irrespective of whether the same constitutes a perfected or inchoate lien or encumbrance on the Property or is only a matter of record or notice

Defendant has moved to dismiss based on this provision arguing primarily that plaintiff did not bargain for notice of non-monetary defaults. It argues that it only had to notify plaintiff prior to acceleration, which it did.

Defendant is correct. Plaintiff, a sophisticated party, certainly could have bargained for notice of non-monetary defaults, such as that of the MCA Lien (compare *416 W. 25<sup>th</sup> Street Associates, v 416 W 25<sup>th</sup> St. Lender LLC et al*, 2021 WL 3513910 at \* 5 [unlike here, contract stated “the Mortgagee shall give to Mortgagor notice in writing with respect to any **non-monetary defaults**” [emphasis supplied]). Alternatively, plaintiff could have bargained for simply notice at the time of the event of default. Instead, it bargained for notice prior to “[p]rior to accelerating the Senior Mortgage Loan or commencing any other enforcement action.” There is no question that plaintiff received that notice prior to defendant’s acceleration of the mortgage.<sup>2</sup> Accordingly, the court dismisses the fourth cause of action for breach of contract.

For the same reason, the court dismisses the third cause of action for breach of the covenant of good faith and fair dealing. Defendant could not have violated the covenant because it acted within the terms of the Subordination Agreement.

There is also no dispute that the existence of the MCA and other liens was publicly available information. Moreover, the record indicates that Mountainview had actual knowledge of the MCA Lien, as it was Mountainview who engaged MCA to perform work at the Property in the first place.

Plaintiff’s declaratory judgment causes of action (see first and second causes of action) attack the payoff letter. The first cause of action seeking a declaratory judgment declaring that

---

<sup>2</sup> Plaintiff has not argued that the language “shall provide written notice of the default **which would permit** Senior Creditor to accelerate” means that it should have received notice back when the event permitting the acceleration occurred.

default interest cannot accrue until September 6, 2022 and that the Payoff letter is invalid because it sought to impose default interest and that therefore plaintiff's purchase option has not expired. This cause of action is dismissed per the reasoning herein. Namely that defendants could charge default interest and did not have to notify plaintiff about the MCA Lien.

Plaintiff argues that the First Construction Lien Default (the MCA Lien) was not actually an event of default because MCA (the lienor) did not serve the MCA Lien to the "last known address" of the Property owner, which therefore renders it ineffective as a matter of law. The service of the MCA Lien and its effect on foreclosure rights has nothing to do with the Subordination agreement or this lawsuit. This issue is the purview of the judge in the first filed foreclosure proceeding currently underway in New Jersey.


Finally, there is no longer a dispute as to whether the default interest runs from May 17, 2020 instead of April 17, 2020, because defendant has conceded default interest runs from the later May 17, 2020 date (see EDOC 89 Def. Reply Mem. at page 9).

The court has considered plaintiff's remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED THAT the court grants the motion to dismiss in its entirety; and it is further ADJUDGED, DECREED AND DECLARED that under the Subordination Agreement default interest can begin to accrue upon the event of default which was the interposition of the MCA lien and as a result (1) default interest runs from May 17, 2020 and (2) plaintiff's purchase option therefore ran out 60 days following the Purchase Election Notice of September 30, 2022; and it is further

ADJUDGED, DECREED AND DECLARED the Payoff Letter is a valid Payoff Letter within the meaning of section 29 of the Subordination Agreement to the extent it assessed default interest from May 17, 2022 because of the MCA Lien.

<u>6/14/2023</u> DATE			 MELISSA A. CRANE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE