

**Malayan Banking Berhad, N.Y. Branch v
Park Place Dev. Primary LLC**

2023 NY Slip Op 32110(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 850083/2020

Judge: Francis A. Kahn III

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. FRANCIS A. KAHN, III PART 32
Justice

-----X
MALAYAN BANKING BERHAD, NEW YORK BRANCH,
INTESA SANPAOLO S.P.A., NEW YORK BRANCH,
WARBA BANK K.S.C.P., 45 PARK PLACE INVESTMENTS,
LLC,
INDEX NO. 850083/2020
MOTION DATE _____
MOTION SEQ. NO. 007

Plaintiff,

- v -

PARK PLACE DEVELOPMENT PRIMARY LLC, PARK
PLACE PARTNERS DEVELOPMENT LLC, 45 PARK PLACE
PARTNERS, LLC, SOHO PROPERTIES GENERAL
PARTNER, LLC, SHARIF EL-GAMAL, STATE OF NEW
YORK CIVIL RECOVERIES BUREAU, GILBANE
RESIDENTIAL CONSTRUCTION LLC, US CRANE &
RIGGING LLC, CONSTRUCTION REALTY SAFETY
GROUP INC., TRADE OFF PLUS, LLC, ALL-CITY METAL
INC., PERMASTEELISA NORTH AMERICA CORP., NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, TRANSCONTINENTAL STEEL CORP., ISMAEL
LEYVA ARCHITECT, P.C., PERI FORMWORK SYSTEMS,
INC., ULE GROUP CORP. D/B/A UNITED LIGHTING
ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD
LLC, JOHN DOES 1-100, SOHO PROPERTIES INC., THE
PACE COMPANNIES NEW YROK, INC., PEAK
MECHANICAL SOLUTIONS, INC., MEN OF STEEL REBAR
FABRICATORS, LLC, GOTHAM DRYWALL,
INC., TRANSCONTINENTAL STEEL CORP., ISMAEL
LEYVA ARCHITECT, P.C., PERI FORMWORK SYSTEMS,
INC., ULE GROUP CORP. D/B/A UNITED LIGHTING
ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 007) 674, 675, 676, 677,
678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698,
699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719,
720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740,
741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761,
762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782,
783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 798, 799, 800, 801, 802, 809, 810, 811, 812, 813,
814, 815, 816, 817, 818, 819, 820

were read on this motion to/for JUDGMENT - SUMMARY.

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

The facts and procedural status of this case was described in this Court's decision dated November 18, 2022 (NYSCEF Doc No. 794). In that decision, the branches of Plaintiff's motion for summary judgment against the Lienor Defendants and for an order of reference were denied. The Court determined, *inter alia*, that the proffered affidavit from Ahmad Hamdi Bin Abdullah was insufficient to establish, *prima facie*, entitlement to summary judgment on the cause of action for foreclosure. On the same day the Court rendered its decision, Plaintiff filed the within motion (MS #7) for, *inter alia*, summary judgment against the Borrower and Guarantor Defendants, dismissal of their affirmative defenses and counterclaims, appointing a referee to compute and to amend the caption. After issuance of the above decision, Plaintiff withdrew all the branches of the motion except those seeking dismissal of the counterclaims and amendment of the caption (NYSCEF Do No. 800).

As to the counterclaims, on a motion pursuant to CPLR §3211[a][7], the allegations contained in the pleading must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (298 *Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant (*see Guggenheimer, supra; Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller, supra; see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

The first counterclaim alleged breach of contract by Plaintiffs and seeks monetary damages for same. As a rule, a cause of action for breach of contract is stated by pleading "the existence of a contract, the Plaintiff's performance thereunder, the Defendant's breach thereof, and resulting damages" (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Defendants pled that the Administrative Agent was responsible for their loan default by unjustifiably withholding financing which in turn caused Lienor Defendants to cease work on the project resulting in their default. As pled, this counterclaim states a claim for breach of contract (*see Amalgamated Bank v Fort Tryon Tower SPE LLC*, ___ Misc3d ___, 2011 NY Slip Op 33461[U][Sup Ct NY Cty 2011]; *see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]).

Contrary to Plaintiff's assertion, Borrower Defendants sufficiently allege the provisions upon which liability is predicated. When the affidavit in opposition of Sharif El-Gamal, a Member of Defendant Park Place Development Primary LLC, is considered, as the Court must in this context, Borrower has properly pled that Plaintiffs "wrongfully" and "unlawfully" rejected as many as 19 proper funding requests from Borrower (*see Gateway II LLC v Hartford Fire Ins. Co.*, ___ Misc3d ___, 2014 NY Slip Op 32483[U][Sup Ct NY Cty 2014]). A review of the Building Facility Agreement reveals that determination of whether Borrower satisfied the contractual conditions precedent to be entitled to Facility distributions, the Administrative Agent's discretion in granting approval must be exercised "reasonably" (Building Facility Agreement, Sections 10.1, 11.4, 12.1). By alleging Plaintiff's acted wrongfully and unlawfully, Borrowers have plainly stated the Administrative Agent's actions in the regard were not reasonable. Plaintiff's reliance on the notification provision in section 21.15 of the

Facility Agreements is unavailing as compliance with a contractual condition precedent is not required to be pled (CPLR §3015[a]).

In the end, “[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [its] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

However, the second counterclaim, based on an alleged breach of the implied covenant of good faith and fair dealing, is improperly duplicative of the breach of contract counterclaim (*see eg City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]; *Sky Coverage v Alwex Inc.*, 194 AD3d 587 [1st Dept 2016]). Likewise, the third counterclaim fails for the same reason (*see Ness Tech. S.A.R.L. v Pactera Tech. Intl. Ltd.*, 173 AD3d 635 [1st Dept 2019]).

The branch of Plaintiff’s motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]). Defendants’ opposition misconstrues the issue to be attended. Standing to bring a foreclosure action is measured when the action is *commenced* not thereafter (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360). This is because when there is a transfer of any interest after an action is commenced, either the assignor or assignee may continue to prosecute or defend the action with or without formal substitution (*see* CPLR §1018; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). In this case, Plaintiff demonstrated with the affidavit of Justin J. Santoli that Malayan Banking Berhad, New York Branch assigned its rights and obligations as Administrative Agent to MSD RCOF Partners XLIX, LLC. Thus, that party has the capacity to prosecute this action.

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for summary judgment, to dismiss the affirmative defenses and counterclaims and to appoint of a referee to compute are withdrawn, and it is further

ORDERED that the branch of Plaintiff’s motion to dismiss Borrower and Guarantor Defendants’ counterclaims is granted only to the extent that the second and third are dismissed, and it is

ORDERED that the branch of the motion to amend the complaint is granted and the caption shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
MSD RCOF Partners XLIX, LLC, as Administrative Agent for
MALAYAN BANKING BERHAD, LONDON BRANCH, INTESA
SANPAOLO S.P.A., NEW YORK BRANCH, WARBA
BANK K.S.C.P., and 45 PARK PLACE INVESTMENTS,
LLC,

Plaintiff

-against-

PARK PLACE DEVELOPMENT PRIMARY LLC, PARK
PLACE PARTNERS DEVELOPMENT LLC, 45 PARK

PLACE PARTNERS, LLC, SOHO PROPERTIES GENERAL PARTNER, LLC, SHARIF EL-GAMAL, STATE OF NEW YORK CIVIL RECOVERIES BUREAU, GILBANE RESIDENTIAL CONSTRUCTION LLC, US CRANE & RIGGING LLC, CONSTRUCTION REALTY SAFETY GROUP INC., TRADE OFF PLUS, LLC, ALL-CITY METAL INC., PERMASTEELISA NORTH AMERICA CORP., TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C., PERI FORMWORK SYSTEMS, INC., ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and JOHN DOES 1-100, the last one hundred names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants

-----X

6/16/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Francis A. Kahn III

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

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