

**MREF REIT Lender 2 LLC v FPG Maiden Holdings,
LLC**

2023 NY Slip Op 32912(U)

August 22, 2023

Supreme Court, New York County

Docket Number: Index No. 653189/2022

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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MREF REIT LENDER 2 LLC and MREF REIT LENDER 14 LLC,

Plaintiffs,

- against -

FPG MAIDEN HOLDINGS, LLC; FORTIS PROPERTY GROUP, LLC; FPG MAIDEN LANE, LLC; JOEL KESTENBAUM; BANK LEUMI USA; VALLEY NATIONAL BANK, as successor-by-merger to BANK LEUMI USA; BANK LEUMI LE-ISRAEL BM; and HAREL-MAIDEN LANE-GENERAL PARTNERSHIP,

Defendants.

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MOTION DATE	
MOTION SEQ. NO.	001 & 003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

The Court heard oral argument on August 22, 2023, via Microsoft Teams on two pre-Answer motions to dismiss the Complaint filed in this action by plaintiffs MREF REIT Lender 2 LLC (“Seaport Mezzanine Lender”) and MREF REIT Lender 14 LLC (“Amity Lender”) against FPG Maiden Holdings, LLC (“Seaport Mezzanine Borrower”), Fortis Property Group, LLC (“FPG”), FPG Maiden Lane, LLC (“Seaport Senior Borrower”), Joel Kestenbaum (a principal of FPG), and “Senior Lenders” Bank Leumi USA (“BLUSA”), its successor Valley National Bank, Bank Leumi le-Israel BM (“BLITA”), and Harel-Maiden Lane-General Partnership (NYSCEF Doc. No. 11). The first motion (seq. 001) is by the Senior Lenders for an Order, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss with prejudice all eight claims asserted against Senior Lenders and/or BLITA, namely the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Sixteenth Causes of Action in plaintiffs’ Complaint. The second motion (seq. 003) is by

defendants Fortis Property Group, LLC, FPG Maiden Holdings, LLC, FPG Maiden Lane, LLC, and Joel Kestenbaum for an order, pursuant to CPLR 3211(a)(1) and (7) and 3016(b), dismissing plaintiffs' First, Second, Third, Sixteenth, and Seventeenth Causes of Action in the Complaint. The Court previously denied the motion by BLITA to dismiss for lack of jurisdiction (seq. 002, NYSCEF Doc. No. 103). In accordance with the August 22, 2023 transcript of proceedings, the two pending motions to dismiss are granted in part and denied in part.

At issue are certain loans made by plaintiffs in connection with the development project at 161 Maiden Lane in Manhattan known as One Seaport ("the Seaport Project"). The essence of plaintiffs' claim is that both the defendant Borrower and the defendant Senior Lender were aware, but concealed from plaintiffs, that the building was bowing out by about six inches and encroaching on adjoining land and that because of the leaning, the glass curtain wall that was essential to the success of the Seaport Project could not be installed. Plaintiffs' claim primarily sound in fraud and breach of contract and to enforce various payment Guaranties. Also pending before this Court are two related trial-ready actions; namely, a foreclosure action by the Senior Lenders against the Borrower entitled *Valley National Bank, et al., v FPG Maiden Lane, et al.*, Index No. 657252/20, and a Lender Liability action by the Borrower against the Senior Lender entitled *FPG Maiden Lane, et al. v Bank Leumi USA, et al.*, Index No. 653584/20.

The Court grants in part and denies in part the pre-Answer motion to dismiss by the Senior Lenders (seq. 001) as follows. The Court dismisses the fraud-related claims in the Fourth, Fifth and Sixth Causes of Action. The building's structural deficiencies were discoverable before plaintiffs made their loans, and the Senior Lenders had no superior knowledge that created a duty to disclose additional information. The contractual provisions also bar reliance on any representations beyond the terms of the contract.

The Court grants dismissal of the promissory estoppel claim in the Eighth Cause of Action as the issues raised there are primarily addressed in the contract and fraud claims, rendering the promissory estoppel claim duplicative.

The Court dismisses the Ninth Cause of Action seeking rescission and/or reformation of the Intercreditor Agreement for reasons stated on the record.

The Court dismisses the Tenth Cause of Action for unjust enrichment regarding the “Amity Loan” made by plaintiff “Amity Lender” MREF REIT Lender 14 LLC, except insofar as the claims are asserted against defendant Bank Leumi Le-Israel BM or other defendants who are not parties to the written agreements. The various written agreements bar the quasi-contract claim as to the parties to the writings.

The Court dismisses the Sixteenth Cause of Action for a declaratory judgment that the Amity Lender is entitled to recover any funds recovered by any party in the Borrower’s Lender Liability action. The claim is not properly asserted in the context of this action, which addresses only the rights and obligations of the parties in connection with their own dealings. Further, any recovery in the related action is purely hypothetical.

Similarly, the Court grants in part and denies in part the pre-Answer motion to dismiss by the defendant Borrowers (seq. 003) as follows. The Court declines to dismiss the fraud claim in the First Cause of Action. Giving plaintiffs the benefit of every favorable inference, their pleadings adequately state claims and create issues of fact including, but not limited to, the extent to which the alleged misrepresentations are statements of opinion, whether any alleged contractual misrepresentations can extend to defendants who are not named parties to the contracts, and the extent to which any of the amendments to the contracts may bar certain claims in light of the contractual reservation of rights. Any claims of ratification and waiver similarly

raise issues of fact that cannot be determined on a pre-Answer motion to dismiss. In light of the various provisions relating to individual liability, the Court cannot find that the documentary evidence conclusively establishes that defendant Joel Kestenbaum is protected against any and all claims for liability.

The Court declines to dismiss the breach of contract claim in the Second Cause of Action. The claim is sufficiently pled, and no documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v Martinez*, 84 NY2d 83 (1994).

The Court declines to dismiss the Third Cause of Action to enforce the Recourse Guaranty against defendant Kestenbaum. In light of the arguably conflicting language in various provisions of the various documents, the Court cannot determine as a matter of law at this stage of the litigation whether Kestenbaum may be held personally liable.


The Court grants dismissal of the declaratory judgment action claim in the Sixteenth Cause of Action. As previously stated, plaintiff Amity Lender in that claim asserts it is entitled to recover any funds recovered by any party in the Borrower’s action. The claim is not properly asserted in the context of this action, which addresses only the rights and obligations of the parties in connection with their own dealings. Further, any recovery in the related action is purely hypothetical.

The Court dismisses the Seventeenth Cause of Action for unjust enrichment related to any recovery by the Borrower in the FPG action for the same reasons stated for dismissal of the declaratory judgment claim.

Defendants shall file an Answer to the remaining claims within twenty days of the date of this Decision.

The Court also conducted a Status Conference regarding discovery. The Note of Issue deadline is March 18, 2024, based on the discovery schedule in place (NYSCEF Doc. No. 34). The parties are still working to complete document discovery, which is voluminous. The Court confirmed the Note of Issue deadline and set a Status Conference for December 4, 2023, at 11:00 a.m. via Microsoft Teams.

Dated: August 22, 2023



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE		