

**Penn Hotel Jr. LLC v JCMC W. 34 Mezz II LLC**

2023 NY Slip Op 33315(U)

September 22, 2023

Supreme Court, New York County

Docket Number: Index No. 650126/2023

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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INDEX NO. 650126/2023

PENN HOTEL JUNIOR LLC,

MOTION DATE 07/14/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

JCMC WEST 34 MEZZ II LLC, MEYER CHETRIT

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 24, 25, 26, 28, 29, 30, 31

were read on this motion to/for DISMISS

In this action, plaintiff seeks to recover against defendants under a junior mezzanine loan and note, as well as a related completion guaranty. The guarantor defendant now moves to dismiss two of the claims against him.

Background

The relevant facts in this case are generally not in dispute.

The Underlying Mortgage Loan

In January 2020, nonparty Arbor Realty SR, Inc. (Arbor) loaned \$71,017,817.94 to nonparty JCMC West 34 Owner LLC (Mortgage Borrower). That loan was secured by a mortgage on real property near Penn Station. In connection with the loan, Arbor and the Mortgage Borrower executed a Consolidated, Amended and Restated Mortgage Loan Promissory Note, as well as a Mortgage Loan Agreement, both dated January 28, 2020. Contemporaneously, defendant Meyer Chetrit executed and delivered to Arbor various guaranties. The Mortgage Borrower is an entity that defendant Chetrit and his brother, nonparty

Joseph Chetrit, own. On January 28, 2020, Arbor assigned the Mortgage Loan and all of the Mortgage Loan Documents to nonparty Arbor JPM Funding, LLC (JPM).

The Mortgage Loan's maturity date was April 27, 2022. The Mortgage Borrower failed to make an interest payment on April 1, 2022 and failed to pay the balance of the Note on the maturity date. On May 11, 2022, JPM assigned the Mortgage Loan and related loan documents to nonparty Penn District Hotel LLC (Mortgage Lender).

*The Related Senior Mezz Loan*

Also on January 28, 2022, nonparty JCMC West 34 Mezz LLC (Senior Borrower) borrowed \$19,523,465.52 from JPM. Senior Borrower and JPM entered an Amended and Restated Mezzanine Loan Promissory Note, as well as an Amended and Restated Loan Agreement (Senior Mezzanine). The Senior Mezz Loan is secured by an Amended and Restated Pledge Agreement, and defendant Chetrit executed certain guaranties in connection with the Senior Mezz Loan and the construction project. The Senior Mezz Loan also matured on April 27, 2022. On May 11, 2022, JPM assigned the Senior Mezz Loan to nonparty Penn Hotel Senior LLC (Senior Lender).

In April 2022, the Senior Borrower failed to make an interest payment on the Senior Mezz Loan. The Senior Borrower also failed to pay off the Senior Mezz Loan upon its maturation.

*The Related Junior Mezz Loan and the Forbearance Agreement*

Also on January 28, 2020, defendant JCMC West 34 Mezz II LLC borrowed \$19,975,146.42 from nonparty Arbor Realty Participation, LLC. They entered an Amended and Restated Mezzanine Loan Promissory Note (Junior Mezzanine) and an Amended and Restated Loan Agreement (Junior Mezzanine). Defendant Chetrit also executed an Amended and

Restated Guaranty of Completion (Junior Mezzanine) (the Completion Guaranty), an Amended and Restated Interest Reserve Replenishment Guaranty (Junior Mezzanine) (the Reserve Guaranty), and an Amended and Restated Recourse Guaranty (Junior Mezzanine) (the Recourse Guaranty). Plaintiff acquired title to the Junior Mezz Loan Documents on May 11, 2022.

The Junior Mezz Loan's maturity date was originally January 27, 2022. The maturity date was extended, pursuant to the Junior Mezz Extension Agreement, to April 27, 2022. The Completion Guaranty provides that the Project Improvements had to be finished before January 1, 2022. Defendants did not pay the amounts owed under the Junior Mezz Loan and Note on the maturity date. Pursuant to a Forbearance Agreement, dated July 1, 2022, plaintiff agreed not to enforce its rights until October 30, 2022.

After borrower defaulted under the Junior Loan Documents, plaintiff agreed to forbear from enforcing certain of its rights until October 30, 2022 (Doc 10 [7/1/22 Forbearance Agreement]). The Forbearance Agreement expired, and the Junior Mezz Loan was not repaid.

#### *Foreclosure*

After the defaults, plaintiff foreclosed on the Junior and Senior Borrowers, as well as the Mortgage Borrower, and purchased the property with a \$100,000 credit bid.

#### *Liquidated Damages Demand*

In a letter dated November 17, 2022 (Liquidated Damages Letter), plaintiff demanded the "Project Completion Amount" pursuant to § 5 (c) of the Completion Guaranty. Plaintiff's "Inspecting Person," as defined in the Completion Guaranty - nonparty Nautilus Consulting, LLC - determined that the Project Completion Amount was \$106,367,012, representing "the costs which would have been incurred by the Lender in connection with completion of the

Project Improvements free of liens and in accordance with the Project Improvement Documents” as of August 1, 2022 (*see* Doc 11 [Liquidated Damages Letter]).

*Plaintiff's Claims Relating to the Junior Mezz Completion Guaranty*

Plaintiff asserts that, in the event of Junior Borrower’s default under the Junior Mezz Loan Documents, the Guarantor agreed to “assume all responsibility for, pay all costs and expenses related to, and to complete the Project (as defined in the Junior Mezz Completion Guaranty), and make all payments required by the Payment Obligations (as defined in the Junior Mezz Completion Guaranty)” (Complaint, ¶ 5).

Additionally, plaintiff asserts that it is entitled to compel the Junior Mezz Guarantor to specifically perform his obligations under the Completion Guaranty; sue for damages above the amounts owed under the Junior Mezz Loan, including the costs of completing the project; and “demand, without completing the Project, that the Guarantor pay to the Plaintiff, . . . as liquidated damages, an amount equal to the costs, both incurred and/or which would have been incurred in connection with the completion of the Project, as estimated by the Plaintiff’s construction consultant reasonably and in good faith (the ‘Project Completion Amount’)” (Complaint, ¶ 5).

In its first cause of action, plaintiff seeks liquidated damages under the Completion Guaranty. Specifically, plaintiff seeks liquidated damages in the amount of \$106,367,011.94, the amount that Plaintiff’s Inspecting Person calculated in connection with the Liquidated Damages Letter.

In its second cause of action, plaintiff asserts a claim “For Specific Performance or, In the Alternative, Damages Under the Junior Mezz Completion Guaranty.” Section 5 (b) of the Completion Guaranty states:

“At any time after the occurrence of an Event of Default, Lender may commence a lawsuit against Guarantor compel Guarantor to perform its obligations under this Guaranty and/or to recover damages under this Guaranty. Lender’s damages under this Guaranty shall include, without duplication: (i) the costs of completing the Project and/or correcting any construction defects, (ii) actual damages arising from any delay in completion of the Project, including interest, taxes and insurance premiums, and (iii) the unreimbursed expenses which Borrower and/or Guarantor is obligated to pay hereunder or under any of the other Loan Documents. Lender need not perform any work on the Project before commencing such a lawsuit. GUARANTOR EXPRESSLY ACKNOWLEDGES THAT THE MEASURE OF THE LENDER’S DAMAGES FOR BREACH OF THIS GUARANTY SHALL BE BASED ON THE COSTS OF COMPLETING THE PROJECT, NOT THE AMOUNT OF THE LOAN OR THE EXTENT TO WHICH COMPLETING THE PROJECT WOULD INCREASE THE VALUE OF THE PROPERTY”

(Doc 4, § 5 [b]).

In connection with the second cause of action, plaintiff seeks

“judgment against the Guarantor: (a) compelling the Guarantor to specifically perform all of his obligations under the Junior Mezz Completion Guaranty, including, without limitation, to pay all costs and expenses related to, and to complete the Project, and to make all payments required by the Payment Obligations or, in the alternative, (b) awarding damages in an amount to be determined at trial, which sum includes, among other things, (i) the costs of completing the Project and/or correcting any construction defects, (ii) actual damages arising from any delay in completion of the Project, including interest, taxes and insurance premiums, and (iii) the unreimbursed expenses which the Junior Mezz Borrower and/or the Guarantor is obligated to pay under the Junior Mezz Completion Guaranty or under any of the other Junior Mezz Loan Documents, plus interest, attorneys’ fees and other enforcement costs, as well as the costs of this action”

(Complaint, ¶ 115).

#### *Guarantor’s Partial Motion to Dismiss*

In Motion Seq. No. 01, defendant Chetrit moves to dismiss the first and second causes of action in the complaint pursuant to CPLR 3211 (a) (7). Plaintiff opposes the motion.

#### Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

Defendant Chetrit moves, pursuant to CPLR 3211 (a) (7), to dismiss the first and second causes of action “to the extent they purport to seek damages in excess of the amount Borrower owes under the Junior Mezz Loan Agreement Plaintiff opposes the motion” (Doc 18 [notice of motion]). He argues that the liquidated damages provision in the Completion Guaranty is an unenforceable penalty.

Plaintiff opposes the motion. It argues that Chetrit waived his right to assert a defense that the relevant provisions of the Completion Guaranty are unenforceable. It also argues that liquidated damages are appropriate in this case.

“Whether a contractual provision represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances” (*Bates Adv. USA. Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006] [internal quotation marks omitted], *rearg denied* 7 NY3d 784, citing *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379 [2005]). The party that seeks to avoid liquidated damages bears the burden of showing that the alleged liquidated damages are an unenforceable penalty (*JMD Holding Corp.*, 4 NY3d at 380; *see also Hunts Point Multi-Serv. Ctr., Inc. v Terra Firma Constr. Met. & Gen. Contr. LLC*, 5 AD3d 183, 184 [1st Dept 2004]).

Additionally, the Court of Appeals has held that

“[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced”

(*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977] [internal citations omitted]).

The contract must be interpreted as of the date of its making, not the date of the breach (*id.* at 425). Permissible liquidated damages are compensable and are “an estimate . . . of the extent of the injury that would be sustained as a result of breach of the agreement” (*id.* at 424). The Court of Appeals has acknowledged that New York Courts “favor[] freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation” (*JMD Holding Corp.*, 4 NY3d at 380, quoting 3 Farnsworth, Contracts § 12.18]).

Nevertheless, on this pre-answer motion to dismiss under only CPLR 3211 (a) (7), Chetrit fails to meet his burden of demonstrating either that the damages that would result from a default under the Junior Mezz Loan Documents were readily ascertainable at the time of the breach, or that the alleged liquidated damages [the Project Completion Amount of \$106,367,012] are grossly disproportionate to the probable actual damages.

On this motion, defendant bears the burden of proof. Here, at this pre-answer stage,<sup>1</sup> defendant has not offered any evidence that is probative of whether the liquidated damages are grossly disproportionate. Instead, he submits just his attorney’s memoranda. Plaintiff’s liquidated damages claim [first cause of action] and specific performance claim [second cause of

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<sup>1</sup> Only defendant JCMC West 34 Mezz II LLC has answered the complaint. Chetrit filed this pre-answer partial motion to dismiss instead of filing an answer.

action] do not, on their face, fail to state a cause of action. Accordingly, the court denies the motion.


In light of the above determination, the court does not reach the issue of whether defendant Chetrit waived his right to assert an affirmative defense that the first and second causes of action constitute an unenforceable penalty.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendant Chetrit's partial motion to dismiss is denied; and it is further

ORDERED that Chetrit must answer the complaint within 20 days of the date of the date the court e-files this decision and order.

<u>9/22/2023</u>					
DATE			MELISSA A. CRANE, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<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