

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

2024 NY Slip Op 30982(U)

March 21, 2024

Supreme Court, New York County

Docket Number: Index No. 651694/2023

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

-----X

JCMC WEST 34 MEZZ II LLC

Plaintiff,

- v -

PENN HOTEL JUNIOR LLC,

Defendant.

-----X

INDEX NO. 651694/2023

MOTION DATE 09/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 36

were read on this motion to/for DISMISS

In Motion Sequence No. 001, defendant Penn Hotel Junior LLC moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss plaintiff JCMC West 34 Mezz II LLC's Verified Complaint.

Introduction

This case involves a series of loan agreements relating to a world-class hotel project at a property near Penn Station.

In January 2020, nonparty Arbor Realty SR, Inc. loaned \$71,017,817.94 to nonparty JCMC West 34 Owner LLC. A mortgage on real property near Penn Station secured the loan. 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, nonparty Meyer Chetrit executed and delivered to Arbor various guaranties. On May 11, 2022, the mortgage and related loan documents were assigned to nonparty Penn District Hotel LLC.

Also on January 28, 2022, nonparty JCMC West 34 Mezz LLC borrowed \$19,523,465.52 from nonparty JPM. These nonparties 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 Chetrit executed guaranties in connection with the Senior Mezz Loan and the construction project. On May 11, 2022, JPM assigned the Senior Mezz Loan to nonparty Penn Hotel Senior LLC (Senior Lender).

Finally, on January 28, 2020, plaintiff 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). 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). Defendant Penn Hotel Junior LLC 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 parties extended the maturity date, pursuant to the Junior Mezz Extension Agreement, to April 27, 2022. Defendants did not pay the amounts owed under the Junior Mezz Loan and Note on the maturity date. After borrower defaulted under the Junior Loan Documents, defendant agreed to forbear from enforcing certain of its rights until October 30, 2022 (Doc 10 [7/1/22 Forbearance Agreement]).

The loans matured, and the forbearance period expired. The loans were not repaid on time. Defendant foreclosed on the junior mezz loan and ultimately purchased the junior mezz borrower for a \$100,000 credit bid.

The loans were structured as follows: the property secured the mortgage loan; senior borrower's 100% ownership interest in the mortgage borrower secured the senior mezz loan; and junior borrower's 100% ownership interest in the senior borrower secured the junior mezz loan. Thus, the entity that purchased the junior mezz loan [i.e., defendant] became the beneficial owner of the underlying property by virtue of junior borrower's ownership of the senior mezz borrower.

On 11/4/22, Junior Mezz Lender issued a notice of Disposition of Collateral (the Disposition Notice) (Complaint, ¶ 55 [NYSCEF Doc 2]; see Doc 10 [Disposition Notice]). The Disposition Notice stated that it would be foreclosing on Junior Mezz Borrower's 100% ownership interest (the "Interest") in Senior Mezz Borrower (*id.*). The Disposition Notice also stated that, in accordance with the UCC, Junior Mezz Lender would hold a public auction of the Interest on 1/18/23 (*id.* ¶ 56). The Disposition Notice further provided that the auction would be "subject to the terms and conditions set forth in those certain Terms of Sale," that would only be available upon request from the Junior Mezz Lender (*id.* ¶ 57; see Doc 11 [Terms of Sale]).

In the related action, Penn Hotel Junior LLC seeks damages and/or specific performance under the Junior Mezz Loan and the related completion guaranty (see 650126/2023, *Penn Hotel Junior LLC v JCMC West 34 Mezz II LLC*).

In this action, JCMC West 34 Mezz II LLC seeks damages for defendant's alleged breaches of UCC §§ 9-610 (b) and 9-615 (f). Plaintiff asserts that the foreclosure sale was commercially unreasonable. Now, in Motion Seq. No. 01, defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7).

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]). Dismissal under CPLR 3211 (a) (1) is warranted where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; see also *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

In support of its motion, defendant argues that plaintiff’s UCC 9-610 claim [first cause of action] must be dismissed because plaintiff’s allegations are speculative and the claim is duplicative of the second cause of action. Defendant also argues that the UCC 9-615 claim [second cause of action] must be dismissed because the foreclosure sale was commercially reasonable as a matter of law and, even if it were not, the sale amount is not so low as to be actionable. Finally, defendant argues that the second cause of action fails to state claim. Plaintiff opposes the motion.

1. Plaintiff’s UCC 9-615 claim (second cause of action)

Section 9-615 (f) states:

“(f) Calculation of surplus or deficiency in disposition to person related to secured party. The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.”

It is undisputed that the transferee [defendant Penn Hotel Junior] was the secured party under the UCC. Defendant’s winning bid was the only bid, and defendant closed the transaction for \$100,000 [credit bid]. Plaintiff alleges that “the fair-market value of the Interest at the time of the disposition was over \$40 million” because the public auction was not commercially reasonable (Complaint, para. 96; *see id.* paras. 55-62). Among other things, plaintiff alleges that the sale was improper in that the terms of sale and the disposition notice included commercially unreasonable deposit and closing requirements, unnecessary disclosure requirements, and an overbroad indemnification provision.

While plaintiff’s commercial unreasonableness allegations may not bear out in discovery, the court must deny this motion to dismiss. “[W]hether a sale was commercially reasonable is, like other questions about ‘reasonableness,’ a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny” (*RADIUM2 Capital, LLC v Platinum Rapid Funding Group Ltd.*, 2022 N.Y. Slip Op. 31170[U], 4 [Sup Ct, NY County 2022]; *see also Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 174 AD3d 150, 164-165 [1st Dept 2019]; *Seomi v Sotheby’s, Inc.*, 27 Misc 3d 1231(A), at *3 n3 [Sup Ct, NY County 2010] [noting that commercial reasonableness is better suited for summary judgment than a motion to dismiss]).

Defendant contends that the disposition and the sale price were reasonable as a matter of law. It argues that the consideration for the interest sold here “was at least [66% to] 77% of the Plaintiff’s alleged valuation of the Property” – that is, \$140 million according to the complaint (NYSCEF Doc 27 at 2-3 [mem of law]; *see also* Docs 16-26 [Hooker aff. and exs.]). However,

this argument rests on the faulty assumption that defendant's consideration for the transaction was really in excess of \$104 million. Defendant asserts that, under the terms of sale, it was required to take title "subject to" all mortgages, liens, and property taxes (NYSCEF Doc 27 at 3 [def's mem]). Thus, it "(i) took title to the Interests subject to, and thereby assumed responsibility to pay, at least \$104,436,935.17 of senior indebtedness, (ii) paid \$3,173,094.54 in transfer taxes, and (iii) credit bid \$100,000" (*id.*). Contrary to defendant's position, defendant did not foreclose on or purchase the underlying property or the senior mezzanine loan. It only foreclosed on the junior mezzanine borrower's interest, and therefore it did not assume any liabilities under the senior mezz loan or the mortgage.

Further, the court agrees with plaintiff that defendant's submissions in support of this motion raise issues of fact that cannot be resolved at this juncture. "[W]hether a term or requirement is commercially reasonable is generally an issue of fact that cannot be decided at this stage" (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 174 AD3d 150, 164-165 [1st Dept 2019], citing *Weinsten v Fleet Factors Corp.*, 210 AD2d 74 [1st Dept 1994]). As other courts have noted, "a sale price [alone] is not outcome determinative as to the reasonableness of sale" (*RADIUM2 Capital, LLC v Platinum Rapid Funding Group Ltd.*, 2022 N.Y. Slip Op. 31170[U], 5 [Sup Ct, NY County 2022]). Defendant's position is at odds with the standard this court must apply to a motion to dismiss (*see e.g. Leon*, 84 NY2d at 87), and its submissions "offer[] [defendant's] version of the facts and its interpretation of what is commercially reasonable" (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 174 AD3d 150, 164-165 [1st Dept 2019] [denying motion to dismiss UCC Article 9 claims]).

Zohar CDO 2003-1, Ltd. v Patriarch Partners, LLC (2021 WL 4460547 [SDNY Sept. 29, 2021], *amended*, 17-CV-307 (PKC), 2021 WL 4710787 [SDNY Oct. 7, 2021]) does not require a different result. The *Zohar* auction took place after “a nine-hour evidentiary hearing” after which the judge vacated the TRO and “specifically ordered the parties to proceed with the auction with judicially imposed modifications” (*id.* at *13). The District Court “reject[ed] [the third-party defendants’] argument that the terms of the auction as modified by Judge Rakoff were not approved in a proper judicial proceeding,” and ruled that “the proceeding before Judge Rakoff and his Order foreclose [the third parties’] attack on the commercial reasonableness of the auction as to any matter that was raised or could have been raised in that proceeding” (*id.* at *14). The court then opined, in dicta, that even if commercial reasonableness were open to challenge, the facts would not state a claim (*see id.*) This is because, among other things, the “closest [the third parties] come to asserting facts to support a claim of unreasonableness is the assertion that “[t]he auction was conducted in a commercially unreasonable manner . . . in the months preceding the sale” (*id.*).

Here, plaintiff’s factual allegations are not so speculative that plaintiff fails to state a cause of action, and defendant has not established, as a matter of law, that the sale was commercially reasonable.

2. Plaintiff’s UCC 9-610 claim

Section 9-610 (b) states that “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.” In plaintiff’s first cause of action, it alleges that the terms of sale included various terms that were not commercially reasonable (*see* Complaint, paras. 55-62, 82-89).

Defendant contends that plaintiff's section 9-610 claim duplicates the 9-615 claim and, therefore, the first cause of action should be dismissed. That portion of the motion is denied. First, plaintiff cites no case law supporting that assertion. Next, Official Comment 10 to Section 9-610 states:

“10. Relevance of Price. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable. Note also that even if the disposition is commercially reasonable, Section 9-615(f) provides a special method for calculating a deficiency or surplus if (i) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor, and (ii) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.”

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

Accordingly, it is

ORDERED that defendant's motion to dismiss (MS 01) is denied.

3/21/2024
DATE


MELISSA A. CRANE, J.S.C.

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