

**Benefit St. Partners Realty Operating Partnership,
L.P. v Moskovits**

2024 NY Slip Op 33760(U)

October 15, 2024

Supreme Court, New York County

Docket Number: Index No. 652331/2023

Judge: Nancy M. Bannon

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. NANCY M. BANNON PART 61M

Justice

-----X

BENEFIT STREET PARTNERS REALTY OPERATING
PARTNERSHIP, L.P.,

Plaintiff,

- v -

TOBY MOSKOVITS and MICHAEL LICHTENSTEIN
a/k/a YECHIEL MICHAEL LICHTENSTEIN

Defendants.

-----X

INDEX NO. 652331/2023
MOTION DATE 07/05/2024
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88 were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this breach of contract action arising from a guaranty agreement, the plaintiff, Benefit Street Partners Realty Operating Partnership, L.P. (the "Lender"), moves pursuant to CPLR 3212 for summary judgment against the defendants, Toby Moskovits and Michael Lichtenstein a/k/a Yechiel Michael Lichtenstein (the "Guarantors"), seeking \$33,466,983.31, plus interest and attorney's fees. The defendants oppose the motion. The motion is granted as to the defendants' liability for breach of contract, and the issue of the amount of contract damages and contractual attorneys' fees to be awarded shall be determined by a Special Referee or Judicial Hearing Officer.

II. BACKGROUND

Under the Loan Agreement, dated October 13, 2017, the Lender provided a \$68 million loan to non-party 96 Wythe Acquisition LLC (the "Borrower"), which was secured by a mortgage lien on the Borrower's collateral, the Williamsburg Hotel. The Guarantors were the owners and developers of the hotel. On the same date, in connection with the Borrower's obligations under the Loan Agreement, the Guarantors executed a Guaranty with the Lender. Under Section 1.1 of the Guaranty, the Guarantors "irrevocably and unconditionally" guaranteed the Borrower's

performance under the Loan Agreement, and agreed to be held liable as primary obligors of the Borrower's obligations under Loan Agreement. Article 12.1(b)(ii)(4) of the Guaranty provides that the debt under the Loan agreement is due if the Borrower files a bankruptcy petition. Under Section 2.4(v), the Guarantors waived "valid defenses, claims or offsets", and remain liable "regardless of whether Borrower [is] found not liable" on its obligations. Under Section 6.10, the rights and remedies of the Lender are not impaired or affected if the Guarantors become liable for the Borrower's indebtedness other than under the Guaranty.

On June 11, 2019, the Lender commenced a foreclosure action in this court against the Borrower and the two Guarantors entitled Benefit Street Partners Operating Partnership, LP v 96 Wythe Acquisition LLC, et al. (Index No. 653396/2019), seeking to foreclose on the Williamsburg Hotel. By an order dated April 9, 2020, the court (Ostrager, J. [Ret.]), denied the Lender's motion for summary judgment and dismissal of the defendants' affirmative defenses and counterclaim. By an order dated February 16, 2021, the Appellate Division, First Department reversed and granted the motion, finding that the Lender had "established *prima facie* entitlement to summary judgment by producing the mortgage, note, and guaranty executed by defendants, and evidence of defendants' default on their obligations thereunder, including their failure to timely repay the principal balance of the loan". Benefit St. Partners Operating Partnership, L.P. v 96 Wythe Acquisition LLC, 191 AD3d 520 (1st Dept 2021). A week later, the Borrower filed a Notice of Bankruptcy in the Southern District of New York (Case No. 21-22108). The foreclosure action remains stayed.

The Lender commenced this instant action against the Guarantors on May 12, 2023, seeking summary judgment in lieu of a complaint. (MOT SEQ 001). The court (Ostrager, J. [Ret.]) denied that motion, converted the proceeding to a plenary action and directed the Lender to file a complaint, which the Lender did on November 6, 2023. In the complaint, the Lender pleads two causes of action for (1) breach of the guaranty, and (2) attorney's fees. The Lender alleges that upon the Borrower's bankruptcy filing, the Guarantors became liable for monies owed by the Borrower, and that the Guarantors breached the Guaranty by failing to pay the amounts owed. The Lender sought \$29,097,331.90, after crediting the net sales of the sale of the Williamsburg Hotel in the bankruptcy proceeding, as well as attorney's fees under Section 1.8 of the Guaranty. The Guarantors answered, asserting 14 affirmative defenses. This motion ensued.

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

"A guaranty is a promise to fulfill the obligations of another party and is subject to the ordinary principles of contract construction" Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., 25 NY3d 485, 492 (2015) (internal citations omitted). Applying those principles, it is well established that "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-47 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's, Inc., 174 AD2d 470, 471 (1st Dept. 1991); see Greenfield v Philles Records, 98 NY2d 562 (2002).

The Lender's submissions, including the subject Loan Agreement and Guaranty, the Borrower's Bankruptcy Petition, and a spreadsheet detailing the amounts owed by the Guarantors, establishes the Lender's *prima facie* entitlement to summary judgment on the issue of liability. The Guarantors' breach is established by "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., N.Y. Branch v Navarro, supra at 492 (2015) (internal quotation marks omitted), citing Davimos v Halle, 35 AD3d 270, 272 (1st Dept. 2006).

The Guarantors' submissions in opposition fail to raise a triable issue of fact as to their liability under the Guaranty. The Guarantors do not dispute that the Borrower's bankruptcy petition triggered the Guarantor's obligations under the Guaranty. Instead, the Guarantors argue that there is an issue of fact as to, *inter alia*, whether the Borrower defaulted under the Loan Agreement, when this default occurred, and whether the Lender denied the Guarantor's their right to extend the loan. However, the Borrower's default under the Loan Agreement was already determined by the Appellate Division, which found that the Lender "established *prima facie* entitlement to summary judgment by producing the mortgage, note, and guaranty executed by [the Borrower and Guarantors], and evidence of [Borrower and Guarantors'] default on their obligations thereunder, including their failure to timely repay the principal balance of the loan". Benefit St. Partners Operating Partnership, L.P. v 96 Wythe Acquisition LLC, *supra*. "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as the appellate court ... [and] operates to foreclose re-examination of [the] question absent a showing of subsequent change in the law (Carmona v Mathisson, 92 AD3d 492 [1st Dept. 2012].)" Apollo Asset Mgmt., Inc. v Cernich, 226 AD3d at 466 (1st Dept. 2024). While the determination was made in the separate foreclosure action, it is binding on this court under the principle of collateral estoppel since all parties to that case are named parties here and the issue of the Lender's right to foreclose is precisely the same. The Guarantor's cannot reasonably argue otherwise. Furthermore, as observed by the Appellate Division, by Section 2.4(v) of the Guaranty, the Guarantors' waived their affirmative defenses and counterclaims, which precludes any challenge to the enforceability of the Guaranty. See Bernstein v Dubrovsky, 169 AD3d 410 (1st Dept. 2019); Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577 (1st Dept. 2010).

In this motion, the Lender seeks damages of \$33,466,983.31, plus attorney's fees. The Lender submits the affidavit of Tanya Mollova, the Lender's Managing Member, as well as a spreadsheet detailing how this sum was calculated. Mollova organizes the fees owed in six categories: (1) the principal unpaid balance of the Loan Agreement (\$68,000,000.00); (2) contractual monthly interest payments owed from May 15, 2019 (\$22,574,046.52); (3) default interest owed (\$13,852,156.70); (4) late fees due (\$245,556.60); (5) attorney's fees, of which \$8,460,967.52 was paid and \$3,899,555.07 is unpaid, the Lender also includes a \$899.43 as a miscellaneous expense for obtaining an STR Report; and (6), an exit fee (\$340,000.00). Mollova also avers that the Lender withdrew \$303,684.94 from the reserve accounts and applied it to the contract interest outstanding on June 10, 2019, and subtracts this figure from the total amount

due. Adding these amounts, the total is \$117,069,496.90. The Lender then subtracts \$87,972,165.00, the net proceeds from the sale of the Williamsburg Hotel in the bankruptcy proceeding, resulting in \$29,097,331.90 as of April 18, 2023. The Lender then takes adds account regular interest and default interest accumulated from April 18, 2023 to March 14, 2024, when the Lender filed this motion, and reaches \$33,466,983,31.

However, the papers submitted are insufficient to establish how the Lender arrived at these figures. Specifically, the Lender fails to explain why it calculates contractual monthly interest payments from May 15, 2019, and default interest payments from June 10, 2019. Furthermore, while it is well settled that attorneys' fees are recoverable where, as here, there is a specific contractual provision for that relief, (see Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 [2010]), the Lender does not submit any affirmation, billing records, invoices or other proof to establish the amount of its attorneys' fees and costs incurred in this matter. Therefore, the amount of damages, including the six categories of fees owed, such as interest rates owed under the Loan Agreement and Guaranty, as well as attorney's fees, shall be determined by a Special Referee or Judicial Hearing Officer.

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is,

ORDERED that the motion of the plaintiff Benefit Street Partners Realty Operating Partnership, L.P. pursuant to CPLR 3212 on its two causes of action is granted to the extent of that it is granted the defendant is granted summary judgment as against the defendants, Toby Moskovits and Michael Lichtenstein a/k/a Yechiel Michael Lichtenstein, on the issue of liability, and it is further

ORDERED that the amount of money damages shall be determined by a Judicial Hearing Officer (JHO) or Special Referee, who shall be designated to hear and report to this Court on the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

- (1) the principal unpaid balance of the Loan Agreement
- (2) contractual monthly interest payments owed under the Loan Agreement;
- (3) default interest payments owed under the Loan Agreement

- (4) late fees owed under the Loan Agreement
- (5) attorney's fees owed under the Loan Agreement; and
- (6) exit fees owed under the Agreement; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff Benefit Street Partners Realty Operating Partnership, L.P. shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212- 401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that plaintiff Benefit Street Partners Realty Operating Partnership, L.P. shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special

Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the Court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/15/2024
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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