SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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NEWAGE GARDEN GROVE, LLC,

Plaintiff,

- v -

WELLS FARGO BANK, N.A., AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF THE CSAIL 2017-CX9 COMMERCIAL MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CX9 and RIALTO CAPITAL ADVISORS, LLC,

Defendants.

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INDEX NO. 653775/2022

MOTION DATE 05/29/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS003) 51, 52, 53, 54, 55, 62, 63, 64, 67
were read on this motion to/for DISMISS.

In this action asserting claims related to alleged breaches of a loan agreement (NYSCEF # 23 – FAC), plaintiff/counterclaim-defendant Newage Garden Grove, LLC (Newage) moves to dismiss, pursuant to CPLR 3211(a)(1) and (a)(7), a counterclaim by defendants/counterclaim-plaintiffs Wells Fargo Bank, N.A., as Trustee, on behalf of the Registered Holders of the CSAIL 2017-CX9 Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2017-CX9 (Lender) and Rialto Capital Advisors, LLC (Rialto, and together with Lender, counterclaim-plaintiffs) seeking reimbursement for attorneys' fees and other expenses from Newage (NYSCEF # 48 – CC). Counterclaim-plaintiffs oppose the motion. For the following reasons, Newage's motion is granted.

Background

The court assumes the parties' familiarity with the background of this case, which has been thoroughly detailed in prior Decisions and Orders (*see* NYSCEF #s 18, 46). Briefly stated, on May 31, 2017, Newage entered into a loan agreement for a $20,500,00 loan (the Loan) secured by a hotel in Garden Grove, CA (the Loan Agreement) (FAC ¶ 69; CC ¶¶ 1-2). In entering into the Loan Agreement, the parties contemplated that the "[Loan] Agreement and all covenants, agreements, representations and warranties made herein . . . shall continue in full force and effect so long as all or any of the Debt is outstanding and unpaid unless a longer

period is expressly set forth herein or in the other Loan Documents" (*see* NYSCEF # 54 – Loan Agreement § 10.1). After executing the Loan Agreement, the Loan was pooled into a commercial mortgage-backed security pass-through trust, with Lender appointed as trustee and Rialto designated as special servicer (FAC ¶¶ 3, 71).

As relevant to the present motion, Newage made various representations and warranties to Lender in connection with the Loan Agreement (*see* Loan Agreement §§ 4.1-4.2). One such representation was that Newage would be and remain Special Purpose Entity (SPE) as defined by the Loan Agreement and abide by certain requirements in connection with maintaining that status (the SPE Covenants) (CC ¶ 3; Loan Agreement § 4.1.30). These SPE Covenants were to "survive for so long as any amount remains payable to Lender under this Agreement or any other Loan Document" (Loan Agreement § 4.1.30[b]; *see also id.* § 4.2 ["Borrower agrees that all of the representations and warranties of Borrower set forth in Section 4.1 . . . shall survive for so long as any amount remains owing to Lender"]).

After entering into the Loan Agreement, Newage failed to make required monthly payments due in June 2020, and the parties therefore engaged forbearance and modification discussions (CC ¶ 5). The parties, however, were unable to reach an agreement (*id.* ¶ 6). Counterclaim-plaintiffs allege that it was around this time that Lender discovered through Newage's financial disclosures that Newage had incurred non-permitted debt in violation of the SPE Covenants (*see id.*). Notably, such a breach of the SPE Covenants constituted an Event of Default under the Loan Agreement (Loan Agreement § 8.1 [a] [x]). And upon an Event of Default, Lender could declare the Loan immediately due and payable by Newage, with all of its rights and remedies "remain[ing] in full force and effect until . . . the Debt has been paid in full" (*see* CC ¶ 4; Loan Agreement § 8.2 [a]-[b]). Consequently, on October 5, 2021, Rialto issued a Notice of Default to Newage (*see* CC ¶ 7).

Newage responded on October 15, 2021, disputing the nonmonetary defaults, and arguing that the purported non-permitted debts were, in fact, capital contributions (*see* CC ¶ 8). Although counterclaim-plaintiffs contend that this response was an after-the-fact attempt to re-cast the purported violations of the SPE Covenants, Newage's claim nevertheless prompted Lender to retain an independent forensic accountant to review Newage's financial information (*id.* ¶ 9). The accountant, however, purportedly concluded that Newage's assertions were incorrect (*see id.*). Eventually, after several months, Rialto, on behalf of Lender, provided a Loan payoff statement seeking a total of $24,769,672.19 from Newage (FAC ¶ 117). On March 29, 2022, Newage paid all amounts demanded by counterclaim-plaintiffs in their payoff statement but did so expressly under protest (*id.* ¶ 118; NYSCEF # 48 – Answer ¶ 118).

In furtherance of its dispute over the total payoff amount, Newage commenced this action on October 12, 2022 (*see* NYSCEF # 1). Counterclaim-plaintiffs characterize this action as "compound[ing] Newage's [purported] breaches

of the Loan Agreement" (CC ¶ 10). Specifically, counterclaim-plaintiffs allege that Newage has forced them to incur substantial costs and expenses, including attorneys' fees, to defend against Newage's claims and enforce the Loan Agreement (*id.* ¶ 12). Counterclaim-plaintiffs accordingly maintain that they are entitled to reimbursement for these costs and expenses, and they invoke certain provisions of the Loan Agreement in support (*id.* ¶¶ 13-17). In support, counterclaim-plaintiffs point to Section 9.4(a), which provides, in relevant part, that Newage "shall be fully and personally liable . . . for any loss, cost, expense, damage, claim or other obligation (including without limitation reasonable attorneys' fees and court costs) incurred or suffered by Lender arising out of or in connection with" Newage's failure to "maintain its status as [an SPE] or comply with any representation, warranty or covenant set forth in Section 4.1.30" (Loan Agreement § 9.4 [a] [xiii]). Counterclaim-plaintiffs also rely on Section 10.13, pursuant to which Newage agreed

> to pay . . . for all costs and expenses (including reasonable attorneys' fees and expenses) incurred by Lender in connection with . . . enforcing or preserving any rights, in response to third party claims or the prosecuting or defending of any action or proceeding or other litigation, in each case against, under or affecting [Newage] [or] this Agreement"

(*id.* § 10.3 [a] [xii]). Counterclaim-plaintiffs aver that Newage has refused to pay or reimburse them for reasonable costs and expenses, and it has therefore breached the aforementioned obligations under the Loan Agreement (CC ¶¶ 17, 20-21).

Legal Standards

CPLR 3211(a) provides for various grounds under which a party may move to dismiss one or more causes of action, including when a pleading "fails to state a cause of action" (CPLR 3211 [a] [7]) or "a defense is founded upon documentary evidence" (CPLR 3211 [a] [1]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). Whether a plaintiff can ultimately establish its allegations is not considered when determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Dismissal based on documentary evidence is warranted "where 'it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [alterations omitted]). In "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]).

Courts have held that documentary evidence within the meaning of CPLR 3211(a)(1) includes "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a . . . claim" (*id.* at 80).

Discussion

Counterclaim-plaintiffs assert a single counterclaim for breach of contract, alleging that Newage is in breach of its obligation under Sections 9.4 and 10.13 of the Loan Agreement to reimburse counterclaim-plaintiffs for their reasonable costs and expenses incurred in this action (*see* CC ¶¶ 19-22). Newage now seeks dismissal. In doing so, Newage primarily argues that, after Newage repaid its debt in full, the Loan Agreement terminated under its plain terms, and, as a result, it could not have breached the agreement by failing to reimburse counterclaim-plaintiffs (NYSCEF # 55 – MOL at 5-7; NYSCEF # 67 – Reply at 3-7). In opposition, counterclaim-plaintiffs argue that they can maintain their claim for fees and costs because Newage breached the SPE Covenant during the pendency of the contract (NYSCEF # 64 – Opp at 6-9). They then separately contend that, even if the Loan Agreement did terminate, the fee-shifting provisions underlying their breach of contract claim survived any such termination (*id.* at 10-12).

To plead breach of contract, a plaintiff "must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445 [1st Dept 2016]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing'"(*Riverside S. Planning Corp. v CRP/Extell Riverside L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). "Whether a contract is ambiguous presents a question of law for resolution by the court" (*CRP/Extell Riverside*, 60 AD3d at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007]). And if an agreement is "reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield*, 98 NY2d at 569-570).

Here, there is no meaningful dispute that (1) counterclaim-plaintiffs provided Newage with a payoff statement listing the total amount required to repay the Loan, including any purported interest fees, and (2) Newage paid this demanded amount, albeit under protest (*see* FAC ¶¶ 116-118; Answer ¶¶ 116-118). That payoff had notable consequences on Newage's obligations and counterclaim-plaintiffs' rights and remedies as is evident from plain terms of the unambiguous Loan Agreement. For example, the Loan Agreement provides that it and its

corresponding obligations would remain in force while full payment of the Loan remained outstanding (*see* Loan Agreement § 10.1). This included the SPE Covenants, which "survive[d] for so long as any amount remains payable to Lender under this Agreement or any other Loan Document" (*id.* §§ 4.1.30[b], 4.2). The Loan Agreement also provided that the rights and remedies available to Lender as a result of any corresponding Event of Default would "remain in full force and effect until . . . the Debt has been paid in full" (*id.* § 8.2[b]). Stated succinctly, these provisions, construed together, reflect the parties' intent that full payoff of the Loan would extinguish counterclaim-plaintiffs' pursuit of attorneys' fees and cost, like those set forth in Sections 9.4 and 10.13.

Certainly, if the parties intended for counterclaim-plaintiffs to invoke the fee-shifting provisions to survive the termination of the Loan Agreements, they were aware of how to do so (*see, e.g.*, Loan Agreement § 9.2[i] ["The liabilities and obligations of the Indemnified Persons and the Indemnifying Persons under this Section 9.2 shall survive the termination of this Agreement and the satisfaction and discharge of the Debt"]; *id.* § 10.21 ["The provisions of this Section 10.21 shall survive the expiration and termination of this Agreement and the payment of the Debt"]). Yet no survival language appears within Sections 9.4 or 10.13. In the absence of any indication that the parties intended the fee-shifting obligations to continue upon full repayment of the Loan, there is no contractual provision for Newage to have breached in connection with counterclaim-plaintiffs' counterclaim.[1]

Counterclaim-plaintiffs offer two primary points to avoid this conclusion. Neither is persuasive. They first maintain that they can properly counterclaim for attorneys' fees because Newage breached the SPE Covenants during the pendency of the Loan Agreement, and by now litigating this issue through the present lawsuit, Newage is causing counterclaim-plaintiffs to incur "continuing damages" flowing its alleged breach (Opp at 6-7). Hence, by counterclaim-plaintiffs' account, this is an action "arising out of or in connection with" Newage's breach (*see id.* at 7). This contention, however, ignores the fact that any rights, remedies, or privileges under the Loan Agreement only remained in "full force and effect" up until the point of full payment of the Loan (Loan Agreement § 8.2[b]). And because full payment of the Loan—including corresponding default interest and fees tied to Newage's

[1] The cases cited by counterclaim-plaintiffs are neither to the contrary nor in support of a different conclusion (*see, e.g.*, *Maida v Retirement and Health Servs. Corp.*, 36 F3d 1097 (Table), at *6 [6th Cir 1994] [observing that contract expressly provided for attorney's fees arising out of any action brought to determine contractual rights and duties, and further noting that courts generally "look to the parties' intentions to determine whether the attorney fee provision survives" termination of a contract]; *Vogel v Boris*, 2024 WL 1884479, at *2 [SD NY Apr. 30, 2024, No. 20 Civ. 9301 (VM)] [agreement expressly provided for attorney's fees and costs if a dispute arising out of agreement resulted in a lawsuit between the parties]; *Cottman Ave. PRP Group v AMEC Foster Wheeler Envtl. Infrastructure Inc.*, 439 F Supp 3d 407, 435 [ED Pa 2020] [observing that contractual language unambiguously indicated that indemnification provision survived contractual expiration so long as "underlying negligence giving rise to the claim, loss, damage, liability, cost, or action" arose from the work contemplated by the agreement and during the contractual period]).

purported breach of the SPE Covenant—undisputedly occurred in March 2022, Newage had, at that point, cured any claimed Event of Default (*see* Answer ¶¶ 116-118). Although counterclaim-plaintiffs may be frustrated that they are now litigating the propriety the nonmonetary defaults they had claimed under the Loan Agreement, that does not mean that they are incurring "continuing damages" flowing from Newage's past purported breaches of the SPE Covenants.

Counterclaim-plaintiffs' second contention challenging the termination of the Loan Agreement is even less persuasive. On this point, counterclaim-plaintiffs aver that Newage's full payment of the Loan did not terminate its obligation to reimburse Lender because, for purposes the "Survival" provision set forth in Section 10.1, any fees and costs incurred to litigate Newage's lawsuit amount to additional "Debt"[2] under the Loan Agreement (Opp at 9). Not so. As counterclaim-plaintiffs' acknowledge, Newage's payment of the amounts set forth in the payoff statement contemplated payment of "the Loan in full" (*see* Answer ¶¶ 116-118 & Fourth Affirmative Defense). Consequently, upon Newage's payment, the "Debt" was no longer "outstanding and unpaid" under Section 10.1. Any other conclusion would lead to the absurd result that, even if a borrower paid its debt obligation in full, a later-filed lawsuit by that borrower contesting the propriety of default interest and fees can somehow revive that borrowers' debt obligations to a lender. Tellingly, counterclaim-plaintiffs cite to no provision of the Loan Agreement contemplating this outcome, nor do they identify any case law endorsing such a result.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that counterclaim-defendant's motion to dismiss is granted and counterclaim-plaintiffs' counterclaim is dismissed; and it is further

ORDERED that counsel for counterclaim-defendant shall serve a copy of this decision with notice of entry on counterclaim-plaintiffs within ten days of this filing.

10/15/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[2] "Debt" is defined as "the outstanding principal amount set forth in, and evidenced by, this Agreement and the Note together with all interest accrued and unpaid thereon and all other sums . . . due to Lender in respect of the Loan . . . ." (Loan Agreement at Debt Definition).