BPL Funding 100, LLC v Kramer
2025 NY Slip Op 31995(U)
June 2, 2025
Supreme Court, New York County
Docket Number: Index No. 659431/2024
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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BPL FUNDING 100, LLC,

Plaintiff,

- v -

DAVID KRAMER, MARK REED, WHITFARM REALTY LLC,

Defendant.

---X

INDEX NO. 659431/2024

MOTION DATE 01/17/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 48

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants' motion to dismiss is denied.

Background

In 2017, a project that aimed to redevelop the Brooklyn Public Library into a mixed-use space (which would include a luxury condominium) obtained financing via a series of loans. Relevant for this matter is the $110 million mezzanine loan and security agreement (the "MLA") between BPL Funding 100, LLC ("Plaintiff") and non-parties One Clinton LLC and Clinton Affordable LLC (together, the "Borrowers"). The MLA was also guaranteed by David Kramer, Mark Reed, and Whitfarm Realty LLC (collectively, the "Defendants"), who unconditionally guaranteed the payment and performance of the Borrowers. Plaintiff alleges that in early 2024, the Borrowers failed to repay the mezzanine loan by the maturity date and as a result, were required to obtain written consent from Plaintiff in order to sell any of the condominium units. Plaintiff also alleges that a condominium unit was sold without their written consent and that (contrary to the terms of the MLA) the Borrowers failed to remit 100% of the proceeds to Plaintiff.

It is Plaintiff's position that the Borrower's failure to 1) repay by the maturity date, 2) obtain written consent prior to sale of the unit, and 3) to remit 100% of the proceeds of said sale, constituted breaches of the MLA and springing recourse events that would trigger the Defendants' liability under the Guaranty for the full outstanding amount on the MLA. In December of 2024, Plaintiff filed this underlying proceeding, seeking to recover the outstanding amount plus attorneys' fees. Defendants bring the present pre-answer motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 [2017].

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 [1994].

Discussion

Defendant is moving to dismiss the first cause of action to the extent that it alleges that a Springing Recourse Event has occurred. They argue that documentary evidence shows that 1) Plaintiff consented in advance to the unit sale along with the withholding of a portion of the proceeds; 2) that the parties had extended the maturity date of the MLA and therefore the

Borrowers were not in default at the time of the unit sale; and 3) even if a Springing Recourse Event had occurred, it would be an unenforceable penalty to impose full personal liability on Defendants in this circumstance. In support of their argument, they have submitted affidavits, emails, and other agreements. Plaintiff has opposed, arguing that 1) the affidavits and emails submitted do not constitute documentary evidence; 2) Plaintiff never waived the MLA provisions; 3) it would not be unconscionable to impose recourse liability pursuant to the terms of the Guaranty. For the reasons that follow, while the Court is not prevented from considering the emails provided by Defendants, they have failed to conclusively establish through documentary evidence that there has been no springing recourse event.

The Emails in Question Can Be Considered as Documentary Evidence

As a preliminary matter, Plaintiff argues that the affidavits and emails submitted by Defendants does not constitute documentary evidence under CPLR § 3211(a)(1). Affidavits are generally not considered as documentary evidence. *See, e.g., Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431, 431 [1st Dept. 2012]. Emails, however, are somewhat different. The Second Department appears to consider them the same as affidavits for the purposes of a motion to dismiss. *See, e.g., 7 Mansion, LLC v. Calvano*, 226 A.D.3d 730, 732 [2nd Dept. 2024]. But in the First Department, emails can constitute proper documentary evidence. *See Art & Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 [1st Dept. 2014] (stating that "[e]mail correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1)); *Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 433 [1st Dept. 2014] (holding that "emails can qualify as documentary evidence if they meet the 'essentially undeniable' test"). The Court is not prevented from considering the emails in

question to see if Defendants have satisfied the documentary evidence standard simply because they are emails.

Defendants' Evidence Does Not Unassailably Establish That the Borrowers Were Not in Default at the Time of the Unit Sale

The analysis then turns to whether the Borrowers were in default when the condominium sale in question took place. Under the terms of the MLA, if the Borrowers were in default, then Plaintiff's written consent to the sale would need to have been obtained in advance. Defendants argue that there is documentary evidence establishing that the relevant parties consented to an extension of the maturity date on the MLA, and they have submitted a document purporting to be a Second Amendment and emails relating to the parties' discussion of the proposed Second Amendment. The Second Amendment, however, has not been signed by Plaintiff, who points to a provision in the MLA that requires any modification of the agreement to be in writing and signed by both Plaintiff and the Borrowers.

Defendants argue that even without a signature from Plaintiff, the maturity date was essentially waived and Plaintiff acted as if the Second Amendment was in effect. They cite to the case law regarding partial performance on unsigned writings. *See, e.g., Flores v. Lower E. Side Serv. Ctr.*, 4 N.Y.3d 363, 368 [2005] (holding that "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute – such as the statute of frauds"). But not only is there a provision in the MLA stating that any such amendment needs to be signed by both parties, there is also a provision stating that no delay in enforcing any right by Plaintiff under the MLA can be construed as a waiver. The Court of Appeals has held in a case with a similar no-waiver provision that the issue of whether the parties' course of behavior constituted a waiver is an issue of fact that cannot be resolved at the

summary judgment stage. *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 104 [2006]. Therefore, the unsigned Second Amendment does not constitute documentary evidence that unassailably establishes that the Borrowers were not in default at the time of the unit sale.

Any Favorable Inference from the Emails Regarding the Planned Sale and Distribution of Proceeds Must be Drawn in Favor of Plaintiff

The next step for analysis is determining whether, as Defendant argues, Plaintiff consented in advance to the unit sale. Defendants' evidence for this is that when Plaintiff was sent a detailed budget that included the unit sale and reflected the intent to withhold a portion of the proceeds, an agent for Plaintiff responded "Thanks." But Plaintiff points to the email sent immediately post-sale inquiring as to why a portion of the proceeds were withheld. They also argue that by accepting what proceeds were remitted to them, they were not waiving their entitlement to the rest. Because there are conflicting inferences that can be drawn from the emails (which on this motion must be taken in favor of Plaintiff), Defendants have not submitted documentary evidence that conclusively establishes that Plaintiff consented in advance to the unit sale or the decision to withhold a portion of the proceeds.

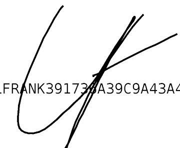
Enforcing the Recourse Liability Provision Would Not Violate Public Policy

Defendants finally argue that enforcing the full recourse liability against them would violate public policy and constitute an unenforceable penalty. Generally speaking, "a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for penalty and is unenforceable." *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.* 41 N.Y.2d 420, 424 [1977]. But the Second Department has held that a guaranty for a loan that was in most cases non-recourse, but

had a full recourse liability provision in case of a springing recourse event (as is the case here) "merely affixes liability, and is not, in effect, a liquidated damages provision that imposes an unenforceable penalty." *G3-Purves St., LLC v. Thomson Purves, LLC*, 101 A.D.3d 37, 38 [2nd Dept. 2012]. Defendants argue that Plaintiff may have "essentially manufactured the grounds for full recourse liability" and that their course of behavior surrounding the Second Amendment, and the unit sale indicates that Plaintiff had consented to the sale and withholding of proceeds. But as addressed above, this interpretation of the facts has not been conclusively and unassailing established by documentary evidence, and therefore granting a motion to dismiss on these grounds would be premature. The Court has considered the parties' other arguments and found them unavailing. Accordingly, it is hereby

ADJUDGED that the defendants' motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.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6/2/2025					LYLE E. FRANK, J.S.C.
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