BPL Funding 100, LLC v Kramer
2026 NY Slip Op 30263(U)
January 15, 2026
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.

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INDEX NO. 659431/2024

MOTION DATE 07/25/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

DAVID KRAMER, MARK REED, WHITFARM REALTY LLC,

Plaintiff,

-against-

BROOKLYN PUBLIC LIBRARY FUNDING 100 GP, LLC, U.S. IMMIGRATION FUND - NY LLC, NICHOLAS MASTROIANNI, MARK GIRESI, JOHN OLIVER, JOHN DOES 1-10

Defendant.

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Third-Party
Index No. 595625/2025

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 126, 128, 129

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is granted.

Background

The Initial Redevelopment Project and the Parties

This action arises out of a planned redevelopment of a Brooklyn Library branch into a new mixed-use development consisting of a library branch, retail, and a condominium (the "Project"). This Project was overseen by third-party defendant U.S. Immigration Fund NY LLC ("USIF"), which is a New York company responsible for the Project's administrative matters concerning compliance with United States Citizenship and Immigration Services guidelines

related to the EB-5 Immigrant Investor Program. This program allows foreign investors to be granted permanent residency in certain circumstances, and the members of BPL Funding 100, LLC ("BPL") are foreign citizens who contributed funds toward the Project as part of the EB-5 program. BPL is managed by Brooklyn Public Library Funding 100 GP, LLC ("BPLGP"). The controlling principal for BPLGP is USIF, who is in turn managed by third-party defendant Nicholas A. Mastroianni, II, with third-party Defendant Mark Giresi serving as COO and General Counsel.

In 2017, the Project was financed through a mix of senior mortgage loans and a $110 million non-recourse mezzanine loan. The Mezzanine Loan was documented through a loan and security agreement (the "Mezzanine Agreement") and was accompanied by a guaranty of recourse obligations (the "Mezzanine Guaranty"). The Mezzanine Loan was made between BPL and the developer, non-party One Clinton LLC, with an initial maturity date of June 15, 2022. Certain of One Clinton's obligations under the Mezzanine Agreement were guaranteed by defendants/third-party plaintiffs David Kramer, Mark Reed, and Whitfarm Realty LLC (collectively, the "Guarantors"). Relevant here, the guaranteed obligations and their triggering conditions fell under two categories, Recourse Liabilities and Springing Recourse Events.

Delays and Extensions

Due in part to COVID, the Project ran into substantial delays and in 2021, BPL and one Clinton amended the Mezzanine Loan in order to extend the maturity date to July 20, 2023. This amendment also included a single 6-month extension option which would allow One Clinton to extend the maturity date again to January 22, 2024. In connection with the amendment, the parties also executed an agreement ratifying the various obligations under the Mezzanine Loan and the Mezzanine Guaranty. The 6-month extension was triggered in August of 2023 via letter

agreement executed by both parties. At this time, the senior mortgage loan was close to being paid off. Then another extension of the maturity date was executed by the parties via letter agreement, with the new maturity date set as February 28, 2024. This date passed without payment by One Clinton.

Losses, Negotiations, and Alleged Collusion

In early February 2024, a Project update was sent to BPL members stating that more than $150 million of Project funds had been lost due to various factors such as delays and increased interest. Unsurprisingly, BPL members were unhappy with this development and retained counsel who began to send requests to USIF and BPL to take action in order to recover the lost funds, including legal action against One Clinton. As the loan was generally non-recourse, the Guarantors allege that faced with this pressure from the investors, BPL and USIF began to collude with the intent of causing One Clinton to breach in such a way as to trigger either the Recourse Liabilities or Springing Recourse Events provisions of the Mezzanine Guaranty, thus allowing recourse against the Guarantors.

As stated above, the final maturity date came and went without full payment by One Clinton. The senior loan was paid in full on February 28, 2024, which under the Mezzanine Loan triggered certain requirements on the part of One Clinton regarding unit sales in the condominium section of the project. In early April 2024, USIF's Senior Vice President of Finance, third-party defendant John Oliver (collectively with Mastroianni and Giresi the "Individual USIF Defendants"), emailed One Clinton stating that USIF and BPL wanted to make a one-year extension on the Mezzanine Loan. About a week later, Oliver emailed a draft amendment created by counsel for USIF. A further draft was made by USIF that included a requirement that One Clinton instruct tenants to deliver rents directly to BPL and was sent to

One Clinton on April 17, 2024. On April 29, a final clean copy was executed by One Clinton and returned to Oliver and USIF (the "Final Amendment"). USIF would never sign the Final Amendment, although the Guarantors allege that One Clinton believed that USIF was going to sign and operated in the following days under that impression. In late May, One Clinton asked Oliver for bank account information in order to facilitate the tenant rent payments directly to BPL, and once the information was received letter to the tenants were sent out in accordance with the proposed Final Amendment.

Unit 30C and Proceed Distribution

Alongside the discussions over the Final Amendment, Oliver and One Clinton exchanged emails discussing the sale of Unit 30C and the distribution of the proceeds following the closing, (which, like so much of the Project, had been delayed). In June of 2024, One Clinton sent Oliver a proposed budget that included a retention of certain funds from the sale of 30C to fund the Project with $1.6 million remaining being distributed to BPL. There was no objection at the time to the proposed budget. Shortly thereafter, the unit closed, and One Clinton emailed Oliver that the net proceeds would be sent once the check cleared. In July, an update as to all pending sales was provided to Oliver, who questioned why BPL was only being sent $1.6 million from Unit 30C. In response, One Clinton stated that as previously discussed the remaining funds were being retained to fund the Project. In late August, BPL's new counsel sent One Clinton a demand letter asserting the belief that the proposed Final Amendment had not altered the maturity date, that One Clinton was therefore in breach, that failure to obtain BPL's written consent to the sale of Unit 30C constituted a Springing Recourse Event, and that the retention of the proceeds from Unit 30C triggered the Recourse Liabilities provision from the Mezzanine Guaranty. A demand for full payment followed in mid-November.

Procedural History

This proceeding was filed in December of 2024 – one of several actions to arise out of the Project. The complaint was brought by BPL against the Guarantors, seeking to enforce the Mezzanine Guaranty. The Guarantors brought a motion to dismiss, which was denied (the "June Order"). They then answered, asserting ten affirmative defenses and three counterclaims. The Guarantors also filed a Third-Party Complaint, in which three claims for indemnification, tortious interference, and fraudulent misrepresentation are asserted against BPL, USIF, the Individual USIF Defendants, and unidentified individuals that the Guarantors allege aided USIF and BPLGP in perpetuating the alleged scheme to force a default on the Guarantors (collectively, the "Third-Party Defendants").

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]. A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the

pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 [1977].

Discussion

In this motion, the Third-Party Defendants move to dismiss the affirmative defenses and counterclaims asserted in the Answer, and the Third-Party Complaint in its entirety. They move based on a variety of grounds including that the Guarantors waived the ability to assert counterclaims, claims, and affirmative defenses, that the asserted equitable affirmative defenses are unavailable in an action at law, and that the claims asserted fail for other reasons. The Guarantors oppose the motion. For the reasons that follow, the motion is granted on the grounds that all affirmative defenses, counterclaims, and claims were waived by the Mezzanine Guaranty.

An Unconditional Waiver May be Counteracted by Wrongful Conduct that Triggers Liability, But Not When the Guaranteed Party Is Already in Default at the Time of the Alleged Wrongful Conduct

The Third-Party Defendants argue that the counterclaims, claims, and affirmative defenses all fail as a matter of law because the Mezzanine Guaranty expressly prohibits the assertion of any claim or defense of One Clinton or against the payment of the guaranteed obligations. They cite to *Cooperatieve*, in which the Court of Appeals noted that an absolute and unconditional guaranty is often found to preclude the assertion of "a broad range of defenses", including fraud. *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.", N.Y. Branch v. Navarro*, 25 N.Y.3d 485, 493. The Court of Appeals held there that there was no

"categorical exception for collusion claims from the absolute liability provision" of an unconditional guaranty. *Id*., at 495. The Guarantors point to other language in *Cooperatieve,* however, where the Court of Appeals noted that under the case *Canterbury,* an unconditional guaranty "does not foreclose a guarantor's challenge that the creditor's wrongful post-execution conduct triggered the event that accelerates or causes the guarantor's liability." *Id*., at 496.

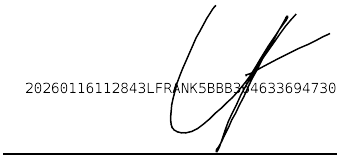
The Third-Party Defendants argue that because the Mezzanine Guaranty waived future claims and defenses, the exception for alleged wrongful post-execution conduct does not apply. But even when an unconditional guaranty purports to waive any defense or claim "whatsoever", under the narrow *Canterbury* exception a defense that is grounded in the claim that the other party's wrongful conduct was what caused the default triggering guarantor liability is exempt from the otherwise unconditional waiver. *See, e.g.*, *Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 211 (1st Dept. 2007) (finding that the case at hand was not analogous to the *Canterbury* wrongful-conduct exception); *Vandergrand Props. Co., L.P. v. Warnock*, 206 A.D.3d 597, 598 (1st Dept. 2022) (finding that an issue of fact going to wrongful post-execution conduct had not been raised). Because here the Guarantors allege that the Third-Party Defendants wrongfully schemed to lull One Clinton into falsely believing that they were no longer in default, it follows that the unconditional waivers would not apply under the *Canterbury* exception.

But fatal to this argument is the crucial fact that at the time the alleged wrongdoing occurred, One Clinton was indisputably in default as the maturity date had passed without payment. In *Red Tulip,* the First Department held that the wrongful conduct/*Canterbury* exception to an unconditional guaranty waiver did not apply when the party that was the subject of the guaranty was already in default at the time of the alleged wrongful conduct. *Red Tulip,* at 211. While a properly pled allegation of wrongful conduct causing the triggering of the

Guarantor's liability would stand despite the unconditional claim waiver provision, because here all alleged wrongful conduct occurred *after* One Clinton was already in default on the Mezzanine Loan, the wrongful conduct exception does not apply. Accordingly, it is hereby

ADJUDGED that the motion is granted; and it is further

ADJUDGED that the counterclaims and affirmative defenses pled in the answer and the third-party complaint are dismissed.



1/15/2026
DATE

LYLE E. FRANK, 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