BankUnited, N.A. v Gray-Line Dev. Co. LLC
2026 NY Slip Op 31829(U)
April 28, 2026
Supreme Court, New York County
Docket Number: Index No. 654176/2022
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** 54

Justice

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BANKUNITED, N.A.,

INDEX NO. 654176/2022

Plaintiff,

- v -

DECISION AFTER TRIAL

GRAY-LINE DEVELOPMENT CO. LLC and HARRY MACKLOWE,

Defendants.

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In December 2013, plaintiff BankUnited, N.A. issued a $14,175,000 loan to defendant Gray-Line Development Co. LLC (Gray-Line) (*see* Dkt. 169 [the Note]). The proceeds were used to develop property in Manhattan. The source of repayment was rent revenue from Gray-Line's commercial tenant, Walgreen Eastern Co., whose lease expired in January 2022. Gray-Line defaulted on the Note in March 2022. Plaintiff commenced this action in November 2022 to enforce the Note and two springing guaranties that defendant Harry Macklowe executed: a Springing Master Lease Guaranty (Dkt. 172 [the Master Lease Guaranty]) and Principal Shortfall Guaranty (Dkt. 171 [the Shortfall Guaranty]).* In November 2024, the court granted plaintiff summary judgment on the Note and the Master Lease Guaranty and denied summary judgment on the Shortfall Guaranty (*see* Dkt. 157). A bench trial was held in September 2025 (*see* Dkt. 304), after which the parties filed post-trial briefs (Dkts. 305, 306). For the reasons that follow, the court finds that the Shortfall Guaranty is unenforceable.

The Shortfall Guaranty provides that Macklowe:

> Unconditionally and absolutely guarantees to the Mortgagee the sum that would be necessary (if applied in reduction of the principal balance of the Loan) to cause the debt service coverage ratio [DSCR] of the Property (as determined by the Mortgagee in its sole discretion based on the market rental income as determined by the most recent appraisal obtained by the Mortgagee, increased by 3% per annum since the date of said appraisal and adjusted by the vacancy and loss factor determined as the market factor in said appraisal, the Mortgagee's underwritten expenses, the then-applicable interest rate plus 100 basis points and the then-applicable amortization period) to be 1.25:1. This Springing Principal Shortfall Guaranty shall become effective if the Walgreen Lease (as defined in the Mortgage)

* Macklowe also executed a full-recourse Carveout Guaranty that is not at issue in this action (*see* Dkt. 173).

DECISION AFTER TRIAL

> shall expire by its terms, and the tenant thereunder shall not have exercised its option to extend the term thereof and **shall remain in effect until such time** as the Property is re-leased to a new tenant, satisfactory to the Mortgagee in its reasonable discretion, pursuant to a written lease which provides for a rent sufficient to cause the Property to have a debt service coverage ratio (as determined by the Mortgagee in its sole discretion based on trailing quarterly actual income, the Mortgagee's underwritten expenses, the then-applicable interest rate plus 100 basis points and a twenty-five (25) year amortization period) of no less than 1.25:1, and such tenant shall have taken possession of the Property, opened for business and commenced paying rent (Dkt. 171 at 1-2 [emphasis added]).

Plaintiff explains the four steps it took to calculate the principal shortfall: (1) it determined the Property's net operating income (NOI) "by reference to the market rental income and the associated vacancy and loss factor from BankUnited's most recent appraisal and BankUnited's underwritten expenses"; (2) it divided "the calculated NOI by 1.25 to determine the total debt service that would produce a DSCR of 1.25 to 1.00"; (3) by using "the interest rate and amortization inputs in the Principal Shortfall Guaranty" it calculated "the principal amount of a hypothetical loan that would require debt service payments equal to the hypothetical debt service it calculated in step two"; and (4) it subtracted "the principal amount of the hypothetical loan calculated in step three from the principal balance of the existing Loan, with the resulting difference being the sum – the principal shortfall" (Dkt. 306 at 13). After obtaining an appraisal, plaintiff concluded that "the Property had a negative NOI" and thus "could not calculate a loan that would generate a DSCR of 1.25 to 1.00" (*see id.*). According to plaintiff, this means that Macklowe is liable for the full principal balance of the loan (*see id.* at 13-14).

The court disagrees. While the conditions triggering Macklowe's liability under the Shortfall Guaranty have indisputably been met, this guaranty, by its terms, does not evidence an intent for Macklowe to be held liable for the principal balance of the loan at maturity. Such a conclusion would be inconsistent with his liability only being in effect "until such time as the Property is re-leased to a new tenant" where the lease "provides for a rent sufficient to cause the Property to have a [DSCR]" of 1.25 to 1.00. Holding Macklowe unequivocally liable for the full loan balance would deprive him of the opportunity to avail himself of that provision if and when a replacement tenant is found.

The Shortfall Guaranty does not clearly set forth the most basic, fundamental terms of the guaranty: how much Macklowe must pay and when he must pay. Plaintiff notes that "the Master Lease Guaranty [also] does not say when or if Macklowe 'shall' make any payments, yet Macklowe concedes that 'the only rational interpretation' is that Macklowe had to make monthly payments to BankUnited" (Dkt. 306 at 21). For the Master Lease Guaranty that makes sense in context, as it was guaranteeing monthly rent payments until a new tenant was procured. The Master Lease Guaranty provides that Macklowe owes "a sum equal to the amount of the base rent under the Walgreen Lease" (Dkt. 172 at 1). This is a clear textual indication that the parties intended there to be a monthly payment obligation. By contrast, the Shortfall Guaranty providing that Macklowe owes "the sum that would be necessary...to cause the debt service coverage ratio of the Property...to be 1.25:1" does not imply any obvious due date. Plaintiff rejects the notion that the Shortfall Guaranty requires

periodic debt service payments and instead argues that a lump-sum payment of the principal balance is due upon maturity. This is not a reasonable interpretation.

Plaintiff acknowledges that "the operative language in the two Springing Guaranties **is substantially identical**, providing that Macklowe guarantees to BankUnited a 'sum' that will be calculated in accordance with the applicable guaranty" (Dkt. 306 at 21 [emphasis added); yet, somehow the same language requires monthly payments under the Master Lease Guaranty but a lump sum under the Shortfall Guaranty, despite both guaranties expressly providing that Macklowe's liability would abate upon procurement of a new tenant. The words that expressly provide for such a liability cutoff—"shall remain in effect until such time"—appear in both guaranties. The parties surely intended them to have the same meaning: retaining the possibility of Macklowe's liability abating if and when a new tenant was procured until the extended term of the lease would have ended. The Master Lease Guaranty requiring Macklowe to cover missing monthly rent payments until that time is consistent with the language used. The Shortfall Guaranty requiring him to make a lump-sum payment in the amount of the full principal balance is inconsistent with that language. It would render "shall remain in effect until such time" in the Shortfall Guaranty to be meaningless (*see Southern Advanced Materials, LLC v Abrams*, 220 AD3d 74, 83 [1st Dept 2023]; *see also Shah v 20 E. 64th St. LLC*, 230 AD3d 405, 411 [1st Dept 2024]). If the parties contemplated that Macklowe could be held fully liable for the outstanding principal balance before the extended term of the lease would have ended they would not have included the "shall remain in effect until such time" caveat in the Shortfall Guaranty (*see 1995 CAM LLC v West Side Advisors, LLC*, 2025 WL 2955889, at *3 [NY Oct. 21, 2025] ["If the guaranty continued until the end of the Lease, there would be no need to reiterate the requirement that the Premises be delivered 'completely vacant' in the guaranty"]). Thus, the court finds that plaintiff's interpretation lacks a credible textual basis (*see id.* at *2 ["an interpretation that renders language in the guaranty superfluous is a view unsupportable under standard principles of contract interpretation"]).

Plaintiff, however, proffers another evidentiary path towards this conclusion based on extrinsic evidence submitted at trial. That evidence is also wholly unpersuasive.

At trial, Jill Marie Ho Tai testified that the Shortfall Guaranty "was designed to ensure that the Borrower could secure take out financing at maturity and repay the Loan in full" by requiring "Macklowe to pay down the principal balance of the Loan (make up the projected 'principal shortfall') so that the cash flow from the Property with a new tenant in place would support refinancing from a third-party lender at a debt service coverage ratio of 1.25 to 1.00" (Dkt. 298 at 4). Ho Tai supports her testimony by relying on plaintiff's own internal credit memorandum, which provides that "in the event that Walgreen's does not exercise their renewal option, Harry Macklowe will personally guaranty the pay-down amount required for the Facility to be refinanced" (Dkt. 190 at 11). While that may have been the scope of what plaintiff wanted Macklowe to guaranty, as explained above, that intention is not reflected in the Shortfall Guaranty itself. After all, the language in the credit memorandum is clear and unambiguous and could easily have been used in the Shortfall Guaranty. Plaintiff does not explain why it was not.

Significantly, plaintiff admits that the credit memorandum was never shared with Macklowe or his representatives, nor were its contents discussed with them (Dkt. 304 at 58-59). Plaintiff also did not submit any proof that its understanding of the Shortfall Guaranty as reflected in the credit memorandum was conveyed to Macklowe or the individual who negotiated on his behalf, Bruce Kimmelman. The court does not credit Ho Tai's testimony that this understanding was confirmed in writing (*see* Dkt. 298 at 4-5), as the emails with Kimmelman that she cites are untethered to the language used in either the credit memorandum or the guaranty that was executed months later. The Kimmelman email, moreover, lacks anything close to confirmation of or agreement to plaintiff's understanding (*see* Dkt. 192 [September 27, 2013 email stating "the payment guaranty is just on the differential of the shortfall on refinance proceeds"]). At most, the credit memorandum reflects what plaintiff subjectively believed it was procuring. Absent evidence that such understanding was explicitly shared with Macklowe or Kimmelman before execution of the guaranty, there is no reason to believe that there was ever a meeting of the minds on its scope.

Another reason to doubt that the credit memorandum is proof of the parties' meeting of the minds is that plaintiff itself told Macklowe that only the final terms of the guaranty would control and not other preliminary documents such as the term sheet (*see* Dkt. 224 at 1). Thus, if other terms did not make their way into the final agreement there is good reason to assume they were never agreed upon by the parties. This concern is particularly acute with respect to the Shortfall Guaranty, as there is undisputed evidence that Macklowe was resistant to providing one at all (*see* Dkt. 298 at 6). The notion that he agreed to provide a guaranty materially broader than expressly drafted is not credible. Under these circumstances, the court cannot conclude that he actually agreed to those terms or that there was a meeting of the minds that is not actually reflected in the final document.

The court has considered the other evidence and testimony proffered by plaintiff and does not find it to be credibly probative of the parties' intent (*see* Dkt. 305 at 19-24).

A guaranty is unenforceable if it is missing material terms and plaintiff fails to submit credible evidence of a meeting of the minds at trial (*Bellevue Builders Supply Inc. v Belmonte*, 271 AD2d 849 [3d Dept 2000]). That is the case here. The court finds plaintiff's textual interpretation of the Shortfall Guaranty unpersuasive and that it has not proven there was a meeting of the minds based on any credible extrinsic evidence. Plaintiff's interpretation requires inferring missing material terms in a manner that would negate a material term that actually appears in the agreement--the "shall remain in effect until such time" caveat. Plaintiff has not proffered any reasonable way to harmonize its interpretation with that provision, nor can the court discern how to enforce the Shortfall Guaranty without fundamentally rewriting it to impose broad personal liability that lacks any credible support in the record.

While plaintiff may have wanted additional protection from Macklowe above that provided in the Master Lease Guaranty, it was incumbent on plaintiff to properly document this intent in the Shortfall Guaranty. Plaintiff is a bank. It, with the aid of sophisticated counsel, knows how to make guaranteed obligations perfectly clear. It had the capacity to reflect its intent clearly in writing just as it did in the credit memorandum. It did not. It

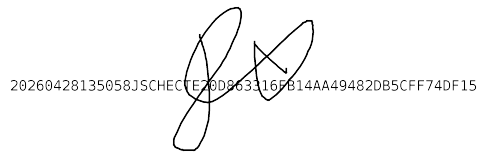
also failed to clearly convey its intent to Macklowe prior to execution. Instead, plaintiff drafted an incoherent guaranty and failed to ensure there was a meeting of the minds.

Indeed, years later, plaintiff apparently realized it drafted a guaranty that was missing material terms and tried unsuccessfully to get Macklowe to agree to its interpretation (*see* Dkt. 305 at 13). He refused (*see id.*, citing Dkt. 300 at 7). While this refusal could be construed as further evidence of a lack of a meeting of the minds or simply as Macklowe being opportunistic; either way, it establishes that plaintiff perceived it had a problem of its own making.

In the end, the text of the guaranty does not support plaintiff's interpretation nor does the extrinsic evidence prove any meeting of the minds as to plaintiff's purported expectation. The court cannot rewrite the Shortfall Guaranty to provide plaintiff with an extremely broad guaranty to which Macklowe never expressly agreed (*see White Rose Food v Saleh*, 99 NY2d 589, 591 [2003] ["A guaranty is to be interpreted in the strictest manner"], *accord Lo-Ho LLC v Batista*, 62 AD3d 558, 560 [1st Dept 2009]; *see also 665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1st Dept 1999] [guaranties "are to be strictly construed in favor of a private guarantor" and a "guarantor should not be bound **beyond the express terms of his guarantee**"] [emphasis added]). Thus, plaintiff failed to carry its burden of proof, as it has not proffered any reasonable interpretation of how much is owed or when such amounts are owed (*see Parris v Schneider Elec. Mobility NA, Inc.*, 197 AD3d 710 [2d Dept 2021]).

To be sure, as noted, Macklowe is still liable under the Master Lease Guaranty and Gray-Line is liable under the Note. The court will direct entry of judgment after addressing plaintiff's fee application. For the avoidance of doubt, by virtue of this decision plaintiff is not entitled to fees for trial; thus, its application should not seek fees incurred after summary judgment was granted.

Accordingly, it is ORDERED that, unless the parties reach an agreement on fees (in which case the parties shall e-file and email the court a joint letter to that effect along with a proposed order directing the entry of judgment), plaintiff shall e-file a fee application (including billing records) and a proposed order directing the entry of judgment by May 19, 2026, and defendants may e-file any objections to the fee application and proposed order by June 9, 2026.



DATE: 4/28/2026 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**