Siegel v People's United Bank

Supreme Court of New York, Kings County

September 4, 2014, Decided

505372/2013

Reporter

44 Misc. 3d 1227(A) *; 2014 N.Y. Misc. LEXIS 3978 **; 2014 NY Slip Op 51358(U) ***

[*1]** Myron Siegel, Yosef Gruber and Mordechai Hirsch, Plaintiffs, against People's United Bank as Successor in Interest to Bank of Smithtown, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: **[**1]** For Plaintiffs: Madeline Greenblatt, Esq., Berg & David, PLLC, Brooklyn, NY.

For Defendant: Christopher E. Vatter, Esq., Jaspan Schlesinger LLP, Garden City, NY.

Judges: Carolyn E. Demarest, J.

Opinion by: Carolyn E. Demarest

Opinion

Carolyn E. Demarest, J.

In this action by plaintiffs Myron Siegel (Siegel), Yosef Gruber (Gruber), and Mordechai Hirsch (Hirsch) (collectively, plaintiffs) seeking damages for an alleged breach of a contract arising from the failure to fund a construction loan pursuant to a commitment letter, defendant People's United Bank (defendant), as successor in interest to Bank of Smithtown, moves, under motion sequence number two, for an order, pursuant to CPLR 3211 (a) (1), (3), and/or (7), dismissing, with prejudice, plaintiffs' complaint as against it predicated on the claimed grounds that this action is barred as a matter of law based upon the documentary evidence, that plaintiffs' complaint fails to state a cause of action, and that plaintiffs lack standing to maintain this action.

BACKGROUND

In 2007, Siegel partnered with Gruber and Hirsch, who are experienced developers, for the purpose of developing properties located at 29-31 and 37-41 Lexington Avenue, in Brooklyn, New York (the properties) into two new multi-unit [**2] residential buildings. The project was also to encompass the conversion of a building located at 25-27 Lexington Avenue into a 25-unit development. According to Siegel, he was to retain a 51% ownership interest in the development and Gruber and Hirsch were to retain the remaining 49% ownership interest. At that time, the properties were owned by the Myron and Selina Siegel Family Limited Partnership, a family limited partnership that Siegel fully controlled.

In order to facilitate and commence the beginning stages of construction at the properties, plaintiffs obtained a hard money loan in the amount of $4,300,000, and a mortgage was placed on the properties to secure this hard money loan. Plaintiffs then sought to secure a first mortgage construction loan in the amount of $10,047,000 for the purpose of satisfying the hard money loan and to complete the construction of the project at the properties. In February 2008, United Commercial Capital, a mortgage broker, referred plaintiffs to the Bank of Smithtown (the Bank) to obtain this construction loan.

Thereafter, the Bank entered into a Commercial Mortgage Commitment, dated February 26, 2008, with plaintiffs. The Commercial Mortgage Commitment, [**3] which was executed, on behalf of the Bank, by Robert J. Anrig, its executive vice-president and chief lending officer, and addressed to plaintiffs, stated that plaintiffs' application for a land and construction loan mortgage on the property had been approved under the terms set forth [***2] therein for the amount of $10,047,000, subject to the submission of satisfactory proof of legal occupancy, compliance with all applicable government regulations, and contingent on its approval of all facts disclosed by the title company search and survey to be furnished by them, as the borrowers. The Commercial Mortgage Commitment set forth that the term of the loan was for 24 months, that the principal advances would be available on a percentage of completion basis in accordance with the construction budget submitted by plaintiffs and approved by the Bank's construction consultant. It specified that the Bank would permit a first advance, at closing, in the maximum amount of $1,800,000 or 75% of the "as is" appraised value, whichever was less.

Pursuant to the terms of the Commercial Mortgage Commitment, the interest rate for this loan was to be the prime lending rate plus .50%, and plaintiffs were to **[**4]** be granted two six-month extension options at each of the maturity dates of the loan upon payment of a fee due at the time the option was exercised. In addition, the Commercial Mortgage Commitment provided that the loan was to be evidenced by a note and secured by a first mortgage on the properties, and repayment of the mortgage was to be guaranteed by plaintiffs. The Commercial Mortgage Commitment required plaintiffs to pay the Bank a non-refundable commitment fee of $104,700 for the loan, and they paid the Bank $10,000 with their application towards this fee, with the balance of $94,700 due at the closing.

Under the heading "Appraisal," the Commercial Mortgage Commitment provided as follows:

"This commitment is subject to a satisfactory appraisal of the properties which will be performed by Standard Evaluation Services. The appraisal will provide an as is' value of the combined properties. The as is' value must b[e] in the minimum amount of $2,400,000.00. The appraisal of the properties will also provide for an as completed' value of the properties as rental apartment buildings as well as a residential for sale condominium buildings. The combined as completed' value of the two buildings **[**5]** must b[e] in the minimum amount of $13,396,000.00. The appraisal must be acceptable to [the Bank], in its sole discretion. The fee for said appraisal is estimated at $4,800.00, subject to the final bill, and must be prepaid."

The Commercial Mortgage Commitment set forth that, at the time of the closing of the loan, plaintiffs were required to pay all expenses incurred in connection with the loan, including the appraisal fees and other specified fees. The Commercial Mortgage Commitment provided that certain listed documents were required to be received by the Bank's attorney prior to scheduling the closing. Under "Loan Closing," the Commercial Mortgage Commitment stated that "[u]pon receipt of the above documents, our attorney **[***3]** will contact you or your attorney to schedule the closing."

The Commercial Mortgage Commitment further provided that it was made subject to acceptance by plaintiffs within 15 days thereof, and "following such acceptance [wa]s to continue in full force and effect for a period of 90 days from the date [t]hereof." According to the terms of the Commercial Mortgage Commitment, plaintiffs were to accept such commitment by executing a copy of the Commercial Mortgage Commitment and returning **[**6]** it with a check for $12,000,

which encompassed the payment of the appraisal fee, an environmental fee, a construction consultant fee, a flood search fee, and partial payment of the Bank's legal fee. In addition, the Commercial Mortgage Commitment provided that "[i]f the loan provided for herein is not closed within the same time specified, then, at the option of the Bank, this commitment will expire and become null and void." Plaintiffs accepted the Commercial Mortgage Commitment by executing it and paying the required fees within the 15-day period.

An internal memorandum by the Directors' Loan Committee of the Bank, dated February 26, 2008, entitled "Commercial Building Loan Proposal," set forth that the borrowers were plaintiffs or a single asset entity controlled by plaintiffs, that the loan amount was $10,047,000, that the purpose of the loan was that the borrowers were planning on constructing two buildings that were on the same street, that the project would consist of 34 residential units and 17 parking spaces, and that both buildings would be five stories in height. One of the conditions listed for the loan was a maximum loan to value of 75%. Under the heading, "Project Cost Analysis," **[**7]** it set forth that the land was valued at $4,420,000. Under the heading "Collateral," it set forth that the Bank would take a first mortgage that would be spread to both properties, and that the Bank would "obtain an as completed' value of the building both as a rental apartment building and a for sale condominium project." It stated that "[b]oth values w[ould] have to fall with the 75% guideline for the Bank to fund the entire loan amount of $10,040,000." This Commercial Building Loan Mortgage Proposal was never provided to plaintiffs.

An appraisal, dated April 8, 2008, addressed to the Bank was prepared by Standard Valuation Services (the appraisal). The appraisal stated that its purpose was to estimate the "as is" market value and the "upon completion" market value, based upon the value definitions and special assumptions and limiting conditions outlined therein. It further stated that it also estimated the market value of the properties "upon completion" if utilized as a rental facility. The appraisal set forth that the highest and best use of the properties would be a rental apartment building. It estimated the market value of the properties to be: $5,000,000 "As Is" on March 21, 2008; $12,200,000 **[**8]** "Upon Completion" in June 2009; and $13,400,000 "As Rental Building." Plaintiffs assert that they never received a copy of this appraisal.

Plaintiffs allege that they submitted all documents required under the Commercial Mortgage Commitment and met all required conditions in a timely manner. According to Siegel, he, Gruber, and Hirsch further showed all of the completed plans and the permits **[***4]** that they

obtained to the Bank. Plaintiffs claim that because they entered into the Commercial Mortgage Commitment with the Bank, they did not seek commitments from other lenders for the construction loan. They further claim that after the Commercial Mortgage Commitment was signed, the Bank repeatedly reassured them that the loan would be funded in accordance with the terms of the Commercial Mortgage Commitment. Siegel, in an affidavit, attests that, at the urging of the Bank, he, Gruber, and Hirsch laid the foundation for the properties and completed steel work in one of the foundations.

According to Siegel, plaintiffs were ready, willing, and able to close on the loan during the 90-day period set forth in the Commercial Mortgage Commitment, but the Bank, without providing any reason, delayed the **[**9]** closing. Siegel states that even after the 90-day period had expired, the Bank continued to work with them toward the closing of the loan and repeatedly assured them of an imminent closing while their respective attorneys negotiated back and forth with regard to setting up the closing. Siegel maintains that the Bank never stated that it was declaring the Commercial Mortgage Commitment null and void as a result of being unable to close within the prescribed 90-day time period. He explains that it was not until over two months subsequent to the expiration of the 90-day period, after numerous assurances by the Bank that the closing would occur and following continued negotiations between their respective lawyers to meet that end, that plaintiffs received a letter from the Bank, dated August 5, 2008, indicating that the Bank was not going to fund the loan.

This August 5, 2008 letter, addressed to ABP Realty LLC (ABP) (which consists of the Myron and Selina Siegel Family Limited Partnership, in which Siegel is a general partner, and M & Y Lexington, LLC, in which Hirsch is a member), c/o United Commercial Group Inc., enclosed a refund check in the amount of $9,671 of the $22,000 collected **[**10]** from plaintiffs in connection with the Commercial Mortgage Commitment, and merely stated that this check represented the refund of money collected on the "withdrawn loan" less certain specified fees, without providing any other explanation as to the reason that it would not be closing on the loan.

According to plaintiffs, the Bank failed to meet its obligation to lend them $10,047,000 without good cause and in violation of the terms of the Commercial Mortgage Commitment. Plaintiffs assert that by the time that the Bank made it known that it was not going to meet its obligation to lend them these monies, as set forth in the Commercial Mortgage Commitment, they did not have time to seek out funding from another source. Plaintiffs allege that due to the Bank's

alleged breach of its contractual obligation to make the construction loan to them, they were unable to meet their obligation under the hard money loan. Plaintiffs' complaint alleges that as a result, they lost the properties in foreclosure. However, after defendant submitted proof, on this motion, that according to ACRIS, there was no foreclosure or referee's deed pertaining to the properties, Siegel, in his affidavit, explained **[**11]** that the properties were lost because they had to be turned over to the hard money lender in lieu of foreclosure. Plaintiffs also **[***5]** contend that as a result of the Bank's failure to fund the loan, the development never materialized and the construction project could not be completed, resulting in the loss of the profits that would otherwise have been generated by the completion of the construction project.

On September 11, 2013, plaintiffs filed this action against defendant, as the successor in interest to the Bank. Plaintiffs seek damages of not less than $50,000,000 based upon the alleged breach of the Bank's contractual obligation to lend them $10,047,000 pursuant to the Commercial Mortgage Commitment for the construction loan. On November 14, 2014, defendant e-filed its instant motion to dismiss plaintiffs' complaint.

DISCUSSION

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible [favorable] inference, and determine only whether the facts as alleged fit within any cognizable legal **[**12]** theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704, 864 N.Y.S.2d 70 [2d Dept 2008], *lv dismissed* 12 NY3d 878, 910 N.E.2d 1002, 883 N.Y.S.2d 173 [2009]; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414, 754 N.E.2d 184, 729 N.Y.S.2d 425 [2001]). "In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), 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 a motion for dismissal will fail" (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818, 865 N.Y.S.2d 667 [2d Dept 2008], quoting *Morris v Morris*, 306 AD2d 449, 451, 763 N.Y.S.2d 622 [2d Dept 2003]). "[B]are legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference" (*id.*). However, dismissal of the complaint

pursuant to CPLR 3211 (a) (7) "will be warranted only in those situations in which it is conclusively established that there is no cause of action" (*Town of N. Hempstead v Sea Crest Constr. Corp.*, 119 AD2d 744, 746, 501 N.Y.S.2d 156 [2d Dept 1986]).

Furthermore, affidavits and other documentary evidence submitted in opposition to the motion "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976]). To the extent that extrinsic evidence, including affidavits and documentary evidence, is considered, "the standard of review under a CPLR 3211 motion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 731 N.E.2d 577, 709 N.Y.S.2d 861 [2000], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]).

Pursuant to CPLR 3211 (a) (1), a party "may move for judgment dismissing one or more causes **[**13]** of action against [it] on the ground that . . . a defense is founded upon documentary evidence." A dismissal pursuant to CPLR 3211 (a) (1) is warranted on the **[***6]** basis that a defense based upon documentary evidence exists and the documentary evidence submitted "definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim" (*Berardino v Ochlan*, 2 AD3d 556, 557, 770 N.Y.S.2d 75 [2d Dept 2003]; *see also Leon v Martinez*, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; *Forftis Fin. Servs.v Fimat Futures USA*, 290 AD2d 383, 383, 737 N.Y.S.2d 40 [1st Dept 2002]). The documentary evidence submitted must conclusively establish a defense to the asserted claim as a matter of law and utterly refute the complaint's factual allegations (*see Leon*, 84 NY2d at 88). Thus, "[a] motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Fontanetta v John Doe 1*, 73 AD3d 78, 83, 898 N.Y.S.2d 569 [2d Dept 2010], quoting *Fortis Fin. Servs.*, 290 AD2d at 383).

CPLR 3211 (a) (3) provides for dismissal of an action where "the party asserting the cause of action has not legal capacity to sue." CPLR 3211 (a) (3) also embraces the ground of the lack of standing to sue, and this statute is, therefore, available to support a motion to dismiss on this ground (*see Hecht v Andover Assoc. Mgt. Corp.*, 114 AD3d 638, 640, 979 N.Y.S.2d 650 [2d Dept 2014]).

Defendant, in support of its motion insofar as it seeks dismissal of plaintiffs' complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, contends that plaintiffs have failed **[**14]** to state a viable claim for breach of contract. "The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages" (*Kausal v Educational Prods. Info. Exch. Inst.*, 105 AD3d 909, 910, 964 N.Y.S.2d 550 [2d Dept 2013], *appeal dismissed* 21 NY3d 1039 [2013]; *see also Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127, 921 N.Y.S.2d 329 [2d Dept 2011]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806, 921 N.Y.S.2d 260 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of NY, Inc.*, 69 AD3d 802, 803, 893 N.Y.S.2d 237 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695, 498 N.Y.S.2d 12 [2d Dept 1986]).

Defendant argues that plaintiffs have not satisfied these elements. In making this argument, defendant, citing *Transit Mgt., LLC v Watson Indus., Inc.* (23 AD3d 1152, 1154, 803 N.Y.S.2d 860 [4th Dept 2005]), contends that a commitment letter, such as the Commercial Mortgage Commitment, is merely a preliminary agreement to agree, and is not a final binding contract that is enforceable. Defendant's argument, however, is erroneous. In *Transit Mgt., LLC* (23 AD3d at 1154), the Appellate Division, Fourth Department, specifically held that "a commitment letter proffered by a lender and accepted by a prospective borrower constitutes an enforceable contract."

However, as defendant contends, where a commitment letter contains a condition precedent, and it is undisputed that this condition precedent is not met, the commitment letter is not enforceable (*see Transit Mgt., LLC*, 23 AD3d at 1154). Thus, in *Transit Mgt., LLC* (23 AD3d at 1154), it was held that since there was a condition precedent that had to be met to render the commitment letter enforceable, **[**15]** and it was undisputed that the **[***7]** borrower did not satisfy the condition precedent with respect to providing written confirmation of firm payoff figures for its state and federal tax liabilities, the lender's obligation under the commitment letter never arose. Similarly, in *Carver Fed. Sav. Bank v Word Aflame Community Church Inc.*, 34 Misc 3d 1239[A], 950 N.Y.S.2d 721, 2012 NY Slip Op 50480[U], *4 [Sup Ct, Kings County 2012]), cited by defendant, the Supreme Court, Kings County, held that there was no viable claim against a lender for breach of contract because "the clear terms of the [c]ommitment [l]etter obligate[d the lender] to provide the loan only where [the borrower had] satisfied the

conditions set forth in [the commitment letter]" and "there [wa]s no dispute that [the borrower] was not able to secure the required equity infusion" in compliance with a condition precedent in the commitment letter.

Here, defendant contends that a condition precedent to the enforcement of the Commercial Mortgage Commitment was that the properties be appraised at a minimum "as completed" value of $13,396,000. It argues that according to the appraisal, the properties had an "as completed" value of only $12,200,000, and that, plaintiffs, therefore, failed to meet a necessary condition precedent, rendering the Commercial Mortgage Commitment unenforceable. It maintains that this **[**16]** establishes grounds for dismissal based upon the failure to state a claim for breach of contract pursuant to CPLR 3211 (a) (1) and based upon the documentary evidence of the appraisal and the Commercial Mortgage Commitment pursuant to CPLR 3211 (a) (1).

Defendant, however, only refers to the "as completed" value as residential for sale condominium buildings, and ignores the fact that the properties were also appraised as rental apartment buildings, and that the "as completed" value of the properties as rental apartment buildings was $13,400,000. Plaintiffs argue that they satisfied the condition precedent set forth in the Commercial Mortgage Commitment regarding the minimum amount of the "as completed" value of the properties because the "as completed" value of the properties as rental apartment buildings was $13,400,000, which met and exceeded the minimum amount of $13,396,000 required under the Commercial Mortgage Commitment.

"When interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized" (*Fernandez v Price*, 63 AD3d 672, 675, 880 N.Y.S.2d 169 [2d Dept 2009]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]; *McCabe v Witteveen*, 34 AD3d 652, 654, 825 N.Y.S.2d 499 [2d Dept 2006]). "The terms of a contract are **[**17]** clear and unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Fernandez*, 63 AD3d at 675; *see also Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 385 N.E.2d 1280, 413 N.Y.S.2d 352 [1978], *rearg denied* 46 NY2d 940, 415 N.Y.S.2d 1027 [1979]; *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131, 832 N.Y.S.2d 1 [1st Dept 2006]). Conversely, contract language is ambiguous when it is "reasonably susceptible of

more than one interpretation," and extrinsic or parol evidence **[***8]** may then be permitted to determine the parties' intent as to the meaning of that language (*Chimart Assoc. v Paul*, 66 NY2d 570, 572-573, 489 N.E.2d 231, 498 N.Y.S.2d 344 [1986]; *see also Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 267, 557 N.E.2d 87, 557 N.Y.S.2d 851 [1990]).Here, the Commercial Mortgage Commitment is ambiguous since it provided that the combined "as completed" value of the two properties must be in the minimum amount of $13,396,000, without specifying whether both the "as completed" value for the properties as rental apartment buildings and the "as completed" value for the properties as residential for sale condominium buildings must meet this minimum amount or whether it was sufficient if the "as completed" value of the properties as rental apartment buildings met this minimum amount. Indeed, the fact that the Bank sought to have the appraiser obtain the "as completed" value of the properties as rental apartment buildings supports **[**18]** plaintiffs' argument that this requirement would be satisfied if the appraisal of rental value alone met this minimum amount. Thus, the fact that the Bank required the appraisal value for "as completed" rental apartment buildings be provided raises a factual issue as to the meaning of this language and whether it was agreed under the Commercial Mortgage Commitment that the condition precedent for funding the loan would be satisfied if the "as completed" value for the properties as rental apartment buildings was at least $13,396,000. While defendant points to the Commercial Building Loan Proposal, which stated that both values would have to fall within the 75% guideline for the Bank to fund the entire loan amount of $10,047,000, this internal memorandum was not provided to plaintiffs by the Bank, nor was it incorporated into the Commercial Mortgage Commitment. Consequently, this internal memorandum does not conclusively show that this was the understanding reached between plaintiffs and the Bank or was agreed to by plaintiffs.

In addition, "[s]uch factors as the appraisal's margin of error and the data, reasoning and analysis' that the appraiser used to arrive at its conclusions must be examined **[**19]** to determine whether reliance on those valuations [wa]s justified" (*Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557, 952 N.Y.S.2d 524 [1st Dept 2012]). Thus, defendant has failed to conclusively prove that there was a failure of a condition precedent regarding the appraisal of the properties so as to warrant dismissal of this action pursuant to CPLR 3211 (a) (1).

Furthermore, defendant has failed to establish that the Bank terminated the Commercial Mortgage Commitment because of the appraisal. The August 5, 2008 letter is silent regarding the reason for the termination of the Commercial Mortgage Commitment and there is no other documentary evidence submitted by defendant which refers to the reason for such termination. Plaintiffs point to the fact that defendant has not submitted any affidavit based upon personal knowledge which explains why the Commercial Mortgage Commitment was "withdrawn" and their construction loan was not funded. Defendant argues that it was under no obligation to submit an affidavit in support of its motion to dismiss since it is based upon documentary evidence. However, **[***9]** the documentary evidence consisting exclusively of the Commercial Mortgage Commitment is ambiguous, at best, and does not establish that plaintiffs failed to satisfy a condition precedent to its **[**20]** enforceability or that the appraisal was the reason for the Bank's termination of the Commercial Mortgage Commitment so as to necessitate the dismissal of plaintiffs' complaint as a matter of law at this early stage of this action, prior to any discovery. It is noted that there is no indication that plaintiffs were ever provided with the appraisal and, at oral argument, plaintiffs contended they never saw the appraisal upon which defendant relies.

Defendant further argues that plaintiffs also failed to comply with the condition precedent which required that the closing of the loan occur within 90 days from the date of the Commercial Mortgage Commitment. Defendant contends that since the closing of the loan did not occur within this 90-day time period, the Commercial Mortgage Commitment expired and became null and void by its express terms. Generally, "[i]n a commercial contract of the nature of that at bar, such a statement [regarding the time in which a loan must close] implicitly indicates that time is of the essence and the deadline will be enforceable" (*55 Eckford Realty LLC v Industrial & Commercial Bank of China [U.S.A.] N.A.*, 39 Misc 3d 1208[A], 971 N.Y.S.2d 70, 2013 NY Slip Op 50541[U], *12 [Sup Ct, Kings County 2013]; *see also Reddy v Ratnam*, 95 AD3d 982, 983, 943 N.Y.S.2d 623 [2d Dept 2012]). However, here, Siegel, in his affidavit, attests **[**21]** that the delay in closing was caused by the Bank, and that he, Gruber, and Hirsch were ready, willing, and able to close during the 90-day period.

"A party to a contract cannot rely on the failure of another to perform a condition precedent where [it] has frustrated or prevented the occurrence of the condition'" (*Fairway Prime Estate Mgt., LLC*, 99 AD3d at 557, quoting *ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490,

857 N.E.2d 513, 824 N.Y.S.2d 192 [2006]; *see also Fifty States Mgt. Corp. v Niagara Permanent Sav. & Loan Assn.*, 58 AD2d 177, 181, 396 N.Y.S.2d 925 [4th Dept 1977] [holding that "[i]t is well settled that a party cannot insist upon performance of a condition precedent when its nonperformance has been caused by the party itself"]). If, as plaintiffs claim, the Bank delayed closing on the loan despite their satisfaction of all pre-conditions of the Commercial Mortgage Commitment, solely in order to avoid its contractual obligation by later claiming that the 90-day period expired, then defendant may be said to have frustrated or prevented plaintiff's compliance with that condition precedent (*see Fairway Prime Estate Mgt., LLC*, 99 AD3d at 557-558).

In addition, according to Siegel, even after the expiration of the 90-day period, the Bank continued to reassure him, Gruber, and Hirsch that the loan would close, and the Bank never stated that it was declaring the commitment null and void as a result of not being able to close within the 90 days. Significantly, the August 5, **[**22]** 2008 letter did not state that the Commercial Mortgage Commitment had expired based upon a failure to close the loan within 90 days from February 26, 2008 (i.e., May 27, 2008). Notably, this letter was dated over two months after this 90-day period had expired. Thus, the **[***10]** documentary evidence fails to show that the Bank exercised its option, under the terms of the Commercial Mortgage Commitment, to declare that the commitment had expired and become null and void (*see Scott v KeyCorp*, 247 AD2d 722, 724, 669 N.Y.S.2d 76 [3d Dept 1998]).Defendant additionally argues that plaintiffs have not suffered any damages, and, therefore, cannot satisfy this necessary element of a claim for breach of contract, requiring dismissal pursuant to CPLR 3211 (a) (7). The Bank asserts that contrary to plaintiffs' allegations in their complaint, there was no foreclosure of these properties. As noted above, however, Siegel, in his affidavit, has explained that, upon plaintiff's default, the properties were turned over to the hard money lender in lieu of foreclosure. Defendant, though, points to the fact that the documents filed with the New York City Department of Finance, Office of the City Register show that Block 1966, Lots 53, 57, and 58 remain owned by Myron and Selina Siegel or their **[**23]** family trust. However, ABP, by a deed dated October 1, 2009, transferred Block 1966, Lots 54, 55, 56 to Bhlex Realty LLC, and by another deed dated October 1, 2009, transferred Block 1966, Lots 59 and 159 to Bhlex Realty LLC. According to the appraisal, these Lots also comprise the properties. Defendant states that the consideration for these two transfers was $300,000 each. While no explanation is provided as to the identity of Bhlex Realty LLC, the transfers occurred subsequent to the Bank's

failure to fund the loan. Thus, triable issues of fact are raised as to whether these transfers occurred due to the loss of the loan and whether such transfers resulted in a loss to plaintiffs.

Defendant further argues that plaintiffs cannot claim damages based upon their inability to complete the project because their claim of lost profits would be speculative and were not within the parties' contemplation when they entered into the Commercial Mortgage Commitment. In this regard, however, it has been held that "[d]amages resulting from the loss of future profits are often an approximation" (*Ashland Mgt. v Janien*, 82 NY2d 395, 403, 624 N.E.2d 1007, 604 N.Y.S.2d 912 [1993] [internal citations omitted]). Thus, "[t]he law does not require that they be determined with mathematical precision," **[**24]** but, rather, "requires only that damages be capable of measurement based upon known reliable factors without undue speculation" (*id.*). Therefore, since there is an issue of fact as to whether "[t]he damages plaintiff[s] allege[] were foreseeable, and although [they] may not in the end be able to prove them with reasonable certainty, a determination to that effect at this juncture would be premature" (*Morris v Putnam Berkley, Inc.*, 259 AD2d 425, 426, 687 N.Y.S.2d 139 [1st Dept 1999]; *see also Red Oak Fund, L.P. v MacKenzie Partners, Inc.*, 90 AD3d 527, 528-529, 934 N.Y.S.2d 401 [1st Dept 2011]; *SIGA Techs., Inc. v. Fischetti*, 6 AD3d 299, 300, 774 N.Y.S.2d 709 [1st Dept 2004]).

Defendant also argues that plaintiffs were aware that the loan was "withdrawn" as of August 5, 2008 and that since they received and accepted a refund from the Bank of certain fees that they had paid in connection with the loan and waited until September 11, 2013 to commence this action, they waived their ability to complain that the Bank breached the Commercial Mortgage Commitment. There is no evidence, however, that **[***11]** plaintiffs, by accepting these monies, were relinquishing their right to sue and their claim has been brought within the applicable statute of limitations period for a breach of contract cause of action. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968, 520 N.E.2d 512, 525 N.Y.S.2d 793 [1998]). Such an intent " must be unmistakably manifested, and is not to be inferred **[**25]** from a doubtful or equivocal act'" (*Navillus Tile v Turner Constr. Co.*, 2 AD3d 209, 211, 770 N.Y.S.2d 3 [1st Dept 2003], quoting *Orange Steel Erectors v Newburgh* Steel Prods., 225 AD2d 1010, 1012, 640 N.Y.S.2d 283 [3d Dept 1996]). Here, at most, there are triable issues raised as to plaintiffs' intent and the circumstances surrounding their receipt, retention, and negotiation of the returned check.

Consequently, the court finds that plaintiffs have pleaded a viable cause of action for breach of contract, and that defendant has not conclusively established a defense based upon the documentary evidence (*see Fairway Prime Estate Mgt., LLC*, 99 AD3d at 557). Thus, defendant's motion, insofar as it seeks dismissal of plaintiffs' complaint, pursuant to CPLR 3211 (a) (1) and (7), must be denied.

Finally, defendant argues that plaintiffs' complaint must be dismissed, pursuant to CPLR 3211 (a) (3), upon the ground that plaintiffs lack standing to sue because, according to the deeds and official documents filed with the New York City Department of Finance, Office of the City Register, neither Gruber nor Hirsch had any ownership interest in the properties. Specifically, it points to the fact that the block and lots which comprise the properties, in 2008, were owned by either Siegel, Beth M. Siegel, or ABP.

Defendant's argument is unavailing. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient **[**26]** predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182, 825 N.Y.S.2d 55 [2d Dept 2006]). Here, plaintiffs have standing to sue based upon the fact that they were signatories to the Commercial Mortgage Commitment upon which their breach of contract claim is predicated. Thus, defendant's motion, insofar as it seeks dismissal of plaintiffs' complaint pursuant to CPLR 3211 (a) (3), must be denied.

CONCLUSION

Accordingly, defendant's motion is denied in its entirety. The parties are directed to appear for conference in Commercial Part 1 on October 22, 2014 at 12:00 noon.

Defendant shall serve and file its answer within 20 days hereof.

This constitutes the decision and order of the court.

End of Document