SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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111 WEST 57TH INVESTMENT LLC, ON BEHALF OF ITSELF AND DERIVATIVELY ON BEHALF OF 111 WEST 57TH PARTNERS LLC AND 111 WEST 57TH MEZZ 1 LLC,

Plaintiffs,

- v -

111 W57 MEZZ INVESTOR LLC,SPRUCE CAPITAL PARTNERS LLC,JOSHUA CRANE, ROBERT SCHWARTZ, ATLANTIC 57 LLC,57 MADISON LLC,ARTHUR BECKER, JOHN DOE ENTITY, ACREFI MORTGAGE LENDING, LLC,APOLLO CREDIT OPPORTUNITY FUND III AIV I LP, AGRE DEBT 1 - 111 W 57, LLC,APOLLO COMMERCIAL REAL ESTATE FINANCE, INC.,APOLLO GLOBAL MANAGEMENT, INC.,AMERICAN GENERAL LIFE INSURANCE COMPANY, VARIABLE ANNUITY LIFE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AIG PROPERTY CASUALTY COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, AIG ASSET MANAGEMENT (U.S.), LLC,111 WEST 57TH PARTNERS LLC,111 WEST 57TH MEZZ 1 LLC,MICHAEL STERN, KEVIN MALONEY, 111 WEST 57TH SPONSOR LLC,111 WEST 57TH CONTROL LLC,111 WEST 57TH MANAGER LLC,

Defendants.

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INDEX NO. 655031/2017

MOTION DATE 02/21/2025, 02/21/2025

MOTION SEQ. NO. 013 014

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 608, 610, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 652, 663, 664, 671, 672, 673, 675

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 609, 618, 619, 637, 638, 639, 640, 641, 642, 643, 644, 645, 653, 656, 657, 658, 659, 660, 674, 676

were read on this motion for SUMMARY JUDGMENT.

This action involves a derivative claim asserted by 111 W57th Investment, LLC ("Plaintiff" or "Investment") on behalf of 111 West 57th Partners LLC ("Partners") and its wholly owned subsidiary 111 West 57th Mezz 1 LLC ("Borrower") against Defendant 111 W57 Mezz Investor LLC ("Defendant" or "Lender") alleging that Lender breached the implied covenant of good faith and fair dealing inherent in a March 28, 2017 Pledge and Security Agreement ("PSA"). Defendant moves for summary judgment (Mot. Seq. 013), and Plaintiff moves for partial summary judgment as to liability (Mot. Seq. 014).[1] For the following reasons, both parties' motions are denied.

DISCUSSION

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The "burden [then] shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

[1] The factual background of this action has been discussed at length in prior decisions (*see Ambase Corp. v 111 W. 57th Sponsor LLC*, 2018 NY Slip Op 30160[U] [Sup Ct, NY County 2018], *affd*, 2021 NY Slip Op 02589 [1st Dept 2021]; *Ambase Corporation v ACREFI Mortgage Lending, LLC*, 2019 WL 5394498 [Sup Ct, NY County 2019]; *111 West 57th Street Property Owner v 111 West 57th Partners LLC*, 188 AD3d 590 [1st Dept 2021]; *111 W. 57th Inv. LLC v 111 W57 Mezz Inv. LLC*, 2022 NY Slip Op 34258[U] [Sup Ct, NY County 2022], *affd as mod*, 2023 NY Slip Op 05029 [1st Dept 2023]; *Ambase Corp. v 111 W. 57th Sponsor LLC*, 2022 NY Slip Op 31503[U], 2 [Sup Ct, NY County 2022]). The Court presumes familiarity with those facts here.

As an initial matter, Defendant's attempt to reargue whether Plaintiff has alleged a derivative cause of action for breach of the duty of good faith and fair dealing fails. The First Department has already held that Plaintiff has stated "a derivative cause of action for breach of the duty of good faith and fair dealing by alleging that defendant, in which the [governing contract] vested discretion as to the exercise of UCC remedies, suborned insiders to allow it to exercise that discretion to plaintiff's detriment." (*111 W. 57th Inv. LLC v 111W57 Mezz Inv. LLC*, 192 AD3d 618, 621–22 [1st Dept 2021]). The First Department explained that "[t]he crux of plaintiff's case is that insiders were bribed into giving away the company's right to a sale by auction, which gutted the value received by the company. Thus, the company allegedly is the victim of the scheme by insiders who completely abandoned its interests, and the derivative claims are not barred by the doctrine of in pari delicto. Nor are the derivative claims barred by the exculpatory clause in the parties' pledge agreement. The alleged acts at issue are the intentional, bad faith acts such as are not subject to waiver" (*id.* at 622 [citations omitted]).

However, neither party has demonstrated its entitlement to summary judgment. Plaintiff argues that Defendant violated the Pledge Agreement's implied covenant of good faith and fair dealing through the purportedly sham strict foreclosure by arbitrarily exercising its discretion under the Pledge Agreement to notice a UCC strict foreclosure for the sole purpose of stealing the value of 111 West 57th Mezz 1 LLC's equity by suborning its managers, Michael Stern and Kevin Maloney. Plaintiff argues that this breach is demonstrated by the fact that Sponsor refused to object to a proposed Strict Foreclosure, and that after the Strict Foreclosure was consummated Plaintiff's equity was removed from the capital structure, all other equity investors had their equity "carried over," and therefore the existing equity owners, including Defendant, were able to raise capital needed to cure significant shortfalls for the project by selling off Plaintiff's

equity. Plaintiff also point to the fact that Stern and Maloney reentered the ownership structure of the Project through entities that they owned and/or controlled and became permanent construction managers and/or developers of the Project.

In response, Defendant argues that Stern and Maloney only declined to object to the Strict Foreclosure proposal because they feared that a UCC auction would result in a deficiency, and because by objecting without a good faith basis to believe they could either cure the default or that a sale would generate a surplus, they would be held personally liable for the deficiency under their guaranty. However, Defendant has not eliminated issues of material fact.

Indeed, Defendant's counsel admitted during the hearing on the TRO on July 26, 2017 that it "came in as a $25 million mezzanine, and got actually all of the parties together in reliance on the fact that there could be a strict foreclosure here," and, when the Court asked if there was an "agreement," Defendant's counsel replied "yes." (NYSCEF 22 at 12:2–12:12). Defendant's corporate witness, Joshua Crane, admits that Mezz Investor "had come up with a strategy with our counsel on strict foreclosure that we thought would be successful," so he therefore thought a public foreclosure auction was a "low probability" (Crane Tr at 72:6–75:6). However, Crane also testified that his "sense at the time was there was guaranty issues, personal guaranty issues, that would stop the sponsorship from objecting" (*id.* at 76:18-21).

Additionally, Crane admitted that the value of the collateral exceeded the level of Junior Mezzanine Loan Debt (*see* NYSCEF 526 ["Crane Tr"] at 71:17–22, 170:15–171:7 ["Q. And when you purchased the debt, you intended to foreclose, correct? A. Correct. Q. And did you believe that the value of what you were foreclosing upon was more than the amount that you purchased the debt for? A. We did. Q. How much more? A. More. I can't give you a number."]; *see also* NYSCEF 523 ["Stern Tr."] at 432:21–433:24 [Q. Okay. So using your best good faith

job, the as-is valuation as of July 2017 of the membership interest as-is as of that date, did you believe it to be higher than $26 million? THE WITNESS: And $26 million referring to the mezz interest? Q. Yes. A. Yeah, I believed it to be higher . . .." [objection omitted]). Indeed, Crane informed a potential investor that Mezz Investor was "getting in at a good basis because we are taking advantage of a messed-up partnership on a job that is fully bought out" (NYSCEF 545 [July 12, 2017 Email from A. Lyons to J. Crane]; Crane Tr. at 172:2–22).

Furthermore, the record reflects that in the aftermath of the strict foreclosure that Stern and Maloney reentered the ownership structure of the Project through entities that they owned and/or controlled and became permanent construction managers and/or developers of the Project. While Defendant argues that the fact that Lender elected not to change construction managers in the middle of a complex and challenging construction project, and the fact that almost a year after it took over the Project, Lender sold an equity interest in the Project to Madison Realty Capital ("Madison") for between $70 and $90 million is not sufficient to demonstrate that there was a "back-room deal," the Court is not yet persuaded. It may be true, as Defendant argues, that these facts in insolation are not sufficient to prove a breach of the implied covenant. However, when taken together, the evidence demonstrates at the very least an issue of fact as to whether Defendant suborned Stern and Maloney *not* to object to the strict foreclosure. Thus, the parties' motions for summary judgment are denied.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment (Mot. Seq. 013) is **DENIED**; it is further

ORDERED that Plaintiff's motion for partial summary judgment as to liability (Mot. Seq. 014) is **DENIED**; it is further

ORDERED that an initial telephonic pre-trial conference is scheduled for September 30, 2025, at 11:30 AM to discuss trial scheduling and logistics; the parties are directed to meet and confer prior to the conference to discuss the proposed length of trial and any other logistical issues that they have identified and be prepared to discuss those at the conference. The parties are directed to circulate dial-in information prior to the call.

This constitutes the Decision and Order of the Court.

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9/9/2025
DATE

JOEL M. COHEN, J.S.C.

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