769 F.Supp.3d 298
United States District Court, S.D. New York.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE on Behalf OF the REGISTERED HOLDERS OF GS MORTGAGE SECURITIES CORPORATION II, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2012-GCJ9, Plaintiff,
v.
Michael X. MATTONE and Carl F. Mattone., Defendants.

1:23-cv-11035 (ALC) (BCM)
|
Signed March 10, 2025

Synopsis

Background: While foreclosure action against borrower was pending, trustee of commercial mortgage-backed securities trust brought separate action against guarantors for breach of guaranty, preliminary injunction, and unjust enrichment under federal diversity jurisdiction. After trustee sought leave to consolidate action with foreclosure action and sever claims pending results of foreclosure action, one guarantor moved for judgment on the pleadings to dismiss the complaint, the other guarantor filed cross-claims against the moving guarantor, and moving guarantor moved to dismiss cross-claims.

Holdings: The District Court, Andrew L. Carter, Jr., J., adopted report and recommendation of Barbara C. Moses, United States Magistrate Judge, and held that:

trustee's allegations stated claim of breach of guaranty under New York law;

allegation trustee possessed note was sufficient to survive motion for judgment on pleadings;

Court would dismiss trustee's claim for preliminary injunctive relief;

unjust enrichment claims were duplicative of breach of guaranty claims, requiring dismissal under New York law;

breach of guaranty action sought to recover part of same mortgage debt as separate foreclosure action, and thus was barred by statute under New York law;

guarantor was not entitled to award of attorney fees; and

Court would dismiss guarantor's cross-claims against second guarantor for lack of subject-matter jurisdiction.

See also 2024 WL 4265291.

Procedural Posture(s): Motion for Judgment on the Pleadings; Motion for Attorney's Fees.

Attorneys and Law Firms

***302** Baron Giddings, David Vincent Mignardi, Keith Michael Brandofino, Holland & Knight LLP, New York, NY, for Plaintiff.

Holly Alida Clancy, Moses Singer LLP, New York, NY, Michael George Lewis, Neal F. Kronley, DLA Piper U.S. LLP, New York, NY, for Defendant Michael X. Mattone.

John Paul Ruggiero, Esq., Melville, NY, for Defendant Carl F. Mattone.

ORDER ADOPTING REPORT AND RECOMMENDATION

ANDREW L. CARTER JR., United States District Judge:

***303** On May 29, 2024, this Court referred the motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) to Magistrate Barbara C. Moses for a Report and Recommendation. ECF No. 50. In the Report and Recommendation filed on February 21, 2025, Magistrate Judge Moses recommended that Defendant Michael Mattone's motion to dismiss the Complaint be GRANTED; that Plaintiff's breach of guaranty claims against both Defendants be DISMISSED as barred by RPAPL § 1301(3), WITHOUT PREJUDICE to its right to seek to join the Guarantors as Defendants in the Foreclosure Action for the purpose of seeking a deficiency judgment against them; that Plaintiff's claims for preliminary injunction and unjust enrichment be DISMISSED WITH PREJUDICE for failure to state any cognizable claims; and that Carl Mattone's cross-claims against Michael Mattone be DISMISSED WITHOUT PREJUDICE for lack of subject-matter jurisdiction. ECF No. 70 at 30.

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.

72(b). The Court reviews de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." § 636(b)(1); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."). The parts that haven't been objected to are reviewed for clear error. *Lewis v. Zon*, 573 F. Supp. 2d 804, 811 (S.D.N.Y. 2008).

Here, the Report and Recommendation advised the parties that they had fourteen days from service of the Report and Recommendation to file any written objections pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), and warned that failure to file timely objections would result in waiver of such objections and will preclude appellate review. ECF No. 70 at 30. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486, 487 (2d Cir. 2018); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

As of the date of this Order, no objections have been filed, and no request for an extension of time to object has been made. Accordingly, Plaintiff has waived the right to object to the Report and Recommendation or to get appellate review. *See Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *see also Caidor v. Onondaga County*, 517 F.3d 601 (2d Cir. 2008). Despite the waiver, the Court has reviewed the complaint, briefs, and Report and Recommendation, unguided by objections, and finds the Report and Recommendation to be well-reasoned and grounded in fact and law. Accordingly, the Report and Recommendation is ADOPTED in its entirety. The Clerk of Court is respectfully directed to terminate ECF No. 58.

SO ORDERED.

REPORT AND RECOMMENDATION TO THE HON. ANDREW L. CARTER, JR.

BARBARA MOSES, United States Magistrate Judge.

Plaintiff U.S. Bank National Association (U.S. Bank or the Lender), acting through ***304** its special servicer Rialto Capital Advisors, LLC (Rialto), brought this action in its capacity as trustee of a commercial mortgage-backed securities trust that owns a loan in the original principal amount of $81 million, extended by Jefferies LoanCore LLC (Jefferies) to Mattone Group Jamaica Co., LLC (Mattone Group or the Borrower), to finance the Borrower's operations at Jamaica Center (the Property or the Premises), a retail complex in Queens, New York. The loan was secured by a mortgage on the Property and guaranteed by the defendants in this action, Carl F. Mattone (Carl) and his brother Michael X. Mattone (Michael) (collectively, the Guarantors).

On November 11, 2021, after the Borrower defaulted on its payment obligations, the Lender initiated a foreclosure action against it in this District, docketed as *U.S. Bank Nat'l Ass'n v. Mattone Grp. Jamaica Co., LLC*, No. 21-CV-9342 (ALC), 2021 WL 5276493 (S.D.N.Y. Nov. 11, 2011) (the Foreclosure Action). The Lender did not initially name the Guarantors as defendants in the Foreclosure Action, which remains pending. Nor did it seek to add the Guarantors as defendants therein when it became concerned that foreclosing on the Property would fall short of covering the debt. Instead, on December 20, 2023 (after two years of litigation in the Foreclosure Action), the Lender initiated this action against the Guarantors alone, alleging that the Borrower's conduct triggered their "bad boy" liability under the Guaranty of Recourse Obligations (Guaranty) that they signed when the loan was made. Plaintiff asserts three claims – for breach of contract, "preliminary injunction," and unjust enrichment – and seeks both damages and injunctive relief. *See* Compl. ¶¶ 14-86.

Now before the Court for report and recommendation (*see* Dkt. 50) is Michael's motion, filed on April 11, 2024 (Dkt. 40), seeking judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). For the reasons detailed below, I conclude that the motion should be granted.

Plaintiff's well-pleaded factual allegations, which the Court must accept as true for purposes of the pending motion, state a claim for breach of the Guaranty premised on the Borrower's alleged failure to turn over post-default rent collections on demand, which triggered the Guarantors' recourse liability under the Guaranty. However, that claim, in its present form, is barred by New York's Real Property Actions and Proceedings Law (RPAPL), which prohibits a lender – while pursuing a foreclosure action – from commencing or maintaining any other action "to recover any part of the mortgage debt," unless the lender has first obtained "leave of the court in which the former action was brought." RPAPL § 1301(3). Here, U.S. Bank neither sought nor obtained permission in the Foreclosure Action before initiating this action. Moreover, it points to no "special circumstances" that

would warrant a court to grant such permission. *See* Part III(D), *infra.* Plaintiff's first claim should therefore be dismissed without prejudice, leaving plaintiff free to move, in the Foreclosure Action, to add the Guarantors as defendants therein.

Plaintiff's second and third claims should be dismissed with prejudice, because – RPAPL aside – neither of them states a cognizable claim. The second claim fails because a preliminary injunction is a form of relief, not a cause of action. The third claim fails because it is duplicative of the breach of contract claim. Consequently, this action should be dismissed in its entirety, without prejudice to plaintiff's ability to seek leave, in the Foreclosure Action, to name the Guarantors as additional defendants therein, for the limited purpose of asserting a deficiency judgment ***305** against them to the extent permitted by the Guaranty.

I. BACKGROUND

I assume familiarity with the events leading up to the Foreclosure Action, which are described in *U.S. Bank Nat'l Ass'n v. Mattone Grp. Jamaica Co., LLC,* 2024 WL 4265291 (S.D.N.Y. Sept. 23, 2024). I recite the facts underlying the current action only to the extent necessary to explain my recommendations.

A. The Parties

Michael and Carl Mattone, together with their late father, Joseph Mattone, Sr., and three other siblings, were original members of Mattone Group, which built the multi-story shopping center now known as Jamaica Center. Carl Mattone Amend. Ans. (Dkt. 47) ¶¶ 182-185. Construction and leasing of Jamaica Center was completed by 2002. *Id.* ¶ 186. Mattone Group has continuously owned and managed the Property since then. *Id.*; *see also* Compl. (Dkt. 1) ¶¶ 8-12.

On October 31, 2012, Jefferies lent Mattone Group a total of $81 million pursuant to a series of integrated agreements including a Loan Agreement, *see* Compl. ¶ 14; Callejas Decl. (Dkt. 45-4) Ex. 1; an Amended, Restated and Consolidated Promissory Note (the Note), *see* Compl. ¶ 15; Callejas Decl. Ex. 2; a Consolidated Leasehold Mortgage, Assignment of Leases and Rents and Security Agreement (the Mortgage), *see* Compl. ¶ 16; Callejas Decl. Ex. 3; and an Assignment of Leases and Rents (the ALR), *see* Compl. ¶ 17; Callejas Decl. Ex. 4 (collectively the Loan Documents).[1] On the same day, "[i]In order to induce [Jefferies] to extend the Loan and to further secure its repayment," Carl and Michael personally guaranteed the loan in favor of Jefferies ("together with its successors and assigns") by signing the Guaranty. Compl. ¶ 20; Callejas Decl. Ex. 7. Through a series of allonges and assignments, the Loan Documents were assigned to U.S. Bank, which "remains in physical possession of the Note, the Mortgage, and all other Loan Documents to this day." Compl. ¶ 24.

B. The Terms of the Loan and the Guaranty

The Loan Agreement requires Mattone Group to make monthly payments of principal and interest. Loan Ag. §§ 2.1, 2.2.1(b). Failure to pay "any portion of the Debt ... when due" results in an "Event of Default." *Id.* § 8.1(a). "Upon the occurrence of an Event of Default, all or any one or more of the rights, powers, privileges and other remedies available to Lender against Borrower under the Loan Documents or at law or in equity may be exercised by Lender," *id.* § 8.2.2, including commencing a foreclosure proceeding. Compl. ¶ 26.

Section 10.1 of the Loan Agreement, titled "Exculpation," limits the Borrower's recourse liability, that is, the circumstances under which and extent to which the Lender can seek a money judgment on the Note beyond the value of the collateral securing the loan:

> Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Loan Documents by any action or proceeding wherein a money judgment shall be sought against Borrower, except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize ***306** upon its interest and rights under the Loan Documents, or in the Property, the Rents or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender shall not sue for, seek or demand any deficiency judgment against Borrower in any such action or proceeding under or by reason of or under or in connection with any Loan Document.

Loan Ag. § 10.1.

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However, the Lender did *not* waive its rights "to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any loss, damage, cost, expense, liability, or other obligation incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with" certain specified events, listed in § 10.1(a)-(h) and identified as "Borrower's Recourse Liabilities." As relevant here, the Borrower's Recourse Liabilities include various species of misconduct by the Borrower, including:

> (f) misappropriation or conversion by or on behalf of Borrower (including failure to turn over to Lender on demand following an Event of Default) of any gross revenues (including Rents, security deposits, advance deposits, any other deposits, rents collected in advance, funds held by Borrower for the benefit of another party and Lease Termination Payments).

Loan Ag. § 10.1(f).[2]

Further, "Lender's agreement not to pursue personal liability of Borrower as set forth above SHALL BECOME NULL AND VOID and shall be of no further force and effect, and the Debt shall be fully recourse to Borrower" if one of the "Springing Recourse Events" listed in § 10.1(i)-(vi) occurs. As relevant here, a Springing Recourse Event occurs if the Borrower, "in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of Lender under or in connection with the Note, the Mortgage, or any other Loan Document, seeks a defense, judicial intervention or injunctive or other equitable relief of any kind or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan; which is found by a court of competent jurisdiction (a) not to have been raised in good faith, (b) to be frivolous in nature, or (c) to have been asserted in bad faith to intentionally hinder or interfere with ***307** Lender's enforcement of its rights." Loan Ag. § 10.1(vi).

In short, under the Loan Agreement, the Borrower's recourse liability is triggered by its failure to turn over the Rents (or other revenue) to the Lender on demand following an Event of Default, *see* Loan Ag. § 10.1(f), or by its assertion, in a foreclosure action, of a defense or right to relief that has been found by a court of competent jurisdiction to be frivolous or raised in bad faith. *See id.* § 10.1(vi). Under § 10.1(f), the Borrower's liability is limited to the Lender's losses "arising out of or in connection with" the failure to turn over the Rents as required. Once a Springing Recourse Event occurs, however, "the Debt shall be fully recourse to Borrower." *Id.* § 10.1.

By signing the Guaranty, Carl and Michael "irrevocably, absolutely and unconditionally guarantee[d] to Lender the full, prompt and complete payment when due of the Guaranteed Obligations." Guaranty § 2(a). The term "Guaranteed Obligations" means "(i) Borrower's Recourse Liabilities and (ii) from and after the date that any Springing Recourse Event occurs, payment of all the Debt as and when the same is due[.]" *Id.* § 1(b). Thus, the Guarantors' personal liability under the Guaranty is generally co-extensive with the Borrower's recourse liability under the "bad boy" provisions of the Loan Agreement.[3] However, "with respect to the Springing Recourse Event described in Section 10.1(vi) of the Loan Agreement, Guarantors' liability shall not exceed $10,000.000.00." Guaranty § 1(b).

C. Mattone Group's Default

Jamaica Center struggled during the COVID-19 pandemic, when state and city officials mandated the closure of non-essential businesses. *See* Michael Mattone Decl. (Dkt 1-1) ¶ 17.[4] Mattone Group failed to make its required monthly payments of principal and interest between May 2020 and November 2020. Compl. ¶ 33; Michael Mattone Decl. ¶ 29.

By letter dated October 27, 2020, the Lender notified the Borrower and the Guarantors of "the occurrence and continuance of Events of Default based upon the Payments Default," accelerated the loan, and "demanded that Borrower remit all sums due and owing under the Loan Documents." Compl. ¶ 43; Callejas Decl. ¶ 46; Michael Mattone Decl. ¶¶ 31-32.

Between December 2020 and April 2022, Mattone Group resumed making monthly payments. Michael Mattone Decl. ¶ 33. However, upon learning in April 2022 that Rialto was directing those payments into a suspense account (rather than applying them to principal and interest), Mattone Group again ceased making monthly payments ***308** on the loan. Compl. ¶ 34; Michael Mattone Decl. ¶¶ 40-43.

D. The Foreclosure Action

On November 11, 2021, invoking this Court's diversity jurisdiction, the Lender initiated the Foreclosure Action, which was assigned to the Hon. Andrew L. Carter, United States District Judge. The Borrower's unpaid debt, at that time, was approximately $68 million. Callejas Decl. ¶ 49.

On March 13, 2023, the Borrower filed an Amended Counterclaim and Third-Party Complaint against U.S. Bank and third-party defendant Rialto (Dkt. 70 in the Foreclosure Action), alleging claims for breached of contract, breach of the covenant of good faith and fair dealing, tortious interference with business contract, fraud, fraudulent inducement, violations of N.Y. Gen. Bus. Law §§ 349 and 350, and unjust enrichment.

On September 12, 2023, following discovery, the Lender moved for summary judgment on its foreclosure claim. (Dkt. 92 in the Foreclosure Action.) On November 22, 2023, the Borrower filed a motion for sanctions pursuant to Fed. R. Civ. P. 11, arguing that the Lender "misrepresented a *prima facie* element of its foreclosure claim when [it] stated that it was a possessor and assignee of the Note and therefore, lacks standing to foreclose." *U.S. Bank v. Mattone Grp.*, 2024 WL 4265291, at *1. In its opposition brief (Dkt. 123 in the Foreclosure Action), U.S. Bank asserted that the sanctions motion was not made in good faith and was itself frivolous.

E. This Action

On December 20, 2023 – while the summary judgment motion and the sanctions motion were pending in the Foreclosure Action – the Lender opened a second front by filing this action against the Guarantors, once again invoking the Court's diversity jurisdiction. U.S. Bank did not seek leave from Judge Carter before filing this action. However, it did flag the case as "related" to the Foreclosure Action (*see* Dkt. 7), after which it was re-assigned to Judge Carter.

The Complaint alleges that Carl and Michael are personally liable under the Guaranty because of (a) "the misappropriation and conversion of nearly $17,000,000 in rents generated by the Premises following the Borrower's failure to pay debt service beginning in May 2020," and (b) Borrower's "continuous and repeated assertions of affirmative claims and defenses in the Foreclosure Action that are frivolous in nature and have been asserted in bad faith[.]" Compl. ¶ 4; *see also id.* ¶¶ 48-51 (alleging in more detail the failure to remit Rents to the Lender after the default, including "$8,000,000 that Borrower improperly secreted to a purported attorney escrow account"); *id.* ¶¶ 64-65 (alleging in more detail that the Borrower's Rule 11 motion, as well as the "affirmative claims and defenses asserted by the Borrower in the Foreclosure Action," are "frivolous in nature, and have been asserted in bad faith").

The Lender's first claim against the Guarantors, for breach of the Guaranty, relies on both bad-boy triggers, and seeks unspecified damages in "the amounts due pursuant to the Guaranty, with interest, advances, other charges, attorneys' fees and costs." Compl. ¶ 77(C). However, plaintiff explains, it hopes to "recover the full amount of the Debt" in the Foreclosure Action, *see id.* ¶ 74, and intends to pursue the Guarantors only for "the whole residue or so much thereof as the Court may determine to be just and equitable, of the Debt remaining unsatisfied after the sale of the Mortgaged Property (pursuant to the Foreclosure Action)." *Id.* ¶ 75.

***309** The Lender's second claim, for "preliminary injunction," alleges that it is entitled to "immediate possession of the Mortgaged Property, including, without limitation, all Rents generated by the Premises since at least May 2020," Compl. ¶ 79, and seeks both a prohibitory injunction, preventing the Guarantors from "impairing, encumbering, conveying or otherwise transferring the Loan's collateral," *id.* ¶ 81(A), and a mandatory injunction, requiring them to "transfer possession of the Mortgaged Property to Plaintiff." *Id.* ¶ 81(B).[5] In its third claim, for unjust enrichment, the Lender alleges that the Guarantors have been unjustly enriched by the Borrower's failure to remit Rents. *Id.* ¶ 86. Oddly, however, rather than seek disgorgement of the withheld Rents, plaintiff seeks "all unpaid principal, interest, late charges, and collection costs," including attorneys' fees, "as are due and owing in accordance with the Note and the Guaranty." *Id.* ¶ 86(A).

F. Additional Procedural Background

On February 28, 2024, in the Foreclosure Action, the Lender sought leave to consolidate its two lawsuits and, upon consolidation, sever the claims asserted in the Guaranty Action pending the results of the Foreclosure Action. Plaintiff argued that consolidation would be economical because "Guarantors' liability is contingent upon whether Plaintiff is entitled to foreclose in the Foreclosure Action, the amount of the indebtedness due to Plaintiff under the Loan Documents and the amount of the sale proceeds eventually generated by a future foreclosure auction of the Property." Pl. 2/28/24 Ltr. (Dkt. 126 in the Foreclosure Action) at 2; *see also id.* at 3 (the "Guaranty claims could be rendered moot if the foreclosure auction of the Property yields sufficient monies to satisfy the amounts due and owing to Plaintiff"). On March 21, 2024, Judge Carter deferred decision on consolidation pending resolution of Michael's contemplated motion for judgment on the pleadings in this action. (Dkt. 131 in the Foreclosure

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Action.)

On April 11, 2024, in this action, Michael filed the instant motion to dismiss the Complaint pursuant to Rule 12(c). One month later, on May 13, 2024, his brother Carl (who did not join in Michael's motion) filed four cross-claims against him for (i) breach of the implied covenant of good faith and fair dealing under the Guaranty; (ii) breach of common law fiduciary duties; (iii) indemnification; and (iv) contribution. Carl Mattone Amend. Ans. at 30-57. On August 14, 2024, Michael moved to dismiss Carl's cross-claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Dkt. 58.) As relevant here, Michael argued that because there is no diversity between the brothers – both of whom are citizens of New York – the cross-claims will fail for lack of jurisdiction once the Complaint is dismissed. (Dkt 59 at 1.)[6]

On September 23, 2024, in the Foreclosure Action, Judge Carter denied the Borrower's sanctions motion, holding that it waived any challenges to U.S. Bank's standing by failing to raise them in its answer or in a pre-motion answer to dismiss. *See U.S. Bank v. Mattone Grp.*, 2024 WL 4265291, at *3. Moreover, Judge Carter concluded, the "discrepancies" between the allegations in the Lender's foreclosure complaint and the declaration it submitted ***310** in support of its summary judgment motion did not show that the former were "utterly lacking in support," as required before sanctions could be imposed under Rule 11(b), and nothing else in the record "negates Plaintiff's status as the holder and assignee of the Note." *Id.* at *4. To the contrary, Judge Carter expressly found that U.S. Bank had "sufficient documentary evidence to establish standing to foreclose." *Id.* However, Judge Carter did not discuss U.S. Bank's contention that the sanctions motion was made in bad faith or frivolous, and made no finding of frivolousness.

One week later, on September 30, 2024, Judge Carter denied U.S. Bank's summary judgment motion, from the bench, setting the Foreclosure Action on course for trial. (Dkt. 145 in the Foreclosure Action.)

G. The Rule 12(c) Motion

The parties' legal arguments have shifted somewhat over time.

In his moving brief, Michael argued: (1) that to the extent plaintiff seeks a deficiency judgment, its claims are "premature" and "unripe," because RPAPL § 1371 permits a lender to pursue an action against a guarantor "if, and only if, a deficiency judgment results from a foreclosure sale," *see* Def. Mem. (Dkt. 41) at 10; (2) that to the extent it seeks to recover Rents that the Borrower collected from tenants after its default, its claim is barred by RPAPL § 1301(3), *see id.* at 11-12, or, in the alternative, that its recourse liability claim arising from § 10.1(f) of the Loan Agreement is inadequately pled, *see id.* at 17; (3) that to the extent it seeks damages arising from a springing recourse event under § 10.1(vi) of the Loan Agreement, its claim is either unripe or inadequately pled, in that there was no judicial finding that the Borrower engaged in frivolous litigation conduct in the Foreclosure Action, *see id.* at 12-14, 15-16; (4) that plaintiff lacks standing to sue on the Guaranty because it has not "demonstrated possession" of the Note, *see id.* at 14-15; (5) that plaintiff failed to plead the elements of a claim for injunctive relief, *see id.* at 17-18; and (6) that plaintiff's unjust enrichment claim is duplicative of its breach of contract claim.[7]

In its opposition brief, filed on May 2, 2024, the Lender again stressed that it filed this action in order to "preserve" its deficiency claims against Guarantors in the event the foreclosure sale does not "raise sufficient sums to satisfy the amount due and owing on the Loan." Pl. Opp. (Dkt. 46) at 5. Plaintiff became "gravely concerned" about this possibility in December 2023, when one of the anchor tenants at the shopping center elected to terminate its lease. *Id.* Plaintiff assured the Court that it will "only seek to hold the Guarantors liable for any amounts due and owing that are unsatisfied" if and when "a future foreclosure auction results in a deficiency." *Id.* at 1, 10. However, plaintiff continued, RPAPL § 1371 does not require it to wait until a foreclosure judgment is entered to plead a deficiency claim against a guarantor. *Id.* at 4-5. In this case, plaintiff argued, it has standing to sue on the Guaranty because "it is both the holder and assignee of the ... Note," *id.* at 9, and it has adequately pleaded a recourse liability claim based on the Borrower's failure to remit the Rents after ***311** default. *Id.* at 7-8.[8] Therefore, plaintiff concluded, "this is not an issue of ripeness; rather, this is an issue of sequence." *Id.* at 11.

Turning to RPAPL § 1301(3), plaintiff argued that the statute does not bar its breach of guaranty claim because in the Foreclosure Action it seeks the sale of the Mortgaged Property at public auction ("including the Rents generated by the Premises") rather than "damages in the form of the Rents that the Borrower has failed to turn over." Pl. Opp. at 6. Thus, plaintiff explained, it is "not seeking to doubly recover the Rents" in two separate actions. *Id.* at 7. Finally, plaintiff defended its second and third claims as adequately pleaded, *id.* at 10-13, and argued that it need not choose between its breach of guaranty claim and its unjust

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enrichment claim at the motion to dismiss stage. *Id.* at 14.

In his reply brief, filed on May 16, 2024, Michael pointed out plaintiff's admission that "the Rents are a part of the Mortgaged Property." Def. Reply (Dkt. 48) at 2 (quoting Foreclosure Compl. ¶ 16). This admission, Michael says, demonstrates that the present action is indeed barred by RPAPL § 1301(3), because plaintiff is "already suing on the same security in the Foreclosure Action," and "cannot show that there is 'no possibility of a double recovery.' " *Id.* (quoting *Windward Bora LLC v. Browne*, 2023 WL 2744684, at *15 (S.D.N.Y. Mar. 31, 2023), *aff'd,* 110 F.4th 120 (2d Cir. 2024)).

On October 10, 2024, during oral argument on the Rule 12(c) motion, Michael softened his position regarding RPAPL § 1371, conceding that the Lender "could have brought a claim against the guarantors at the inception of the case" to preserve its right to seek a deficiency judgment after foreclosure. 10/10/24 Tr. (Dkt. 67) at 9:9-16; *see also id.* at 19:18-19; *id.* at 22:13-20. He continued to insist, however, that having failed to do so, the Lender is required to wait until the foreclosure sale is consummated to bring a deficiency claim against the Guarantors. *Id.* at 17:2-1; *id.* at 46:9-23. Plaintiff, for its part, conceded that when it became concerned about the value of the Property, it "could have" made a motion to bring the Guarantors into the Foreclosure Action, *id.* at 30:14-1, but chose not to, because it feared that this "would give the borrower[ ] yet another opportunity to say, oh, now, we need further discovery on this." *Id.* at 37:10-14. Additionally, plaintiff conceded that because Judge Carter denied Mattone Group's Rule 11 motion without making a "finding" that the motion itself was frivolous, only "one leg" of its breach of guaranty claim remains, arising out of its allegation that the Borrower failed to turn over Rents to the Lender on demand following an Event of Default. 10/10/24 Tr. at 25:24-26:4.

In their post-argument joint letter – submitted on October 24, 2024, at the Court's request – the parties again shifted their positions. Abandoning his ripeness argument altogether, Michael now argues that, in order to pursue a deficiency judgment against the Guarantors, the Lender could and should have either (i) named them as defendants when it first filed the Foreclosure Action, or (ii) amended its complaint in the Foreclosure Action to add them as defendants. Joint Ltr. (Dkt. 69) at 2-3. Even now, Michael asserts, "Lender's only remedy is to seek leave of the Court to amend their Complaint [in the Foreclosure Action], which they are free to request." *Id.* at 2. However, Michael "reserves the right to oppose Lender's ***312** seeking leave to amend," noting that it "must be prepared to answer" why it did not do so earlier. *Id.* at 4.

Plaintiff, for its part, seemingly agrees that the Guarantors must be made party defendants *in the Foreclosure Action* before a deficiency judgment can be obtained against them, because "[t]hose liable for the mortgage debt are generally entitled to notice and/or an opportunity to participate in the computation of the amount due." Joint Ltr. at 6. However, plaintiff urges, it should be permitted to achieve this result *either* by amending its complaint in the Foreclosure Action *or* by consolidating the two cases. *Id.* at 6-7. Plaintiff adds that since Michael "no longer condemns Lender's Guaranty claim to be unripe," he "should have no objection to Lender's amendment of the Foreclosure Matter complaint to add such claim." *Id.* at 7.

II. LEGAL STANDARDS

A party may move for judgment on the pleadings "[a]fter the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c). In deciding a motion made pursuant to Rule 12(c), the courts apply the same standards applicable to Rule 12(b)(6) motions to dismiss. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 78 (2d Cir. 2015). Judgment on the pleadings is appropriate only "where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). To survive a Rule 12(c) motion, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010) (quoting *Hayden v. Paterson,* 594 F.3d 150, 160 (2d Cir. 2010)).

For purposes of the pending motion, I accept all of the non-conclusory factual allegations in the Complaint as true and draw all reasonable inferences in plaintiff's favor. *Vega*, 801 F.3d at 78 (quoting *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011)). In addition to the pleadings themselves, I am permitted to consider "any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc.*, 647 F.3d at 422 (quoting *Roberts v. Babkiewicz,* 582 F.3d 418, 419 (2d Cir. 2009)); *accord Velarde v. GW GJ, Inc.*, 914 F.3d 779, 781 n.1 (2d Cir. 2019). A complaint is also deemed to include "materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *L-7 Designs, Inc.*, 647 F.3d at 422 (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004)).

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III. DISCUSSION

A. Breach of Guaranty

The Guaranty, like all of the Loan Documents, is governed by New York law. *See* Guaranty § 9. "The elements of a claim for breach of guarant[y] under New York law are (1) an underlying obligation, (2) a guarant[y], and (3) failure by the guarantor to make payment in accordance with the terms of the guarant[y]." *EMA Fin., LLC v. AIM Expl., Inc.*, 2019 WL 689237, at *12 (S.D.N.Y. Feb. 19, 2019) (quoting *Pro. Merch. Advance Cap., LLC v. C Care Servs., LLC*, 2015 WL 4392081, at *5 (S.D.N.Y. July 15, 2015) (Sullivan, J.)); *see also Greenlight Reinsurance, Ltd. v. Appalachian Underwriters, Inc.*, 958 F.Supp.2d 507, 521 (S.D.N.Y. 2013) ("In order to survive a motion to dismiss on a breach of guaranty claim in New York, a plaintiff must plausibly plead '(1) that it is owed a debt from a third party; (2) that ***313** the defendant made a guarantee of payment of the debt; and (3) that the debt has not been paid by either the third party or the defendant.' ") (quoting *Chem. Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994)).

The well-pled allegations in the Complaint, accepted as true, demonstrate all of the required elements. Both Michael and Carl executed the Guaranty as a further inducement for Jefferies to lend $81 million to their family business, Mattone Group. *See* Compl. ¶ 20; Carl Mattone Amend. Ans. ¶ 20. In that document, each of them "irrevocably, absolutely and unconditionally" guaranteed to Lender "the full, prompt and complete payment when due of the Guaranteed Obligations," Guaranty § 2(a), including "(i) Borrower's Recourse Liabilities and (ii) from and after the date that any Springing Recourse Event occurs, payment of all the Debt as and when the same is due in accordance with the Loan Documents." *Id.* § 1(b).

Beginning in May 2020, the Borrower – Mattone Group – failed to remit the required monthly debt service, which is an Event of Default under the Loan Agreement. Compl. ¶ 31-35; Carl Mattone Amend. Ans. ¶¶ 31-35; Michael Mattone Decl. ¶¶ 22-24, 29. Consequently, on October 20, 2020, the Lender declared a default and accelerated the debt. Compl. ¶ 43; Carl Mattone Amend. Ans. ¶ 43; Michael Mattone Decl. ¶¶ 31-32. Although the Borrower temporarily resumed monthly payments between December 2020 and April 2022, *see* Michael Mattone Decl. ¶ 33 (and although the parties dispute whether the Lender correctly accounted for those payments, *see id.* ¶¶ 37-42), plaintiff alleges, and Michael agrees, that the Mattone Group made no further payments on the Loan after April 2022. *See id.* ¶ 43. Thus, "there is now due and owing by Borrower to Plaintiff, pursuant to the Loan Documents, the unpaid principal in the amount of $68,295,320.74 as of August 31, 2023," plus interest, late charges, and various fees and costs (collectively, the Debt). Compl. ¶ 47; Carl Mattone Amend. Ans. ¶ 47.

The only remaining question is whether plaintiff has adequately alleged "failure by the guarantor to make payment in accordance with the terms of the guarant[y]." *EMA Fin.*, 2019 WL 689237, at *12. The Lender conceded, at oral argument, that the Guarantors are not (presently) obligated to pay all or any portion of the Debt due to the happening of a springing recourse event. *See* 10/10/24 Tr. at 25:24-26:4. Although plaintiff alleges that the Borrower asserted frivolous defenses and made a frivolous Rule 11 motion in the Foreclosure Action, *see* Compl. ¶ 65, these allegations do not add up to a springing recourse event under § 10.1(v) if the Loan Agreement, because that clause requires a judicial finding, by a court of competent jurisdiction, that the challenged litigation conduct was "(a) not ... raised in good faith, (b) ... frivolous in nature, or (c) ... asserted in bad faith to intentionally hinder or interfere with Lender's enforcement of its rights." Loan Ag. § 10.1(v). In the absence of any such finding by Judge Carter, this branch of plaintiff's claim for breach of the Guaranty fails.

However, plaintiff has clearly alleged that the Guarantors are liable for the Borrower's recourse liability under § 10.1(f) of the Loan Agreement. On October 27, 2020, the Lender notified the Borrower and the Guarantors of the occurrence and continuance of an Event of Default and "demanded that Borrower remit all sums due and owing under the Loan Documents." Compl. ¶ 43. Plaintiff explains that a "Cash Management Period" commenced when Mattone Group defaulted, requiring it "to remit all Rents and profits generated during the occurrence of the Cash Management ***314** Period" to the Lender, but it failed to do so. *Id.* ¶¶ 48-51, 72, 86.[9] Between May 2020 and the filing of the Complaint, the Borrower failed to turn over "nearly $17,000,000.00 in rents generated by the Premises," some $8 million of which it placed in an attorney escrow account rather than remit to Lender as required by the Loan Agreement. *Id.* ¶¶ 4, 51. This conduct triggered both the Borrower's recourse liability under § 10.1(f) of the Loan Agreement and the Guarantors' personal liability for damages "arising out of or in connection with" the Borrower's failure to turn over the Rents. *Id.* at ¶¶ 69; Guaranty § 1(b)(i). The allegation that the Borrower failed to remit the $17 million (and the Guarantors have not repaid it) also establishes that the

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Lender has been damaged by the breach.

Michael's contention that this branch of plaintiff's breach of guaranty claim fails to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b), *see* Def. Mem. at 17, is misplaced. Rule 9(b) provides that "in alleging fraud or mistake," the claimant must "state with particularity the circumstances constituting" the fraud or mistake. Fed. R. Civ. P. 9(b). The rule can also be applied to conversion, misappropriation, and unjust enrichment claims, but only if they are "premised on fraud." *See Daly v. Castro Llanes*, 30 F. Supp. 2d 407, 414 (S.D.N.Y. 1998). Where a conversion or misappropriation claim is not premised on fraud, "the heightened pleading standard of Rule 9(b) does not apply." *Amusement Indus., Inc. v. Stern*, 693 F.Supp.2d 327, 355 (S.D.N.Y. 2010) (holding that plaintiff's conversion claim did not "require proof of fraudulent statements ... or any intent to defraud" and therefore was not subject to Rule 9(b)). Here, to the extent plaintiff alleges that defendants "converted" or "misappropriated" the Rents, neither charge is premised on fraud. *See*, *e.g.*, Compl. ¶ 71. Moreover, plaintiff's cause of action is clearly one for breach of contract, and the contract itself states plainly that the Borrower's recourse liability (and hence the Guarantors' personal liability) is triggered simply by its "failure to turn over [Rents] to Lender on demand following an Event of Default." Loan Ag. § 10.1(vi). No pleading or proof of fraud is required.

Similarly, Michael's argument (pressed in his briefs, and never formally abandoned) that the Lender lacks standing to sue on the Guaranty because it has not "demonstrated possession" of the Note, Def. Mem. at 14-15, is meritless. Plaintiff has *alleged* possession of the Note, *see* Compl. ¶ 24, which is all that is required to survive a motion made pursuant to Rule 12(c).[10] I therefore conclude that the Lender has adequately pleaded a claim for breach of the Guaranty predicated on § 10.1(f) of the Loan Agreement.

I further conclude that (as ultimately conceded by Michael Mattone, *see* Joint Ltr. at 2-3, 4-5), plaintiff's breach of guaranty claim is neither premature nor unripe. Under New York law, a lender *must* join a guarantor as a defendant in the foreclosure action as a precondition to obtaining a deficiency judgment against ***315** that guarantor. *See* RPAPL § 1371(1) (a deficiency judgment may be awarded against "a person who is liable to the plaintiff" for a mortgage debt "*[i]f* [that person] *is made a defendant in the action*") (emphasis added); *see also 358 & 360 Atl. Ave. Holdings, LLC v. 358 Atl. Realty LLC*, 2023 WL 2969297, at *6 (E.D.N.Y. Mar. 1, 2023) ("by naming [the guarantor] in this action, Plaintiff has preserved its right to seek a deficiency judgment against [the guarantor] after the foreclosure sale"); *Letchworth Realty, LLC v. LLHC Realty, LLC*, 2020 WL 5361666, at *3 (W.D.N.Y. Sept. 8, 2020) ("New York law required the Lender to include the Guarantors in the foreclosure action if it wanted a deficiency judgment against them."); *Minin v. 2494 Amsterdam Ave. LLC*, 2011 WL 5295204 (N.Y. Sup. Ct., N.Y. Cnty., Oct. 27, 2011) ("[A]n individual must be named as a defendant in the foreclosure action if the plaintiff intends to hold that individual liable for any deficiency judgment obtained after the foreclosure judgment and sale.").

Once the guarantor has been made a defendant in the foreclosure action, RPAPL § 1371(2) dictates the timing of the plaintiff's "motion ... for leave to enter a deficiency judgment," which must be made "[s]imultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser." RPAPL § 1371(2). If the plaintiff allows the 90-day window to expire without making a motion for a deficiency judgment, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." RPAPL § 1371(3); *see also Letchworth Realty*, 2020 WL 5361666, at *4 ("[T]he Lender's failure to name the Guarantors in the foreclosure action and move for a deficiency judgment against them means that the proceeds of the sale are deemed to have fully satisfied the mortgage debt, and no right to recover a deficiency now exists.").

In short, while the Lender could not now make a motion for a deficiency *judgment*, nothing in RPAPL § 1371 prevents it from bringing the Guarantors into the Foreclosure Action by amendment, so that it is in a position – if and when the 90-day window opens – to recover any deficiency from them. *See, e.g.*, *Letchworth Realty*, 2020 WL 5361666, at *4 ("Nothing stopped the Lender from adding the Guarantors to the lawsuit once the springing recourse carve-out events triggered their liability[.]"); *Frank v. Jaffa*, 266 A.D. 964, 964, 44 N.Y.S.2d 116, 117 (2d Dep't 1943) (the second owner of a mortgaged property was "free to move to be permitted to join in the complaint [filed by the first owner] and have it amended so as to seek a deficiency judgment against the obligors upon the bond, and to bring them in by a supplemental summons as parties defendant, so that there may be a complete determination in the foreclosure action of the rights of all parties").[11]

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B. Injunctive Relief

Plaintiff's second claim is labelled "Preliminary Injunction Against All Defendants," but appears to seek *final* injunctive relief, including an injunction prohibiting ***316** the Guarantors from "wasting, impairing, encumbering, conveying, or otherwise transferring the Loan's collateral" and requiring them to "transfer possession of the Mortgaged Property to Plaintiff." Compl. ¶¶ 78-81. In their briefs, the parties spill much ink arguing about whether the Complaint alleges sufficient facts to support the Lender's "claim for preliminary injunctive relief." *See* Def. Mem. at 17-18; Pl. Opp. at 11-13; Def. Reply at 8-9.

These arguments are entirely misplaced. An injunction (whether preliminary or final) is a form of relief, not an independent cause of action. *See, e.g.*, *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 406 (S.D.N.Y. 2010) ("[I]njunctions are remedies, not causes of action."); *Furchtgott-Roth v. Wilson*, 2010 WL 3466770, at *5 (S.D.N.Y. 2010) ("An injunction is a form of relief, not a separate cause of action."). Accordingly, plaintiff's "second count" should be dismissed for failure to state any cognizable claim.[12]

C. Unjust Enrichment

To state a claim for unjust enrichment in New York, a plaintiff "must establish three elements: '(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.' " *Digizip.com, Inc. v. Verizon Servs. Corp.*, 139 F.Supp.3d 670, 682 (S.D.N.Y. 2015) (quoting *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 586 (2d Cir. 2006)). "It is important to note, however, the nature of an unjust enrichment claim in New York: 'The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates *in the absence of any agreement*.' " *Beth Israel Med. Ctr.*, 448 F.3d at 586–87 (quoting *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572, 807 N.Y.S.2d 583, 588, 841 N.E.2d 742 (2005)). Thus, as the New York Court of Appeals explains, " '[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987).

Accordingly, "a claim for unjust enrichment is normally proper only in the absence of an express agreement between the parties," *Digizip.com*, 139 F. Supp. 3d at 682, and will be dismissed where, as here, it arises out of an enforceable contract and "simply duplicates, or replaces, a conventional contract [ ] claim." *Id.* (quoting *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F.Supp.3d 467, 483 (S.D.N.Y. 2014)); *accord Bermudez v. Colgate-Palmolive Co.*, 667 F.Supp.3d 24, 44 (S.D.N.Y. 2023) (dismissing duplicative unjust enrichment claim); *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F.Supp.3d 370, 394 (S.D.N.Y. 2021) (same).

I see no reason to depart from this general rule here. First, plaintiff alleges (and Carl admits) that the parties entered into a valid, enforceable written contract, namely, the Guaranty. Compl. ¶¶ 10; Carl Mattone Amend. Ans. ¶ 10. Second, plaintiff's unjust enrichment claim is wholly duplicative of its contract claim in that it seeks recovery of the same Rents that constitute its damages under the surviving branch of its claim for breach of the Guaranty. ***317** *See* Compl. ¶¶ 82-86. Plaintiff's third claim, like its second, should therefore be dismissed in its entirety.

D. RPAPL § 1301(3)

Although plaintiff has plausibly alleged a claim for breach of the Guaranty against both Guarantors, that is not the end of the matter. I must also consider whether that claim is barred – in its present form – by RPAPL § 1301(3), sometimes called the "one action rule," under which, "once a foreclosure action has been filed, a plaintiff may not simultaneously sue on the note without leave of the court in which the foreclosure proceeding is pending." *Batavia Townhouses, Ltd. v. Council of Churches Hous. Dev. Fund Co., Inc.*, 38 N.Y.3d 467, 486, 174 N.Y.S.3d 670, 195 N.E.3d 503 (2022) (Wilson, J., dissenting in part and explaining the history of the one-action rule). As relevant here, the statute prescribes that while a foreclosure action is pending (or after final judgment for the plaintiff therein):

> ... no other action shall be commenced or maintained to recover any part of the mortgage debt, ... without leave of the court in which the former action was brought. The procurement of such leave shall be a condition precedent to the commencement of [the second] action and the failure to procure such leave shall be a defense to [the second] action.

RPAPL § 1301(3).

"In essence, Section 1301 forces a mortgagee into an election of remedies between, on the one hand, an action in equity for foreclosure, in which a deficiency judgment may then also be sought, or, on the other hand, an action at law on the debt." *Fed. Deposit Ins. Corp.* v. *Home Sav. Bank*,

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1993 WL 41818, at *4 (E.D.N.Y. Feb. 9. 1993). The primary purpose of the rule "is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action[.]" *Windward Bora v. Browne*, 2023 WL 2744684, at *13 (quoting *Dollar Dry Dock Bank v. Piping Rock Builders, Inc.*, 181 A.D.2d 709, 710, 581 N.Y.S.2d 361, 362-63 (2d Dep't 1992)); *accord Wells Fargo Bank, N.A. v. Pena*, 51 Misc. 3d 241, 248, 24 N.Y.S.3d 865 (N.Y. Sup. Ct., Kings Cnty., 2016) (the "underlying legislative purpose and policy" of § 1301 is "to avoid the duplication of claims by the same party and multiple litigation simultaneously addressing the same issues") (collecting cases).

RPAPL § 1301(3) "fully applies to an action to recover under the guarantee of a note." *Wells Fargo Bank v. Pena*, 51 Misc. 3d at 247-48, 24 N.Y.S.3d 865 (collecting cases); *see also*, *e.g.*, *Letchworth Realty*, 2020 WL 5361666, at *1 (relying on § 1301(3) to deny lender's motion for leave to "file a separate action for a deficiency judgment" against two guarantors, where lender "should have and could have named the Guarantors as defendants and sought a deficiency judgment against them in the instant foreclosure action"); *Les Placements v. Rosenberg*, 1997 WL 1048897, at *3 (E.D.N.Y. Dec. 1, 1997) ("The terms of § 1301 apply in the guarantee context"); *Orchard Hotel, LLC v. Zhavian*, 34 Misc.3d 1219(A), 2012 WL 319046, at *11 (N.Y. Sup Ct., Kings Cnty., Jan. 31, 2012) (§ 1301(3) "applies equally to actions on the guarantee of a note"). Thus, a pending foreclosure action is "a defense" to a later-filed action on the guaranty, just as it is to a later-filed action on the note itself, if the plaintiff failed to procure leave of the foreclosure court before filing the damages action. *See*, *e.g.*, *Orchard Hotel*, 34 Misc.3d 1219(A), 2012 WL 319046 at *13 ("[U]nder RPAPL 1301(3), this action may not be maintained to recover a judgment on plaintiff's claims under the Guarantees, without ***318** leave of the court in which the foreclosure action was brought.").

Prior to the enactment of the New York Foreclosure Abuse Prevention Act (FAPA), ch. 821, 2022 N.Y. Laws (effective Dec. 30, 2022), there was some authority for the proposition that the court in the second-filed action could construe the complaint in that action as "an application for leave *nunc pro tunc*," and could permit the second suit to proceed if the plaintiff showed " 'special circumstances ... which manifestly require[ ]' that such leave be granted." *Windward Bora v. Browne*, 2023 WL 2744684, at *9 (quoting *Sanders v. Palmer*, 68 N.Y.2d 180, 185, 507 N.Y.S.2d 844, 847, 499 N.E.2d 1242 (1986)) (alterations in original); *see also*, *e.g.*, *U.S. Bank Nat'l Ass'n v. Karnaby*, 190 A.D.3d 1005, 1006, 136 N.Y.S.3d 886, 887 (2d Dep't 2021) (affirming trial court's "retroactive[ ] grant" of "leave to commence the instant action [on the note], nunc pro tunc," where prior foreclosure action had been discontinued such, that defendants "were not thereby placed in the position of having to defend against more than one lawsuit"). However, FAPA amended § 1301(3) by, *inter alia*, adding the sentence: "The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action." Thus, "[c]ourts no longer will be able to excuse a party's failure to obtain leave of the court before commencing a second action as some did before FAPA." 4D John P. McCahey, *Bills and Notes* § 100:11, *in* Commercial Litigation in New York State Courts 24, 26 (Robert L. Haig ed., 5th ed. Supp. 2024). In this case, moreover, the Lender has never argued – either here or in the Foreclosure Action – that "special circumstances" justify it in maintaining both the Foreclosure Action against the Borrower and this action against the Guarantors.[13]

Instead, the Lender contends that it should be permitted to proceed on two tracks simultaneously because it "is not seeking to doubly recover the Rents in both the Foreclosure Action and [this] Guaranty Action." Pl. Opp. at 7. Plaintiff may well have pure motives (in the sense that it does not *intend* to recover, in the aggregate, more than the full amount of the Debt from the Borrower and/or the Guarantors). But that is not the test. The question is whether it is seeking, in this action, to "recover any part of the mortgage debt" at issue in the Foreclosure Action. RPAPL § 1301(3). "To the extent it is, the action cannot be maintained." *Fed. Deposit Ins. Corp.* v. *Home Sav. Bank*, 1993 WL 41818, at *4.

As plaintiff acknowledges, the $17 million in Rents allegedly withheld from the Lender after the Borrower's default forms a part of the Mortgaged Property collateralizing the Debt, on which it seeks to foreclose. Pl. Opp. at 6; *see also* Mortgage at 2-3 (defining "Mortgaged Property" to include, *inter alia*, the Rents); *id.* at 5 § 2(a) ("Mortgagor does hereby absolutely and unconditionally assign to Mortgagee all of Mortgagor's right, title and interest ***319** in all current and future Leases and Rents[.]"). Consequently, this action cannot be maintained in its present form. Having chosen to pursue its equitable remedy in the Foreclosure Action – in which it may also seek a deficiency judgment – plaintiff cannot sue the Guarantors at law, in a separate action, to recover the same $17 million as damages.

This principle is well understood by the courts in New York, which routinely bar suits at law on guaranties – while a parallel foreclosure action is pending or after the lender obtained a foreclosure judgment – precisely because "the

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personal guaranty 'represent[s] part of a debt secured by the mortgage which was the subject of the foreclosure action[.]' " *Minin v. 2494 Amsterdam Ave.*, 2011 WL 5295204 (quoting *TBS Enters., Inc. v. Grobe*, 114 A.D.2d 445, 445-46, 494 N.Y.S.2d 716, 717 (2d Dep't 1985)); *see also Letchworth Realty*, 2020 WL 5361666, at *3 (same; quoting *Minin*); *Shaw Funding, L.P. v. Grauer*, 98 A.D.3d 660, 660, 950 N.Y.S.2d 524, 524-25 (2d Dep't 2012) (dismissing action to recover "rent monies" that were "wrongfully diverted" to defendants pursuant to RPAPL § 1301(3) because the rents, if recovered, were to have been "applied in reduction of the entire indebtedness from time to time outstanding and secured by [the] Mortgage," which was the subject of "a separate mortgage foreclosure action"); *Fed. Home Loan Mortg. Corp. v. Sierra*, 226 A.D.2d 283, 284, 641 N.Y.S.2d 291, 292 (1st Dep't 1996) ("[T]he four guarantees in issue ... do not represent obligations separate and distinct from the debts underlying the four mortgages to which they all refer[.]").

Because plaintiff's breach of guaranty claim seeks to recover part of the same mortgage debt at issue in the Foreclosure Action, and because plaintiff failed to obtain leave in the Foreclosure Action to proceed on parallel tracks, this action is barred by RPAPL § 1301(3) and must be dismissed. Because dismissal is mandatory under § 1301(3), as amended, this Court does not have the option of consolidating the two cases, as the Lender proposes. However, the Lender may, if it wishes, move in the Foreclosure Action to join the Guarantors as defendants, *see Letchworth Realty*, 2020 WL 5361666, at *4, and may then proceed against them, in accordance with RPAPL § 1371, for a deficiency judgment (to the extent permitted by the Guaranty).

E. Attorneys' Fees

Although Michael Mattone is entitled to a dismissal, he is not entitled to an award of his attorneys' fees. Insofar as the record discloses, there is no provision in the Guaranty (or any other Loan Document) that would grant fees to a Guarantor under the circumstances present here. Nor does Michael identify any statute or rule that would permit him to recover fees upon obtaining what may prove to be a temporary dismissal of the Lender's well-pleaded breach of guaranty claim under RPAPL § 1301(3).[14] Consequently, there is no basis upon which the Court could make an exception to the "American Rule," under which "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." ***320** *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

F. Remaining Claims and Cross-Claims

Although only one of the two Guarantors moved to dismiss the Complaint, the Lender's claims against Michael and Carl are identical, and identically flawed. Consequently, the Complaint should be dismissed as against Carl to the same extent, and on the same terms, as it is dismissed against Michael. *See*, *e.g.*, *Almeciga v. Center for Investigative Reporting, Inc.*, 185 F.Supp. 3d 401, 413 (S.D.N.Y. 2016) ("the claims against [non-moving defendants] fail for the same reasons they fail against [moving defendant], and the Court has ample authority in such circumstances to dismiss them as to these defendants as well").

Carl's cross-claims should also be dismissed, without prejudice, for lack of subject-matter jurisdiction. Although U.S. Bank is a citizen of Minnesota, *see* Compl. ¶ 7; Carl Mattone Amend. Ans. ¶ 7, both Michael and Carl are citizens of New York. *See* Compl. ¶¶ 8-9; Carl Mattone Amend. Ans. ¶¶ 8-9. Thus, if my recommendation is accepted with respect to the Complaint, the Court will be left without original jurisdiction over the cross-claims, which were properly pleaded under Fed. R. Civ. P. 13(g), but arise solely under state law. *See* Carl Mattone Amend. Ans. ¶ 180 (invoking this Court's supplementary jurisdiction over the cross-claims pursuant to 28 U.S.C. § 1367).

It is well-settled in our Circuit that when the "jurisdiction-conferring" claims are dismissed before trial, any remaining non-federal cross-claims between non-diverse parties may also be dismissed. *Federman v. Empire Fire and Marine Ins. Co.*, 597 F.2d 798, 811 (2d Cir. 1979) (where a settlement that resolved all of plaintiff's claims eliminated "the underlying jurisdictional bases" for the remaining cross-claims for contribution and indemnification between non-diverse parties, the cross-claims were properly dismissed); *see also*, *e.g.*, *Rogers v. Westfalia Associated Techs., Inc.*, 485 F. Supp. 2d 121, 130-31 (N.D.N.Y. 2007) (dismissing plaintiff's jurisdiction-conferring claims on summary judgment and then dismissing "the claims contingent upon them," including cross-claims for contribution and indemnification); *Nat'l Westminster Bank, PLC v. Grant Prideco, Inc.*, 343 F. Supp. 2d 256, 258 (S.D.N.Y. 2004) (dismissing all remaining claims, for lack of subject-matter jurisdiction, after "[t]he dismissal of NatWest ... eliminated the diverse plaintiff"); *Lyco, Inc. v. Dolomite Const. Co.*,

1991 WL 208886, at *1 (W.D.N.Y. Sept. 25, 1991) (dismissing diverse plaintiff's claim pursuant to Rule 12(b)(6), and then dismissing the remaining cross-claims pursuant to Rule 12(b)(1) because "all the defendants reside in New York" and "there is no independent jurisdictional basis for the cross-claims"). Consequently, upon the dismissal of U.S. Bank's jurisdiction-conferring claims, Carl's cross-claims against Michael should also be dismissed, without prejudice, for lack of subject-matter jurisdiction.

IV. CONCLUSION

For the foregoing reasons, I recommend, respectfully, that defendant Michael Mattone's motion to dismiss the Complaint be GRANTED to the extent set forth herein; that plaintiff's breach of guaranty claims against both defendants be DISMISSED as barred by RPAPL § 1301(3), WITHOUT PREJUDICE to its right to seek to join the Guarantors as defendants in the Foreclosure Action for the purpose of seeking a deficiency judgment against them; that plaintiff's claims for preliminary ***321** injunction and unjust enrichment be DISMISSED WITH PREJUDICE for failure to state any cognizable claims; and that Carl Mattone's cross-claims against Michael Mattone be DISMISSED WITHOUT PREJUDICE for lack of subject-matter jurisdiction.

Dated: February 21, 2025

NOTICE OF PROCEDURE FOR FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties have 14 days from this date to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), unless they receive this Report and Recommendation solely by mail, in which case they have 17 days from the date on which it was mailed. *See* Fed. R. Civ. P. 6(a), 6(d). Any objections must be filed with the Clerk of the Court, addressed to the Hon. Andrew L. Carter, Jr., and delivered to Judge Carter in accordance with his individual rules of practice. Any request for an extension of the deadline to file objections must also be directed to Judge Carter. **Failure to file timely objections will result in a waiver of such objections and will preclude appellate review**. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486, 487 (2d Cir. 2018); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

All Citations

769 F.Supp.3d 298

Footnotes

1 The Callejas Declaration was filed in the Foreclosure Action on September 12, 2023, and then attached as Exhibit D to the Brandofino Declaration (Dkt. 45) in this case.

2 The Loan Agreement further defines "Rents" as "all rents, rent equivalents, moneys payable as damages ... or in lieu of rent or rent equivalents, royalties ..., income, fees, receivables, receipts, revenues, deposits ... accounts, cash, issues, profits, charges or services rendered, and other payment and consideration of whatever form or nature received by or paid to or for the account of or benefit of Borrower, Manager [Mattone Group Management, LLC] (other than fees payable to Manager in accordance with the Management Agreement) or any of their agents or employees from any and all sources arising from or attributable to the Property and the Improvements, including all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of the Property or rendering of services by Borrower, Manager (other than fees payable to Manager in accordance with the Management Agreement) or any of their agents or employees and proceeds, if any, from business interruption or other loss of income insurance." Loan Ag. § 1.1.

3 This type of guaranty is "known colloquially in the industry as a 'bad boy guaranty' " because it "requires defendants to compensate the lenders in the event they or the Borrower engage in certain acts that could harm the lenders' interest in the collateral or the lenders' ability to enforce their rights under the loan agreement." *Nexbank, SSB v. Soffer*, 144 A.D.3d 457, 458, 41 N.Y.S.3d 217, 218 (1st Dep't 2016); *see also* Jessica D. Gabel, *The Terrible Tousas: Opinions Test the Patience of Corporate Lending Practices*,

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27 Emory Bankr. Dev. J. 415, 469 n.48 (2011) ("A carve out guaranty (also known as a 'bad boy' guaranty) is employed where a loan is non-recourse except on occurrence of the specified events the lender wishes to discourage – such as bankruptcy, false representations, or financial reporting, the wrongful transfer of collateral, or misappropriation of rents, security deposits, reserve accounts or insurance proceeds.").

4 The Michael Mattone Declaration was filed in the Foreclosure Action on September 27, 2023, and then attached as Exhibit A to the Complaint in this action.

5 Plaintiff has never moved for preliminary injunctive relief under Fed. R. Civ. P. 65.

6 Rather than fully brief Michael's motion to dismiss Carl's cross-claims, the parties sought and obtained an extension of Carl's deadline to file his opposition papers until 30 days after the Court's decision on the instant motion to dismiss the Complaint. (Dkt. 65.)

7 Additionally, Michael argues that he is entitled to recover his attorneys' fees and costs incurred in the defense of this action, because it is "a blatant waste of both the Court's and Mr. Mattone's resources." Def. Mem. at 20. However, Michael does not identify any contractual or statutory basis for a fee award, and never made a Rule 11 motion in this action.

8 Plaintiff conspicuously failed to defend the branch of its breach of guaranty claim depending on the happening of a springing recourse event. *See* Pl. Opp. at 10-11.

9 *See also* Loan Ag. § 3.1 (during a Cash Management Period, non-residential rents "must be swept on a daily basis" into an account controlled by Lender and "applied and disbursed in accordance with this Agreement"); *id.* § 3.11 (during a Cash Management period, "all Available Cash must be paid to Lender").

10 Moreover, as noted above, Judge Carter expressly found that the Lender has "sufficient documentary evidence to establish standing to foreclose." *U.S. Bank v. Mattone Grp.*, 2024 WL 4265291, at *3

11 I note as well that the six-year statute of limitations applicable to a claim for breach of a written guaranty, *see* N.Y.C.P.L.R. § 213(4), has not yet run. *Cf. Westnine Assocs. v. W. 109th St. Assocs.*, 247 A.D.2d 76, 677 N.Y.S.2d 557 (1st Dep't 1998) (affirming trial court's dismissal of amended complaint as against newly-joined guarantors where plaintiff failed to serve them until "after the expiration of the Statute of Limitations").

12 Dismissing the second claim will not prevent the Lender from moving for preliminary injunctive relief, if it meets its burden under Fed. R. Civ. P. 65(a), or from requesting a final injunction at the conclusion of the case, if warranted. *See Chiste*, 756 F. Supp. 2d at 407 (dismissing plaintiff's claims for a declaratory judgment and an injunction but deeming those remedies "added to her ad damnum clause").

13 Even before FAPA, the "special circumstances" test was strict. "If the plaintiff could have had a perfect remedy against all persons who were liable for the payment of the debt by making them parties to the foreclosure suit and obtaining a deficiency judgment against them, special circumstances likely do not exist to permit further proceedings." *Letchworth Realty, LLC*, 2020 WL 5361666,

at *2 (cleaned up). Here, that "perfect remedy' existed, and may still exist. The risk that if the Guarantors are brought into Foreclosure Action they may try to delay it – by seeking additional discovery – does not justify the Lender's decision to forgo its perfect remedy and institute a separate action on the Guaranty without advance leave from Judge Carter.

14 Michael cannot rely upon Rule 11, because he did not make any Rule 11 motion in this action. *See* Fed. R. Civ. P. 11(b)(2) (describing procedural prerequisites for an award of sanctions under Rule 11). Moreover, Michael's underlying contention – that the Lender misrepresented "its possession of the Consolidated Note" in both lawsuits, *see* Def. Mem. at 20 – was rejected by Judge Carter in the Foreclosure Action. *U.S. Bank v. Mattone Grp.*, 2024 WL 4265291, at *4.

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