

New York Commercial Division Round-Up

News & Updates on Cases Decided in the Commercial Division of the New York State Supreme Court

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[Worldwide Economic And Credit Crisis Does Not Provide A Basis To Force A Renegotiation Of Loan Documents](#)

By [Eric O'Connor](#)

In a recent case in the Commercial Division of the Supreme Court of the State of New York, Justice Bransten granted the lender's motion for a \$50 million summary judgment in lieu of complaint pursuant to CPLR §3213 based upon promissory notes and a guaranty, because borrowers failed to carry their burden to establish any viable defense. *See KBS Preferred Holding I LLC v. Petra Fund REIT Corp.*, Index No. 601836/09 (Sup Ct, NY County, May 3, 2010) ("KBS").

Specifically, there was no dispute that "the Notes and Guaranty qualify as instruments for the payment of money only," and there was also no dispute as to their execution and payment default. *KBS* at 13. Therefore, because the plaintiff lender "established a prima facie case pursuant to CPLR §3213," the borrowers had the burden to "demonstrate the existence of a triable issue of fact relative to a bona fide defense." *KBS* at 13-14.

The Court rejected each of the borrowers' three defenses.

Lender Did Not Breach the Parties' Contract.

First, borrowers argued that lender had breached its "obligation to act reasonably" pursuant to a term of the loan agreement by "refusing to negotiate with [borrowers] to restructure the debt during the time of unprecedented economic calamity," and a particular crisis in the credit markets. *KBS* at 5, 14-15. Borrowers argued that the lender could not declare a default, accelerate the payments due, or commence an action to enforce the Loan Documents, but rather had a duty to negotiate a restructuring of borrowers' debt obligations. *KBS* at 14. The Court quickly disposed of this argument by finding that the loan agreement was "clear and unambiguous" and even "[a]ssuming, *arguendo*" that lender was obligated to enter into negotiations to restructure borrowers' debt, "there is no basis in the Loan Documents for the inference that such negotiations were required to be successfully concluded." *KBS* at 15.

Lender Did Not Breach the Implied Covenant of Good Faith and Fair Dealing.

Second, borrowers argued that, particularly in light of the “current economic crisis,” lender breached the implied covenant of good faith and fair dealing by refusing to negotiate, declaring a default, and accelerating the balance due. *KBS* at 6, 17. However, because borrowers were “sophisticated commercial entities” in the field, the Court held that borrowers would not be justified “in presuming that, in the event of default, the Lender would be obligated to restructure the Borrower and Guarantor’s obligations on those terms deemed acceptable by the Borrower and Guarantor.” *KBS* at 17. The Court also held that borrowers’ implied covenant defense “cannot substitute for unsustainable breach of contract claim.” *KBS* at 17-18 (citing *Nikitovich v. O’Neal*, 40 A.D.3d 300, 301 (1st Dept. 2007)).

Borrowers’ Impossibility Defense Fails.

Finally, borrowers argued that the world-wide economic crisis rendered their performance under the loan documents impossible. The Court explained that the defense of impossibility has been “applied narrowly,” performance must be “objectively impossible,” and “the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.” *KBS* at 18 (citing *Kel Kim Corp. v. Central Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987)). Moreover, “financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, “ is not tantamount to impossibility so as to excuse a defendant from liability in damages for failure to perform the contract.” *KBS* at 19 (quoting *Pettinelli Elec. Co., Inc. v. Board of Educ. of City of New York*, 56 A.D.2d 520, 521 (1st Dept.) *affd.* 43 N.Y.2d 760 (1977), quoting *407 E. 61st Garage v. Savoy Corp.*, 23 N.Y.2d 275, 281 (1968)). And, again describing borrowers as “highly sophisticated,” the Court held that future performance by borrowers was not impossible and to hold otherwise would unjustly enrich borrowers. *KBS* at 21.

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