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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

DOCKETED

JUN 16 2026

R. POSTELL
COMMERCE PROGRAM

MF1 2023-FL12 LLC,

Plaintiff,

v.

DAVID WAXMAN, AARON SMITH and JOSEPH
ZIMATORE,

Defendants.

January Term 2025

No. 1310

Commerce Program

Control Number 25124306

ORDER

AND NOW, this 16th day of June 2026, upon consideration of the Motion for Summary Judgment filed by Plaintiff MF1 2023 -FL12 LLC, the Response in Opposition filed by Defendants David Waxman, Aaron Smith and Joseph Zimatore, the Reply, and in accord with the attached Opinion, it is **ORDERED** that:

1. The Motion for Summary Judgment is **GRANTED**.
2. Judgement is entered in favor of Plaintiff and against Guarantors in the amount of \$1,250,000.00.
3. Plaintiff is granted leave to file a motion seeking attorney fees or other disbursements incurred by Plaintiff and its predecessors in interest in connection with the enforcement of the subject Guaranty within thirty days from the date this Order docketed.
4. Defendants may file a response to the motion within thirty days from the date the motion is filed of record.

BY THE COURT:



MICHAEL E. ERDOS, J.

ORDOP-Mf1 2023-FL12 Llc Vs Waxman Etal [RCP]



25010131000027

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

MF1 2023-FL12 LLC,	:	January Term 2025
	:	
Plaintiff,	:	No. 1310
	:	
v.	:	Commerce Program
	:	
DAVID WAXMAN, AARON SMITH and JOSEPH:	:	Control Number 25124306
ZIMATORE,	:	
	:	
Defendants.	:	

OPINION

This is an action for breach of a Guaranty given by Defendants David Waxman, Aaron Smith and Joseph Zimatore (collectively “Guarantors”). Presently before the Court is the Motion for Summary Judgment filed by Plaintiff MF1 2023 -FL 12, LLC (“Lender”). For the reasons discussed below, the Motion for Summary Judgment is granted.

BACKGROUND

1. The Loan

On August 24, 2023, MF1 Capital, LLC, the original lender, issued to MM Poth Brewery Landlord LLC (“Borrower”) a commercial mortgage loan in the principal amount of \$35,750,000. (Docket (Dkt.) 12-18-25 Lender’s Motion ¶ 1 and 1-16-26 Guarantors’ Response ¶ 1). The Loan is evidenced by a promissory note dated August 24, 2023. (Id. ¶ 2). Borrower also executed additional documents related to the commercial mortgage loan including but not limited to an Open-End Mortgage, an Assignment of Leases and Rents, a Security Agreement and Fixture filing, and a Multi-Family Loan and Security Agreement. (Id. ¶¶ 3, 4). The property connected with the Loan is known as Poth Brewery Lofts at 3145 W. Jefferson Street, Philadelphia, PA 19121 (“Property”).

On April 21, 2025, Lender, by way of assignment, was transferred “all right, title and interest of the Assignor in and to the Loan.... [a]nd all other agreements, including but not limited to guaranty agreements, ...entered into or delivered in connection with the Loan.” (Dkt. 12-18-25 Lender’s Motion ¶ 25 and 1-16-26 Guarantors’ Response ¶ 25).

The Interest Reserve Account

The Loan Agreement in § 4.10 provides in part the following:

- (a) On the Closing Date, Borrower shall deposit with Lender an amount equal to 1,250,000.000. Such amounts will be held in a deposit account established by Lender (the “Interest Reserve Account”). In the event that the balance of the Interest Reserve Account is ever less than \$500,000.00, Borrower shall, on the following Payment Date, deposit with Lender an amount sufficient to cause the balance of the Interest Reserve Account to be equal to \$1,250,000 (each such deposit, an “Interest Reserve Account Replenishment Deposit”), which amounts will be held in the Interest Reserve Account. (Dkt. 1-14-25, Complaint, Exhibit B, part 1 Loan Agreement § 4.10).

The Loan Agreement also provides in § 3.04 that “Borrower shall be personally liable to Lender” in the event “Borrower fails to make any Interest Reserve Account Replenishment Deposit pursuant to the terms of this Agreement...” (Dkt. 1-14-25, Complaint, Exhibit B, part 1 Loan Agreement §§3.04 and 3.04 (a)).

The Guaranty

On August 24, 2023, Guarantors executed a Guaranty. (Dkt. 12-18-25 Lender’s Motion ¶ 5 and 1-16-26 Guarantors’ Response ¶5). The Guaranty provides that each Guarantor “absolutely and unconditionally guarantees to Lender the prompt and unconditional payment of the Guaranteed Recourse Obligations of Borrower,” which “shall mean all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Article 3 of the Loan Agreement”. (Dkt. 1-14-25, Complaint, Exhibit D, Guaranty. p. 1).

The Guaranty also provides that:

“Guarantor will reimburse Lender, to the extent that such reimbursement is not made by Borrower, for all expenses (including reasonable counsel fees and disbursements) incurred by Lender in connection with the collection of the Guaranteed Recourse Obligations of Borrower or any portion thereof or with the enforcement of this Guaranty. § 2.02. (Dkt. 1-14-25, Complaint, Exhibit D, Guaranty. p. 2).

The “Guaranteed Recourse Obligations of Borrower” include the payment of the Interest Reserve Account Replenishment Deposit that the Borrower is contractually required to make under §4.10 of the Loan Agreement. (Id. p. 1).

Payment History

The Loan Agreement requires that “on the Payment Date occurring in October 2023 and on each Payment Date thereafter up to and including the Maturity Date, Borrower shall pay to Lender the Monthly Payment Amount.” (Id. Complaint, Exhibit B, part 1, § 2.04 (a)(ii)). The Loan Agreement also requires that Borrower make deposits on each payment date into specified accounts for taxes, insurance and reserves. (Id. Complaint, Exhibit B, part 1, Article 4).

The Loan Agreement provides that it shall constitute an Event of Default if, among other things, “any Monthly Payment Amount or any deposit into the Reserve Accounts due on a Payment Date is not paid when due under the Loan Documents.” (Id. Complaint, Exhibit B, part 1, Article 10.01 (a)). The monthly payments and deposits into the Reserve Accounts for May, June and July 2024 were not paid until June 6, July 9 and September 6, 2024, respectively. (Dkt. 12-18-25 Lender’s Motion ¶ 33 and 1-16-26 Guarantors’ Response ¶¶33; Dkt. 3-14-25. ¶ 36). Borrower stopped making payments as required by the Loan Agreement in August 2024. (Dkt. 1-14-25, Complaint, Exhibit E, Notice of Default).

The Notice of Default

On October 22, 2024, Lender sent Borrower a notice of default. (Id.). The notice of default provided that if the amounts were not paid in full within five days of the date of the

notice, Lender would consider exercising its rights as set forth in the Loan Agreement, including the right to accelerate and declare the loan due in full, foreclose, apply the interest reserve account monies to delinquent interest and other remedies under the Loan Agreement that the Lender deems appropriate. (Dkt. 1-14-25, Complaint, Exhibit E, Notice of Default).

The Mortgage provides in § 9.01(j) that upon the occurrence and during the continuance of an Event of Default, Lender may, among other things, “apply any sums then deposited in the Reserve Accounts to the payment of interest on the unpaid principal balance of the Note.” (Dkt. 12-18-25 Lender’s Motion ¶ 36 and Dkt. 1-16-26, Guarantors’ Response ¶36; Dkt. 1-14-25, Complaint, Exhibit C, Article IX). As of December 5, 2024, there was accrued and unpaid interest excluding default interest due on the Loan in the amount of \$1,645,946.32 and the balance in the Interest Reserve Account was \$764,769.24. (Dkt. 1-14-25, Complaint ¶ 18; Dkt. 3-14-25, Answer ¶ 18).

On December 5, 2024, Lender, through its counsel, provided a Notice of Application of Funds from the Interest Reserve Account and Demand for Interest Reserve Account Replenishment Deposit to Borrower and Guarantors. (Dkt. 12-18-25 Lender’s Motion ¶ 39 and Dkt. 1-16-26, Guarantors’ Response ¶39) The Notice of Replenishment Demand advised Borrower and Guarantors that:

(A) AS OF THE DATE HEREOF, THE EVENT OF DEFAULT IDENTIFIED IN THE NOTICE OF DEFAULT HAS NOT BEEN CURED BY BORROWER AND IS CONTINUING; (B) LENDER HAS ELECTED TO APPLY THE BALANCE OF THE INTEREST RESERVE ACCOUNT TOWARDS THE ACCRUED AND UNPAID INTEREST ON THE PRINCIPAL BALANCE OF THE NOTE; AND (C) DEMAND IS HEREBY MADE UPON THE BORROWER AND GUARANTOR TO MAKE AN INTEREST RESERVE ACCOUNT REPLENISHMENT DEPOSIT IN THE AMOUNT OF \$1,250,0000.00 ON OR BEFORE THE DECEMBER PAYMENT DATE ON DECEMBER 9, 2024. (Dkt. 1-14-25, Complaint, Exhibit F).

The Notice further advised Borrower and Guarantors that:

IN THE EVENT AND TO THE EXTENT THAT THE INTEREST RESERVE ACCOUNT REPLENISHMENT DEPOSIT IS NOT MADE IN FULL BY THE DECEMBER PAYMENT DATE, LENDER MAY, AT ITS DISCRETION, COMMENCE AN ACTION AGAINST GUARANTORS PERSONALLY ON THE GUARANTY FOR THE FULL AMOUNT OF THE SHORTFALL. (Dkt. 1-14-25, Complaint, Exhibit F).

To date, Borrower and Guarantors have not replenished the Interest Reserve Account. (Dkt. 1-14-25, Complaint ¶ 23; Dkt. 3-14-25, Answer ¶ 23).

The PACE Loan

Between July and September 2024, Borrower requested permission from Lender as required by the Loan Agreement to apply for a \$10 million PACE loan. (Dkt. 1-16-26, Guarantors' Response, Waxman Affidavit, ¶15; Dkt. 1-14-25, Complaint, Exhibit B, part 1, § 7.01 (a)-(b)). The Loan Agreement defines "PACE Loan" to mean "any Property Assessed Clean Energy Loan or any similar financing". (Dkt. 1-14-25, Complaint, Exhibit B, part 2, definition schedule). Borrower intended to use those proceeds to bring the MF1 Loan current and pay it down to manageable level, reducing rather than creating any new risk for MF1. (Dkt. 1-16-26, Guarantors' Response, Waxman Affidavit, ¶14).

Lender did not give Borrower consent to apply for the PACE loan. (Dkt. 12-18-25 Lender's Motion ¶ 48 and Dkt. 1-16-26, Guarantors' Response ¶ 48). Under the Loan Agreement § 12.02, the Lender has an absolute right to deny approval. Section 12.02 provides:

"Whenever pursuant to this Agreement, Lender exercises any right given to it to approve or disapprove, or any agreement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangement or terms are satisfactory or not satisfactory shall (except as it otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive. (Id. § 12.02.).

Procedural History

On January 13, 2025, Lender commenced a mortgage foreclosure action against Borrower. The action is captioned *MF1 Capital Seller XI LLC v. MM Poth Brewery Landlord LLC*, 2501-1216 (“Borrower Action”). In the Borrower Action, Lender filed a motion for summary judgment, which Borrower did not oppose. On April 14, 2026, the Court granted Lender’s motion for summary judgment and entered a judgment in mortgage foreclosure against Borrower in the amount of \$41,985, 848.82 together with interest and default interest fees and expenses from December 14, 2025 to the date of the Sheriff’s Sale of the property. (Dkt. *MF1 Capital Seller XI LLC v. MM Poth Brewery Landlord LLC*, 2501-1216, 4-14-2026 Order). As of the date of this writing, the property has not been sold at sheriff sale.

In addition to the Borrower Action, Lender also filed this action against the Guarantors on January 14, 2025 for breach of contract seeking to recover the full Interest Reserve Account replenishment amount - \$1,250,000. On May 1, 2025, Lender with the cooperation of the historic Tax Credit Investor took control of Borrower’s assets and appointed GREP Atlantic LLC (“Greystar”) as the manager of the building. (Dkt. 1-16-26, Guarantors’ Response, Waxman Affidavit, ¶ 22). Greystar has been in complete control of the property and collecting all rents since its installation. (Id. Waxman Affidavit, ¶23). On December 18, 2025, Lender filed this motion for summary judgment, which is ripe for consideration.

DISCUSSION

I. Guarantor breached the Guaranty by failing to replenish the Interest Reserve Account.

A Guaranty is a contract subject to the same rules of interpretation as other contracts. *Meeting House Lane, Ltd. v. Melso*, 628 A.2d 854, 857 (Pa. Super. 1993), *appeal denied*, 537 Pa. 633, 642 A.2d 486 (1994). Here, in the contract of Guaranty, Guarantors promised to “absolutely

and unconditionally” guarantee the prompt and unconditional payment of the Guaranteed Recourse Obligations of Borrower. (Dkt. 1-14-25, Complaint, Exhibit D, Guaranty). Guaranteed Recourse Obligations of Borrower is defined as “all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Article 3 of the Loan Agreement. (Id.). The Loan Agreement § 3.04 specifically provides that Borrower shall be personally liable to Lender if they fail to make any Interest Reserve Account Replenishment Deposit pursuant to the terms of the Loan Agreement. (Dkt. 1-14-25, Complaint, Exhibit B, part 1 Loan Agreement §§3.04 and 3.04 (a)).

Guarantors did not make the required replenishment deposit as required by the Guarantee. While Guarantors admit that the required payment was not made, they argue that they are excused from making these payments because Lender did not act in “good faith” in considering the PACE loan and in seizing control of the property and appointing a property manager. As will be discussed below, this argument fails.

A. Lender did not breach its implied duty of good faith and fair dealing by not approving the PACE Loan and by “seizing” control of the property.

Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. *Creeger Brick and Bldg. Supply Inc. v. Mid-State Bank and Trust Co.*, 560 A.2d 151, 154 (Pa. Super. 1989). “Good faith” has been defined as “[h]onesty in fact in the conduct or transaction concerned.” *Id.* at 153. The Supreme Court of Pennsylvania has refused to impose a duty of good faith that would modify or defeat the legal rights of a creditor. *Id.* As a result, the duty of good faith imposed upon contracting parties does not compel a lender to surrender rights that have been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan that are favorable to itself. *Id.*

In this case, the Loan Agreement includes a provision entitled “Lender's Discretion” which provides that:

Whenever pursuant to this Agreement, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or to decide whether arrangements or terms are satisfactory shall (except as is otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive. (Dkt. 1-14-25, Complaint, Exhibit B, part 1 § 12.02).

Based on the foregoing provision, the PACE Loan application (disapproved) and the appointment of Greystar (approved) may not be the basis of Guarantors’ claim for breach of the implied duty of good faith and fair dealing as they were discretionary decisions.

With respect to the PACE Loan, under § 12.2, Lender had no obligation to approve the application for the PACE Loan. In fact, Lender had no obligation to even consider Borrower’s request. *See e. g., Stobba Residential Associates, L.P. v. RS Rialto 2019-FL I Holder, LLC et al.*, No. 487 EDA 2023, 2023 WL 8542590 (Pa. Super. December 11, 2023)(unpublished disposition, non-precedential, memorandum¹) (Lender had no obligation to even **consider** its forbearance request, and the trial court properly granted summary judgment to Lender on Borrower’s breach of duty of good faith and fair dealing claim. (emphasis in the original)).

The Lender Discretion provision gives Lender the absolute right to make decisions without risk of being questioned. Accordingly, the contention that Lender acted in bad faith when it exercised a right conferred to it by the Loan Agreement fails as a matter of law. *See, Creeger*, 560 A.2d at 154. (The implied covenant of good faith does not “compel a lender to

¹ Non precedential opinions filed after May 1, 2019 may be cited for their persuasive value. *See*, Superior Court Op section 65.37. The Opinion in *Stobba* is persuasive.

surrender rights ...conferred to the lender by the terms of the loan contract.”)² Moreover, notwithstanding §12.02, there is no evidence that the PACE Loan, even if considered and approved by Lender, would have avoided the need to use Interest Reserve Account funds as Borrower was already sporadically paying its obligation to Lender.

Similarly, Guarantors’ contention that Lender breached its implied duty of good faith and fair dealing when it “seized” control of the property by installing Greystar as the property manager also fails as a matter of law. Like the PACE Loan, Lender’s decision to take control of the property was sanctioned as a discretionary decision of the Lender which was final and conclusive. Further, notwithstanding the Lender discretion provision, the contention that the property was mismanaged is not persuasive, not supported by the evidence, and speculative. Borrower and Guarantors had more than enough time to replenish the Interest Reserve Account before this litigation commenced in January 2025 and before the appointment of a manager in May 2025.³ The actions of Greystar post complaint are not the cause of Guarantors’ default and

² Guarantors rely upon *Francis v. LCP N. Third, LLC*, 293 A.3d 273, 279 (Pa. Super. 2023) and *Academy Industries, Inc. v. PNC Bank, NA*, 2002 WL 1472342 (Pa. C.P. May 20, 2002) (Shepard, J) to support their contention that Lender breached its obligation to consider the proposed PACE loan in good faith. (Dkt. 1-16-26, Memo in Opposition, 14). However, *Francis* and *Academy Industries* are distinguishable from this case, as Lender discretion provision were not present in the relevant agreements. Generally, parties to a contract have an implied duty of good faith and fair dealing, but only in the absence of an express provision to the contrary. The implied duty of good faith cannot trump the express provisions in the contract. *Stammerro v. Stammerro*, 889 A.2d 1251, 1259 (Pa. Super. 2005), citing *Centric Bank v. Sciore*, 348 A.3d 1089, 1105–06 (Pa. Super. 2025).

³ In his affidavit attached to Guarantors’ response to the Lender’s motion for summary judgment, Waxman avers that Greystar was unfamiliar with the market in which the property was located and declined to learn about the property before taking over. He further avers that as a result of Greystar’s appointment, expenses have increased, two prospective commercial tenants were lost, and residency occupancy has declined which prevented the property from being refinanced to pay the Interest Reserve Replenishment deposit and pay off the loan. (Dkt. 1-16-26, Guarantors’

therefore may not serve as a basis for a claim that Lender breached its implied duty to act in good faith.

B. Lender's action of accepting "catch up" payments is not a basis for failing to act good faith.

Guarantors attempt to argue that Lender and Borrower entered into a binding agreement that modified the original terms of the Loan when Lender agreed to accept "catch up" payments in exchange for considering the approval of the PACE Loan is not persuasive. The Loan Documents specifically prohibit oral modifications of the Agreements. Notwithstanding the prohibition of oral modifications to the Loan Agreement, Guarantors have failed to establish the required consideration for the alleged modification. Here, the "catch up" payments that were allegedly requested by Lender were already an existing obligation of the Borrower. The "catch up" payments were late payments under the Loan Agreement. The performance of a pre-existing obligation cannot supply the necessary consideration for a legally binding agreement.

Pennsylvania State University v. University Orthopedics, Ltd., 706 A.2d 863, 873 (Pa. Super. 1998). Accordingly, such payment cannot constitute consideration. ⁴

Response, Waxman Affidavit, ¶25-27). Guarantors' reliance upon Waxman's affidavit to prove Lender's breach of the implied duty of good faith and fair dealing is misplaced because Greystar was installed after the default by Borrower and Guarantors and after this litigation was commenced. Accordingly, the alleged "bad faith" cannot excuse Guarantors' performance.

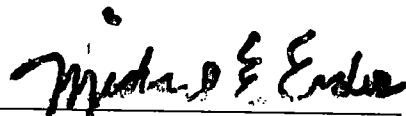
⁴In passing, Guarantors state that entering judgment on the Guaranty is premature until it is determined if Lender will sustain any loss with respect to the loan. (Dkt. 1-16-26, Memo p. 9). Lender acknowledges that it could not execute upon a judgment against the Guarantors without first completing the foreclosure process and complying with the Pennsylvania Deficiency Act in the mortgage foreclosure action. (Dkt. 12-18-25, Motion, ¶ 71). Moreover, Lender, as a result of the default, has the right under the Loan Documents to exercise all rights and remedies under any causes of action, whether before or after the sale of the Property, and apply the proceeds of any recovery to the debt in such priority or proportion as Lender in its discretion deems proper. (Dkt. 1-14-25, Complaint, Exhibit C – Mortgage §9.01 (o) and § 9.02). Additionally, Lender's rights, powers and remedies may be pursued singularly, concurrently or otherwise, at such time and in such order as Lender may determine in Lender's sole discretion. (Id. Exhibit B, Part 1, § 10.3).

CONCLUSION

Based on the foregoing, Guarantors had a duty under the Guaranty to replenish the Interest Reserve Account. Their failure to replenish the account constitutes a breach of the Guaranty, which caused Lender to suffer damages in the amount of \$1,250,000.00. The Motion for Summary Judgment is **GRANTED**. Judgement is entered in favor of Plaintiff and against Guarantors in the amount of \$1,250,000.00.

Plaintiff is granted leave to file a motion seeking attorney fees or other disbursements incurred by Plaintiff and its predecessors in interest in connection with the enforcement of the subject Guaranty within thirty days from the date this Order docketed. Defendants may file a response to the motion within thirty days from the date the motion is filed of record.

BY THE COURT:



MICHAEL E. ERDOS, J.

Therefore, the concern that entering judgment at this time is premature or may lead to a double recovery appears to have been contemplated by the parties as evidenced by the Loan Documents. Lender appreciates the concern and indicates that execution will not occur until after the foreclosure process is complete.