SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 28, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6995 The People of the State of New York, Respondent, Ind. 62704C/06

-against-

Marsha Sibblies, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered March 3, 2009, convicting defendant, after a jury trial, of obstructing governmental administration in the second degree and resisting arrest, and sentencing her to a conditional discharge for a period of one year, unanimously affirmed.

On November 27, 2006, a police officer stopped defendant in her car after she was seen making an illegal left turn. Defendant refused the officer's request to turn over her license and registration and then, after being told that she was about to be placed under arrest for that refusal, she physically resisted

the efforts of that officer and others to obtain the requested paperwork, to remove her from the vehicle, and to place her under arrest. Among other obstructive actions, defendant closed her vehicle's window on the officer's arm, causing him injury, and flailed and kicked as she was handcuffed. Based on this incident, which occurred on November 27, 2006, defendant was initially charged with a felony, but on February 8, 2007, the People dropped that charge, which left pending the misdemeanor charges of assault in the third degree, resisting arrest, obstructing governmental administration in the second degree, and harassment in the second degree. The People filed a certificate of readiness on February 22, 2007.

At the next calendar call for the case, on March 28, 2007, the prosecutor stated: "The People are not ready at this time. The People are continuing to investigate and are awaiting medical records. It was a cop assault." On this basis, the People requested an adjournment of one week. Defendant's attorney, who was appearing for her for the first time, also requested an adjournment to prepare motions. The court adjourned the case to June 7 for trial, instructing the People to file a certificate of readiness when they were ready.

Within one week of the March 28 calendar call, the People received the medical records. On May 23, 2007, they filed a

certificate of readiness. Defendant moved to dismiss on the ground that the People violated the speedy trial provisions of CPL 30.30. She noted that the People were not in possession of the medical records concerning the medical treatment rendered to the injured officer when they filed their certificate of readiness on February 22, and argued that the February 22 statement of readiness was illusory because the People announced on March 28 that they were not ready, a situation that did not change until May 23, when they again filed a certificate of readiness. In defendant's view, the People are chargeable with the period from February 8 to May 23, which exceeds the 90 days permitted by CPL 30.30.

In opposing the motion, the People asserted that, because they could have proceeded to trial without the medical records, the statement of readiness filed with the court on February 22 was made in good faith and was not way illusory. They further asserted that their decision to continue their investigation after filing their February 22 statement of readiness did not render that statement of readiness, made in good faith, a nullity. Supreme Court denied the motion, and we affirm.

The People's unequivocal contention that they could have proceeded without the medical records is both undisputed and plainly correct. The People could have proven their case through

the testimony of the injured officer, as well as that of his partner, who also participated in the defendant's stop and arrest. Without any medical records, these witnesses could have described how defendant committed the crime of assault in the third degree by rolling up her vehicle's window on one officer's arm. The officer could also have testified to the pain and bruising he suffered from defendant's actions and the time he missed from work as a result. The People indicated that they in fact subsequently changed their strategy for presenting the case, and decided to offer the medical records in support of the assault charge (of which defendant was ultimately acquitted). Since the People were plainly ready to present a prima facie case when they filed their certificate of readiness on February 22, that certificate was not illusory (*see People v Fulmer*, 87 AD3d 1385 [2011], *lv denied* 18 NY3d 994 [2012]; *People v Bargerstock*, 192 AD2d 1058 [1993], *lv denied* 82 NY2d 751 [1993]).

A statement of readiness by the prosecution "is presumed to be accurate and truthful" (*People v Acosta*, 249 AD2d 161, 161 [1998], *lv denied* 92 NY2d 892 [1998]). Defendant argues that the People's March 28 statement that they were not ready to proceed rebutted the presumption of the accuracy of their February 22 statement of readiness. Defendant's position is inconsistent with our decision in *People v Wright* (50 AD3d 429 [2008], *lv*

denied 10 NY3d 966 [2008]), in which we made the following statement: "We find no basis for finding these unequivocal announcements of present readiness to be illusory. There is nothing in CPL 30.30 to preclude the People from declaring their present readiness, but still gathering additional evidence to strengthen their case" (*id.* at 430). Notably, at the time of the initial statement of readiness in *Wright*, the People were "not yet in possession of forensic evidence and medical records that they ultimately introduced at trial" (*id.*). In rejecting the defendant's speedy trial claim, we observed that "the People could have tried this case on the basis of eyewitness testimony alone, and the wisdom of doing so is irrelevant for speedy trial purposes" (*id.*). Inasmuch as the same is true here, defendant's motion to dismiss under CPL 30.30 was properly denied.

The evidence at trial was legally sufficient to support defendant's convictions for obstructing governmental administration in the second degree (Penal Law § 195.05) and resisting arrest (Penal Law § 205.30), and the convictions were not against the weight of the evidence. According to the police testimony, after defendant was told that she was about to be placed under arrest for refusing an officer's lawful request that

she produce her license and registration, she physically obstructed the police as they attempted to obtain requested paperwork, to remove her from the vehicle, and to place her under arrest, as previously noted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 28, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6996 Alejandra Arenas, Index 306550/09
Plaintiff-Respondent,

-against-

Felix Guaman, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered June 16, 2011, which denied defendants' motion for summary judgment dismissing the complaint alleging a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Assuming that, with respect to plaintiff's claims of significant limitation or permanent consequential limitation of use of her right shoulder and cervical and lumbar spine, defendants made a prima facie showing of entitlement to judgment as a matter of law in support of their motion, plaintiff submitted sufficient medical evidence to raise triable issues of fact as to the severity of her injuries and as to the injuries' causal connection with the accident.

Defendants met their burden as to the 90/180-day claim by relying on plaintiff's testimony that she was confined to bed for only "a month or two" and was unable to perform only a few activities (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522-523 [2010]; *see also* Insurance Law § 5102[d]). Her physician's findings with respect to her restrictions do not raise a triable issue of fact, since they are based on plaintiff's subjective complaints of pain (*see Browne v Covington*, 82 AD3d 406, 407 [2011]; *see also Below v Randall*, 240 AD2d 939, 940 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 28, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7408 In re With You, Inc., et al., Index 106746/10
Petitioners-Respondents,

-against-

Alex Astilean, et al.,
Respondents-Appellants.

Law offices of Jamie T. Corio, PLLC, East Hampton (Daniel S. Steinberg of counsel), for appellants.

Rosenberg & Giger PC, New York (John J. Rosenberg of counsel), for respondents.

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered February 8, 2011, which, to the extent appealed from as limited by the briefs, granted the petition confirming so much of an arbitration award awarding petitioner David Levin $50,000 on his counterclaim for defamation against respondent Alex Astilean, and awarding petitioners costs and attorneys' fees incurred in connection with the arbitration in the amount of $357,586.74 providing that $250,000 of that amount was to be paid from fees held in escrow, unanimously affirmed, without costs.

The agreement at issue in this case was between respondent Speedfit LLC and petitioner With You, Inc. for the services of petitioner Jessica Simpson in the production of a video featuring an exercise program created by respondent Alex Astilean, co-owner

of Speedfit. The arbitration clause in the agreement is broad and reads as follows: "Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration . . . "

We find no basis to disturb the arbitrator's finding that With You properly terminated the contract based on Speedfit's failure to present a video for final approval within a "reasonable time" after filming of the video (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]). We likewise find no reason to disturb the arbitrator's finding that petitioners are entitled to be indemnified for attorneys' fees incurred in connection with the arbitration proceeding pursuant to the contract's indemnification clause which, the arbitrator determined, is not limited to third-party claims (*see Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1997]). This construction of the contract was neither irrational nor in excess of the arbitrator's powers (*see generally Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372-373 [2004]). Even assuming, however, that the arbitrator misconstrued the indemnification clause, this would not constitute a proper basis for vacating the award (*see Maross*

Constr. v Central N.Y. Regional Transp. Auth., 66 NY2d 341, 346 [1985]).

During the course of the parties' relationship, a dispute arose over who should appear in the video. Unbeknownst to petitioner David Levin, Simpson's business manager, Astilean was secretly recording their meetings and phone calls. Following the termination of the agreement and the commencement of arbitration, Astilean released or caused to be released portions of a telephone conversation with Levin, which made it seem as if the released portion was an uninterrupted conversation. As a result of the released information, Levin interposed a counterclaim in the arbitration for defamation against Astilean. Astilean did not seek a stay of arbitration of the counterclaim, but instead continued to participate in the arbitration. The arbitrator awarded Levin $50,000 on the counterclaim, finding that the false impression created by the manipulation of Levin's statements was slander per se.

The motion court properly confirmed that portion of the arbitration award related to the defamation counterclaim. The contract itself provided that all disputes and differences, including those related to the scope of the arbitration, be referred to the arbitrator. Thus, whether the defamation counterclaim was arbitrable was for the arbitrator to decide (*see*

Icdas Celik Enerji Tersane Ve Ulasim Sanayi A.S. v Travelers Ins. Co., 81 AD3d 481, 483 [2011]; *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495 [2009], *affd* 14 NY3d 850 [2010]). Since this claim arises directly out of the dispute over the video and relates directly to the subject of the agreement, no basis exists to overturn the arbitrator's decision to address those issues. "Having determined that the dispute is within the scope of the arbitration clause, we do not consider whether the claim . . . is tenable, or otherwise pass upon the merits of the dispute" (*Icdas Celik*, 81 AD3d at 484 [internal quotation marks omitted]). Here, the arbitrator's decision to address and award damages for the injury to Levin's reputation was not totally irrational or against a strong public policy and therefore was properly confirmed.

Astilean argues that the arbitration award on the defamation claim cannot stand because he was not a party to the agreement or its arbitration clause. This, however, does not avail Astilean. Because he actively sought arbitration in his individual capacity, he is estopped from seeking to vacate the arbitration award. Despite being a nonsignatory to the agreement, Astilean nevertheless commenced the arbitration and brought claims against petitioners, not only on Speedfit's behalf, but also in his individual capacity. By this conduct, Astilean manifested a

clear intent to arbitrate. Having availed himself of the arbitral forum in his individual capacity and lost, Astilean cannot now be heard to complain that the arbitrator found against him personally, and is thus estopped from challenging the award on this basis.

Matter of Silverman (Benmor Coats) (61 NY2d 299 [1984]), relied upon by Astilean, does not require a different result since in that case, the Court of Appeals never addressed the salient issue here — whether a nonsignatory to an arbitration agreement who affirmatively seeks arbitration in his individual capacity is thereafter estopped from challenging the arbitration award on grounds that an award against him exceeds the powers of the arbitrator. Rather, *Silverman* addressed whether participation in an arbitration waives the participant's right to seek vacatur of the award on the ground that the arbitrator exceeded his powers by addressing claims outside the scope of the

arbitration clause.

We have considered the remainder of respondents' arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 28, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7894 THI of Illinois at Brentwood, LLC, et al.,
Plaintiffs-Appellants,

-against-

CAM-Brentwood, LLC, et al.,
Defendants-Respondents.

Index 651735/11

Arent Fox LLP, New York (Allen G. Reiter of counsel), for appellants.

Dechert LLP, New York (Nicolle L. Jacoby of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 2, 2011, which adopted the report and recommendation of the special master and directed plaintiffs to provide certain information and materials and submit to an audit, unanimously affirmed, without costs.

Plaintiffs failed to preserve their current appellate claim that the court should have issued a *Yellowstone* injunction instead of adopting the special master's report, and we decline to review it in the interest of justice. The record shows that plaintiffs consented to the procedure employed by the court, fully participated in the proceedings before the special master, and did not raise their current objection until after the court's October 26, 2011 oral ruling adopting the special master's report

(*see e.g. 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 502 [2010]; *Matter of Union Indem. Ins. Co. of N.Y.*, 67 AD3d 469, 471 [2009], *lv dismissed* 14 NY3d 859 [2010]). Furthermore, by staying the cure period for ten days following adoption of the special master's report, the court essentially provided the relief plaintiffs requested.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 28, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

7640 Turnberry Residential Limited Partner, L.P., Plaintiff-Appellant, Index 651960/10

-against-

Wilmington Trust FSB, Defendant-Respondent.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

Seward & Kissel LLP, New York (Mark J. Hyland of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 4, 2012, affirmed, with costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

7640
Index 651960/10

_____x

Turnberry Residential Limited Partner, L.P.,
Plaintiff-Appellant,

-against-

Wilmington Trust FSB,
Defendant-Respondent.

_____x

Plaintiff appeals from the order and judgment (one paper) of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 4, 2012, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment, granted defendant's cross motion for summary judgment dismissing the complaint and for summary judgment upon both its counterclaims, dismissed the complaint, declared that defendant properly holds the $50,000,000 on deposit and may use such funds to pay certain project costs and damages incurred as a result of plaintiff's breach of contract, and declared that defendant is awarded and plaintiff directed to pay defendant an additional $50,000,000 plus pre- and post-judgment interest for breach of contract under the terms of the subject guaranty.

Meister Seelig & Fein LLP, New York (Stephen B. Meister, Thomas L. Friedman and David E. Ross of counsel), for appellant.

Seward & Kissel LLP, New York (Mark J. Hyland, Jeffrey M. Dine and Mandy DeRoche of counsel), for respondent.

MOSKOWITZ, J.

This appeal presents us with the rare opportunity to analyze a completion guaranty. This sort of guaranty differs from an instrument that guarantees payment. A guarantee of payment typically guarantees a borrower's debt. A completion guaranty guarantees the completion of a project (usually a construction project) should the borrower be unable to do so. Unlike a payment guaranty that is enforceable only after the primary obligor fails to perform, a completion guaranty is often a primary obligation of the guarantor.

In June 2007, a syndicate of lenders (the Lenders) committed to provide $1.85 billion in financing to two limited partnerships (the Borrowers) for the construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the Project) pursuant to a Credit Agreement dated June 6, 2007. The financing under the Credit Agreement consisted of three loans: a $700 million term loan facility, a $350 million term loan delay draw facility, and an $800 million revolving loan facility (the Revolver).

Defendant Wilmington Trust FSB (Wilmington Trust) was the successor Administrative Agent under the Credit Agreement. Wilmington Trust was also the Successor Disbursement Agent under the project's Master Disbursement Agreement (the MDA or Disbursement Agreement), pursuant to which, inter alia,

Wilmington Trust was to disburse funds for costs related to the Project.

Plaintiff Turnberry Residential Limited Partner, L.P. (Turnberry), is an affiliate of the developer for the Project, Fountainebleau Las Vegas Holdings, LLC. Turnberry agreed to provide a Completion Guaranty, dated June 6, 2007, to guarantee payment of "Applicable Project Costs." The Completion Guaranty defines "Applicable Project Costs" as "Project Costs other than Debt Service incurred to complete the Project in a manner consistent with the standards set forth on Exhibit M-2 to the Disbursement Agreement."[1] The Completion Guaranty states that capitalized terms it does not define have the meaning the Disbursement Agreement defines. Accordingly, via the Disbursement Agreement, the Completion Guaranty defined "Debt Service" as "all principal repayments, interest . . . and other amounts payable under . . . the Bank Credit Agreement." "Project Costs," as the Disbursement Agreement defines the term, means "all costs incurred, or to be incurred by the project entities in connection with the development, design, engineering,

[1] Exhibit M-2 to the Disbursement Agreement sets forth requirements that include: a casino with 1600 slot machines and 110 table games, a resort with retail space, convention and meeting facilities, a spa and salon, a night club, and a show room, and approximately 5600 parking spaces.

procurement, construction, installation, opening and completion of the Project in accordance with this Agreement. . .” “Project costs” also includes Debt Service that “will accrue in respect of Indebtedness of the Companies prior to the Opening Date (but expressly excluding Debt Service in respect of the Retail Facility).”

The Preamble to the Completion Guaranty stated that it was “for the benefit of” the Lenders, and was to “induce” the Lenders to make credit extensions. To carry out its obligations under the Completion Guaranty, Turnberry arranged for a $50 million letter of credit that it then drew upon and placed into a Completion Guaranty Proceeds Account (CGPA). Under certain circumstances, Turnberry was required to deposit another $50 million into the account.

Section 3[f][ii] of the Completion Guaranty makes clear that this guaranty is a true guaranty of completion and not a payment guaranty: “[this guaranty] is not a guaranty of indebtedness incurred by the Companies or their Affiliates under the Financing Agreements” and prohibits the use of funds “for any purpose other than the payment of Applicable Project Costs that are then due and payable.”

The various agreements governing this project provide several instances where the completion guarantor’s obligations

survive beyond the life of the project. For instance, section 3[e] of the Completion Guaranty provides that its obligations "shall not be affected by any exercise of remedies by the [Lenders]," and that the Completion Guaranty "shall continue to be enforceable against the Completion Guarantor, for so long as [the Borrowers] remain obligated to the [Lenders] under the Financing Agreements" and "notwithstanding any transfer of the ownership of [the Borrowers]." The Credit Agreement also reflects this continuing obligation. Section 8[B][I] of the Credit Agreement contemplated that an "Event of Default" would trigger the termination of the Commitments under the credit facilities, including the Revolving Loans, and that the Completion Guaranty could continue under these circumstances:

> "(B)if such event is any other Event of Default, either or both of the following actions may be taken: (I) with the consent of . . . either the Required Lenders or the Required Facility Lenders for the respective Facility, the Administrative Agent may, or upon the request of the Required Lenders or the Required Facility Lenders for the respective Facility, the Administrative Agent shall, by notice to Borrowers, declare the Revolving Commitments and/or the Delay Draw Commitment, as the case may be, to be terminated forthwith, whereupon the applicable Commitments shall immediately terminate . . . *during the continuation of an Event of Default, the Administrative Agent and the Lenders shall be entitled to exercise any and all remedies available under the Security Documents* [emphasis added]."

In addition, section 8[r] of the Credit Agreement provides that upon an Event of Default, "the Lenders shall be entitled to exercise any and all remedies available under the Security Documents, . . . including the [Completion] Guarantee." Thus, the parties provided for the Completion Guaranty to remain enforceable even if ownership of the project transferred to a third party and even if the borrower defaulted.

Section 4 of the Completion Guaranty stated that the Completion Guaranty was a primary obligation of the Completion Guarantor, was an absolute, unconditional and irrevocable obligation to pay and was "in no way conditioned on or contingent upon any attempt to enforce, in whole or in part the [Borrowers'] liabilities and obligations to the [Lenders]." Thus, the obligations under the Completion Guaranty were separate from those of the Borrowers.

The Completion Guaranty provides that all amounts payable "shall be applied in the manner contemplated by the Master Disbursement Agreement [MDA] for the payment of Applicable Project Costs." The "manner" for payment of Applicable Project Costs" appears in section 2.10.1[b] of the MDA. This section sets forth the payment priority, or "waterfall" from different funding sources as follows in relevant part:

> "(b) the Current Available Resort Sources as

> of the Advance Date shall be applied to the Resort Request by applying the following order of priority and in each case until the relevant Resort Source is *Exhausted* (except to the extent otherwise limited below):
>
> ...
>
> "(ix) then, from funds then on deposit in the Bank Proceeds Account prior to giving effect to the requested Advance;
>
> "(x) then, from funds available to be drawn under the Bank Proceeds Credit Facility, until the aggregate amount of the Bank Revolving Availability has been reduced to $55,000,000;
>
> "(xi) then, only on and after the Initial Bank Advance Date, from the making of draws under the *Completion Guaranties* (subject to the proviso in Section 2.6.6);
>
> "(xii) . . . ; and
>
> "(xiii) then, only on and after the Initial Bank Advance Date, from the remainder of the Bank Credit Facility [emphasis added]."

Under the MDA, "Exhausted" means:

> "(a) with respect to the Equity Funding Account, the time at which all proceeds thereunder have been fully disbursed, (b) with respect to the Bank Credit Facility and the Retail Facility, the time at which the lending commitments under such Facility have been fully utilized (and, in the case of the Bank Credit Facility, the Bank Proceeds

> Account has no funds remaining on deposit therein), (c) with respect to the Second Mortgage Notes, the time at which no fundsremain in the Second Mortgage Proceeds Account, and (d) with respect to the Liquidity Account, the time at which no funds remain on deposit therein."

By letter dated April 20, 2009, Bank of America, as the then-Administrative Agent for the Credit Agreement, advised developer FBLV that "the Required Facility Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing and that they have requested that the Administrative Agent notify you that the Total Revolving Commitments have been terminated." Although Section 8 of the Credit Agreement defines what constitutes an event of default, the letter did not specify what event or events had occurred.

Six weeks later, on June 9, 2009, developer FBLV and related entities filed a petition for bankruptcy protection under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Florida. The bankruptcy filing was an Event of Default under Section 8[f] of the Credit Agreement and automatically caused all Commitments, including the

Revolving Loan Commitment, to terminate immediately.[2] Wilmington Trust demanded the funding of the additional $50 million Forced Cash Support Amount under section 2 [b] of the Completion Guaranty, but Turnberry refused.

In January 2010, an unrelated third party purchased the Project through the bankruptcy proceeding, free and clear of all encumbrances, for approximately $156 million. After paying various administrative and priority claims, there remained approximately $103 million of sale proceeds available for distribution.

In the bankruptcy proceeding, the Project's general contractor and numerous sub-contractors and suppliers filed mechanics liens against the Project and proofs of claim aggregating in excess of $300 million. In an adversary proceeding filed in bankruptcy court, the lenders have challenged the validity of these claims and asserted that the lienholders are subordinate to the secured lenders pursuant to a subordination agreement the general contractor signed.

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[2] Defendants claim that plaintiff caused the borrower to file for bankruptcy given that it was the borrower's parent corporation. Plaintiff claims that defendants precipitated the bankruptcy by declaring FBLV in default under the loans and terminating them in April 2009. Who and what caused the bankruptcy and default is largely irrelevant, however, because neither in April 2009 nor on the date of the bankruptcy had FBLV used up $745 million of its formerly available credit.

By summons and complaint dated November 9, 2010, Turnberry commenced this litigation seeking a declaration that the purpose of the Completion Guaranty had become frustrated and the return of Turnberry's intial payment of $50 million under the Completion Guaranty.

Wilmington Trust answered, and counterclaimed for: (i) a declaratory judgment that Wilmington Trust properly held the $50 million Turnberry already paid under the Completion Guaranty, and (ii) breach of contract for Turnberry's failure to provide an additional $50 million under the terms of the Completion Guaranty.

By notice dated March 3, 2011, Turnberry moved for summary judgment declaring that Wilmington Trust should return the $50 million to Turnberry, and for summary judgment dismissing Wilmington Trust's counterclaims.

By notice dated April 15, 2011, Wilmington Trust cross-moved for summary judgment dismissing the complaint and granting its counterclaims for breach of contract and declaratory judgment, or alternatively, that discovery be permitted on the parties' intent in entering into the Completion Guaranty.

By order entered November 2, 2011, the court denied Turnberry's motion for summary judgment and granted Wilmington Trust's cross motion for summary judgment. By judgment and order

entered January 4, 2012, the motion court, to the extent appealed from, denied Turnberry's motion for summary judgment, and granted Wilmington Trust's cross motion for summary judgment dismissing the complaint and on both its counterclaims, dismissed the complaint and declared that Wilmington Trust properly held the $50 million Turnberry had already paid under the Completion Guaranty and directing Turnberry to deposit with Wilmington Trust an additional $50 million with interest. The court further declared that Wilmington Trust could use these funds only to pay "Applicable Project Costs."

The pivotal issue is whether plaintiff's obligations under the Completion Guaranty have yet to trigger because the borrower has yet to reach the $745 million mark under the Revolver. Indeed, it is now impossible for FBLV or its affiliates to borrow that amount because a third party has purchased the project.

The general purpose of a completion guaranty is to give lenders some comfort that the construction project will be completed and consequently that the value for the collateral will be worth more than the loan amount. However, the recent nationwide downturn in the real estate market has, in many instances, rendered the value of the real estate, even with completed construction, a losing proposition for lenders because the decreasing value of the real estate often renders it worth

less than the loan. Most, if not all, of the sparse case law concerning completion guaranties are from happier days when the value of the real estate was equal to or worth more than the loans for the construction project. For example, in *1633 Assoc. v Uris Bldgs. Corp.*, 66 AD2d 237, 242 [1979], we determined that the plaintiff could not enforce a completion guaranty where it had purchased property at a foreclosure sale worth more than the sum it expended to complete the building and pay off the liens. This result was appropriate because "to permit recovery under the guaranty of completion would enable plaintiff to be more well off than if the contract had been performed" (*id.*). In essence, enforcement of the completion guaranty would have allowed plaintiff to experience a windfall. Similarly, in *Chase Manhattan Bank v American Natl. Bank* (93 F3d 1064 [2d Cir 1996]), the Court of Appeals for the Second Circuit refused to enforce a completion guaranty where there was no circumstance whereby the plaintiff bank would ever incur completion costs. Here, if there are sufficient funds, defendant Wilmington Trust, as disbursement agent, will pay the mechanics liens, to the extent the bankruptcy court allows.

Turnberry argues that, because the $800 million Revolver loan was never reduced to $55 million because the Lenders terminated and reduced that loan to zero, the waterfall must stop

at Section 2.10.1[b][x] and never reach the Completion Guaranty. This is an incorrect interpretation that fails to take into account the rest of the global agreement governing this complicated real estate transaction. Turnberry relies on the subordinate and conditional clause within Section 2.10.1[b][x] of the waterfall, that provides for application of "funds available to be drawn under the Bank Credit Facility, *until* the aggregate amount of the Bank Revolving Availability has been reduced to $55,000,000 [emphasis added]" to argue that its obligations do not trigger until only $55 million remains "unborrowed." But that subordinate clause -- "until the aggregate amount of" –- relies on there being funds available to be drawn under the Bank Credit Facility. As the motion court correctly determined, if there are no "funds available to be drawn" (because the lenders terminated the line of credit) the "until" provision does not come into play.

Turnberry contends that, in analyzing Section 2.10.1[b] (and the triggering of access to the Completion Guaranty funds), the court misconstrued the defined term "Exhausted" in the MDA and the word "utilized" within that definition.

"Exhausted" is defined as:

> "(a) with respect to the Equity Funding Account, the time at which all proceeds thereunder have been fully disbursed,

> (b) *with respect to the Bank Credit Facility and the Retail Facility, the time at which the lending commitments under such Facility have been fully utilized (and, in the case of the Bank Credit Facility, the Bank Proceeds Account has no funds remaining on deposit therein*), (c) with respect to the Second Mortgage Notes, the time at which no funds remain in the Second Mortgage Proceeds Account and (d) with respect to the Liquidity Account, the time at which no funds remain on deposit therein [emphasis added]."

Turnberry focuses on the defined term "Exhausted" in Section 2.10.l[b], stating that $745 million of the $800 million Revolver commitment had to be "made use of" to get to the $55 million mark (at which point funds under the Completion Guaranty could be accessed. But, as noted, "available to be drawn" in subsection [x] qualifies the term "Exhausted" in the beginning of Section 2.10.1[b]. Turnberry also ignores the parenthetical in the beginning of Section 2.10.1[b], that states "(except to the extent otherwise limited below)."

It is also notable that the parties were able to differentiate the exhaustion point among the various funding sources. For instance, "Exhausted" means the "time at which all proceeds thereunder have been fully disbursed" with respect to the Equity Funding Account. With respect to the "Liquidity Account," "Exhausted" means "the time at which no funds remain on deposit therein." Thus, the parties were able to state when they

meant to equate the term “Exhausted” with the full use of funds. That they did not do so with respect to the Revolver is most telling.

The Revolver terminated upon developer FBLV’s bankruptcy filing and FBLV can no longer borrow under it. Accordingly, the Bank Credit Facility is “fully utilized” (and therefore Exhausted) as a “Current Available Resort Source.” Thus, Wilmington Trust as Disbursement Agent can look to the next “Current Available Resort Source” (the Completion Guaranty) for payment of Project Costs.

Under Turnberry’s interpretation of Section 2.10.1[b], if a Current Available Resort Source, such as the Bank Credit Facility, becomes unavailable, the Disbursement Agent could never apply another Current Available Resort Source lower in the waterfall to pay Project Costs, such as the Completion Guaranty under Section 2.10.1[b][xi] or even the remaining $50 million in the Liquidity Account under Section 2.10.1[b][xii]. This interpretation would render meaningless the language providing that the Completion Guaranty survives an event of default. As discussed, section 8[r] of the Credit Agreement anticipates that Turnberry’s obligations under the Completion Guaranty would survive FBLV’s bankruptcy. Meanwhile, FBLV’s bankruptcy allowed the Lenders to terminate FBLV’s credit. If

the Lenders could terminate for bankruptcy before the borrower used up all but $55 Million of its available loan amount, and Turnberry's obligation's survived that termination, then Turnberry's obligations could trigger even though the borrower did not utilize the full amount under the Revolver. That Turnberry's obligations were also to survive transfer of the project only reinforces this interpretation. It is nonsensical to require the Lenders to lend more money that they might never recoup to a faltering entity, before the Completion Guaranty could trigger.

Turnberry nevertheless argues that the sale of the project frustrated the purpose of the Completion Guaranty because, as there is no further project development, there can be no payments for "Applicable Project Costs," the sole expense to which Completion Guaranty funds applied. Turnberry argues that "Applicable Project Costs" include only those costs "to complete" the Project. As the Project transferred in the bankruptcy, there can be no costs to "complete" it. Turnberry's reading of "Applicable Project Costs" would only allow payment under the Completion Guaranty for the costs of finally completing the Project and would allow Turnberry to recoup funds disbursed prior to completion, even if completion did not ultimately occur. This argument also fails in light of the terms of the Credit Agreement

and section 3[e] of the Completion Guaranty. These documents provide that Turnberry's obligations survive the Lenders' exercise of remedies and that the Completion Guaranty survives transfer of ownership.

Turnberry argues that Wilmington Trust might use the funds in the CGPA to reduce the debt to the Lenders or pay costs that do not qualify as Applicable Project Costs. However, the judgment requires Wilmington Trust to use the funds in the CGPA only to pay for Applicable Project Costs and there is absolutely no indication that Wilmington Trust will interfere or fail to abide by that order.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 4, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, granted defendant's cross motion for summary judgment dismissing the complaint and for summary judgment upon both its counterclaims, dismissed the complaint, declared that defendant properly holds the $50,000,000 on deposit and may use such funds to pay certain project costs and damages incurred as a result of plaintiff's breach of contract, and declared that defendant is awarded and plaintiff directed to pay defendant an additional

$50,000,000 plus pre- and post-judgment interest for breach of contract under the terms of the subject guaranty, should be affirmed, with costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 28, 2012

CLERK