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# Cullen and Dykman Successfully Defends Construction Lender on Appeal

May 11, 2017

A corporate borrower obtained a multi-million dollar construction loan from a major bank for the development of a condominium project in Queens, New York and subsequently obtained a second loan in connection with that project. However, a sewer connection problem was discovered during the project construction, and since the scope, extent, and cost of correcting it were unknown, the bank temporarily withheld a disbursement under the second loan. Ultimately, the borrower could not complete the project with the remaining funds, the loans matured, a foreclosure action was commenced against the borrower, and the loans were then assigned to a third party. Before completion of the foreclosure, an involuntary Chapter 11 Bankruptcy petition was thereafter filed against the borrower, and after confirmation of a Chapter 11 plan, the borrower sued the original lender in the Commercial Division of the N.Y. State Supreme Court in New York County asserting claims for breach of contract (specifically, breach of the second loan evidenced by a Revolving Credit Master Note) and breach of the covenant of good faith and fair dealing.

After extensive electronic discovery and depositions of all parties, as well as a deposition of a non-party appraiser, the Firm, on behalf of the lender, moved for summary judgment, relying on documentation evidencing the drawdown of the available loan proceeds and additional evidence.

After holding oral argument on two separate occasions, the trial court granted lender's motion for summary judgment and dismissed the Complaint. The borrower appealed.

On May 9, 2017, the Appellate Division First Department unanimously affirmed the grant of summary judgment by the lower court and held as follows:

Given the unknown costs involved in unlocking the value of the collateral and given that insufficient funds remained for plaintiff to complete the project, the bank properly exercised its right under the Revolving Credit Master Note in delaying or refusing disbursement of funds while demanding additional collateral. Moreover, because there were insufficient funds available under the loan and line of credit to complete construction, any delay or failure by defendant to make the requested disbursements was not a proximate cause of plaintiff's damages.

Samit Patel, Partner of the Firm, authored the lender's appellate brief and argued the case before the Appellate Division panel on behalf of the lender. For further information, please contact Mr. Patel at [973-849-9006](tel:973-849-9006) or at [spatel@cullenanddykman.com](mailto:spatel@cullenanddykman.com).

## Practices

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