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**Fortress Credit Corp. et al., Respondents, v Hudson Yards, LLC, et al., Defendants,
and Baruch Singer, Appellant.**

3699, 601579/08

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST
DEPARTMENT**

**78 A.D.3d 577; 912 N.Y.S.2d 41; 2010 N.Y. App. Div. LEXIS 8748; 2010 NY Slip Op
8640**

**November 23, 2010, Decided
November 23, 2010, Entered**

HEADNOTES

Suretyship and Guarantee--Scope of Guarantee

COUNSEL: [***1] Sukenik, Segal & Graff, P.C., New York (Douglas Segal of counsel), for appellant.

Sills Cummis & Gross, P.C., New York (Mitchell D. **Haddad** of counsel), for respondents.

JUDGES: Concur--Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Roman, JJ.

OPINION

[*577] [**41] Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 18, 2009, as amended by order, same court and Justice, entered November 13, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on their claims for foreclosure and a conditional deficiency judgment against defendant-appellant guarantor (defendant), and dismissed defendant's counterclaims, unanimously affirmed, with costs.

Plaintiffs met their prima facie burden by producing

the mortgage documents and undisputed evidence of default, namely, nonpayment and a transfer of the mortgaged property without plaintiffs' prior consent; in addition, plaintiffs showed that defendant signed a personal guaranty as additional collateral for the note. Thus, the burden shifted to defendant to raise a triable issue of fact regarding his affirmative defenses to foreclosure (*see Red Tulip LLC v Neiva*, 44 AD3d 204, 209-210, 842 NYS2d 1 [2007], *lv* [***2] *denied* 13 NY3d 709, 918 NE2d 961, 890 NYS2d 446[2009]). Defendant's affirmative defenses, however, are precluded by the guaranty, which waived all defenses and counterclaims except actual [**42] payment and performance in full, which defendant has not alleged (*id.*). It does not avail defendant that his defense--plaintiffs' alleged tortious interference with a potential sale of the mortgaged property for an amount in excess of the outstanding mortgage obligations--arose after the waiver had been executed (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448, 880 NYS2d 67 [2009]). In any event, defendant's allegations of interference lack evidentiary support (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384, 806 NE2d 488, 774 NYS2d 480 [2004]). We have considered defendant's other arguments and find them unavailing. Concur--Andrias, J.P., Catterson, Moskowitz,

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Manzanet-Daniels and Roman, JJ.