



CELEBRATING
55 YEARS

nerej

Completion guarantees in construction development loans: Are they enforceable? - by Gary Markoff, Eyal Schwartz and Luke Colomey

May 09, 2025 - Financial Digest



Gary Markoff

Eyal Schwartz

Luke Colomey

Yes, but not the way you may think.

Lenders who provide mortgage financing want assurances that their financed projects will be completed in accordance with the approved plans and specifications. The last thing lenders want is to be left with an unfinished project which fails to produce cash flow, especially if repayment of the financing is contingent upon completion of the project. Construction loans are at maximum risk when the project is under construction. Cue a completion guarantee. But is it realistic for lenders to believe that a completion guarantee provides adequate assurances that the guarantor will complete the

project if it stumbles?

While courts generally recognize completion guarantees, we have found no Massachusetts court that has enforced them against their guarantors to require completion of construction. Looking beyond Massachusetts, there is very little case law on this topic. The principal reason for this may be that completion guarantees include demands for specific performance. Specific performance is an extraordinary remedy for a court to grant and is generally reserved for circumstances that are so unique that no other remedy at law exists. An oft-cited example is the artist commissioned to create a piece of art who receives a portion of the price but then refuses to perform. Compare the artist scenario with a developer of a construction project. Perhaps a few developers see themselves as artists on a grand scale, but it is unlikely that construction lenders or courts view them in the same light. If the artist-developer defaults, would monetary damages not suffice? After all, what does a lender really want other than repayment of its loan? Maybe retribution, but (thank goodness) such is not recognized as a legal remedy by the courts. At least not yet!

There are abundant examples of courts' reluctance to enforce specific performance in many jurisdictions. In *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal.App.3d 101 (1977), in affirming a monetary judgment for the lender-plaintiff, the California appeals court noted that because the defendant had already refused to complete the project, plaintiff's formal demand for performance of the contract would be a waste of time and money. In *Wong v. Slotkin*, 585 N.Y.S.2d 986, 989 (N.Y. Civ. Ct. 1992), a New York judge commented that courts often do not differentiate between guarantees for payment and performance in construction contracts due to the preference for money damages over specific performance. Monetary damages are seen as an adequate remedy.

Other courts have interpreted completion guarantees in less conventional ways. For example, in *Turnberry Residential Ltd. Partner, L.P. v. Wilmington Trust FSB*, 99 A.D.3d 176, 177 (2012), a New York appellate court noted that "[t]he 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." (Emphasis added.) This case leaves the impression that a completion guarantee provides little more than psychological comfort to a lender. Thus, while lenders may find solace in a completion guarantee, the specific performance provision is unlikely to be enforced. Nevertheless, the completion guaranty is one means to bring the developer to the table to negotiate a loan workout.

In summary, completion guarantees are overrated in their ability to require specific performance by the guarantor. It is critical, therefore, that the completion guaranty give the lender the option to either require the guarantor to complete the project or reimburse the lender the cost of completion if it elects to do so. A completion guaranty with this option may or may not make the lender whole, but it certainly provides more than solace.

Gary Markoff is a partner at and a member of the corporate and real estate departments; Eyal Schwartz is an associate in the litigation department and Luke Colomey is a law clerk at Sherin and Lodgen, Boston, Mass.

