

**YL Rector St. LLC v Anglo Irish Bank Corp., Ltd.**

2010 NY Slip Op 30133(U)

January 20, 2010

Supreme Court, New York County

Docket Number: 401581/09

Judge: Joan A. Madden

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SCANNED ON 1/25/2010  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JOAN A. MADDEN

PRESENT: \_\_\_\_\_ J.S.C.

PART 11

Index Number : 101796/2009  
ANGLO IRISH BANK  
vs.  
YL RECTOR STREET  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
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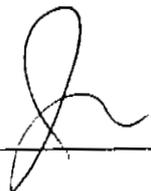
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is granted in accordance with the annexed memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): \_\_\_\_\_

Dated: January 19, 2010

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
YL RECTOR STREET LLC and  
YAIR LEVY,

Plaintiffs, Index No.  
401581/09

-against-

ANGLO IRISH BANK CORPORATION LIMITED  
(f/k/a ANGLO IRISH BANK CORPORATION PLC),  
FORTRESS CREDIT OPPORTUNITIES I LP and  
DRAWBRIDGE SPECIAL OPPORTUNITIES FUND LTD.,

Defendants.

-----X

ANGLO IRISH BANK CORPORATION LIMITED  
(f/k/a ANGLO IRISH BANK CORPORATION PLC),  
as Administrative Agent for Itself and  
FORTRESS CREDIT OPPORTUNITIES I LP and  
DRAWBRIDGE SPECIAL OPPORTUNITIES FUND LTD.,

Plaintiffs, Index No.  
101796/09

-against-

YL RECTOR STREET LLC, YAIR LEVY, DEMAR  
PLUMBING CORP., IVAN BRICE ARCHITECTURE, INC.,  
ENVIRONMENTAL CONTROL BOARD OF THE CITY OF  
NEW YORK, THE BOARD OF MANAGERS OF RECTOR  
SQUARE CONDOMINIUM, THE STATE OF NEW YORK  
and JOHN DOE DEFENDANT NOS. 1-25,

Defendants.

-----X

JOAN A. MADDEN, J.:

This action involves a loan transaction dispute combined  
with an underlying mortgage foreclosure action between a bank and

a real estate developer. Motions with sequence numbers 001 and 005 are hereby consolidated for disposition. The facts underlying the loan transaction action and the mortgage foreclosure action are the same.

In motion sequence 001 (the loan transaction), YL Rector Street LLC and Yair Levy (Levy), (together, YL) filed a complaint against Anglo Irish Bank Corporation Limited (f/k/a Anglo Irish Bank Corporation PLC), Fortress Credit Opportunities I LP and Drawbridge Special Opportunities Fund Ltd. (collectively, Anglo), seeking to recover damages for an alleged breach of contract by Anglo to lend YL \$165 million. Anglo moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing YL's complaint.

In the second action (the mortgage foreclosure action), Anglo seeks to foreclose and sell the mortgaged premises, and also requests a deficiency judgment against YL and Levy. Anglo now moves, pursuant to CPLR 3212, for an order for the relief demanded in the complaint and dismissing YL's affirmative defenses. Anglo also moves, pursuant to CPLR 3215, for an order granting a default judgment against Demar Plumbing Corp. (Demar), Ivan Brice Architecture, Inc. (Brice), Environmental Control Board of the City of New York (ECB), the Board of Managers of Rector Square Condominium (Board of Managers), and the State of New York upon the grounds that they have failed to appear or

serve a notice of appearance and waiver. Additionally, Anglo seeks, pursuant to section 1321 of the Real Property Actions and Proceedings Law, for a referee to be appointed to compute the amount due for principal and interest on the note and mortgage.

#### **BACKGROUND AND FACTUAL ALLEGATIONS**

Anglo Irish Bank is the lead lender and Administrative Agent for itself and co-defendants Fortress and Draw Bridge. Prior to January 21, 2009, Anglo Irish Bank was a public limited company incorporated under the laws of Ireland. As of January 21, 2009, Anglo Irish Bank became a private limited company. On October 21, 2005, YL Rector Street LLC bought a premises located at 225 Rector Street, New York, New York (the premises). The premises consist of a residential apartment building with 304 residential units, a parking garage and commercial retail space. Yair Levy is a managing member of YL Rector Street LLC, and has a substantial economic and beneficial interest in YL Rector Street LLC. YL purchased the premises in order to renovate and sell leasehold condominium units for a profit.

#### "The Loan Transaction"

On September 7, 2007, YL entered into a loan agreement with Anglo for three mortgage loans totaling \$165 million (the loan). In connection with the loan, Levy executed three limited guaranties entitled the "Payment Guaranty," the "Completion Guaranty," and the "Non-Recourse Carve-Out Guaranty." Anglo's

Foreclosure Motion, Exhibit A, ¶ 13. The purpose of the loan was to refinance an existing loan secured by the premises, renovate the premises, pay the construction costs linked to the renovation and convert it to a condominium ownership.

According to YL, Anglo did not comply with its obligation to lend YL the \$165 million and, as a result, the project could not be completed. YL filed a complaint against Anglo asserting five causes of action. In essence, YL alleges it complied with its obligations under the terms of the loan agreement. YL also notes that Levy invested \$23 million in YL Rector Street LLC, and that YL Rector Street LLC invested this money in the project. As such, YL argues that it is damaged in the amount of no less than \$23 million.

In response to this complaint, Anglo moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing the complaint. According to Anglo, YL manufactured this complaint as a way to delay the entry of judgment in the related mortgage foreclosure action. Anglo claims that, despite funding \$163 out of \$165 million up to January 2009, and also "pressing [YL] for many months to complete the renovations to the lobby and common areas," YL refused to complete renovations on the condominium project. Dybas Affidavit, ¶ 3.

Anglo claims that YL had myriad defaults which it failed to cure within the applicable grace periods as set out in the

documents. For instance, Anglo states that YL defaulted on \$351,881.19 of the ground lease property taxes (a/k/a PILOT) that were due on January 1, 2009; that YL abandoned the condominium without heat or hot water; and that YL's failure to pay subcontractors for work resulted in \$285,697.79 in mechanic's liens being filed against the premises. Anglo further alleges that at least one contractor has accused YL of pocketing some of the loan proceeds, and that YL embezzled most of the tenant reserve funds. It states that YL has also failed to maintain a proper operating shortfall escrow fund, that YL failed to maintain the minimum liquidity levels as required by the loan documents, and that it failed to pay certain third-party expenses. *Id.*, ¶ 4.

Anglo also asserts that, pursuant to the loan documents, it was under no obligation to fund YL after March 1, 2008, since this was the stipulated deadline. In pertinent part, the building loan agreement states as follows:

Section 4.03. Conditions Precedent to Advance of Loan Proceeds In Respect of Direct Costs for Capital Improvements and Building Upgrades. Lenders shall not be obligated to make an advance of Loan proceeds in respect of Direct Costs in connection with Capital Improvements and Building Upgrades until the following conditions shall have been satisfied:

\*\*\*

4.03 (b) There shall exist no Default or Event of Default, and no Default or Event of Default would result from the making of the advance [.]

And then Section 6.08 provides:

Construction of Improvements. The Borrower hereby covenants and agrees as follows:

(a) To complete all of the work relating to Capital Improvements and Building Upgrades by March 1, 2008 (the "Completion Date") [.]

Anglo's Motion 001 for Summary Judgment, Exhibit E, at 41.

Anglo additionally states that it was under no obligation to fund requisitions without appropriate documentation, and that YL's requisitions, at times, were not appropriately documented pursuant to the building loan agreement. Anglo claims that it became increasingly "difficult to decipher [YL's] requisitions, which often did not correspond with work performed or even identify where the requisitioned monies were supposed to go."

Dybas Affidavit, ¶ 15. Section 4.05 of the building loan agreement provides:

Conditions to Future Advances. Lenders' obligation to make advances of proceeds of the Loan after the Initial Advance pursuant to Section 4.02 or advances of Loan proceeds pursuant to Sections 4.03 or 4.04, as applicable, shall be subject to the following conditions:

\*\*\*

(f) Administrative Agent (or Servicer) and the Construction Consultant shall have received a Requisition for the advance, together with such other documentation and information as either of them may reasonably require.

*Id.* at 46-47.

According to Levy's affidavit, when the loan closed on September 7, 2007, \$142,834,325.14 was disbursed by Anglo. Levy Affidavit in Opposition, ¶ 11. The building loan agreement also indicates that an additional \$9 million of the Anglo loan was to

be set aside as an interest reserve. Levy indicates that an additional \$765,000 was also set aside by Anglo as a reserve to pay PILOT taxes and ground lease payments. *Id.*, ¶ 12. Levy states that, as a result of the refinancing, only \$13 million was available to be used by YL to cover the costs of the construction. As such, Levy claims that he informed Anglo that these loan proceeds must be timely disbursed, otherwise the contractors would halt work on the project. He states that Anglo knew or should have known that Levy had limited financial resources to fund the project, and that he was relying on Anglo's timely funding in order to complete the project. Levy states that, beginning in April 2008, Anglo did not "fully or timely fund the YL requisitions." *Id.*, ¶ 23. For instance, in April 2008, when it requested a \$638,857.42 advance, and only allegedly received \$418,465.31, this difference impacted the project's progress. Subsequent shortfalls allegedly resulted in contractors leaving the job. *Id.*, ¶ 36-37. Levy also claims that Anglo delayed funding in an "unsuccessful attempt to get YL to sign" a fourth amendment of the building loan agreement. *Id.*, ¶ 34.

Levy maintains that, although the financial statement from December 31, 2006 displays his net worth as \$96,640,160.00, only \$2 million of this was in cash. He states that despite Anglo's knowledge of this, part of his Guaranty required him to maintain

a \$3 million cash liquidity, otherwise a default would occur under the loan. According to Levy, even though Anglo could have declared a default from the time the loan closed, it did not do so until November 21, 2008.

In its memorandum of law, YL argues that material questions of fact exist which would defeat Anglo's motion for summary judgment. It appears that YL has abandoned three of its five causes of action and now solely argues that Anglo failed to timely comply with its obligations under the loan agreement, and that Anglo breached its duty of good faith owed to both YL and Levy under the loan agreement. YL also requests that the court defer on ruling on this motion until certain discovery be permitted pursuant to CPLR 3212 (f).

YL also claims that it neither abandoned the property nor stole the tenant reserve funds. It also alleges that, since Anglo decided to fund after the project completion deadline of March 1, 2008, Anglo was required to fund "fully and timely especially since they did not notify YL that there was a YL default." *Id.*, ¶ 45.

Anglo maintains that it was under no obligation to fund after March 1, 2008, since this was the stipulated project deadline, and, as YL did not complete the project by this date, this was a default under the loan agreement. It moves for an order, pursuant to, CPLR 3212, dismissing YL's complaint.

Foreclosure Action

On February 9, 2009, Anglo brought an action to foreclose up to \$165 million in mortgage loans that were made to YL. Since 72 of the residential units have been sold and thereby released from the liens of Anglo's mortgages, the mortgaged premises now consist of the remaining 232 unsold condominium units, the parking garage, the commercial space and the other common elements. According to Anglo, the mortgage loan documents required that YL make monthly payments to the operating shortfall escrow fund for the purposes of PILOT taxes to the Battery Park City Authority. It continues that, pursuant to the loan notes and mortgages, if YL defaulted on any other tax or charge YL was required to pay, and this default continued for a period of 20 days, Anglo had the option to foreclose the liens of the mortgages.

As set forth in Anglo's complaint, YL Rector Street LLC and Levy allegedly defaulted under the loan documents as follows: (a) failing to make the PILOT payment that was due to the Battery Park City Authority in the amount of \$351,881.19, (b) failing to pay contractors for work performed at the premises which has resulted in mechanic's liens being filed against the premises, (c) failing to make payments of \$150,000 each on July 15, 2008, September 15, 2008, October 15, 2008, November 15, 2008, December 15, 2008 and January 15, 2009 into the Operating Shortfall Escrow

Fund, pursuant to section 6.19 of the building loan agreement, (d) failing to pay certain third-party expenses, such as \$30,936.00 to the administrative agent, and \$16,087.50 to the construction consultant, (e) failure of Levy to maintain a minimum liquidity of not less than \$3 million, and (f) failing to complete all construction by March 1, 2008, as set forth in the building loan agreement.

Additionally in its complaint, Anglo identifies Demar as holding a mechanic's lien on the mortgaged premises in the amount of \$270,103.00, which lien is subsequent and subordinate to the liens of the subject mortgaged premises. Anglo identifies Brice as holding a mechanic's lien on the premises for the sum of \$15,594.79, which lien is subsequent and subordinate to the liens of the subject mortgaged premises. According to Anglo, the ECB also holds a judgment or lien against the premises in the amount of \$2,500.00. The Board of Managers is named as a defendant in Anglo's action since liens may accrue as a result of unpaid common charges. The State of New York is named as a defendant for purposes of foreclosing the liens, since there may possibly be unpaid limited liability company licensing fees. As listed in the caption, "John Doe" defendants are tenants or potential persons with liens on the premises. The defendants listed above are named as party defendants for the purposes of terminating any interests.

On November 21, 2008, Anglo notified YL of the defaults listed in subsections c-f of the alleged defaults listed above. On January 27, 2009, Anglo gave YL written notice of the PILOT payment default as described in subsection a, and also stated that \$117,330,077.46, which was the entire unpaid principal balance of the notes and mortgage, was due, plus interest, costs of collection and attorneys' fees.

On February 9, 2009, Anglo filed a foreclosure action with two causes of action. The first cause of action requests that this foreclosure action proceed to a judgment and sale and that the mortgaged premises be sold accordingly. According to Anglo, there is a remaining loan balance of \$117,330,077.44, plus the protective and construction advances made by Anglo to the receiver since the commencement of this suit. The second cause of action requests judgment against YL and Levy for any deficiency which may remain following the foreclosure sale of the mortgaged premises.

YL answered the complaint and included 14 affirmative defenses as to why the complaint should be dismissed as against them. In response to its failure to pay \$351,881.19 in PILOT taxes, YL concedes that it did not pay those fees. However, Levy argues that "these funds were segregated in the Project's management account, but were improperly removed by the then managing agent to pay its own fees, when the managing agent (who

is not affiliated with YL or me) learned that [Anglo] commenced this action and the managing agent feared that, as a result, its fees would not be paid." Levy continues, "YL never abandoned the Project." Levy Affidavit in Opposition, ¶ 63.

Anglo now moves, pursuant to CPLR 3212, for an order granting summary judgment on the foreclosure action, granting default judgment against the remaining defendants and appointing a referee to compute in the entirety the amount due on the mortgage.

## DISCUSSION

### I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of

the motion." *Grasso*, at 544, citing to *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990).

## II. Breach of Contract of the Loan Transaction

In its complaint, YL argues that it was damaged when Anglo did not fully and timely provide the funds according to the loan agreement dated September 7, 2007. As a result of not fully and timely funding the requisitions starting in April 2008, YL alleges that it was unable to complete its condominium project and filed a suit to recoup its investment in the project. YL argues that, even though Anglo funded all the loan except for \$2 million, it was Anglo's failure to timely fund the \$2 million that resulted in YL's not being able to pay its bills on time, work then stopped on the project, and the closing of sales of units stopped.

In the loan agreement dated September 7, 2007, if YL did not complete the project by March 1, 2008, Anglo was under no obligation to continue to advance money for construction. YL admits that it did not complete construction by March 1, 2008, and admits that before April 2008, Anglo supplied all of the funds. For 16 months after the inception of the loan, Anglo supplied \$163 out of \$165 million to YL.

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by

the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 (1<sup>st</sup> Dept 2007), citing *Furia v Furia*, 116 AD2d 694 (2d Dept 1986). As Anglo argues, this cause of action must fail as a matter of law since it is evident that Anglo complied with the terms of the loan and there was no breach. It was actually YL who failed to comply with the terms of the loan, not Anglo.

YL asserts that, since Anglo continued to fund the loan despite YL's default by not completing construction, Anglo should have been required to fund fully and timely until Anglo officially declared a default on November 21, 2008. Anglo contends that it did not waive any of its rights by continuing to fund the loan after YL defaulted on March 1, 2008. It provides the non-waiver section of the building loan agreement, which states, in pertinent part:

Section 8.17. Non-Waiver; Remedies Cumulative. No failure or delay on Administrative Agent's, Servicer's or any Lender's part in exercising any right, remedy, power or privilege hereunder or under any of the other Loan documents or provided by Law (hereinafter in this Section, each a "Remedy") shall operate as a waiver of any such Remedy or shall be deemed to constitute Administrative Agent's, Servicer's or any Lender's acquiescence in any default by Borrower or Guarantor under any of said documents. A waiver by Administrative Agent, Servicer or any Lender of any Remedy on any one occasion shall not be construed as a bar to any other or future exercise thereof or of any other Remedy. The Remedies are cumulative, may be exercised singly or concurrently and are not exclusive of any other Remedies.

Anglo's Foreclosure Motion, Exhibit F, at 82-83.

Due to the non-waiver section of the agreement, this court finds that Anglo did not waive any of its rights by continuing to fund the loan after any of YL's defaults. Accordingly, as Anglo adhered to the provisions of the loan agreements, and YL has not set out any evidence which would create a material issue of fact as to any such breach by Anglo, this cause of action must fail.

### III. Implied Duty of Good Faith and Fair Dealing

YL argues that, even if Anglo could base its refusal to fully fund the project on the basis of the provisions of the loan agreement, Anglo still breached its duty of good faith to YL, which was a duty owed under the loan agreement and the guaranty. YL mentions *Canterbury Realty and Equipment Corporation v Poughkeepsie Savings Bank* (135 AD2d 102 [3d Dept 1988]), and states that the Court therein held that a lender may not declare a default after the lender improperly caused such default. However, as Anglo mentions, in this case, as well as the other cited by YL, it was the lender who caused the borrower's default, not, as in the present case, where it was the borrower who caused the default. In the instant motion, YL defaulted on the loan agreement before it alleged any funding misconduct by Anglo.

In similar cases, the courts have "rejected defendants' conclusory and unsupported claims of bad faith ... as negated by the express terms of the parties' unambiguous written agreements." *CrossLand, Savings, FSB v Loguidice-Chatwal Real*

*Estate Investment Co.*, 171 AD2d 457, 457 (1<sup>st</sup> Dept 1991). As Anglo argues, it conducted itself within the terms of the loan agreement. Accordingly, YL cannot prove that Anglo acted in bad faith under the subject contract, and this cause of action must fail.

#### IV. Further Discovery

In its memorandum of law, YL argues that it should be given access to Anglo and its affiliates' financial records, pursuant to CPLR 3212 (f), before the court delivers a determination on this motion. YL alleges that Anglo's failure to timely disburse the loan may be due to Anglo's lack of sufficient liquidity. YL maintains that media reports have demonstrated events which may have resulted in Anglo's curtailment of its funds.

CPLR 3212 (f), which concerns facts unavailable to the opposing party, provides as follows:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

As Anglo argues, "[t]o speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (subd [f])." *Auerbach v Bennett*, 47 NY2d 619, 636 (1979); see also *Banque Nationale de Paris v 1567 Broadway Ownership*

*Associates*, 214 AD2d 359, 360 (1<sup>st</sup> Dept 1995).

Not only did Anglo provide funds in a timely fashion until April 2008, it is undisputed that it provided \$163 million out of \$165 million. As such, there are no grounds for a continuance, as YL has not demonstrated that "facts essential to justify opposition may exist." Therefore, as YL's two remaining causes of action have failed, Anglo's motion for summary judgment is granted and YL's loan transaction complaint is dismissed in its entirety.

#### V. Affirmative Defenses in the Mortgage Foreclosure Action

In its motion for summary judgment, in motion sequence 005, Anglo seeks to dismiss YL's affirmative defenses as without merit. In its reply memorandum of law, although it does not address each of its proposed affirmative defenses individually, YL contends that material questions of fact remain as to whether: 1) Anglo failed to timely and fully fund the project under the building loan agreement; 2) Anglo maintains an office in New York or is licensed or registered in New York; 3) Levy violated the guaranty; 4) the default notices sent out by Anglo provided a sufficient cure period; and 5) Anglo breached its duty of good faith.

As in the loan transaction motion, YL also argues that the foreclosure motion should be denied or continued, pursuant to CPLR 3212 (f).

a. First, Thirteenth and Fourteenth Affirmative Defenses:

YL alleges in its first, thirteenth and fourteenth affirmative defenses that Anglo fails to state a cause of action sufficient to sustain a claim of deficiency judgment against Levy. As previously discussed, Levy issued three guaranties in conjunction with the loan agreements. In Anglo's complaint, the second cause of action seeks to hold Levy responsible for any deficiency which may remain following the foreclosure sale of the mortgaged premises. As Anglo states, it has elected to proceed by way of action to foreclose the mortgages instead of suing at law for the guaranty of payment. As such, Levy may be held liable for certain payments and Anglo has stated a cause of action for a deficiency judgment against Levy. Accordingly, these affirmative defenses must be dismissed as premature at this time, since Anglo has stated a cause of action for a potential deficiency judgment, but the amount of the deficiency cannot be assessed until after the foreclosure sale.

b. Second and Third Affirmative Defenses:

In its second and third affirmative defenses, YL claims that Levy has no obligation under the completion costs guaranty. These affirmative defenses are misplaced, since Anglo seeks to enforce the payment guaranty if necessary, not the completion costs guaranty. Accordingly, these affirmative defenses must be dismissed.

c. Fourth and Twelfth Affirmative Defenses:

In these affirmative defenses, YL alleges that Anglo did not send the notices required under its agreements with YL. YL continues in its memorandum of law that Anglo never gave YL a proper notice of default. Although there were many conceded defaults on YL's part, as Anglo argues, YL acknowledges that it did not pay the complete amount of PILOT taxes by January 1, 2009. That the managing agent may have taken this money, as YL alleges, does not negate YL's responsibility for payment. Furthermore, as previously discussed, Anglo sent out a notice of default on November 21, 2008 for not one, but four alleged events of default, prior to YL's failure to pay PILOT taxes. Moreover, YL does not allege that it attempted to cure any of these defaults.

On January 27, 2009, Anglo accelerated the loan by written notice based on the failure to pay the PILOT taxes. Section 4.01 of the mortgage documents provides that, if a default of any tax occurs and continues for a period of 20 days, Anglo has the right to declare an event of default and accelerate the loan. Since Anglo's conduct falls within the terms of the building loan agreements, this affirmative defense must be dismissed.

d. Fifth Affirmative Defense:

In its fifth affirmative defense, YL contends that Anglo has not pled with particularity Levy's liability under the

guarantees. Levy has conceded that he has signed the payment guaranty which expressly holds him liable for specifically identified payments. Therefore, this affirmative defense must be dismissed.

e. Sixth Affirmative Defense:

In this affirmative defense, YL alleges that Anglo did not comply with the terms of the loan agreements to timely lend the full amount of the \$165 million loan. As indicated above, YL fails to submit legally sufficient evidence that Anglo did not comply with its obligations and this defense must be dismissed.

Additionally, as part of this affirmative defense, YL alleges that Anglo, "who was in control of all of the funds at the closing of a Unit sale (because no Unit closing could occur unless Anglo Irish delivered its release of lien), directed that such Excess be paid toward amortization of the Loan, thereby depriving YL of that amount of interest which should have been paid from the Unit sales' proceeds." As Anglo argues in its memorandum of law, this affirmative defense is meritless, since it is not alleged that the loan was in default for YL's failure to pay interest, nor did YL pay interest per the express terms of the loan.

f. Seventh Affirmative Defense:

This defense is identical in part to the sixth defense and must be dismissed.

g. Eighth Affirmative Defense:

In this defense, YL argues that Anglo should be "equitably estopped" from foreclosing its mortgage because YL contributed some of its own funds to the project. In the alternative, Levy seeks to be compensated for up to \$23 million.

In order to successfully make a claim for equitable estoppel,

plaintiff must show, inter alia, (1) that [a party] made false representations or concealed material facts, (2) that such was done with the intention or expectation that such conduct would be acted upon by [the other party] and (3) that [the party making the representation] had actual or constructive knowledge of the true facts.

*Grieseimer v Bourst*, 141 AD2d 919, 920 (3d Dept 1988).

In essence, YL argues that it would not have continued to provide its own funding, such as the \$9 million at closing, if it knew that Anglo would declare a default on "technical violations." The record is devoid of any evidence that Anglo concealed facts from YL, or that it made any false representations. Accordingly, as YL has not been able meet the pleading requirements for claiming a defense of equitable estoppel, this defense must be dismissed.

h. Ninth Affirmative Defense:

In this affirmative defense, YL alleges that, by depriving YL of the ability to complete the project, Anglo breached its

implied duty of good faith owed to YL. As discussed above, there are no facts which support this allegation, and it must be dismissed.

I. Tenth Affirmative Defense:

In its tenth affirmative defense, YL alleges that Anglo is not licensed to do business in the State of New York and, as such, may not maintain an action. The courts have held that unlicensed foreign banking corporations who maintain an office in New York are permitted to commence a mortgage foreclosure suit in this state. *Banque Arabe Et Internationale D'Investissement v One Times Square Associates Limited Partnership*, 193 AD2d 387, 387 (1<sup>st</sup> Dept 1993); see also Banking Law § 200 (4). Therefore, this affirmative defense must be dismissed.

j. Eleventh Affirmative Defense:

In this affirmative defense, YL argues that, since the fair market value of the units subject to Anglo's lien exceeds the entire amount claimed by Anglo, the proceeds of such sales will be sufficient to discharge YL's debt. As such, no deficiency judgment can be obtained against Levy.

As previously mentioned, Levy signed the guaranty and Anglo, if successful with its foreclosure motion, may be able to pursue a deficiency judgment against Levy after the sale of foreclosed units. Accordingly, this affirmative defense is irrelevant and is dismissed.

Accordingly, all of the affirmative defenses have been dismissed and there are no triable issues of fact which remain. As such, as a matter of law, Anglo is entitled to summary judgment on its mortgage foreclosure action.

#### VI. YL's Request for Additional Discovery Demands

YL has again alleged that Anglo's failure to disburse all of the funds is due to Anglo's lack of sufficient liquidity. To assist in proving these allegations, YL seeks to extend discovery. Again, it is undisputed that Anglo provided \$163 million out of \$165 million of the loan to YL in the first 16 months after the loan agreement. According to Anglo, as of the time of this suit, it has in fact continued to fund the project and has exceeded its original loan commitment to the project. Dybas Reply Affidavit, ¶ 23. Accordingly, there is no basis for a continuance, and further discovery is denied.

#### VII. Default Judgment Against Remaining Defendants

Pursuant to CPLR 3215, Anglo seeks an order granting a default judgment against Demar, Brice, Board of Managers and the State of New York, on the grounds that they have failed either to appear or to serve a notice of appearance and waiver. The record demonstrates that on February 11 and 13, 2009, Anglo complied with service pursuant to CPLR 3215, including affidavits of additional mailings pursuant to BCL 306 and 307, where

appropriate. Anglo's Foreclosure Motion, Exhibit K. On February 16, 2009, Demar filed a notice of appearance and waiver and claim to surplus. *Id.*, Exhibit J. Accordingly, a default judgment is granted. See *Jones v 414 Equities LLC*, 57 AD3d 65, 81 (1<sup>st</sup> Dept 2008).

#### VIII. Referee to Compute

As the court has granted summary judgment in the mortgage foreclosure action, pursuant to section 1321 of the Real Property Actions and Proceedings Law, Anglo's request for a referee to be appointed to compute the amount due for principal and interest of the note and mortgage, is also granted.

#### **CONCLUSION**

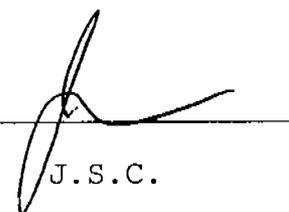
Accordingly, the motion to dismiss YL Rector Street LLC and Yair Levy's complaint brought by Anglo Irish Bank Corporation Limited (f/k/a Anglo Irish Bank Corporation PLC), Fortress Credit Opportunities I LP and Drawbridge Special Opportunities Fund Ltd. is granted, the foreclosure motion brought by Anglo Irish Bank Corporation Limited (f/k/a Anglo Irish Bank Corporation PLC), as Administrative Agent for Itself and Fortress Credit Opportunities I LP and Drawbridge Special Opportunities Fund Ltd. is granted in its entirety, including the motion to foreclose and sell the premises, the dismissal of the affirmative defenses, the

deficiency judgment, the default judgment against the remaining defendants, and a referee shall be appointed to compute the amount due for principal and interest of the note and mortgage.

SETTLE ORDER ON NOTICE

DATED: January 20, 2010

ENTER:

  
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J.S.C.