NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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FIRST COMMERCE, LLC, AS ASSIGNEE OF STERLING NATIONAL BANK, SUCCESSOR BY MERGER TO HUDSON VALLEY BANK, N.A.,

Plaintiff,

- against -

Index No. **800953/22E**

Hon. **FIDEL E. GOMEZ**
Justice

2901 SCHURZ HOLDING, LLC, RONALD G. D'ALESSIO, SCHURZ AVENUE DEVELOPMENT, LLC, UNITED STATES OF AMERICA, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD AND JOHN DOES #1 THROUGH 10 INCLUSIVE,

Defendant.

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The following papers numbered 1 to 4, Read on this motion noticed on 4/29/22, and duly submitted as no. 2 on the Motion Calendar of 6/1/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference and Amending Caption in Mortgage Foreclosure	5	
Memorandum of Law	2	
Administrative Order 5.25.2022 and Amended Bronx Auction Plan 2021		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 10/25/2022

_____

Hon._____

FIDEL E. GOMEZ, AJSC

1.CHECK ONE	☐ CASE DISPOSED X NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS	☐ GRANTED (MOTION) ☐ DENIED (CROSS-MOTION)
3. CHECK IF APPROPRIATE.	X GRANTED IN PART ☐ OTHER ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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FIRST COMMERCE, LLC, AS ASSIGNEE OF STERLING NATIONAL BANK, SUCCESSOR BY MERGER TO HUDSON VALLEY BANK, N.A.,

Plaintiff(s),

- against -

2901 SCHURZ HOLDING, LLC, RONALD G. D'ALESSIO, SCHURZ AVENUE DEVELOPMENT, LLC, UNITED STATES OF AMERICA, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD AND JOHN DOES #1 THROUGH 10 INCLUSIVE,

Defendant(s).

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DECISION AND ORDER

Index No: 800953/22E

In this action to foreclose on a mortgage and sell the real property which it encumbers, plaintiff moves seeking an order, *inter alia*, pursuant to CPLR § 3212 granting it summary judgment. Plaintiff contends that summary judgment is warranted because it holds the note executed by defendant 2901 SCHURZ HOLDING, LLC (Schurz Holding) obligating it to repay a loan, that it was assigned the mortgage executed by Schurz Holding, which pledged real property as collateral for the loan, and that Schurz Holding has defaulted under the terms of the note and mortgage. Plaintiff also avers that based on the foregoing default, defendant RONALD G. D'ALESSIO (D'Alessio), who executed a guaranty, guaranteeing Schurz Holding's obligations under the note and mortgage, is also liable for the foregoing debt, and has failed to make any payments

thereon. Schurz Holding and D'Alessio oppose the instant motion asserting, solely by counsel, that denial is warranted because, *inter alia*, the default under the note and/or mortgage has only been a partial one.

For the reasons that follow hereinafter, plaintiff's motion is granted, in part.

The instant action is for foreclosure on a mortgage and the sale of the real property, which it encumbers. The complaint, filed on January 20, 2022, alleges that on March 23, 2006, Schurz Holding, after it had been conveyed real property located at 2901 Schurz Avenue, Bronx, NY 10465 (2901) by SCHURZ AVENUE DEVELOPMENT (Shurz Development), executed a note between itself and Hudson Valley Bank (HVB), wherein it agreed to repay a loan by HBV totaling $720,000. The note consolidated a prior note between Schurz Development and Union State Bank (USB) with a loan made to Schurz Holding by HVB for $170,000. HVB was assigned the mortgage given to USB by Schurz Development, which secured the note between Schurz Development and USB by pledging 2901 as security. On March 23, 2006, as security for the additional $170,000 loaned to Schurz Holding by HVB, the former executed a gap mortgage, which pledged 2901 as security. As additional inducement for the loan, D'Alessio executed a guaranty, wherein he agreed to guarantee the loan to Schurz Holding. Schurz Holding also executed an assignment of

leases, assigning all future leases to HVB, and an agreement, wherein Schurz Holding gave HVB an interest in Schurz Holding's inventory. Under the terms of the foregoing note, Schurz Holding agreed to make monthly interest only payments beginning on May 1, 2006 and repay all sums due under the loan on April 14, 2011, the maturity date. HVB and Schurz Holding entered into eight agreements, whereby the parties agreed to extend the maturity date to September 15, 2012. On June 29, 2016, by merger with HVB, Sterling National Bank (SNB) acquired HBV's rights under the foregoing mortgage, note, and agreements. SNB and Schurz Holding also entered into an agreement whereby the maturity date was extended to October 1, 2020 and wherein Schurz Holding acknowledged that the outstanding balance on the loan, evinced by the note, was $646,281.14. On May 27, 2020, SNB and Schurz Holding entered into an agreement whereby it would allow Schurz Holding to defer monthly payments through December 1, 2020. On May 19, 2021, SNB assigned and delivered the note, mortgage, and related agreements to plaintiff, and plaintiff owns and holds the note, mortgage, and related agreements. Per the note and mortgage, the failure to pay the loan on the maturity date constituted a default and it is alleged that Schurz Holding has defaulted by failing to pay the loan on the maturity date. Based on the foregoing, plaintiff seeks a judgment allowing it to foreclose on the mortgage and sell 2901. Plaintiff also seeks to foreclose on the agreement wherein Schurz

Holding granted plaintiff an interest in Schurz Holding's inventory.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's motion seeking summary judgment on its cause of action to foreclose on the mortgage and to sell 2901 is granted to the extent of appointing a referee to compute all sums due plaintiff under the note and mortgage pursuant to RPAPL § 1351. Plaintiff establishes that it currently holds the note executed by Schurz Holding, was assigned the mortgage also executed by Schurz Holding in favor of HVB, that Schurz Holding defaulted under the terms of the note and mortgage, and that D'Alessio, who executed a guaranty, has also defaulted under the terms therein.

Plaintiff's motion seeking summary judgment on its cause of action seeking to foreclose on the security agreement, wherein Schurz Holding pledged its inventory as collateral, is denied insofar as the record is bereft of any evidence that the security interest in Schurz Holding's inventory was assigned to plaintiff, such that it has an interest in the foregoing inventory as required by UCC § 9-203[b][2].

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to

demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same *(Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]), or when the opponent fails to object to the admission of such evidence (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019] ["However, as a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion."]; *see Greene v Kevin D. Greene, LLC*, 188 AD3d 1012, 1013 [2d Dept 2020]; *Rosenblatt v St. George Health and*

Racquetball Assoc., LLC, 119 AD3d 45, 55 [2d Dept 2014] ["Thus, the Supreme Court erred when it, sua sponte, determined that the plaintiff's deposition transcript was inadmissible because of the lack of a certification and, as a result, concluded that Eastern Athletic had failed to meet its prima facie burden."]). The latter is premised on the well settled principle that a court ought not raise arguments never raised by the parties themselves (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial

> of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

In a foreclosure action, plaintiff establishes prima facie entitlement to summary judgment by submitting proof of a note, a mortgage, and defendant's default or failure to pay the same (*Barcy Investors, Inc. v Sun*, 239 AD2d 161, 161 [1st Dept 1997]; *Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308, 309 [1st Dept 2005]; *Federal Home Loan Mortgage Corp. v Karastathis*, 237 AD2d 558, 558 [2d Dept 1997]; *DiNardo v Patcam Service Station Inc.*, 228 AD2d 543, 543 [2d Dept 1996]). Once plaintiff demonstrates prima facie entitlement to summary judgment, it is then incumbent upon defendant to demonstrate a viable defense which creates an issue of fact, thereby precluding summary judgment (*id.*). When there is no issue as to defendant's default and the

only issue is as to the amount actually owed, summary judgment must nevertheless be granted (*Crest/Good Manufacturing Co, Inc. v Baumann*, 160 AD2d 831, 831-832 [2d Dept 1990]; *Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). Any dispute as to the amount owed is to be resolved after summary judgment is granted pursuant to RPAPL § 1321 (*id.*).

In addition to the foregoing, it is also well settled that since "foreclosure of a mortgage may not be brought by one who has no title to it" (*Lasalle Bank Natl. v Ahearn*, 59 AD3d 911, 912 [3d Dept 2009] [internal quotation marks omitted]), plaintiff in a foreclosure action must therefore establish that it has legal or equitable interest in the mortgage, such that it has standing to foreclose on the mortgage when an action is commenced (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v* Barnett, 88 Ad3d 636, 637 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2d Dept 2009]). Thus, when a defendant raises the issue of plaintiff's standing, plaintiff must prove its standing to be accorded relief (*U.S. Bank National Assoc. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). A plaintiff in a mortgage foreclosure action has standing to bring suit when it is "both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Dellarmo* at 748 [internal quotation

marks omitted]; *Weisblum* at 108; *Barnett* at 637; *Silverberg* at 279; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]). Neither the assignment of a note nor of a mortgage need be in writing and merely the transfer of those instruments, meaning physical delivery, confers title upon an assignee and, therefore, also confers standing (*Flyer v Sullivan*, 284 AD 697, 699 [1954]; *Dellarmo* at 748; *Barnett* at 637; *Silverberg* at 280; *Weisblum* at 108; *Ahearn* at 912; *Collymore* at 2009). Insofar as the mortgage is merely security for the note, namely the debt, assignment of a note also effectuates assignment of the mortgage (*Dellarmo* at 748; *Silverberg* at 280). However, assignment of the mortgage, does not by itself, result in the assignment of the note (*id.*). Thus, the assignment of a mortgage without the concomitant assignment of the note is a nullity (*Flyer* at 698; *Merrit v Bartholick*, 9 Tiffany 44, 45 [1867]; *Dellarmo* at 749; *Collymore* at 754).

To the extent that standing to foreclose on a mortgage is required at the time an action is commenced, where standing is absent at the time of commencement, such shortcoming cannot be cured by retroactive assignment occurring after an action is commenced (*Countrywide Home Loans v Gress*, 68 AD3d 709, 710 [2d Dept 2009] ["a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment."]; *Wells Fargo Bank, N.A. v*

Marchione, 69 AD3d 204, 210 [2d Dept 2009] ["If an assignment is in writing, the execution date is generally controlling and written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated."] [internal quotation marks omitted]; *Ahearn* at 912 [same]).

RPAPL § 1311(1) states that in an action sounding in foreclosure a necessary defendant is, *inter alia*,

> [e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein.

Since the objective of a foreclosure action is "to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" (*6820 Ridge Realty LLC v Goldman*, 263 AD2d 22, 26 [2d Dept 1999] [internal quotation marks omitted]; *Polish Nat. All. of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400, 404 [2d Dept 1983]), it is well settled that tenants residing at the premises sought to be sold at foreclosure are necessary parties in an action to foreclose a mortgage (*6820 Ridge Realty LLC* at 25; *see 1426 46 St., LLC v Klein*, 60 AD3d 740, 742 [2d Dept 2009];

Flushing Sav. Bank v CCN Realty Corp., 73 AD2d 945, 945 [2d Dept 1980]). The failure to join a necessary party in a foreclosure action leaves that party's rights unaffected and the sale at foreclosure void as to that party (*Polish Nat. All. of Brooklyn, U.S.A.* at 406; *1426 46 St., LLC v Klein*, 60 AD3d 740, 742 [2d Dept 2009]; *6820 Ridge Realty LLC* at 26).

RPAPL § 1321(1) states that

> [i]f the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due.

Thus, on an application for an order of reference, a plaintiff establishes entitlement to said relief when it submits "the mortgage, the unpaid note, the complaint, other proof setting forth the facts establishing the claim, an affidavit of an individual authorized to act on its behalf attesting to the default on the note, and proof that the defendants failed to answer within the time allowed" (*Household Fin. Realty Corp. of New York v Adeosun-Ayegbusi*, 156 AD3d 870, 871 [2d Dept 2017]; *LaSalle Bank Nat. Ass'n v Jagoo*, 147 AD3d 746, 746 [2d Dept 2017]; *John T. Walsh*

Enterprises, LLC v Jordan, 152 AD3d 755, 756 [2d Dept 2017]; *US Bank Nat. Ass'n v Singer*, 145 AD3d 1057, 1058 [2d Dept 2016]).

Despite the language in RPAPL § 1321(1), which limits the appointment of a referee to actions where the mortgagee defaults in the plenary action or where the same admits plaintiff's right to foreclose on the mortgage in an answer, courts routinely appoint referees pursuant to RPAPL § 1321 in cases where the mortgagor is awarded the right to foreclose upon a motion for summary judgment (*Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233, 1233-1234 [2d Dept 2018] [In an action for foreclosure and sale, the court appointed a referee to compute after granting plaintiff's motion for summary judgment.]; *see Deutsche Bank Natl. Tr. Co. v Logan,* 183 AD3d 660 [2d Dept 2020] [same]; *U.S. Bank N.A. v Calabro*, 175 AD3d 1451, 1451 [2d Dept 2019] [same]; *Deutsche Bank Nat. Tr. Co. v Logan*, 146 AD3d 861, 861 [2d Dept 2017] [same]).

A guaranty agreement must be strictly construed (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]). Summary judgment seeking an order enforcing a guaranty is warranted upon proof of "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.* at 492; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *City of New*

York v Clarose Cinema Corp., 256 AD2d 69, 71 [1st Dept 1998]).

With regard to a security interest under the Uniform Commercial Code,

> [a] security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment

(UCC § 9-203[a]). Moreover, one to whom a security interest has been given may enforce the same when, *inter alia*, the party to whom a security interest is given has provided value for that interest (UCC § 9-203[b][1]), the debtor has rights in the collateral (UCC § 9-203[b][2]), and the debtor has an authenticated security agreement "that provides a description of the collateral" (UCC § 9-203[b][A]).

Upon a default under the terms of a security agreement, a secured party "may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure" (UCC § 9-601[a][1]). Based on the foregoing, a party seeking to foreclose on a security agreement establishes entitlement to summary judgment when the requirements promulgated by UCC § 9-203 are established (*Fundex Capital Corp. v Reichard*, 172 AD2d 420, 420 [1st Dept 1991] ["The security interest became enforceable by reason of the debtors' signed security agreement describing the collateral (a March 1982

'Pledge of Shares and Assignment of Lease of Cooperative Apartment'), their receipt of value (a $120,000 loan), and their clearly identifiable rights in the collateral (possession of the shares and occupancy of the apartment).”]).

Discussion

In support of its motion, plaintiff submits an affidavit by David E. Wall (Wall), plaintiff's Senior Loan Portfolio Manager, wherein he reiterates the allegations in the complaint. Wall provides a history of the agreements, which preceded the relevant note and mortgage. In August 2002, pursuant to a note, HVB loaned $4,000,000 to UNK Holding, LLC, 3100 Tremont Avenue Associates, Inc., 3221 Tremont Associates, Inc., 3200 Tremont Associates, Inc., and 3600 Tremont Associates, Inc. The note was secured by a mortgage, which pledged five parcels of real property - Block 1408, Lot 14 in New York County (parcel 1), and Block 5350, Lots 48, 49, 50, and 51 (parcels 2-4), in Bronx County as security. In May 2003, HVB assigned the note and mortgage to Suma Federal Credit Union (Suma) and was consolidated with another note and mortgage that UNK executed in favor of Suma totaling $2,000,000. This new note and mortgage evinced a loan totaling $6,000,000. In June 2003, Suma assigned the consolidated note and mortgage to Star Equity Group, Ltd (SEG). At the same time, the mortgage was spread to cover an additional parcel of real property - Block 5331, Lot 15

(parcel 6), in Bronx County. Between July and September 2003, the mortgage was spread four times to cover additional parcels of real property - Block 5431, Lot 19 (parcel 7), Block 5334, Lot 1 (parcel 8), Block 1412, Lot 115 (parcel 9), and Block 5453, Lots 136 and 137 (parcels 9-10). In September 2003, the mortgage lien was split. Parcel 10, formerly Block 5453, Lots 136 and 137, became Lots 138, 139, 140, 141, and 242. SEG released the mortgage lien on Lots 138-141, and a mortgage securing a note in the sum of $550,000 attached to Lot 242, which was formerly part of Lot 137. On September 8, 2003, SEG assigned the foregoing mortgage to USB and Schurz Development executed and delivered a note evincing the loan and a substitute mortgage, where Lot 242 was pledged as security for the note. On March 23, 2006, Schurz Development conveyed 2901 to Schurz Holding. Wall states that Schurz Holding defaulted under the terms of the relevant agreements because it failed to pay all amounts due to plaintiff upon maturity of the Loan.

Plaintiff submits the documents referenced by Wall and by the complaint[1].

[1] It bears noting that while Wall failed to lay any foundation for the admission of the documents upon which he relies, Schurz Holding and D'Alessio's opposition to the instant motion raises no objection to the motion on grounds that the record is bereft of any admissible evidence. Accordingly, this Court will consider the documents appended to the motion, described in the complaint, and upon which Wall relies (*Greene* at 1013; *Bank of New York Mellon* at 202).

Plaintiff submits a mortgage note dated September 8, 2003 between Schurz Development and USB. Per the note, USB loaned Schurz Development $550,000. The latter agreed to repay the loan with interest. Per the mortgage note, the principal balance with interest was to be paid on September 1, 2008 or upon a default as defined by the mortgage securing the mortgage note.

Plaintiff submits a substituted mortgage between Schurz Development and USB, also dated September 8, 2003. Pursuant to the substituted mortgage, Schurz Development pledged property located at 2905-2911 Schurz Avenue, Bronx, NY (Block 5453, Lots 136 and 137) as security for the mortgage note[2]. Per paragraph 1 of the substituted mortgage, Schurz Development agreed to pay the loan in the mortgage note. Paragraph 4 of the substituted mortgage states that the entire balance of the loan would become due "after default in the payment of any installment of principal or of interest for 15 days," and to the extent that paragraph 5 states that "the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," it is clear that USB could initiate an action to foreclose on the mortgage upon Schurz Development's default.

[2] By virtue of Wall's affidavit and the complaint, plaintiff represents that 2901 is the premises encumbered by the substituted mortgage insofar as it encumbers Block 5453, Lots 136 and 137, which per Wall is now Lot 242 of the same Block, and which the complaint represents is 2901.

Plaintiff provides an agreement between HVB and Schurz Holding, dated March 23, 2006, wherein the latter agrees to assume the mortgage between Schurz Development and HVB and consolidate it with a loan for $170,000. Per the agreement, Schurz Holding agreed to repay HVB $720,000 and agreed to secure the consolidated note by the existing mortgage, pledging 2901 as security, and by executing a gap mortgage for the additional loan of $170,000. Within the agreement, the terms of which are governed by the consolidated note, Schurz Holding represents that it owns 2901, and agrees

> to combine those rights and obligations that the Mortgagor has under the Existing Mortgage and Existing Note with Mortgagor's rights and obligations under the Consolidated Note and New Mortgage both dated of even date herewith.

Plaintiff provides a consolidated note between HVB and Schurz Holding, wherein the latter agrees to repay $720,000. The agreement incorporates the note between Schurz Development and SEG, asserting that the indebtedness totaling $720,000 represents a prior loan totaling $550,000 plus a new loan totaling $170,000. Paragraph 2 mandated that beginning May 1, 2006, Schurz Holding make monthly interest payments, and prescribed April 1, 2011 as the maturity date, upon which the loan would become due. Paragraph 7 listed the events constituting a default under the consolidated note, which included the failure to make a payment when due. Paragraph 8 states that upon default, HVB could declare all sums

due under the loan immediately due. Paragraph 14, a no waiver provision, states that

> [n]o failure to accelerate the Loan evidenced hereby by reason of default hereunder, or acceptance of a past due installment, or indulgence granted from time to time shall be construed to be a waiver of the right to insist upon prompt payment thereafter, or shall be deemed to be a novation of this Note or as a reinstatement of the Loan evidenced hereby or as a waiver of such right of acceleration or any other right, or be construed so as to preclude the exercise of any right which Bank may have, whether by the laws of the state governing this Note, by agreement or otherwise; and Borrower and each endorser hereby expressly waive the benefit of any state or rule of law or equity which would produce a result contrary to or in conflict with the foregoing.

Plaintiff submits a gap mortgage and security agreement, dated March 23, 2006 between Schurz Holding and HVB. The gap mortgage states that to secure the loan made to Schurz Holding in the sum of $170,000, it pledged 2901 as security. Paragraph 2.1 states that Schurz Holding was required to pay all sums when due as required by the note. Paragraph 7.1 defines a default as the failure to make a payment when due and paragraph 7.2.3 provides that upon a default, HVB could initiate a proceeding to foreclose on the mortgage.

Plaintiff submits a guaranty agreement, dated May 23, 2006, wherein D'Alessio agrees to guarantee all sums due under the

consolidated note.

Plaintiff submits an agreement dated March 23, 2006, wherein Schurz Holding assigns all existing leases at 2901 to HVB.

Plaintiff submits a security agreement, dated March 23, 2006, wherein as additional security for the loan evinced by the consolidated note, Schurz Holding grants HVB an interest in, *inter alia*, "all goods, merchandise, raw materials, [and] goods in process," owned by Schurz Holding. Pursuant to paragraph 4, a default under the security agreement is any default under the consolidated note and/or mortgage. Per paragraph 5, upon default, HVB could avail itself of all rights and remedies under the UCC.

Plaintiff submits a loan modification agreement, dated May 27, 2020, between Schurz Holding and SNB. The agreement states that SNB is successor by merger to HVB. The agreement indicates that SNB is the owner of both the note and mortgage and that the parties seek to modify the agreement to the extent of deferring payments for 90 days. Paragraph 2 states that with the exception of deferring payments due under the note and mortgage for 90 days as of June 1, 2020, all other terms remain the same.

Plaintiff submits an allonge dated March 19, 2021, wherein the note evincing the loan to Schurz Holding in the sum of $720,000 is assigned to plaintiff.

Plaintiff submits a document dated April 15, 2021, wherein SNB assigns the substituted mortgage to plaintiff.

Plaintiff submits an agreement dated April 15, 2021, wherein SNB assigns the gap mortgage and security agreement to plaintiff.

Lastly, plaintiff submits an agreement dated April 15, 2021, wherein SNB assigns the assignment of leases agreement, executed by Schurz Holding, in favor of HVB, to plaintiff.

Based on the foregoing, with regard to the first cause action in the complaint - foreclosure on the mortgage and the sale of the property which it encumbers, plaintiff demonstrates prima facie entitlement to summary judgment.

As noted above, in a foreclosure action, a plaintiff establishes prima facie entitlement to summary judgment by submitting proof of a note, a mortgage, and defendant's default or failure to pay (*Barcy Investors, Inc.* at 161; *Chemical Bank* at 309; *Federal Home Loan Mortgage Corp.* at 558; *DiNardo* at 543). Moreover, a plaintiff in a mortgage foreclosure action has standing to bring suit when it is "both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Dellarmo* at 748 [internal quotation marks omitted]; *Weisblum* at 108; *Barnett* at 637; *Silverberg* at 279; *U.S. Bank, N.A.* at 753). Neither the assignment

of a note nor of a mortgage need be in writing and merely the transfer of those instruments, meaning physical delivery, confers title upon an assignee and, therefore, also confers standing (*Flyer* at 699; *Dellarmo* at 748; *Barnett* at 637; *Silverberg* at 280; *Weisblum* at 108; *Ahearn* at 912; *Collymore* at 2009). Insofar as the mortgage is merely security for the note, namely the debt, assignment of a note also effectuates assignment of the mortgage (*Dellarmo* at 748; *Silverberg* at 280). However, assignment of the mortgage, does not by itself, result in the assignment of the note (*id.*). Thus, the assignment of a mortgage without the concomitant assignment of the note is a nullity (*Flyer* at 698; *Merrit v Bartholick*, 9 Tiffany 44, 45 [1867]; *Dellarmo* at 749; *Collymore* at 754).

Here, the allonge dated March 19, 2021, which evinces that the consolidated mortgage note executed by Schurz Holding was assigned to plaintiff by SNB, coupled with Wall's assertion that plaintiff owns and holds the foregoing note establishes that plaintiff owns and holds the note. Moreover, the two agreements dated April 15, 2021, wherein SNB assigns the substituted mortgage and the gap mortgage and security agreement to plaintiff, establish that plaintiff owns and holds the relevant mortgages. Thus, plaintiff establishes that it has the requisite standing to bring this action (*Dellarmo* at 748; *Weisblum* at 108; *Barnett* at 637; *Silverberg* at 279; *U.S. Bank, N.A.* at 753). A review of the terms of the

consolidated mortgage note evinces that Schurz Holding was bound to make monthly interest payments on the loan beginning on May 1, 2006, with all sums under the loan due on April 1, 2011, the maturity date. This same agreement defined a default upon which the entire loan would become due as the failure to make a payment when due. The terms of the gap mortgage and security agreement, dated March 23, 2006, between Schurz Holding and HVB, where 2901 was pledged as security contained similar language and authorized the initiation of a proceeding to foreclose on the mortgage upon a default. Moreover, Wall's affidavit states that Schurz Holding failed to pay the loan upon its maturity date. Accordingly, since in a foreclosure action, a plaintiff establishes prima facie entitlement to summary judgment by submitting proof of a note, a mortgage, and defendant's default or failure to pay (*Barcy Investors, Inc.* at 161; *Chemical Bank* at 309; *Federal Home Loan Mortgage Corp.* at 558; *DiNardo* at 543), here, based on the foregoing, plaintiff establishes entitlement to summary judgment on its cause of action seeking a judgment of foreclosure and sale.

Similarly, plaintiff establishes prima facie entitlement to summary judgment on the incidental claim for a deficiency judgment against D'Alessio by virtue of the guaranty agreement to which he is bound. A deficiency judgment sought against a guarantor in a foreclosure action is "[merely] incidental to the principal relief demanded against the mortgagor" (*LibertyPointe Bank v 7 Waterfront*

Prop., LLC, 94 AD3d 1061, 1062 [2d Dept 2012]; *see Dudley v Congregation of Third Order of St. Francis*, 138 NY 451, 458 [1893]).

As noted above, summary judgment and an order enforcing a guaranty is warranted upon proof of "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.* at 492; *Davimos* at 272; *City of New York* at 71). Here, the guaranty submitted by plaintiff, dated March 23, 2006, evinces that D'Alessio agreed to guarantee Schurz Holding's obligation under the relevant notes and mortgages. Moreover, since Wall states that Schurz Holding continues to be in default, it is clear that D'Alessio has also failed to perform under the guaranty.

Plaintiff's application for summary judgment and a judgment allowing it foreclose on the security agreement, wherein Schurz Holding pledged its inventory as collateral, is denied.

As discussed above, a party seeking to foreclose on a security agreement establishes entitlement to summary judgment when the requirements promulgated by UCC § 9-203 are established (*Fundex Capital Corp.* at 420). This means that one to whom a security interest has been given, may enforce the same when, *inter alia*, the party to whom a security interest is given has provided value for that interest (UCC § 9-203[b][1]), the debtor has rights in the

collateral (UCC § 9-203[b][2]), and the debtor has an authenticated security agreement "that provides a description of the collateral" (UCC § 9-203[b][A]).

Here, the instant security agreement, dated March 23, 2006, granted a right to Schurz Holding's inventory in favor of HVB and the record is bereft of any evidence that it was assigned to plaintiff. Accordingly, plaintiff fails to establish as required by UCC § 9-202(b)(2), that it has rights in the collateral governed by the security agreement.

Nothing submitted by Schurz Holding and D'Alessio raise issues of fact precluding summary judgment. First, Schurz Holding and D'Alessio submit no evidence whatsoever. Second, their arguments in opposition have no merit.

Schurz Holding and D'Alessio's contention, treated as one pursuant to CPLR § 3212(f), that the dearth of discovery warrants denial of the instant motion as premature, is unavailing.

Pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 297 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d

Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue, N.V., Inc*, 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the instant motion, is wholly within the control of the party opposing summary judgment and could be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f), will be denied (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999).

A party claiming ignorance of facts critical to defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because, a court cannot condone fishing expeditions and as such "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery, should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536,

537 [2d Dept 1998]).

Here, Schurz Holding and D'Alessio argue that discovery could give rise to potential equitable defenses, such as the doctrine of unclean hands, estoppel and/or waiver. Where as here, given that the record contains all of the relevant agreements, information as to whether the foregoing defenses exist is solely within the knowledge of Schurz Holding and D'Alessio. Accordingly, the foregoing assertion does not preclude summary judgment (*Johnson* at 270). If indeed such defenses are applicable, they could have been interposed within Schurz Holding and D'Alessio's answer. Moreover, denial of the instant motion for want of discovery must denied, because the record is bereft of any assertion that discovery has been sought and has not been provided (*Sasson* at 488; *Cruz* at 540).

To the extent that Schurz Holding and D'Alessio argue that they have not defaulted because Schurz Holding continues to make monthly payments, this does not warrant denial of the instant motion. First, other than counsel's affirmation, which is not evidence (*Zuckerman* at 563; *Columbia Ribbon & Carbon Mfg. Co., Inc. v A-1-A Corp.*, 42 NY2d 496, 500 [1977]; *Israelson v Rubin*, 20 AD2d 668, 669 [2d Dept 1964], *affd*, 14 NY2d 887 [1964]), there is no evidence in the record of the foregoing. Second, by the express terms of the consolidated note, a default was defined as the failure to make any payment when due, including paying off the

entire loan on the maturity date. Per the loan modification agreement, the maturity date was extended until September 1, 2020, meaning that all sums under the loan - not partial payments - were due. As per Wall's affidavit, the default upon which this action is premised is the failure to pay the loan in full on the maturity date. Accordingly, the making of partial payments, as urged by Schurz Holding and D'Alessio does not negate the default under the relevant agreement so as to preclude summary judgment.

Additionally, when an agreement contains a "no waiver provision," which precludes waiver even if partial payments after default have been accepted, the acceptance of the same will not prevent foreclosure (*UMLIC VP, LLC v Mellace*, 19 AD3d 684 [2d Dept 2005] ["Moreover, the plaintiff's claim is also refuted by the fact that its assignor advised the obligors on the note that they would remain liable for the balance of the accelerated debt even after the partial payment was accepted."]). Here, per paragraph 14 of the consolidated mortgage note, the "acceptance of a past due installment, or indulgence granted from time to time shall be construed to be a waiver of the right to insist upon prompt payment thereafter, or shall be deemed to be a novation of this Note." Thus, per the agreements between the parties, partial payments by Schurz Holding cannot be deemed a waiver to foreclose on the mortgage so as to preclude summary judgment.

Lastly, even in the absence of any "no waiver" language in an agreement, in an action to foreclose on a mortgage, once the loan is accelerated because of a default thereunder, partial payments do not cure the default (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001] ["The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt."]; *P.T. Bank Cent. Asia, New York Branch v Ho Ho Ho Realty Co., Inc.*, 273 AD2d 212, 212 [2d Dept 2000] ["Contrary to the appellants' contention, although the respondent accepted intermittent payments from HHHRC after the note matured, the payments never cured its default."]).

MOTION FOR DEFAULT JUDGMENT

Plaintiff's motion seeking an order entering a default judgment against all other defendants is granted. Significantly, plaintiff establishes that it served all other defendants with the complaint, that the claims against them have merit, and that said defendants have failed to interpose answers.

Pursuant to CPLR § 3215[f], "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim" (*Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005] [Default judgment granted once plaintiff

submitted proof that defendant was served with the summons and complaint and an affidavit of the facts constituting the claim.]; *Andrade v Ranginwala*, 297 AD2d 691, 691-692 [2d Dept 2002]). Once the requisite showing has been made, a motion for a default judgment must be granted unless the defendant can establish a meritorious defense to the claims made, a reasonable excuse for the delay in interposing an answer, and that the delay in interposing an answer has in no way prejudiced the plaintiff in the prosecution of the case (*Buywise Holding, LLC v Harris*, 31 AD3d 681, 683 [2d Dept 2006]; *Giovanelli v Rivera*, 23 AD3d 616, 616 [2d Dept 2005]).

Pursuant to CPLR §3215(a), "[i]f the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default." Accordingly, if the damages sought are not for a sum certain or for an amount which can be made certain, a default judgment is only as to liability, where the defendant admits all traversable allegations in the complaint as to liability only (*Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *Arent Fox Kinter Plotkin & Kahn, PLLC v Gmbh*, 297 AD2d 590, 590 [2d Dept 2002]). A trial on inquest must be held wherein the defendant is afforded an opportunity to present and try a case in mitigation of damages (*Rokina Optical Co., Inc.* at 730; *Arent Fox Kinter Plotkin & Kahn, PLLC* at 590). The term "sum certain" contemplates a situation where once liability has been established,

"there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments" (*Reynolds Securities, Inc. v Underwriters Bank and Trust Company*, 44 NY2d 568, 572 [1978]).

With regard to establishing the merits of the claim, plaintiff may use an affidavit or a complaint verified by the plaintiff (*Mullins v DiLorenzo*, 199 AD2d 218, 220 [1st Dept 1993]; *Gerhardt v J & R Salacqua Contr. Co., Inc.*, 181 AD2d 719, 720 [2d Dept 1992]). Additionally, plaintiff can also use deposition testimony (*Empire Chevrolet Sales Corporation v Spallone*, 304 AD2d 708, 709 [2d Dept 2003]; *Ramputi v Timko Contracting Corp.*, 262 AD2d 26, 27 [1st Dept 1999]). While generally, a plaintiff cannot establish the merits of his or her claims using a complaint verified by an attorney (*Deleon v Sonin & Genis*, 303 AD2d 291, 292 [1st Dept 2003]; *Juseinoski v Board of Education of the City of New York*, 15 AD3d 353, 356 [2d Dept 2004]), a complaint verified by an attorney, where the attorney has personal knowledge of facts constituting the claim, is sufficient to establish the merits of a plaintiff's claim (*State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]; *Martin v Zangrillo*, 186 AD2d 724, 724 [2d Dept 1992]).

CPLR § 3215(c) states that

> [i]f the plaintiff fails to take

> proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Thus, a party who fails to take a default within a year after said default could have been taken, has abandoned his case and the remedy is dismissal (*Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2d Dept 2005]; *Geraghty v Elmhurst Hosp. Center of New York City Health and Hospitals Corp.*, 305 AD2d 634, 634 [2d Dept 2003]). Significantly, pursuant to CPLR § 320(a), generally "[a]n appearance shall be made within twenty days after service of the summons." In order to avoid dismissal under this section, a plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45, 45 [1st Dept 2000]; *LaValle v Astoria Construction & Paving Corp.*, 266 AD2d 28, 28 [1st Dept 1999]; *State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]). Notably, in the absence of a motion seeking dismissal for the failure to timely seek a default, a court has the power to dismiss an action *sua sponte* (*Perricone v City of New York*, 62 NY2d 661, 663 [1984]; *Winkelman v H & S Beer and Soda Discounts, Inc.*, 91 AD2d 660, 661 [2d Dept 1982]).

Here, plaintiff submits an affidavit, which evinces that on February 9, 2022, Schurz Development was served with the summons and complaint when a copy of the same was left with the New York Secretary of State. Moreover, plaintiff provides a copy of the complaint, which is verified by Wall, and indicates that Schurz Development may have an interest in 2901.

Plaintiff submits an affidavit evincing that on February 8, 2022, defendant UNITED STATES OF AMERICA (USA) was served with the summons and complaint when a copy was left with a clerk at 86 Chambers Street, New York, NY 10007. The complaint states that USA is a named defendant because it may have an interest in 2901.

Plaintiff submits an affidavit evincing that on February 10, 2022, defendant CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD (ECB) was served with the summons and complaint when a copy was left with a clerk at 100 Church Street, New York, NY 10007. The complaint states that ECB is a named defendant because it may have an interest in 2901.

Plaintiff submits several affidavits of service, indicting that on February 5, 2022, defendants LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES, were served with the summons and complaint when copies were left with them at 2901. The complaint, which designates them as JOHN DOE defendants alleges that the foregoing defendants may have an interest in 2901.

Based on the foregoing, plaintiff establishes that the foregoing defendants were duly served with the summons and complaint. LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES were personally served with process (CPLR § 308 [Personal service upon a natural person shall be made by any of the following methods . . . by delivering the summons within the state to the person to be served"). USA was served with process by delivering a copy of the summons and complaint to the appropriate United States Attorney (Fed Rules Civ Pro rule 4[i][1][A][i] ["To serve the United States, a party must . . . deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk."]). ECB was served with process by delivering the summons and complaint to the Office of the Corporation Counsel (CPLR § 311(a)(2) ["Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows . . . upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county."). Schurz Development, a Limited Liability Company, was served with process when the summons and complaint were left with the New York Secretary of State (CPLR § 311-a[a] ["Service of process on any domestic or foreign limited

liability company shall be made by delivering a copy personally to . . . any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant."]; LLC § 301[a] ["The secretary of state shall be the agent of every domestic limited liability company that has filed with the department of state articles of organization making such designation and every foreign limited liability company upon which process may be served pursuant to this chapter."]).

In addition, since the objective of a foreclosure action is "to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" (*6820 Ridge Realty LLC* at 26; *Polish Nat. All. of Brooklyn, U.S.A.* at 404), to the extent that the complaint alleges that all of these defendants may have an interest in 2901, the claims against them have merit. This is especially true with regard to the individual defendants - who are likely to be tenants at 2901 since it is well settled that tenants residing at the premises sought to be sold at foreclosure are necessary parties in an action to foreclose a mortgage (*6820 Ridge Realty LLC* at 25; *see 1426 46 St., LLC* at 742; *Flushing Sav. Bank* at 945). Accordingly, the motion for the entry of a default judgment against Schurz Development, USA, ECB, LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES is granted.

Motion to Amend Caption

Plaintiff's motion seeking leave to amend the caption to replace defendants JOHN DOES #1 THROUGH 10, with LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES is granted. Significantly, the foregoing defendants were duly served with the complaint such that the amendment sought will not prejudice them.

CPLR § 305(c) allows a party to amend the caption or the summons and verified complaint in a proceeding and authorizes the court to "allow any summons or proof of service to be amended, if a substantial right of a party against whom the summons issued is not prejudiced." CPLR § 2001 further states that at any stage of an action, a court may permit a mistake, omission, defect or irregularity to be corrected upon such terms as may be just. In allowing such amendments, the relevant inquiry is whether the correct party was actually served, whether the amendment would prejudice the party in any way, and whether the correct party was on notice that despite the mistake in the caption or summons or complaint, he/she was the entity or person against whom the suit was brought (*Medina v City of New York*, 167 AD2d 268, 270 [1st Dept 1990] [The court, relying on CPLR § 305(c) and § 2001, granted plaintiff leave to amend, *inter alia*, the caption to name the correct defendant when no prejudice would result therefrom.]; *see*

Fink v Regent Hotel, Ltd., 234 AD2d 39, 41 [1st Dept 1996] ["It is well settled that an application to amend the caption to reflect the true name of the defendant should be granted where, as here, the designated entity was the intended subject of the law suit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby."]; *Pinto v House*, 79 AD2d 361, 364 [1st Dept 1981]; *Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]). Here, for the reasons stated above, amending the caption is necessary and will not prejudice defendants in any way. It is hereby

ORDERED that summary judgment against Schurz Holding and D'Alessio is granted solely on plaintiff's first cause of action for foreclosure pursuant to the Order of Reference and Amending Caption in Mortgage Foreclosure annexed hereto. It is further

ORDERED that a default judgment is granted against Schurz Development, USA, ECB, LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES pursuant to the Order of Reference and Amending Caption in Mortgage Foreclosure annexed hereto. It is further

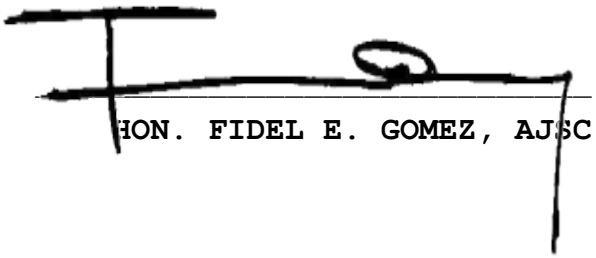
ORDERED that the caption be amended to reflect the addition of LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY, and JEANINE HYNES as defendants, as per the Order of Reference and Amending Caption in Mortgage Foreclosure annexed hereto. It is

further

ORDERED that plaintiff serve a copy of this Decision and Order and Order of Reference and Amending Caption in Mortgage Foreclosure annexed hereto with Notice of Entry upon all defendants within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : October 25, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC

At an IAS ~~Term~~, Part 32 of the Supreme Court of the State of New York, Bronx County, at the Courthouse located at 851 Grand Concourse, Bronx, New York 10451, on the 25th day of October, 2022

Present: FIDEL E. GOMEZ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

FIRST COMMERCE, LLC, as assignee of STERLING NATIONAL BANK, successor by merger to HUDSON VALLEY BANK, N.A., Plaintiff, v. 2901 SCHURZ HOLDING, LLC, RONALD G. D'ALESSIO, SCHURZ AVENUE DEVELOPMENT, LLC, UNITED STATES OF AMERICA, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY and JEANINE HYNES, Defendants.	Index No. 800953/2022E Premises to be Foreclosed: 2901 Schurz Avenue a/k/a 4367/4377 East Tremont Avenue Bronx, New York 10465 Block 5453, Lot 242 **ORDER OF REFERENCE AND AMENDING CAPTION IN MORTGAGE FORECLOSURE**

UPON the Summons, Verified Complaint and Notice of Pendency filed in this action on or about January 20, 2022, and upon the Affirmation of Jonathan P. Vuotto, Esq., counsel for Plaintiff, from which it appears that this action was brought to foreclose a certain Substitute Mortgage dated September 8, 2003, and a certain Gap Mortgage dated March 23, 2006, as consolidated by a certain Consolidation Agreement dated March 23, 2006, encumbering real estate, situated in the County of Bronx, State of New York, commonly known as 2901 Schurz

Avenue, a/k/a 4367/4377 East Tremont Avenue, Bronx, New York 10465 (the "Mortgaged Premises"), by reason of certain defaults as alleged in the Verified Complaint, and it further appearing that all of the defendants have been duly served with a copy of the Summons and Verified Complaint and/or have appeared herein, copies of such proofs of service being filed with the Court; and Defendants 2901 Schurz Holding, LLC and Ronald G. D'Alessio ("Answering Defendants") having served and filed an Answer; and the Court having entered an Order granting summary judgment in favor of Plaintiff; and it appearing that none of the Defendants is an infant, incompetent or absentee, or in the military; **NOW**, on the motion of McAndrew Vuotto, LLC, attorneys of record for Plaintiff, it is

ORDERED, that the motion is granted; and it is further

ORDERED, that William Forero, Esq. with an address of Law Offices of Edmond J. Pryor ~~292 City Island Ave~~ Bronx, NY 10464 718-829-0222, is hereby appointed Referee to ascertain and compute the amount due, except for attorney's fees, to the Plaintiff herein for principal, interest, and other disbursements advanced as provided for by statute and in the Note and Mortgage upon which this action was brought, to examine and report whether or not the Mortgaged Premises should be sold in parcels, and that the Referee make his/her computation and report ~~report no later than sixty (60) days after service of this order with Notice of Entry, or~~ with all convenient speed, and that, except for good cause shown, the Plaintiff shall move for judgment no later than sixty (60) days from the date of the Referee's report; and it is further

FG
J.S.C.

ORDERED, that, if required, said Referee take testimony pursuant to RPAPL § 1321; and it is further

~~**ORDERED,** that pursuant to CPLR 8003(a) (the statutory fee of $50.00) (in discretion of the court, a fee of $_____), shall be paid to the Referee for the computation state and upon the filing of his/her report; and it is further~~

FG
J.S.C.

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36), including but not limited to, section 36.2(e)("Disqualifications from appointment"), and section 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that the referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with part 36 of the rules of the Chief Administrative Judge, and it is further

ORDERED, that the caption of this action shall be and hereby is amended as is reflected in this Order of Reference and Amending Caption so as to include "LUIS SERRANO, MILEDI CAMACHO, PERRY GUERRA, NATHAN PERRY and JEANINE HYNES" and remove "JOHN DOES #1 through 10 inclusive" and that any and all pleadings and/or other papers filed herein shall contain said amended caption;

ORDERED, that a copy of this Order with Notice of Entry shall be served upon ~~the~~ all parties and persons entitled to notice, including the ~~designated Referee, counsel for the owner of the equity of redemption, and any other party entitled~~ Referee appointed herein.
~~to notice within twenty (20) days of Plaintiff's counsel's receipt hereof. The Referee shall not proceed to take evidence as provided herein without proof of such service, which proof must also accompany any application for Final Judgment of Foreclosure and Sale~~.

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J.S.C.

ENTER.

Pursuant to CPLR §8003 (a) and in the discretion of the court, a fee of $250.00 shall be paid to the Referee upon the filing of his report, and in accordance with CPLR §8003 (b), the statutory fee shall be paid to the Referee at the time of the foreclosure sale.

FG
J.S.C.

J.S.C.
FIDEL E. GOMEZ
10/25/22