74 Misc.3d 1223(A)
Unreported Disposition
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This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, Bronx County, New York.

NORMAN REALTY & CONSTRUCTION CORPORATION, Plaintiff(s),
v.
151 EAST 170TH LENDER LLC, Defendant(s)/Counterclaim-Plaintiff(s),
and
Michael J. Mason, Linda Mason, Edward Macias d/b/a Kath-Ed Bakery, Liubo Junkovic, Moscoso Pharmacy, Morales Pharmacy Henry Molanno, Moscoso Pharmacy II, Morales Pharmacy II and Henry Molanno, Nova Laundromat Corp., Readycap Commercial LLC H. Naji Wael and Sotore Hassan S. Dihyem, Ke Di Zheng d/b/a Wing Ling Restaurant, New York State Department of Taxation & Finance, New York City Department of Finance, Environmental Control Board of the City of New York; and John Doe ##1-10, Said John Doe Defendants Being Fictitious, It Being Intended to Name All Other Parties Who May Have Some Interest in or Lien Upon the Premises Sought to be Foreclosed, Additional Counterclaim-Defendant(s).

Index No. 802734/21E
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Decided on March 21, 2022

Attorneys and Law Firms

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Counsel for defendant/counterclaim plaintiff: Armstrong Teasdale LLP

Counsel for counterclaim defendants Morales Pharmacy Inc., D/B/A Moscoso Pharmacy, Moscoso Pharmacy, Moscoso Pharmacy II, Morales Pharmacy II and Henry Molano: Allegaert Berger & Vogel LLP

Opinion

Fidel E. **Gomez**, J.

***1** In this action for unconscionability and fraudulent inducement, defendant moves seeking an order, *inter alia*, granting it summary judgment as to plaintiff's causes of action in the complaint and on defendant's counterclaims seeking, *inter alia*, to foreclose on a mortgage and sell the real property which secures it. Defendant also seeks summary judgment on its counterclaim which seeks to enforce a guaranty executed by counterclaim defendants MICHAEL J. MASON (MM) and LINDA MASON (LM). Saliently, defendant avers that because plaintiff, within the agreements between the parties, waived all claims arising from the instant transactions, summary judgment as to those claims is warranted. Moreover, with regard to its counterclaims, defendant avers that summary judgment is warranted insofar as the record establishes that plaintiff has defaulted under the terms of the relevant mortgages, that defendant holds the notes secured by the mortgages, and that MM and LM have failed to comply with the payment obligations assumed by them in the guaranty.

Plaintiff opposes defendant's motion, asserting that because it has sought leave to amend the complaint, the instant motion must be denied as moot. MM and LM also oppose defendant's motion asserting that because they executed the guaranty after the other loan documents were executed, the agreements are unenforceable insofar as they lack consideration. Plaintiff cross-moves for an order pursuant to CPLR § 3025 granting it leave to amend both its complaint and answer to the counterclaims. Saliently, plaintiff seeks to add Harold Sherr (Sherr) as an additional defendant and omit its cause of action for unconscionability from the complaint and assert it as an affirmative defense in its answer. MM and LM also cross-move seeking an order granting them summary judgment on defendant's counterclaim seeking to enforce the guaranty agreement. Specifically, MM and LM seek summary judgment for the same reasons they oppose defendant's motion. Defendant opposes plaintiff, MM, and LM's cross-motion. Defendant saliently asserts that the amendments sought are devoid of merit such that leave to amend should be denied. Accordingly, absent leave to amend the complaint and answer, defendant contends that its motion is not rendered moot. Moreover, defendant contends that the record establishes that the guaranty agreement executed by MM and LM were supported by ample consideration, namely the loan made to plaintiff.

For the reasons that follow hereinafter, defendant's motion is granted, in part and plaintiff, MM and LM's cross-motion is denied.

The instant action is for unconscionability and fraudulent inducement. The complaint alleges the following. Over the course of several years, plaintiff and defendant executed a series of agreements related to real property located at 151 East 170 Street, Bronx, NY 10452 (151). On July 31, 2017, the parties executed a gap note in the amount of $1,253,400.48. On November 19, 2018, the parties executed a Restated Consolidated Secured Promissory Note in the amount of $5,634,929.18 and a gap note in the amount of $1,231.443.24. On February 24, 2020, the parties executed a Restated Consolidated Secured Promissory Note and a Mortgage Consolidation Modification and Extension Agreement in the amount of $5,634.929.18. Based on the foregoing, plaintiff asserts three causes of action. The first and second causes of action allege that the foregoing agreements violated UCC § 2-302, in that the agreements were discriminating, unconscionable, one-sided and oppressive. As a result of the foregoing, plaintiff alleges that it sustained extensive damage totaling $5,000,000. The third cause of action alleges that defendant misrepresented its intent to defraud plaintiff when it executed the agreements between the parties, that defendant knowingly and willfully failed to advise plaintiff that upon executing the agreements, plaintiff would immediately be in default at an interest rate of 24 percent, and that defendant promised to provide plaintiff with an extension agreement, but then delayed the same for four months in order to have plaintiff accrue additional interest. As a result of the foregoing, plaintiff seeks to void the agreements between the parties.

***2** Defendant's answer alleges the following. On November 19, 2018, the parties executed a Consolidated Secured Promissory Note, wherein plaintiff agreed to repay defendant for a loan in the amount of $5,634,929.18. On that same day, as additional security, the parties executed a Mortgage Consolidation and Extension Agreement, an Assignment of Leases and Rents and Security Agreement. The Mortgage Consolidation and Extension Agreement secured the Consolidated Secured Promissory Note, pledging 151 as security. On that same day, MM and LM also executed a guaranty, wherein they guaranteed plaintiff's obligations under the first mortgage and the Mortgage Consolidation and Extension Agreement, Assignment of Leases and Rents, and Security Agreement. On February 24, 2020, the parties executed a Restated Consolidated Secured Promissory Note in the amount of $5,634,929.18. On that same day, as additional security, the parties executed a Mortgage Consolidation and Extension Agreement, and another Assignment of Leases and Rents and another Security Agreement. The Restated Consolidated Secured Promissory Note promulgated plaintiff's obligation to repay the loan, plus interest. The Mortgage Consolidation and Extension Agreement, which secured the Restated Consolidated Secured Promissory Note, defines default as the failure to make a payment on the loan when due, and authorized the initiation of an action to foreclose the Mortgage Consolidation and Extension Agreement and sell the security when and if plaintiff defaulted. Based on the foregoing, defendant asserts three counterclaims. The first counterclaim is to foreclose on the Mortgage Consolidation and Extension Agreement because plaintiff defaulted thereunder and owes $9,680,468.49, with interest and late charges through May 14, 2021. The second cause of action is for the sale of 151. Plaintiff alleges that 151 was pledged as security for the second note, by virtue of the Mortgage Consolidation and Extension Agreement, and that plaintiff has defaulted under the terms of the Restated Consolidated Secured Promissory Note in that it failed to make the payments due thereunder. The third cause of action is for a deficiency judgment, wherein it is alleged that pursuant to the Restated Consolidated Secured Promissory Note, the Mortgage Consolidation and Extension Agreement and the guaranty, plaintiff, MM, and LM are liable for any sums owed on the loan after 151 is sold.

Defendant's summons with counterclaims, wherein it asserted the three counterclaims in its answer against MM, LM and several counterclaim defendants states that with regard to the additional counterclaim defendants, with the exception of NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, and ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, all are tenants at 151. As to the remaining defendants the foregoing alleges that they have an interest in 151.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment and dismissal of the complaint and on its counterclaims for (1) foreclosure on the mortgage and the sale of 151 and; (2) a deficiency judgment against plaintiff, MM, and LM after the sale of

151 is granted, to the extent, *inter alia*, of appointing a referee to compute sums due to defendant on the loan. Significantly, on this record, defendant establishes that all of plaintiff's causes of action are barred by, *inter alia*, the waiver portion of the Restated Consolidated Secured Promissory Note. Moreover, the record establishes that plaintiff's cause of action for fraudulent inducement is additionally barred by the disclaimer clause in the Mortgage Consolidation and Extension Agreement, wherein plaintiff expressly disclaimed reliance on any statements and representations made to it by defendant. Lastly, defendant establishes that it holds the Restated Consolidated Secured Promissory Note and Mortgage Consolidation and Extension Agreement, that plaintiff defaulted under the terms therein, that foreclosure and sale of 151 is a remedy provided therein, and that MM, and LM are liable for plaintiff's debt under the guaranty. Defendant's motion for summary judgment as against counterclaim defendants MORALES PHARMACY INC, D/B/A MOSCOSO PHARMACY, MOSCOSO PHARMACY, MOSCOSO PHARMACY II, MORALES PHARMACY II and HENRY MOLANO (collectively "the pharmacy") is granted because by granting defendant's motion as against plaintiff, the pharmacy, which is only a defendant because it is a tenant within 151, submits no opposition establishing a defense to any of defendant's counterclaims.

In support of its motion, defendant submits two affidavits by Sherr, defendant's Managing Menber, who states the following. On November 19, 2019, plaintiff executed a promissory note in favor of defendant, which would mature on November 19, 2019, for $5,634,929.18 and also delivered the same to defendant. On the foregoing date, as additional security on the loan, plaintiff also executed a mortgage, secured by 151. MM and LM also executed a guaranty, wherein they unconditionally agreed to guarantee plaintiff's obligations under the promissory note. Because plaintiff failed to pay the sums due on the promissory note when it matured, on February 24, 2020, plaintiff executed a restated note, wherein plaintiff's obligations under the prior note were reaffirmed, ratified and amended. On the foregoing date, plaintiff executed a consolidated mortgage, ratifying the prior mortgage and amending the same. On February 27, 2021, MM and LM executed another guaranty, wherein they unconditionally agreed to guarantee plaintiff's obligations under the restated note and the consolidated mortgage. On March 14, 2020, and continuing thereafter, plaintiff failed to make the $25,000 monthly interest payments required by the restated note and consolidated mortgage. Plaintiff also failed to pay all sums due on the restated note on January 31, 2021, when the same matured. On March 23, 2021, defendant sent plaintiff, MM and LM a notice demanding payment pursuant to the guaranty, as well as the Hardship Declaration required by the Covid-19 Emergency Protect Our Small Businesses Act of 2021. The foregoing declaration was never returned. Sherr states that defendant's claims, which seek to foreclose on the mortgages and which seek a deficiency judgment against plaintiff as the mortgagor and MM and LM as the guarantors, is premised on the failure to pay the indebtedness under the notes. As of May 14, 2021, plaintiff owes defendant $9,680,468.97 with interest accruing at a rate of $6,038.97 per day thereafter. Sherr further states that the reason that MM and LM could not sign the guaranty on February 24, 2020, the date they executed the restated note and consolidated mortgage, is because they were either traveling or couldn't sign before a notary public. As a result, they signed the guaranty on February 27, 2020, three days later. Sherr's affidavit, he states, is based on his review of defendant's documents, which he incorporates by reference in his affidavit and which he states were maintained in the ordinary course of defendant's business.

***3** Defendant submits the documents referenced by Sherr [1] .

1 Defendant's records are admissible insofar as Sherr laid the requisite business records foundation. To be sure, the business record foundation only requires proof that (1) the record at issue be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). Accordingly, "[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" (*DeLeon v Port Auth. of New York and New Jersey*, 306 AD2d 146 [1st Dept 2003]).

The Consolidated Secured Promissory Note (consolidated note) is dated November 18, 2019, is between plaintiff and defendant, and evinces that defendant loaned plaintiff $5,634,929.18. Paragraph 1 states that the consolidated note is secured by the Mortgage Consolidation and Extension Agreement, Assignment of Leases and Rents, and Security

Agreement (mortgage). Per paragraph 2 of the consolidated note, repayment of the loan, which included the principal amount plus interest, and which would accrue monthly, was due on the maturity date, which the consolidated note states is November 18, 2019. Paragraph 3 defined the failure to pay sums on the loan when due as a default.

The mortgage is dated November 19, 2018, and states that plaintiff is indebted to defendant in the sum of $5,634,929.18. Paragraph 2 of the mortgage obligates plaintiff to pay all sums due under the consolidated note in accordance with the mortgage, which required that plaintiff pay monthly installments of interest and principal. Within paragraph 3 and 7, plaintiff assigned to defendant, as security for the loan, all rights to 151 and

> all machinery, furniture, furnishings, equipment, computer software and hardware, fixtures (including, without limitation, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures) and other property of every kind and nature, whether tangible or intangible, whatsoever owned by Mortgagor, or in which Mortgagor has or shall have an interest, now or hereafter located upon the Premises,

as well all present and future rents. Upon default, defendant had the right to possession of all rents. Paragraphs 21 and 21(a), read together, define a default as the failure to repay any portion of the loan when due. Further, upon default, per paragraph 23 of the mortgage, defendant has the right to foreclose the mortgage. Paragraphs 46(a) and (c) of the mortgage state that

> [t]he Loan Documents contain the entire agreement between Mortgagor and Mortgagee relating to or connected with the Loan. Any other agreements relating to or connected with the Loan not expressly set forth in the Loan Documents are null and void and superseded in their entirety by the provisions of the Loan Documents ... [and that the] Mortgagor acknowledges that, with respect to the Loan, Mortgagor is relying solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Mortgagee or any parent, subsidiary or affiliate of Mortgagee. Mortgagor acknowledges that Mortgagee engages in the business of real estate financings and other real estate transactions and investments which may be viewed as adverse to or competitive with the business of the Mortgagor or its affiliates. Mortgagor acknowledges that it is represented by competent counsel and has consulted counsel before executing the Loan Documents.

***4** The Restated Consolidated Secured Promissory Note (restated note) is dated February 24, 2020, and is between plaintiff and defendant. Paragraph 1 states that the restated note "modifies, amends and restates the obligations of [plaintiff]," in the consolidated note and that it was being executed because plaintiff "did not pay sums due under the Consolidated Note, in which the entire principal and interest was due thereon on November 19, 2019." Paragraph 2 states that the restated note is secured by a Mortgage Consolidation, Modification and Extension Agreement (consolidated mortgage), which is secured by 151. The restated note at paragraph 3, states that the total amount owed by plaintiff is $7,430,044.34, which excludes interest to accrue through the maturity date, which per paragraph 4, is January 31, 2021. Pursuant to paragraph 4, plaintiff was to repay the foregoing sum at $25,000 per month, beginning on March 15, 2020, and the entire loan was to be repaid on January 31, 2021. Paragraph 4.1 defined default as the failure to make a payment when due. Paragraph 8.8 of the restated note states that the restated note

> sets forth the entire agreement and understanding of Holder and Maker, and Maker absolutely, unconditionally and irrevocably waives any and all right to assert any defense, setoff, counterclaim or cross-claim of any

> nature whatsoever with respect hereto or the obligations of Maker hereunder or the obligations of any other person or party relating hereto in any action or proceeding brought by Holder to collect the outstanding balance of the Principal Sum, accrued and unpaid interest, late charges, and other amounts owing, or any portion thereof, or to enforce, foreclose and realize upon the liens and security interests created by the Loan Documents and any other security document.

Paragraph 8.8 states that plaintiff

> acknowledges and agrees that, as of the Effective Date, it has no defenses, counterclaims, offsets, cross-complaints or demands of any kind or nature whatsoever that can be asserted to reduce or eliminate all or any part of their liability to repay any indebtedness to Holder or seek affirmative relief for damages of any kind or nature from Holder, which claims arise out of or are related to the Loan Documents or the Maker's relationship with Holder. To the extent that the Maker alleges that it holds any such claims, the Maker acknowledges and agrees that it fully, forever and irrevocably releases any such claims pursuant to this Agreement.

The consolidated mortgage, dated February 2020, is between plaintiff and defendant, incorporates the consolidated note, mortgage, and restated note by reference, and further states that plaintiff "did not pay the principal due under the [consolidated note] amount of $5,634,929.18 or the interest thereon and other charges due thereon and was in default under the [consolidated note]." Paragraphs 2 and 3 state that the consolidated mortgage is amending the prior loan documents to the extent indicated therein, but not in any way releasing plaintiff of the obligations imposed by the prior documents.

The demand letter, dated March 18, 2021, from defendant to plaintiff, apprises plaintiff that the debt under all the loan documents was due and that defendant demanded immediate payment.

The Guarantee Agreement (heretofore and hereinafter "the guaranty"), is undated, but is executed by MM and LM. It states that as a condition of the loan to plaintiff, MM and LM, as plaintiff's sole shareholders, guarantee the loan. Specifically, paragraph 1 states that MM and LM "unconditionally and irrevocably each jointly and severally guarantee to Lender the full and punctual payment and performance when due of all of Borrower's obligations under the Loan Documents, whether at maturity or earlier by reason of acceleration or otherwise."

A letter sent by defendant to MM and LM, dated February 27, 2020, and executed by MM and LM, states that the guaranty is a condition of the loan to plaintiff and that it had to be executed and returned to defendant no later than March 6, 2020.

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]).

***5** 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]).

Unconscionable Contracts

UCC § 2-302(1) states that

> [i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Thus, an unconscionable contract is voidable (*King v Fox*, 7 NY3d 181, 191 [2006]; *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988]). An unconscionable contract is one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms" (*Gillman* at 10). Stated differently, an unconscionable bargain is one that "no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other" (*Christian v Christian*, 42 NY2d 63, 71 [1977] [internal quotation marks omitted]). Indeed, the

gravamen of an unconscionable contract is the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (*King* at 191; *Gillman* at 10). Whether a contract is unconscionable requires an examination of the contract formation process so as to determine the absence of meaningful choice (*Gillman* at 10-11). To that end, to determine the absence of meaningful choice, courts focus on "the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power" (*Gillman* at 10-11; *State v Wolowitz*, 96 AD2d 47, 68 [2d Dept 1983]).

***6** UCC § 2-302(2) states that when a party claims that a contract ought not be enforced because it is unconscionable, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." This is because, generally, a claim of unconscionability only exists to protect the commercially illiterate, such that it does not lie in a commercial setting, where the parties dealing at arm's length have equality of bargaining power (*Gillman v Chase Manhattan Bank, N.A.*, 135 AD2d 488, 491 [2d Dept 1987], *affd*, 73 NY2d 1 [1988]; *Equit. Lbr. Corp. v IPA Land Dev. Corp.*, 38 NY2d 516, 523 [1976]). Accordingly, where there exist no circumstances establishing that consent to the execution of a contract was not "freely and knowingly given" (*State v Avco Fin. Serv. of New York Inc.*, 50 NY2d 383, 390 [1980]), there is no claim for unconscionability (*id.* at 391). Indeed, when a party is represented by counsel during the formation of a contract, courts have declined to uphold a claim for unconscionability (*FGH Contr. Co., Inc. v Weiss*, 185 AD2d 969, 971 [2d Dept 1992] ["The record does not support the Supreme Court's determination that the conduct here was oppressive and unconscionable. That is not the case here. Notably, the Weisses were represented by an attorney at all relevant times involved in this proceeding" [internal citations and quotation marks omitted].).

Whether a party can bring an affirmative claim to void an agreement for unconscionability has been clearly answered by the case law which proscribes it. It is clear that a party cannot bring an affirmative claim sounding in unconscionability in the formation of an agreement (*Super Glue Corp. v Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 606 [2d Dept 1987] ["Nor does UCC § 2—302 create a cause of action to recover damages in favor of a party to an allegedly unconscionable contract. The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause" [internal citation and quotation marks omitted].; *see Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 354 [2d Dept 2006]; *Pearson v Natl. Budgeting Sys., Inc.*, 31 AD2d 792, 792 [1st Dept 1969]). In other words, unconscionability can only be asserted as a defense to the enforcement of a contract and not as a claim for money damages.

Fraud and Fraudulent Inducement

A cause of action for fraud, misrepresentation and fraudulent inducement requires allegations of representation of an existing fact, falsity, scienter, justifiable reliance and damages (*United States Life Ins. Co. in City of New York v Horowitz*, 192 AD3d 613, 614 [1st Dept 2021] ["The elements of a claim for fraudulent inducement are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"] [internal quotation marks omitted]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1994]; *Bramex Associates, Inc. v CBI Agencies, Ltd.*, 149 AD2d 386 (1st Dept 1989]). In addition, to maintain such a cause of action, it is required that plaintiff establish that he/she reasonably believed that the representation made was true and that plaintiff took justified action as a result thereof (*LoGalbo v Plishkin, Rubano & Baum*, 197 AD2d 675, 676 [2d Dept 1993]; *Verschell v Pike*, 85 AD2d 690, 691 [2d Dept 1981]).

When fraud is alleged, the CPLR mandates that said cause of action be pleaded with detail. CPLR § 3016(b) reads

> [w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances

> constituting the wrong shall be stated in detail.

Thus, a cause of action for fraud must be pleaded with specificity and a failure to do so mandates dismissal (*Griffith v Medical Quadrangle, Inc.*, 5 AD3d 151, 152 [1st Dept 2004]; *Gall v Summit, Rovins, and Feldesman*, 222 AD2d 225, 226 [1st Dept 1995]; *Mountain Lion Baseball, Inc. v Gainman*, 263 AD2d 636, 638 [3d Dept 1999]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]; *Bramex Associates, Inc.* at 384; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976]; *Levine v K. Gimbel Accessories, Inc.*, 41 AD2d 637, 638 [1st Dept 1973]; *DeFalco v Cutaia*, 236 AD2d 358, 358 [2d Dept 1997]). In *Modell's NY, Inc. v Noodle Kidoodle, Inc.* (242 AD2d 248 [1st Dept 1997]), the court dismissed plaintiff's claim of fraud when it failed to comply with CPLR § 3016(b), in that the complaint offered no facts demonstrating reliance and offered a conclusory allegation of intentional misrepresentation (*id.* at 250). Similarly, in *Wint v ABN AMRO Mortgage Group, Inc.* (19 AD3d 588 [2d Dept 2005]), the court dismissed plaintiff's complaint when it failed to plead fraud with sufficient specificity in that the same failed to allege any material misrepresentation and/or material omission defendant knew to be false (*id.* at 588).

***7 Contracts**

It has long been held that absent a violation of law or some transgression of public policy people are free to enter into contracts, making whatever agreement they wish no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than to reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Thus, "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.* at 475). This approach, of course, serves to provide "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*W.W.W. Assoc., Inc.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*Greenfield* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract, are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*Greenfield* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

***8** Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it generally has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]; *Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]). An exception, however, exists when the agreement between the parties expressly disclaims reliance on any oral representations in the making of the agreement (*Danann Realty Corp.* at 323 ["In this case, of course, the plaintiff made a representation in the contract that it was not relying on specific representations not embodied in the contract, while, it now asserts, it was in fact relying on such oral representations. Plaintiff admits then that it is guilty of deliberately misrepresenting to the seller its true intention. To condone this fraud would place the purchaser in a favored position."]; *Cohen v Cohen*, 1 AD2d 586, 587-588 [1st Dept 1956], *affd*, 3 NY2d 813 [1957] ["But the question in this case is not whether the conventional merger clause in the settlement agreement precludes plaintiff from introducing testimony to show that false inducing representations were made by defendant. The question rather is whether plaintiff can possibly prove she relied on the misrepresentations, since such reliance is an essential ingredient of her cause of action. We have given plaintiff the benefit of every fair intendment and inference that can be drawn from the complaint and annexed agreement; but it seems to us that the specific disclaimer in the agreement of the representation alleged in the complaint effectively destroys plaintiff's allegation that she executed the agreement in reliance upon defendant's representation."]). In other words, when a party disclaims reliance, in writing, on any oral representations in the execution of a contract, he/she cannot assert a claim for fraudulent inducement by claiming reliance on the very statements he/she disclaimed in writing.

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of NY*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long standing rule, the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*id.* at 416 [internal citations omitted]).

Foreclosure

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 (*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, have 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 NY 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).

***9** 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 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).

Guaranty Agreements

A guaranty 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]).

Discussion

Based on the foregoing, defendant establishes prima facie entitlement to summary judgment with regard to the three causes of action in the complaint.

First, with regard to all three causes of action, defendant establishes that plaintiff expressly waived its right to assert any claims arising from the agreement between the parties. To be sure, it is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 475) and that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Here, paragraph 8.8 of the restated note submitted by defendant states that plaintiff

> has no defenses, counterclaims, offsets, cross-complaints or demands of any kind or nature whatsoever that can be asserted to reduce or eliminate all or any part of their liability to repay any indebtedness to Holder *or seek affirmative relief for damages of any kind or nature from Holder, which claims arise out of or are related to the Loan Documents or the Maker's relationship with Holder* (emphasis added).

***10** Thus, by executing the agreement, plaintiff clearly and unambiguously waived its right to bring any claims and thus, the instant action is barred.

Second, on this record, defendant establishes prima facie entitlement to summary judgment as to the causes of action for unconscionabilty. Significantly, it is well settled that a party cannot bring an affirmative claim sounding in unconscionability in the formation of an agreement (*Super Glue Corp.* at 606; *see Fortune Limousine Serv., Inc.* at 354; *Pearson* at 792). Thus, here, the causes of action for unconscionability affirmatively pleaded in the complaint fail for that reason alone. However, the cause of action also fails because the record establishes that the loan documents in question evince a transaction between sophisticated business people dealing at arm's length, and each were represented by counsel. As noted above, a claim of unconscionability only lies to protect the commercially illiterate and does not lie in a commercial setting, where the parties dealing at arm's length have equality of bargaining power (*Gillman* at 491; *Equit. Lbr. Corp.* at 523). This is particularly true where, as here, as born by the record, plaintiff was at all times represented by counsel, such that there existed no circumstances establishing that consent to the execution of the contract was not "freely and knowingly given (*State* at 390; *see FGH Contr. Co., Inc.* at 971 ["The record does not support the Supreme Court's determination that the conduct here was oppressive and unconscionable. That is not the case here. Notably, the Weisses were represented by an attorney at all relevant times involved in this proceeding" [internal citations and quotation marks omitted]). Indeed, here, within paragraph 46(c) of the restated note, plaintiff expressly states that it acknowledged it "engages in the business of real estate financings and other real estate transactions and investments which may be viewed as adverse to or competitive with the business of the Mortgagor or its affiliates," and further acknowledged "that it is represented by competent counsel and has consulted counsel before executing the Loan Documents."

Lastly, defendant establishes that the claim for fraudulent inducement is barred as a matter of law. Significantly, defendant submits the mortgage and relies on paragraph 46(c) thereof, which states that plaintiff "acknowledges that, with respect to the Loan, Mortgagor is relying solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Mortgagee or any parent, subsidiary or affiliate of Mortgagee." Thus, this written disclaimer, where plaintiff expressly asserts that the agreement was made without reliance on anything told to it by defendant, and which was made part of the consolidated mortgage, establishes prima facie entitlement to summary judgment

with regard to the last cause of action in the complaint for fraudulent inducement. To be sure, while allegations that a plaintiff reasonably believed that the representation made was true and that plaintiff took justified action as a result thereof give rise to a cause of action for fraudulent inducement (*LoGalbo* at 676; *Verschell* at 691), it is well settled that the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument where, as here, the parties to an agreement expressly disclaim reliance on any oral representations in the making of the agreement (*Danann Realty Corp.* at 323; *Cohen* at 587-588). Thus, here, none of the claims in the complaint regarding oral misrepresentations are admissible so as to alter the clear and unambiguous terms of the loan documents.

***11** Defendant also establishes prima facie entitlement to summary judgment against plaintiff and the pharmacy on its counterclaims for foreclosure on the mortgages and the sale of 151, pledged as security for the loan.

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). Here, defendant's evidence establishes that it holds the consolidated note, the restated note, the mortgage and the consolidated morgage, all of which evince that defendant loaned plaintiff money which plaintiff was obligated to repay, that the failure to repay the loan as prescribed would constitute a default, that upon default, defendant's remedy was to foreclose on the mortgages and sell 151, the real property which secured the mortgages, and that plaintiff has, in fact, defaulted by failing to pay. The default here was established both by Sherr in his affidavit and by the demand letter sent to plaintiff and appended thereto. The foregoing not only establishes prima facie entitlement to summary judgment as against plaintiff, the mortgagee, but also as to the pharmacy, who is only a named defendant because it is a tenant at 151, and who pursuant to RPAPL § 1311(1), is a necessary defendant.

Defendant also establishes prima facie entitlement to summary judgment as against MM and LM pursuant to the guaranty, thereby making them liable for any deficiency judgment.[2] Defendant, with the guaranty, establishes that given plaintiff's default and indeed, MM and LM's default under the guaranty, it is entitled to judgment against them to the extent that they are obligated to pay any deficiency sums after the sale of 151. To be sure, summary judgment on a guaranty agreement 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 which binds MM and LM is absolute, requiring them to pay plaintiff's debt upon plaintiff's default. As noted above, defendant establishes that plaintiff has defaulted and therefore, that MM and LM's obligations under the guaranty agreement are thereby triggered.

2 In a foreclosure action, a deficiency judgment is authorized by statute (RPAPL § 1371 ["If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided."]).

Nothing submitted by plaintiff in opposition raises an issue of fact sufficient to preclude summary judgment.

Plaintiff submits an affidavit by LM, plaintiff's president, wherein she states that months prior to November 19, 2019, the maturity date of the consolidated note, Sherr told her that defendant would give her a new loan, such that she didn't have to worry about defaulting on the consolidated note. Defendant then delayed the new loan until February 24, 2020, by which time, plaintiff had been charged with 97 days of default interest. Despite protestations, in order to cut off the default interest rate under the consolidated note, plaintiff executed the restated note. When LM requested a payoff letter from defendant because she had procured alternate financing to pay the loan, the size of the debt - $8,712,99.92 - made it impossible to close on the alternate financing.

***12** To the extent that the foregoing constitutes an attempt to establish facts giving rise to a fraudulent inducement claim, the same is without merit. While allegations that a plaintiff reasonably believed that the representation made was true and that plaintiff took justified action as a result thereof give rise to a cause of action for fraudulent inducement

(*LoGalbo* at 676; *Verschell* at 691), here, as noted above, the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument where, as here, the parties to an agreement expressly disclaim reliance on any oral representations in the making of the agreement (*Danann Realty Corp.* at 323; *Cohen* at 587-588). It bears repeating that per paragraph 46(c) of the mortgage, plaintiff disclaimed reliance on any and all oral representations. Thus, this written disclaimer, where plaintiff expressly asserts that the agreement was made without reliance on anything told to it by defendant, which was made part of the consolidated mortgage, precludes consideration of LM's statements regarding fraudulent inducement. Thus, no questions of fact preclude summary judgment as to the cause of action for fraudulent inducement.

Similarly, MM and LM's evidence seeking to controvert defendant's evidence regarding the guaranty fails to raise a question of fact as to the binding nature of the guaranty. Specifically, LM contends that because the guaranty was executed days after the restated note and consolidated mortgage referenced therein, the guaranty is bereft of consideration. This, of course, is unavailing insofar as the letter appended to the guaranty, sent to MM and LM, expressly states that the guaranty was a condition of the loan to plaintiff as did the guaranty. It is with that understanding-which LM does not contest - that she and MM executed and returned the same to defendant (*Teitelbaum v Mordowitz*, 248 AD2d 161 [1st Dept 1998] ["Consideration for a guarantee can be past or executed, where, as here, the guarantee recites in writing that it is being given in exchange for a loan and there is no question that the proceeds of the loan were received."]; *Liberty Nat. Bank v Gross*, 201 AD2d 467, 468 [2d Dept 1994] ["Although the two documents may not have been executed on the same date, they were clearly part of the same transaction, and there was no need for new or additional consideration to make the guarantee valid and enforceable under either New York or Connecticut law."]).

DEFENDANT'S MOTION
FOR DEFAULT JUDGMENT

Defendant's motion pursuant to CPLR § 3215(f) seeking an order granting it a default judgment against defendants EDWARD MACIAS D/B/A KATH-ED BAKERY, LIUBO JUNKOVIC, NOVA LAUNDROMAT CORP., READYCAP COMMERCIAL LLC: H. NAJI WAEL AND SOTORE HASSAN S. DIHYEM, KE DI ZHENG D/B/A WING LING RESTAURANT, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY, DEPARTMENT OF FINANCE, and ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, is granted. Defendant establishes that the foregoing defendants were served with its counterclaims, that they failed to appear or interpose an answer, and that the counterclaims have merit.

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 [3] 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]).

3 "While counterclaims are not specifically mentioned anywhere in CPLR § 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints" (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 [2d Dept 2011]).

***13** 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]).

In support of its motion, defendant submits affidavits of service, which evince that all of the defendants against whom a default judgment is sought were duly served with defendant's counterclaims in June 2021.

Based on the foregoing, defendant establishes that the foregoing defendants were served with the counterclaims. In addition, Sherr's affidavits establish the merits of the counterclaims, specifically, the claim for foreclosure and sale of 151, the premises at which each of the foregoing defendants is a tenant. Notably, the foregoing defendants are not liable for the debt herein, but as tenants in the property which defendant seeks to be sold by foreclosure, they are necessary parties and were only sued as a result (RPAPL § 1311). Lastly, defendant establishes that the time to interpose answers has expired and the foregoing defendants have never appeared or interposed an answer to defendant's counterclaims. Accordingly, defendant's motion for the entry of a default judgment as to the foregoing defendants is granted.

DEFENDANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

***14** Defendant's motion to strike plaintiff's affirmative defenses as well as those asserted by the pharmacy is denied as moot. Significantly, in granting summary judgment in favor of defendant and against plaintiff, the pharmacy MM,

and LM, the Court necessarily determines that the affirmative defenses fail as a matter of law and therefore do not have to be affirmatively dismissed.

Alternatively, to the extent that defendant has been granted summary judgment as against plaintiff, the pharmacy, MM and LM, the portion of defendant's motion seeking dismissal of plaintiff, MM, LM, and the pharmacy's affirmative defenses is necessarily denied because the record warrants, as noted above, the grant of defendant's motion nd therefore, evinces that none all of the affirmative defenses are, as matter of law, meritless. (*Equities Corp. v Ziegelman*, 190 AD2d 784, 784 [2d Dept 1993] ["Although Preferred has alleged fraud in the inducement as a defense to the enforcement of the Guaranty, the Guaranty was unconditional and irrevocable, irrespective of circumstances which might constitute a legal or equitable discharge or release of guarantor or surety. Accordingly, Preferred has waived the defense of fraud in the inducement, and the court should have dismissed that affirmative defense, and granted summary judgment, in its entirety, in favor of the defendants on their counterclaims" [internal quotation marks omitted]).

For example, plaintiff's seventh affirmative defense wherein it asserts that defendant breached the loan agreements between the parties finds, on this record, absolutely no factual support.

DEFENDANT'S MOTION FOR AN ORDER OF REFERENCE

Defendant's motion seeking an order of reference appointing a referee to compute all sums due to defendant is granted. Having determined that defendant is entitled, upon the issuance of a judgment (RPAPL § 1351 ["The judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee within ninety days of the date of the judgment."]), to foreclosure on the consolidated mortgage and the sale of the property which secures it, the Court must appoint a referee to compute all sums due to defendant.

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.

***15** 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]).

Here, having granted defendant's motion on its counterclaims for a judgment of foreclosure and sale of 151, the appointment of a referee pursuant tp RPAPL § 1321(1) to compute sums owed on the instant loan is warranted.

PLAINTIFF, MM AND LM'S CROSS-MOTION TO AMEND THE PLEADINGS

Plaintiff, MM and LM's cross-motion for an order pursuant to CPLR § 3025, granting them leave to amend the complaint and their answer to defendant's counterclaims is denied. Based on this Court's decision to grant defendant's motion for summary judgment, it is clear that the proposed amendments are patently devoid of merit.

Generally, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Delay, however, in seeking leave to amend a pleading is not in and of itself a barrier to judicial leave to amend. Instead, "[i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). A failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, will generally warrant denial of a motion to amend a pleading.

Where once, the proponent of an order seeking leave to amend a pleading was expressly required to demonstrate that the proposed amendment had merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore, properly denied."]; *Herrick v Second Cuthouse, Ltd.,* 64 NY2d 692, 693 [1984][Court concluded that defendant could amend its answer when the amendment would not prejudice plaintiff and where the amendment was found to have merit]; *Mansell v City of New York*, 304 AD2d 381, 381-382 [1st Dept 2003]), requiring the proffer of evidence establishing that the proposed amendment had merit (*Curran v Auto Lab Serv. Ctr.*, 280 AD2d 636, 637 [2d Dept 2001]; *Heckler Elec. Co. v Matrix Exhibits-N.Y.*, 278 AD2d 279, 279 [2d Dept 2000]), there is no longer such a requirement (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] ["On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations."]; *Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008] ["These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance."]). Instead, absent prejudice, a motion to amend a pleading ought to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit [4] (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2d Dept 2019]; *WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518, 519 [1st Dept 2019]; *MBIA Ins. Corp.* at 500; *Lucido* at 226-227).

4 In this Court's view, this is a distinction without a difference. In other words, there is really no way to ascertain whether a pleading is palpably insufficient or patently devoid of merit unless the proponent of the amendment proffers evidence in support of the merits of the amendment. Thus, but for semantics, the old rule and the new one are essentially the same.

***16** Leave to amend a complaint will not be granted unless the proposed amendment, as pleaded, establishes a cause of action (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Davis & Davis v Morson*, 286 AD2d 585, 585 [1st Dept 2001]). Moreover, since the court must examine the proposed pleading for patent sufficiency, it is axiomatic that the proposed pleading must be provided with a motion seeking leave to amend the same and that a failure to do so warrants denial of the motion (*Loehner v Simons*, 224 AD2d 591, 591 [2d Dept 1996]; *Branch v Abraham and Strauss Department Store*, 220 AD2d 474, 476 [2d Dept 1995]; *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639, 640 [2d Dept 1960]).

Here, a review of the proposed amended complaint evinces that plaintiff replaces the two causes of action in the complaint with one for rescission, adds a cause of action for violation of the covenant of good faith and fair dealing and adds a cause of action for fraudulent inducement against Sherr. Insofar as all of the causes of action asserted hinge on fraudulent inducement, which on this record does not exist, the proposed amendments are meritless. To the extent that plaintiff, MM and LM seek to amend their answer to add additional affirmative defenses, including one that the

agreements between the parties is unconscionable, the cross-motion is denied. Again, given the Court's determination on the merits that defendant is entitled to summary judgment on all of its counterclaims, the proposed amendments are devoid of merit as a matter of law. This is particularly true of the affirmative defense of unconscionability. As noted above, the restated note states that plaintiff "engages in the business of real estate financings and other real estate transactions and investments" and "acknowledges that it is represented by competent counsel and has consulted counsel before executing the Loan Documents." Accordingly, as a matter of law, plaintiff has no cause of action and as such, no defense sounding in unconscionability.

MM AND LM'S CROSS-MOTION FOR SUMMARY JUDGMENT

MM and LM's motion for summary judgment and dismissal of the counterclaim seeking a deficiency judgment against them by virtue of the guaranty is denied. Significantly, as discussed in detail above, in granting defendant's motion for summary judgment on this issue, the Court has determined that MM and LM are bound by the guaranty agreement such that they are obligated to pay plaintiff's debt in total or to the extent that there is a deficiency after 151 is sold. It is hereby

ORDERED that the affirmative defenses interposed by the pharmacy, plaintiff, MM, and LM be stricken. It is further

ORDERED that defendant submit a proposed Order of Reference within 45 days hereof. It is further

ORDERED that the Clerk enter judgment in favor of defendant as against counterclaim defendants EDWARD MACIAS D/B/A KATH-ED BAKERY, LIUBO JUNKOVIC, NOVA LAUNDROMAT CORP., READYCAP COMMERCIAL LLC: H. NAJI WAEL AND SOTORE HASSAN S. DIHYEM, KE DI ZHENG D/B/A WING LING RESTAURANT, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY, DEPARTMENT OF FINANCE, and ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK. It is further

ORDERED that the caption in this action be amended [5] to omit JOHN DOE ##1-10, SAID JOHN DOE DEFENDANTS BEING FICTITIOUS, IT BEING INTENDED TO NAME ALL OTHER PARTIES WHO MAY HAVE SOME INTEREST IN OR LIEN UPON THE PREMISES SOUGHT TO BE FORECLOSED, and to substitute MORALES PHARMACY INC. D/B/A MOSCOSO PHARMACY, MOSCOSO PHARMACY, MOSCOSO PHARMACY II, MORALES PHARMACY II AND HENRY MOLANO as counterclaim defendants in place of MOSCOSO PHARMACY, MORALES PHARMACY, HENRY MOLANNO; AND MOSCOSO PHARMACY II, MORALES PHARMACY II AND HENRY MOLANNO. It is further

5 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, defendant seeks to amend the caption to correctly reflect the pharmacy and omit placeholders in the caption.

***17 ORDERED** that defendant serve a copy of this Order and with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

All Citations

Slip Copy, 74 Misc.3d 1223(A), 2022 WL 839929 (Table), 2022 N.Y. Slip Op. 50212(U)