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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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2,

Plaintiff,

- against -

Index No. **803227/21E**

Hon. **FIDEL E. GOMEZ**
Justice

FCA AND V LLC A/K/A F C A AND V LLC; FRANCIS C. MCGUIRE, INDIVIDUALLY; JOHN DOE (SAID NAME BEING FICTITIOUS TO REPRESENT UNKNOWN TENANTS/OCCUPANTS OF THE SUBJECT PROPERTY AND ANY OTHER PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PROPERTY),

Defendant.

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The following papers numbered 1 to 4, Read on this motion noticed on 1/28/22, and duly submitted as no. 1 on the Motion Calendar of 5/26/22.

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

Plaintiff's motion and defendants FCA and V LLC A/K/A F C A, V LLC, and FRANCIS C. MCGUIRE's cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 9/6/22

_____

Hon. _____
FIDEL E. GOMEZ, AJSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS X GRANTED (MOTION)
CROSS-MOTION IS X DENIED (CROSS-MOTION)
☐ GRANTED IN PART

3. CHECK IF APPROPRIATE.
☐ 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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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2,

Plaintiff(s),

- against -

FCA AND V LLC A/K/A F C A AND V LLC; FRANCIS C. MCGUIRE, INDIVIDUALLY; JOHN DOE (SAID NAME BEING FICTITIOUS TO REPRESENT UNKNOWN TENANTS/OCCUPANTS OF THE SUBJECT PROPERTY AND ANY OTHER PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PROPERTY),

Defendant(s).

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DECISION AND ORDER

Index No: 803227/21E

In this action to foreclose on a mortgage and sell the real property which it encumbers, plaintiff, *inter alia*, moves seeking an order pursuant to CPLR § 3212 granting it summary judgment. Plaintiff contends that summary judgment is warranted because it holds the note executed by defendants FCA and V LLC A/K/A F C A and V LLC (hereinafter collectively referred to as "FCA") obligating FCA to repay a loan, that it was assigned the mortgage executed by FCA, which pledged real property as collateral for the loan, and that FCA has defaulted under the terms of the note and mortgage. Plaintiff also avers that based on the foregoing default, defendant FRANCIS C. MCGUIRE (McGuire), who executed a guaranty, guaranteeing

FCA's obligations under the note and mortgage, is also liable for the foregoing debt, and has failed to make any payments thereon. FCA and McGuire oppose the instant motion asserting that because the instant action was brought in violation of the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (hereinafter sometimes referred to as "the EPOSBA"), the instant motion must be denied. FCA and McGuire also cross-move seeking an order pursuant to RPAPL § 1301(3), dismissing the action against McGuire on grounds that the action against him - one at law - cannot be maintained because the action against FCA seeks foreclosure, which is an equitable cause of action. Plaintiff opposes FCA and McGuire's cross-motion, asserting that the remedy sought against McGuire is not one at law but merely one for a deficiency judgment pursuant to RPAPL § 1371(1) and incidental to the foreclosure cause of action.

For the reasons that follow hereinafter, plaintiff's motion is granted and FCA and McGuire's cross-motion is denied.

The instant action is for foreclosure on a mortgage and the sale of the real property, which it encumbers. The complaint, filed on March 9, 2021, alleges that on May 15, 2017, FCA executed a promissory note (note), wherein FCA agreed to repay non-party, Velocity Commercial Capital, LLC (Velocity), $234,500 loaned to FCA by Velocity. On that same day, FCA executed a Commercial Mortgage,

Security Agreement and Assignment of Leases and Rents (mortgage), which secured the loan by pledging the premises located at 692 King Avenue, Bronx, NY 10464 (692) as collateral. To further secure the note and mortgage, McGuire executed a guaranty, wherein he agreed to guarantee the loan to FCA. On May 14, 2018, plaintiff purchased the note from Velocity and the latter assigned the mortgage to the former. On October 1, 2020, FCA failed to abide by the terms of the note and mortgage inasmuch as it failed to make a required monthly payment when due. Plaintiff accelerated all sums due under the note and FCA failed to repay the loan. McGuire also failed to make any payments due under the note and mortgage as required by the guaranty. Based on the foregoing, plaintiff interposes several causes of action. The first is for breach of contract, premised on the failure by FCA and McGuire to repay the loan as required by the note and mortgage. The second cause of action is for assignment of rents, as required by the terms of the mortgage. The third cause of action is for replevin, seeking the equipment and fixtures within 692 as required by the mortgage. The fourth cause of action is for foreclosure on the mortgage and the sale of 692, premised on the terms of the note and mortgage. The last cause of action is for attorney's fees, premised on the terms of the note and mortgage.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's motion for summary judgment on its cause of action for foreclosure on the mortgage and the sale of 692 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 FCA, was assigned the mortgage also executed by FCA in favor of Velocity, that FCA defaulted under the terms of the note and mortgage and that, McGuire, who executed a guaranty, has also defaulted under the terms therein.

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]).

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 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]).

In support of its motion, plaintiff submits an affidavit by

Sandie Lawrence (Lawrence), Department Manager for Velocity. Lawrence states that Velocity is plaintiff's special servicer and that the affidavit is based upon a review of Velocity's business records. Lawrence states that the records she reviewed and which are appended to her affidavit were made and kept in the regular course of Velocity's business, that it was Velocity's practice to create such records, that the records are accurate, and that they were made at or near the time the events therein occurred. Lawrence states that on May 15, 2017, FCA executed a note evincing a loan for $234,500. Said note was transferred to plaintiff on May 23, 2017, who now holds the note and did so when this action was commenced. Lawrence states that on May 15, 2017, FCA also executed a mortgage, pledging 692 as collateral for the foregoing loan. The mortgage was subsequently assigned to plaintiff and the assignment was recorded on July 11, 2018. Lawrence states that on May 15, 2017, McGuire executed a guaranty. With respect to the payment and collection on sums due under the foregoing note and mortgage, Lawrence states that on October 1, 2020, FCA failed to make a payment when due. As such, on December 5, 2020, plaintiff mailed FCA a Demand for Delinquent Payment, a Notice of Default and Notice of Intent to Accelerate (hereinafter collectively referred to as "notice").

Plaintiff submits the documents referenced by Lawrence[1].

The note is dated May 15, 2019, is between FCA and Velocity, and evinces that Velocity loaned FCA $234,500. The note states that FCA was obligated to repay the sums loaned to it with interest via monthly installments of $1,885.15 beginning on July 1, 2017, and with all sums due on June 1, 2047. With regard to a default, the note states that

> this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default . . . [including] default of any liability, obligation, covenant or undertaking of the Borrower, any endorser or any guarantor hereof to the Lender, hereunder or otherwise, including, without limitation, failure to pay in full and when due any installment of principal or interest or default of the Borrower.

The note has an allonge at the end, indorsed in blank, and executed by Velocity.

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[1] Plaintiff's records are admissible insofar as Lawrence 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 mortgage is dated May 15, 2017, is between FCA and Velocity, and per paragraph 1.1, indicates that it secures the note between Velocity and FCA. Paragraph 1.2 states that FCA "hereby pledges, assigns and grants to the Lender, and its successors and assigns, a security interest in any of the Property," which per the mortgage is 692. Paragraph 1.6 states that FCA is obligated to pay "all amounts due and owing" under the note. Paragraph 4.1(a) defines a default as, *inter alia*, "failure to make a payment when due," and paragraph 4.2(d) provides foreclosure as a remedy upon any default.

The guaranty is dated May 15, 2017, is executed by McGuire and states that he "absolutely, unconditionally and irrevocably guarantees the full and punctual payment to the Lender of all sums" due under the note executed by FCA.

The assignment is dated May 14, 2018, and evinces that Velocity assigned the mortgage to plaintiff.

The notice is dated December 5, 2020 and indicates that it was sent to FCA and McGuire. The notice further indicates that FCA defaulted on the note, that the loan had been assigned to plaintiff, and that as of the date of the notice, $32,062.45 was owed on the loan. Per the notice, if the foregoing amount was not paid within 10 days, the loan would be accelerated and all sums due thereunder would become immediately become due.

Based on the foregoing, with regard to the fourth cause of 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, with Lawrence's affidavit and the note, with the allonge, indorsed in blank and annexed thereto (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020] ["Thus, the physical delivery of a note which has an allonge endorsed in blank firmly affixed to it prior to the commencement of the foreclosure action is sufficient to transfer the obligation to the new payee."]; *U.S. Bank Tr., N.A. for Volt Asset Holdings NPL3 v Varian*, 156 AD3d 1255, 1256 [3d Dept 2017]; *cf McCormack v Maloney,* 160 AD3d 1098, 1100 [3d Dept 2018] ["Even if he was [in possession of the note] , the note—which was payable to Trustees Capital—was neither indorsed in blank nor specially indorsed to him. Consequently, plaintiff's physical possession of the note could not render him the lawful holder thereof for purposes of enforcing it."]), plaintiff establishes that it holds, and therefore owns the note executed by FCA in favor of Velocity. Moreover, with the submission of the assignment, evincing that the mortgage between FCA and Velocity was assigned to plaintiff, plaintiff establishes that the mortgage was assigned to it on May 14, 2018, well before March 9, 2021, when the

instant action was commenced[2]. The note and mortgage establish that FCA was loaned money which it was obligated to repay, that the failure to repay the loan as prescribed therein would constitute a default, that upon default one of plaintiff's remedies was to foreclose on the mortgage and sell 692, the real property which secured the mortgage, and that FCA has, in fact, defaulted by failing to pay. Specifically, here, the default, per Lawrence's affidavit, occurred on October 1, 2020. Additionally, the evidence, namely the guaranty submitted by plaintiff, also establishes that McGuire guaranteed the loan made to FCA. The record also demonstrates that to date, upon FCA's default, McGuire has failed to make any payments due on the loan. Accordingly, plaintiff establishes prima facie entitlement to summary judgment on its cause of action seeking a judgment authorizing foreclosure on the mortgage, and the sale of 692, and a deficiency judgment[3], if any, against McGuire, as guarantor.

Nothing submitted by FCA and McGuire raises an issue of fact

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[2] Pursuant to CPLR § 304(a), "[a]n action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter." Thus, here, where the complaint was filed on March 9, 2021, the instant action was commenced on that date.

[3] 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]).

sufficient to preclude summary judgment. Significantly, here, FCA and McGuire submit no evidence in opposition to the instant motion or in support of their cross-motion and instead aver that denial of the instant motion is warranted because it was initiated in violation of the EPOSBA. This contention is without merit.

To be sure, on March 9, 2021, Andrew Cuomo, then the Governor of the State of New York, signed the EPOSBA (L 2021, ch 73), which with regard to the Covid-19 pandemic and its effects on real property and the people associated therewith, limited the prosecution of pending foreclosure actions and prescribed new procedures for the prosecution of newly filed foreclosure actions. Section 3 of Subpart A of Part B of the act addressed any foreclosures pending with the Court prior to March 7, 2020, staying the same for 60 days. Specifically, the act stated that

> [a]ny action to foreclose a mortgage pending on the effective date of this act, including actions filed on or before March 7, 2020, or commenced within thirty days of the effective date of this act shall be stayed for at least sixty days, or to such later date that the chief administrative judge shall determine is necessary to ensure that courts are prepared to conduct proceedings in compliance with this act and to give mortgagors an opportunity to submit the hardship declaration pursuant to this act.

Pursuant to Section 4, the proponent of foreclosure was required to include a Hardship Declaration "with every notice required [to be]

provided to a mortgagor prior to filing an action for foreclosure." Section 2 of the act defined a Hardship Declaration as one wherein the owner of the property sought to be foreclosed stated that he/she suffered, *inter alia*, "[s]ignificant loss of revenue during the COVID-19 pandemic." Pursuant to Section 5 of the act, if a Hardship Declaration was returned to the proponent of foreclosure, then "there [would] be no initiation of an action to foreclose a mortgage against the mortgagor until at least May 1, 2021, and in such event[,] any specific time limit for the commencement of an action to foreclose a mortgage [would] be tolled until May 1, 2021." With regard to the initiation of new foreclosure actions, Section 6 stated that

> [n]o court shall accept for filing any action to foreclose a mortgage unless the foreclosing party or an agent of the foreclosing party files an affidavit, under penalty of perjury: (i) of service demonstrating the manner in which the foreclosing party's agent served a copy of the hardship declaration with required notices, if any, provided to the mortgagor, and attesting that at the time of filing, neither the foreclosing party nor any agent of the foreclosing party has received a hardship declaration from the mortgagor.

Here, where the instant action was commenced on March 9, 2021, when the complaint was filed, per Section 6 of the EPOSBA, plaintiff was indeed required to provide McGuire and FCA with a Hardship Declaration prior to initiating the instant action. If the same

was executed and returned, then plaintiff could not commence the instant action. Moreover, when the instant action was filed, Section 6 of the EPOSBA required the submission to the court of an affidavit by plaintiff attesting that a Hardship Declaration was served and never returned.

On this record, it is clear that plaintiff failed to comply with the exact letter of the EPOSBA, since the affidavit of service evincing service of that Hardship Declaration indicates that it was served on McGuire on March 16, 2021, seven days after the complaint was filed and this action initiated. Moreover, other than plaintiff's assertion in its motion papers, the Court has never been provided with any affidavit indicating that the Hardship Declaration served upon McGuire was never returned.

Despite the foregoing, this Court holds that because the delay in providing the Hardship Declaration to McGuire was minimal, coupled with McGuire's failure to return the same, and because FCA and McGuire have opposed the instant motion, it is clear that neither FCA nor McGuire have been prejudiced or harmed by plaintiff's failure to strictly adhere to the EPOSBA. Indeed, McGuire never even makes such claim.

Indeed, FCA and McGuire have been given an opportunity to oppose the instant motion on the merits, such that they cannot use the EPOSBA and the pandemic as either a sword or a shield to

preclude summary judgment. Stated differently, here, it is clear that neither the pandemic nor plaintiff's violation of the EPOSBA are the reasons for FCA and McGuire's failure to tender evidence sufficient to preclude summary judgment - the very circumstances against which the EPOSBA was enacted to protect. To be sure, Section 3 of the EPOSBA's preamble expressly states the intent of the act, namely

> [e]nsuring small businesses can survive in this unprecedented time is to the mutual benefit of all New Yorkers and will help the state address the pandemic, protect public health, and set the stage for recovery. It is, therefore, the intent of this legislation to avoid as many evictions and foreclosures of small businesses as possible for businesses experiencing a financial hardship during the COVID-19 pandemic. As such, it is necessary to temporarily allow small businesses impacted by COVID-19 to remain in their place of business. A limited, temporary stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID-19 emergency pandemic.

Nothing in the record establishes that the failure to comply with the EPOSBA before initiating this action, or indeed, that the pandemic itself is the reason for the default on the instant loan or that plaintiff's failure to strictly adhere to the EPOSBA prevented FCA or McGuire from adequately opposing this motion and/or defending against this action.

To the extent FCA and McGuire aver, by counsel, that they never received a Hardship Declaration, based on the foregoing, this does not avail them. Moreover, here, the affidavit of service submitted by plaintiff evinces that McGuire was personally served with the Hardship Declaration on March 16, 2021, when the same was handed to him at his home, 688 King Avenue, Bronx NY, 10464. Accordingly, plaintiff tenders legally cognizable proof that a Hardship Declaration was, in fact, served upon FCA and McGuire, and counsel's bare denial of service cannot negate such service.

To be sure, an affidavit evidencing proper service upon the defendant is sufficient to support a finding of personal jurisdiction (*Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]). Personal jurisdiction will be upheld without a traverse hearing if the only evidence submitted in opposition is a bare or conclusory denial of service (*Caba* at 583 [Sworn denial conclusorily stating that defendant was not served was insufficient to rebut service as evinced by the affidavit of service.]; *Simonds v Grobman*, 277 AD2d 369, 370 [2d Dept 2000]["The defendants failed to submit a sworn denial of service. Moreover, they did not swear to specific facts to rebut the statements in the process server's affidavits."]; *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 984 [2d Dept 2009][The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308 (2), and the defendant's bare and

unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service created by the affidavit of service" (internal citations omitted)]; *Scarano* at 716 ["Here, the defendant's affidavit was insufficient. Since he never denied the specific facts contained in the process server's affidavit, no hearing was required."]; *Rabinowitz* at 460 [Defendant negated service of process upon him by citing to the affidavit of service and pointing to the deficiencies therein.]; *Chemical Bank v Darnley*, 300 AD2d 613, 613 [2d Dept 2002]), or a minor discrepancy, such as a mistake in the description of the recipient listed in the server's affidavit (*Green Point Savings Bank v Clark*, 253 AD2d 514, 515 [2d Dept 1998]). Stated differently, in order to successfully assail and rebut service so as to warrant a hearing, a defendant's affidavit must specifically rebut the facts in the affidavit of service (*Caba* at 683; *Simonds* at 370; *Rabinowitz* at 460). If the denial of service is factually specific, then the court must hold a traverse hearing before deciding whether it has personal jurisdiction over the defendant (*Frankel v Schilling*, 149 AD2d 657, 659 [2d Dept 1989]; *Powell v Powell*, 114 AD2d 443, 444 [2d Dept 1985]).

Default Judgment

Plaintiff's motion seeking an order entering a default

judgment against VIRGINIA MCGUIRE (VG)[4] pursuant to CPLR § 3215, a tenant at 692, is granted on default and without opposition. Significantly, plaintiff establishes that VG was served with the summons and complaint and that she failed to answer. Plaintiff also establishes that the claims in the complaint against her 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]).

[4] VG is listed as defendant JOHN DOE in the caption and within the complaint.

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 VG was served with the summons and complaint on March 13, 2021, when a copy of the same was left at 692, her home. In addition, plaintiff provides a copy of the complaint, which is verified by Rick Favela, Director of Special Assets for Velocity, and indicates that VG is a tenant at 692, which is why she is named as a defendant.

Based on the foregoing, plaintiff establishes that VG was served duly and 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") and that the claims in the complaint have merit. As to the latter, as noted above, 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), 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). Thus, the claims against VG, as a tenant within 692, have merit. Accordingly, the motion for the entry of a default judgment against VG is granted.

FCA AND MCGUIRE'S CROSS-MOTION

FCA and McGuire's cross-motion seeking dismissal of the instant action against McGuire pursuant to RPAPL § 1301 is denied. Significantly, although plaintiff has, in fact, interposed both at law and equitable causes of action, summary judgment is only being granted against FCA and McGuire on the cause of action seeking foreclosure, an equitable remedy. Therefore, as against McGuire, his liability as guarantor, is a deficiency judgment pursuant to RPAPL § 1371, which is merely an incidental remedy to the cause of

action for foreclosure.

RPAPL § 1301(1) states that

> [w]here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

RPAPL § 1301(3) states that

> [w]hile the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

Case law has interpreted the foregoing sections of the foregoing statutes to mean that "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies" (*Gizzi v Hall*, 309 AD2d 1140, 1141 [3d Dept 2003]; *see Aurora Loan Services, LLC v Lopa*, 88 AD3d 929, 930 [2d Dept 2011]; *Hometown Bank of Hudson Val. v Colucci*, 127 AD3d 702, 703 [2d Dept 2015]). This is because once a litigant chooses to pursue a remedy at law - such as one for breach of contract - it

must be exercised to exhaustion before resort to an equitable remedy, such as foreclosure (*Hometown Bank of Hudson Val.* at 703; *Aurora Loan Services, LLC* at 930; *Val. Sav. Bank v Rose*, 228 AD2d 666, 667 [2d Dept 1996]). Moreover, limiting the number of suits once a remedy is elected results in the avoidance of multiple lawsuits over the same debt by confining the proceedings to one case and before one court (*Val. Sav. Bank* at 667; *Hometown Bank of Hudson Val.* at 703; *Aurora Loan Services, LLC* at 930).

Thus, generally, RPAPL § 1301(3) precludes a mortgagee who has elected foreclosure from initiating a separate action to collect a debt without leave of court (*Rainbow Venture Assoc., L.P. v Parc Vendome Assoc., Ltd.*, 221 AD2d 164, 164 [1st Dept 1995]; *see Deutsche Bank Natl. Tr. Co. v Gould*, 189 AD3d 576 [1st Dept 2020]). Such leave requires demonstration of special circumstances (*Rainbow Venture Assoc., L.P.* at 164).

While there is a dearth of appellate authority on this issue, it is nevertheless clear to this Court that an action to foreclose a mortgage and sell the property which it encumbers and one which simultaneously seeks to hold one who personally guarantees the note liable for any deficiency judgment due after the sale is not proscribed by RPAPL § 1301. First, it is well settled that 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] ["In an action in the nature of a proceeding in rem to foreclose a statutory lien, and where a personal judgment against some of the parties follows as incidental to the general relief, such judgment cannot be rendered where the plaintiffs fail to establish the lien."]). Indeed, by its express terms, RPAPL § 1371 authorizes the entry of a deficiency judgment in a foreclosure action for any sums that remain due and owing on the note after the sale of the property at auction, thereby militating against any assertion that in a foreclosure action the concomitantly incidental cause of action against the guarantor for a deficiency judgment violates RPAPL § 1301 (RPAPL § 1371[1] ["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."]). Second, there are numerous of appellate cases where the action is permissibly for foreclosure and a

deficiency judgment against the guarantor (*Sanders v Palmer*, 68 NY2d 180, 181-182 [1986] ["When a single debt is secured by a mortgage of property of the corporate debtor and by a mortgage of the separate property of an individual guarantor, the failure to obtain a deficiency judgment after the sale of the corporate debtor's property in a foreclosure action in which the guarantor is a party defendant bars further action to foreclose the guarantor's mortgage or on the guarantee (RPAPL 1371 [3]). The order of the Appellate Division should, therefore, be affirmed, with cost."]; (*LibertyPointe Bank* at 1062 ["The plaintiff bank commenced this action to foreclose a commercial mortgage and note executed by the mortgagor, the defendant 7 Waterfront Property, LLC, and for a deficiency judgment upon the separate guarantees executed by the defendants Yehuda Leib Puretz and Bridgeport Towers, LLC (hereinafter Bridgeport, and together, the defendants). Prior to the motions at issue here, the plaintiff successfully moved for summary judgment against the mortgagor, and the court appointed a referee to report."]). Lastly, there exist persuasive authority, holding that RPAPL § 1301 does not bar an action seeking to both foreclose on a mortgage and for the entry of a deficiency judgment against a guarantor (*People's United Bank v Patio Gardens III, LLC*, 41 Misc 3d 1233[A], *2 [NY Sup 2013] ["The defendants Bruce Barnet and George Heinlein contend that the plaintiff's motion for summary judgment is premature as to them because, as guarantors, their

liability arises only if the sale of the property results in a deficiency. In support thereof, they rely on RPAPL 1301 and RPAPL 1371. Barnet and Heinlein's reliance on RPAPL 1301 and RPAPL 1371 is misplaced. RPAPL 1301 embodies the equitable principle that, once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity, such as foreclosure, may be sought. The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt. Thus, the holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but not both. A prayer for a deficiency judgment in a foreclosure complaint does not constitute a separate action for a money judgment in violation of the election-of-remedies doctrine. Indeed, RPAPL 1371(2) permits the plaintiff in a foreclosure action to make a motion in that action for leave to enter a deficiency judgment. Thus, a cause of action for a deficiency judgment is incidental to the principal relief demanded against the mortgagor in a foreclosure action. Accordingly, the cross motion is denied" [internal citations omitted]).

Here, contrary to McGuire's assertion, there is no at law remedy sought against him such that it is at variance with the equitable remedy of foreclosure and would therefore violate RPAPL § 1301(3). Instead, the remedy sought against FCA is the equitable remedy of foreclosure and as against McGuire as guarantor, the

incidental remedy of a deficiency judgment pursuant to RPAPL § 1371. While it is true that the complaint seeks both legal and equitable remedies, thereby facially violating RPAPL § 1301(3), the grant of summary judgment solely on the equitable remedy of foreclosure remedies that facial violation. Indeed, the grant of summary judgement solely on the cause of action for foreclosure precludes plaintiff from pursuing its other at law causes of action. Plaintiff concedes as much (*see* Attorney Affirmation in Opposition to Defendant's Cross-motion, and in Reply in Further Support of Plaintiff's Motion for Summary Judgment and Order of Reference in Commercial Foreclosure at Paragraph 29 ["Plaintiff has commenced this action in equity to foreclose on the Commercial Mortgage secured by the Premises. This is not an action at law for a monetary judgment against Defendants."]). It is hereby

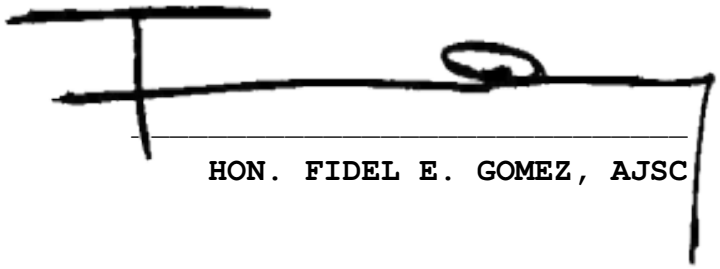
ORDERED that summary judgment against FCA and McGuire is granted solely on plaintiff's cause of action for foreclosure pursuant to the Order Granting Summary Judgment and Order of Reference in Commercial Foreclosure annexed hereto. It is further

ORDERED that a default judgment is granted against VC pursuant to the Order Granting Summary Judgment and Order of Reference in Commercial Foreclosure annexed hereto. It is further

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

This constitutes this Court's decision and Order.

Dated : September 6, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC

At an IAS Part 32 of the Supreme Court held in the County of BRONX, at the Courthouse thereof, on the 6th day of September, 2022.

PRESENT: HON. FIDEL E. GOMEZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2,

PLAINTIFF,

-vs-

FCA AND V LLC A/K/A F C A AND V LLC; FRANCIS C. MCGUIRE, INDIVIDUALLY; JOHN DOE (SAID NAME BEING FICTITIOUS TO REPRESENT UNKNOWN TENANTS/OCCUPANTS OF THE SUBJECT PROPERTY AND ANY OTHER PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PROPERTY),

DEFENDANTS.

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ORDER GRANTING SUMMARY JUDGMENT AND ORDER OF REFERENCE IN COMMERCIAL FORECLOSURE

Index No. 803227/2021E

COMMERCIAL MORTGAGED PREMISES:
692 KING AVENUE
BRONX, NY 10464
Block: 5648 Lot: 201

UPON the Summons, Complaint and Notice of Pendency filed in this action on March 9, 2021, the Notice of Motion dated December 30, 2021, the Affidavit in Support of SANDIE LAWRENCE dated December 3, 2021, the affirmation dated December 30, 2021 of RICHARD D. FEMANO, ESQ. of STERN & EISENBERG, PC, the attorneys of record for U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL

LOAN TRUST 2017-2 ("Plaintiff"), and the exhibits annexed thereto, together with the exhibits attached hereto, and all prior papers filed in this action and prior proceedings had herein; and

AND UPON, the Answer, affirmative defenses and counterclaim(s) of Defendants FCA and V, LLC and FRANCIS C. MCGUIRE, and upon proof that each of the defendants herein has been duly served with the Summons and Complaint in this action and required notices;

AND, it appearing that the remaining Defendants' time to answer the complaint has expired; and no other defendant has appeared or answered the Complaint;

AND, it appearing that the mortgagor FCA and V, LLC is a corporation and not a natural person, and that a COVID conference was not required;

AND, as this Commercial Mortgage is given to FCA and V, LLC, a non-natural person, and as the property secured by this Commercial Mortgage is not a "home loan", a mandatory settlement conference pursuant to CPLR 3408 is not required;

AND, it appearing to the satisfaction of the Court this action was brought to foreclose a commercial mortgage on real property located at 692 KING AVENUE, BRONX, NY 10464, known on the tax maps as: Block: 5648 Lot: 201;

NOW, ON MOTION, of STERN & EISENBERG, PC, attorneys for the Plaintiff, it is hereby

ORDERED, that the Answer, defenses and counterclaims of Defendants FCA and V, LLC and FRANCIS C. MCGUIRE be stricken, as the defenses and counterclaims are without merit; and it is further

ORDERED, that the tenant served at the premises, VIRGINIA MCGUIRE, be substituted in the caption of this action as party a defendant in the place and stead of the "JOHN DOE" defendants, and that the action and the caption of this action be amended accordingly, all of the

foregoing without prejudice to any of the proceedings heretofore had or to be had herein; and it is further

ORDERED, that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2,

Index No. 803227/2021E

PLAINTIFF,

-vs-

FCA AND V LLC A/K/A F C A AND V LLC; FRANCIS C. MCGUIRE, INDIVIDUALLY; VIRGINA MCGUIRE;

DEFENDANTS.

----------X

And that the action be maintained under the same Index Number; and it is further

ORDERED, that the non-appearing and non-answering defendant(s): VIRGINA MCGUIRE, are determined to be in default; and it is further

ORDERED, that Sergio Villaverde with an address of Law Offices of Sergio Villaverde, PLLC 5030 Broadway, Ste 720 New York, NY 10034 212-370-5297, is hereby appointed referee, in accordance with RPAPL § 1321, to compute the amount due to Plaintiff and to examine whether the commercial mortgaged property may be sold in parcels; and it is further

FG

J.S.C.

ORDERED, that the Referee make his/her computation and report with all convenient speed; and it is further

ORDERED, that if necessary, the Referee may take testimony pursuant to RPAPL §1321; and it is further

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 NYCRR Part 36), including, but not limited to §26.2(c) ("Disqualifications from appointment"), and §36.2(d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

~~**ORDERED**, that pursuant to CPLR 8003(a), the statutory fee of $50.00, and in the discretion of the court, a fee of $250.00, shall be paid to the Referee for the computation of the amount due and upon the filing of his/her report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(a); and it is further~~

FG

JSC

ORDERED, that a rent receiver be appointed without notice and that defendant FCA and V, LLC turnover and/or assign all leases and rents in their possession with respect to the Property to satisfy Plaintiff's judgment, plus interest, late charges, other fees, penalties and advances and attorneys' fees and costs that continue to accrue due to the default; and it is further

ORDERED, that defendant FCA and V, LLC's possession of all equipment and fixtures be turned over to Plaintiff to satisfy its judgment against Defendants to satisfy Plaintiff's judgment, plus interest, late charges, other fees, penalties and advances and attorneys' fees and costs that continue to accrue due to the default; and it is further

ORDERED, judgment against Defendants FCA and V, LLC and FRANCIS C. MCGUIRE for Plaintiff's attorneys' fees and costs, incurred as a result of the default, in an amount to be determined by the Court; and it is further

ORDERED, that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

This constitutes the decision and order of the Court.

Pursuant to CPLR §8003 (a) and in the discretion of the court, a fee of $350.00 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.

ENTER:

J.S.C.

FIDEL E. GOMEZ

9/6/22