At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of August, 2009.

P R E S E N T:

HON. BRUCE BALTER,

Justice.

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WACHOVIA BANK, NATIONAL ASSOCIATION,

Plaintiff,

- against -

Index No. 3882/09

75 SCHERMERHORN LLC, et. al.,

Defendants.

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The following papers numbered 1 to read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 5,6
Opposing Affidavits (Affirmations)	4 7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the motion by defendants Sam Klein and PLC Partners, LLC for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint of plaintiff Wachovia Bank, National Association (plaintiff or Wachovia) insofar as asserted against them is granted and the cross motion by plaintiff for an order, pursuant to CPLR 3211 and 3212, dismissing defendants' affirmative defenses and counterclaims and granting summary

judgment in favor of plaintiff with respect to the complaint is denied without prejudice with leave to renew upon proper papers.

On or about July 11, 2007, defendant 75 Schermerhorn LLC (Schermerhorn), as obligor, executed and delivered a promissory note to Wachovia, as obligee, in the amount of $20,701.710. For the purpose of securing payment of the indebtedness, Schermerhorn executed a mortgage in favor of Wachovia covering the real property at 92 Livingston Street, a/k/a 75 Schermerhorn Street, in Brooklyn. In order to further collaterally secure Schermerhorn's obligation to Wachovia, defendants PLC Partners LLC (PLC) and Sam Klein (Klein) executed and delivered to Wachovia a certain Indemnity and Guaranty Agreement (the Guaranty). On or about July 17, 2008, Schermerhorn, PLC, Klein and Wachovia entered into a Loan Extension and Modification Agreement wherein, among other things, the loan obligation was made payable on September 1, 2008. On or about August 28, 2008, the same parties entered into a second Loan Extension and Modification Agreement wherein the obligation was made payable on October 1, 2008. On or about October 1, 2008, the parties executed a third Loan Extension and Modification Agreement making the obligation payable on November 1, 2008. According to the complaint herein, Schermerhorn, Klein and PLC failed to comply with the terms of the mortgage, promissory note and extension agreements by remitting the payment due on November 1, 2008. Therefore, Wachovia commenced the instant action to foreclose the subject real property and to seek a deficiency judgment against Klein, Schermerhorn and PLC. Also named as

defendants herein are Central Parking System of New York, Inc. (a tenant at the subject premises), Perkins Eastman Architects, P.C. (the holder of a mechanic's lien on the property which was recorded after Wachovia's mortgage), BNYH Schermerhorn Members, LLC and LJA Group 9, LLC.

In their motion, Klein and PLC argue that the complaint is devoid of any allegations which, if proven, would warrant the relief requested against them. According to movants, the unambiguous terms of the Guaranty provide that they will have no liability to Wachovia except under certain delineated circumstances, none of which are present or have been alleged in the complaint. They refer to paragraphs 1(A) and 1(B) of the Guaranty in which they assume liability for, among other things, any misappropriation of rents, waste, failure to pay taxes or to maintain premiums on required insurance policies. Because the complaint does not allege any of these "triggering events", movants assert that they cannot be held liable under the facts alleged. In an affidavit, Klein explains that, in late 2008, at Wachovia's insistence, Schermerhorn spent in excess of $3.7 million to qualify for New York City's Industrial and Commercial Inventive Program (ICIP), which provides long-term property tax abatements. According to Klein, Schermerhorn continued to work toward ensuring the project's ICIP eligibility, even after Wachovia declared a default, because Schermerhorn wanted to avoid foreclosure and Wachovia would have had a less valuable asset against which to foreclose without the ICIP benefits. Klein further avers that, once Schermerhorn secured the ICIP eligibility, "Wachovia refused any additional Loan Extensions and shortly

thereafter it terminated all discussions about a mutually agreeable resolution" of Schermerhorn's default. Given Wachovia's alleged bad faith and its possible recoupment of the loan indebtedness from federal assistance under the Troubled Asset Relief Plan (TARP), he suggests that it would be "terribly offensive" if Wachovia were permitted to obtain the property.

In opposition to the motion, Wachovia argues that, "at this early stage of the litigation, it is impossible to know whether and to what extent the Guarantors are liable to Plaintiff under the Guaranty", but , "even under defendants' strained interpretation of the Guaranty's language, the Complaint alleges sufficient grounds such that the Complaint states a cause of action against the Guarantors".* Wachovia points out, for example, that the complaint alleges that Wachovia will have to make advances for taxes and insurance premiums that are or may become due and that there is currently an unsatisfied architect's lien on the property.

In reply, Klein and PLC fault Wachovia for failing to allege that any of the pre-conditions to their liability have occurred or even that the guarantors have any interest in the property. They assert that there are no unpaid taxes on the property and that Wachovia should not be permitted to proceed with its contract claim under the Guaranty on the basis that "there might eventually be a violation of paragraph 1(A)(g) of the Guaranty" pertaining to unpaid taxes and to liens which would be superior to the mortgage. They further note that

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* Wachovia explains that it was required, pursuant to RPAPL § 1301, to include the guarantors as defendants in this action in order to preserve any present or future claim it may have against them.

the architect's lien could not create liability under the Guaranty because that lien was filed after the mortgage was recorded. Klein and PLC further contend that "[t]here is simply no authority for naming [as a defendant] a party who owns an interest, indirect or otherwise, in the entity that owns the property subject to foreclosure."

In support of its cross motion for summary judgment with respect to the complaint, Wachovia submits an affidavit of Thomas H. Kozlark, a Managing Director, in which he avers that Schermerhorn, PLC and Klein have failed to comply with the terms of the mortgage, note and extension agreements by making the payment due on November 1, 2008. He relates that said defendants were notified of their default on November 5, 2008 and given until December 15, 2008 to come to some agreement with Wachovia regarding the default. Since no such agreement was reached, Wachovia submits that it is entitled to summary judgment. Wachovia characterizes the affirmative defenses of defendants as "boilerplate" and maintains that they should be dismissed, as should defendants' counterclaim for unjust enrichment. Specifically, Wachovia asserts that:

1. there is no basis in the TARP program for allowing a reduction in defendants' indebtedness and, further, the amount of money due under the mortgage is not an issue to be resolved at this juncture;

2. the doctrines of "unclean hands" and laches are not defenses to a foreclosure action;

3. Wachovia has acted reasonably in mitigating its damages by allowing three extensions to defendants and it did not negligently or wilfully allow damages to accrue;

4. defendants have not particularized any allegations of fraud on Wachovia's part, nor has Wachovia breached any covenant of good faith or fair dealing;

5. there has been no waiver by Wachovia of its rights under the note and mortgage, nor have defendants corroborated any of their allegations that Wachovia made false representations to them; and

6. the improvements made by defendants to qualify for ICIP benefits cannot be a predicate for damages since defendants were always aware that they would lose the property if they defaulted.

In opposition to the cross motion, defendant Perkins Eastman Architects, PC (Perkins) explains that, if summary judgment is granted, "it could have the effect of extinguishing [its] mechanic's lien in its entirety." According to Perkins, summary judgment is premature because there may be additional parties that need to be named as defendants herein and those defendants that were named may not have been properly served. Perkins further suggests that Wachovia will be unjustly enriched if summary judgment is granted since it will have received the value of Perkins' architectural services while proceeding in bad faith in its dealings with Schermerhorn.

In its opposition to the cross motion, Schermerhorn, PLC and Klein argue that they are entitled to raise equitable defenses to a foreclosure action and that their defenses have merit. Defendants allege that Schermerhorn spent millions of dollars to ensure that the property was eligible for ICIP benefits, that Wachovia falsely assured Schermerhorn that it

would work to amicably resolve the default situation if Schermerhorn took those steps and that, once Schermerhorn secured the ICIP benefits, Wachovia reneged on its assurance.

In reply, Wachovia maintains that Schermerhorn's mortgage remains unpaid and that any TARP funds which Wachovia received are not allocable to the mortgage debt and must be repaid to the federal government. Moreover, with respect to ICIP benefits, Wachovia points out that Schermerhorn applied for the benefits well before obtaining the loan at issue and still has not been approved for such benefits.

Upon a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Morad v Morad*, 27 AD3d 626, 627 [2006]). "While the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). In this case, Klein and PLC rely upon the "unambiguous terms of the Guaranty, which must prevail over plaintiff's allegations." The most prevalent commercial mortgage loans for the past decade have included a guaranty from either a principal or a well-capitalized parent entity insuring that the borrower will not undertake certain prohibited acts (*see* Steiner and Samton, Financing: Acts of "Bad-Boy" Borrower Can Trigger Liability, NYLJ, March 19, 2008, at

5, col 3). In this case, paragraph "1(A)" of the Guaranty limits the liability of PLC and Klein to specific situations involving, among other things, misappropriation, misapplication or conversion of proceeds, rents, security deposits, waste, the failure to pay taxes, obligations relating to hazardous substances, fraud and the failure to pay insurance premiums. Paragraph "1(B)" further provides that the guarantors will be liable to Wachovia under circumstances where the borrower, indemnitor or any of their affiliates, managing members or general partners file for bankruptcy, consent to the appointment of a custodian, receiver or trustee for them or any portion of the subject property or make an assignment for the benefit of creditors or admit insolvency or an inability to pay debts as they become due. As is pertinent here, Wachovia asserts (in its memorandum of law in opposition to the motion) that it "believes that it will be required to make advances for 'taxes, assessments, required improvements, water rates and/or fire insurance premiums on the property that are or may become due under the mortgage . . ."** Wachovia adds that discovery may reveal the presence of other violations or expenses within the purview of the Guaranty. What Wachovia overlooks is that the Guaranty does not contain any basis for holding Klein and PLC liable for a deficiency judgment. The Guaranty provides for Klein and PLC to pay losses or damages as a result of, among other things, the "[f]ailure to pay any valid taxes" (paragraph 1 [A] [g]), but not any part of the loan obligation. Since Klein and PLC did not guarantee Schermerhorn's

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** Although Wachovia further argues that one of the situations enumerated in paragraph "1 (A)" has occurred because of the unsatisfied architect's lien on the property, paragraph "1(A)(g)" of the Guaranty refers to liens "which would be superior to the lien [of Wachovia]" and the architect's lien at issue was recorded after that of Wachovia.

performance of its obligations under the mortgage and note, they cannot be held liable for any deficiency judgment. Given the particular terms of the Guaranty at issue, because the liability of Klein and PLC would be separate and distinct from the mortgage debt, RPAPL § 1301 is inapplicable. Therefore, a separate action may be brought against the guarantors for any money ultimately owed to Wachovia under the "bad-boy non recourse carveouts" (*see P.T. Bank Cent. Asia v Wide Motion Corp.*, 233 AD2d 151 [1996]; *Crossland Sav., FSB v Sackman Enterprises, Inc.*, 181 AD2d 432 [1992]; cf. *Federal Home Loan Mortg. Corp. v Sierra*, 226 AD2d 283 [1996]). Accordingly, the motion by PLC and Klein is granted, the complaint against them is dismissed and the action is severed and continued against the remaining defendants.

CPLR 3212 (a) provides that a party may move for summary judgment after issue has been joined. Here, at least with respect to Klein and PLC, issue has not been joined by service of a responsive pleading.*** Insofar as the other defendants are concerned, Wachovia does not indicate which of them has served an answer, notwithstanding that the cross motion seeks an order "striking the answering defendants' affirmative defenses", nor has Wachovia submitted a copy of any answer that was served, as it is required to do pursuant to CPLR 3212 (b) (*see Nationwide Mut. Ins. Co. v Piper*, 286 AD2d 903, 904 [2001]; *State of New York v Metz*, 241 AD2d 192, 198 [1998]). Moreover, if any of the defendants has not served

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*** Pursuant to CPLR 3211 (f), said defendants' time to serve such a pleading (i.e., an answer) would have been extended until ten days after service of notice of entry of an order denying their dismissal motion, assuming that were the case.

an answer, Wachovia should move for a default judgment with respect to it, rather than summary judgment (*see Tornatore v Bruno*, 280 AD2d 894 [2001]). Accordingly, the cross motion by Wachovia is denied, albeit with leave to renew upon proper papers.

The foregoing constitutes the decision and order of this court.

E N T E R,