[*1]

SCANNED ON 9/20/2009

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

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

Index Number : 601156/2008
BANK OF NEW YORK
VS
COBBLESTONE ESTATES
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 601156/08
MOTION DATE 1/12/09
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to ___, were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
AUG 18 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - COMP.

Dated: 7-17-09

HON. EILEEN BRANSTEN J.S.C.

IN ADDITION TO BEING REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

THE BANK OF NEW YORK MELLON,

Plaintiff,

-against-

COBBLESTONE ESTATES, INC., 380 NASSAU, LLC, STONERIDGE ORGANIZATION, INC., THE SPENCER GROUP, LLC, HOUSECAPES, LTD., SHERIDAN GARDENS, INC., GARY MARCUS and RANJAN BATHEJA,

Defendants.

Index No. 111251/08
Motion Seq. No.: 002
Motion Date: 1/12/09

----------X

THE BANK OF NEW YORK MELLON,

Plaintiff,

-against-

COBBLESTONE ESTATES, INC., GARY MARCUS and RANJAN BATHEJA,

Defendants.

Index No. 601156/08
Motion Seq. No.: 002
Motion Date: 1/12/09

----------X

BRANSTEN, J.:

These actions are related, and involve similar parties and similar issues arising out of the same transaction. In *The Bank of New York Mellon v Cobblestone Estates, Inc.*, Index No. 111251/08 (the "Constructive Trust Action"), plaintiff The Bank of New York Mellon ("BNY") seeks to recover, through the imposition of a constructive trust and the setting aside of allegedly fraudulent transfers of over $3,000,000 by defendant Cobblestone Estates, Inc. ("Cobblestone"), the proceeds of three loans extended to Cobblestone by BNY for the

construction of residential buildings. BNY alleges that Cobblestone and the other defendants diverted the proceeds of the loans for their personal use and benefit.

In *The Bank of New York Mellon v Cobblestone Estates, Inc., Gary Marcus and Ranjan Batheja*, Index No. 601156/08 (the "Promissory Note Action"), BNY seeks to recover a money judgment in the amount of $14,360,447.40, together with interest, costs and attorney's fees, against Cobblestone on the loan agreements and notes evidencing the loan made by BNY to Cobblestone, as well as against defendants Gary Marcus ("Marcus") and Ranjan Batheja ("Batheja"), the guarantors for all three loans. The three loans are in default as a result of the failure of Cobblestone and the guarantors to pay the amounts due on the loans on their maturity date.

The motions in each separate action are consolidated herein for disposition only.

In the Constructive Trust Action, BNY moves, pursuant to CPLR 6301 and 6311, for a preliminary injunction restraining and enjoining defendants Cobblestone, 380 Nassau LLC ("380 Nassau"), Stoneridge Organization, Inc. ("Stoneridge"), The Spencer Group, LLC (the "Spencer Group"), Housecapes, Ltd. ("Housecapes"), Sheridan Gardens, Inc. ("Sheridan"), Batheja and Marcus from selling, transferring or otherwise disposing of: (1) any proceeds of the building loan advanced to Cobblestone by BNY; and (2) any real and personal property in which any of the defendants acquired or obtained an interest from the proceeds of the building loan advanced to Cobblestone by BNY.

In the Promissory Note Action, BNY moves, pursuant to CPLR 3212, for an order: (1) granting it summary judgment against defendants on the three loans at issue in the aggregate principal amount of $14,360,447.40, plus all accrued interest and late charges, evidenced by three promissory notes given by Cobblestone, as borrower, to BNY, as lender, as modified by two amendments, and against Marcus and Batheja under a guarantee executed by them; (2) awarding BNY its costs and expenses, including reasonable attorneys' fees and expenses incurred in connection with the enforcement of defendants' obligations under the notes and the guarantee; and (3) referring this matter to a referee to hear and report on the amount of costs and expenses to be awarded to BNY. BNY also seeks judgment dismissing each of the affirmative defenses and counterclaims asserted by defendants.

BACKGROUND

On April 20, 2005, BNY agreed to lend Cobblestone funds to construct 37 three-story attached town homes, containing 11 residential condominium units, located in Queens, New York (the "Cobblestone Improvements"). BNY and Cobblestone entered into a Building Loan Agreement, dated April 20, 2005 (the "Building Loan Agreement" [8/7/08 Helt Aff., Exh H]), pursuant to which BNY agreed to extend, and Cobblestone agreed to accept, a building loan in the aggregate principal amount of up to $17,000,000 (the "Building Loan").

Of that sum, the principal amount of $7,610,447.40 was lent to Cobblestone pursuant to the Building Loan Agreement (Constructive Trust Complaint, ¶ 17).

Pursuant to the terms of the Building Loan Agreement, Cobblestone agreed to use the proceeds of the Building Loan solely to finance the construction of the Cobblestone Improvements (*id.*, ¶ 20).

Under Sections 1.3 and 1.5 of the Building Loan Agreement, to obtain advances of the Building Loan, Cobblestone was required to submit requests to BNY (the "Requests for Advances") to pay costs incurred in connection with the construction of the Cobblestone Improvements (*id.*, ¶ 21). In Section 2.7 of the Building Loan Agreement, Cobblestone represented and warranted to BNY that it would provide BNY with true and accurate descriptions of the costs and/or payments to be paid from the proceeds requested in each Request for Advances (*id.*, ¶ 22). BNY alleges that it relied upon the representations and warranties made by Cobblestone when it made advances of the Building Loan (*id.*, ¶ 23).

In Section 3.8 of the Building Loan Agreement, Cobblestone also agreed that "[p]ursuant to Section 13 of the Lien Law, Borrower [Cobblestone] will receive the advances to be made hereunder and will hold the right to receive the same as a trust fund for the purpose of paying the costs of construction of the Improvements, and it will apply the same first to such payment and to no other purpose." Section 13 of the New York Lien Law provides that a recipient of construction loan proceeds, like Cobblestone, is required to

receive and hold such proceeds as "a trust fund to be applied first for the purpose of paying the cost of improvement before using any part of the [loan proceeds] for any other purpose." BNY alleges that, therefore, upon receiving the proceeds of the Building Loan, Cobblestone became a trustee of such loan proceeds, and, as such, was required to use and apply the "trust funds" to pay for the cost of the Cobblestone Improvements (*id.*, ¶ 25).

In Section 4.1 of the Building Loan Agreement, Cobblestone further agreed that, among other things, each of the following would constitute an event of default:

> "(1) if [Cobblestone] fails to comply with or there shall be a default by [Cobblestone] under any of the terms, covenants or conditions of this Agreement; or
>
> (2) if at any time any representation or warranty made by [Cobblestone] to [BNY] in this Agreement or in any other Loan Document or in any certificate or statement delivered in connection herewith shall be incorrect or misleading to an extend deemed by Lender, in its sole judgment and discretion, to be material"

(*id.*, ¶ 26).

Pursuant to a Guarantee of Payment, dated as of April 20, 2005, Marcus and Batheja jointly, severally and unconditionally guaranteed the obligations of Cobblestone under the Building Loan Agreement (*id.*, ¶ 27; *see* 8/7/08 Helt Aff., Exh J). Pursuant to a Guarantee of Completion, dated April 20, 2005, Marcus and Batheja guaranteed the lien-free completion of the Cobblestone Improvements (*id.*, ¶ 29; *see* 8/7/08 Helt Aff., Exh K).

Cobblestone failed to pay the Building Loan by the maturity date in the Building Loan Agreement, as extended to October 20, 2007 by subsequent extension agreements (*id.*, ¶ 30). By letter dated January 16, 2008, BNY demanded that Cobblestone, as borrower, and Marcus and Batheja, as guarantors of payment, pay the Building Loan. Cobblestone, Marcus and Batheja have failed to do so (*id.*, ¶ 31).

The Cobblestone Improvements have not been completed (*id.*, ¶ 32). BNY alleges that Cobblestone, Batheja and Marcus, as guarantors of completion and payment, have insufficient funds to complete the Cobblestone Improvements and to pay their obligations to BNY (*id.*, ¶ 32).

After the closing of the Building Loan Agreement in April 2005, Cobblestone periodically submitted Requests for Advances to BNY (*id.*, ¶ 34). From time to time, and in accordance with and pursuant to the terms and conditions of the Building Loan Agreement, BNY disbursed the proceeds of the Building Loan to an account established and maintained by Cobblestone at BNY (the "Cobblestone Account"), and to other accounts, as requested by Cobblestone (*id.*, ¶ 35).

ANALYSIS

Constructive Trust Action: Preliminary Injunction

BNY alleges that, in violation of its statutory and contractual trust obligations, as set forth in the New York Lien Law and in the Building Loan Agreement, Cobblestone

wrongfully diverted the proceeds of the Building Loan by issuing checks to pay for the costs and expenses of real estate projects and other matters completely unrelated to the Cobblestone Improvements (*id.*, ¶ 36). Specifically, BNY alleges that, in violation of the terms of the Building Loan Agreement and other loan documents, Cobblestone issued the following checks, among others, and distributed loan proceeds from the Cobblestone Account for purposes wholly unrelated to constructing the Cobblestone Improvements:

> "(a) approximately $477,000.00 to pay for the construction and related costs and expenses incurred in connection with property located at 380 Nassau Street, Elmont, New York, (380 Nassau), which Batheja owns through the corporate entity 380 Nassau (8/7/08 Helt Aff., Exh B [attaching checks reflecting this payment]);
>
> (b) approximately $155,000.00 to make payments to the "Bank of Smithtown" which were payments on a mortgage loan on Marcus's personal residence located at 41 Dune Road, Quogue, New York (41 Dune Road), currently held in the name of the Spencer Group (*id.*, Exh C);
>
> (c) $35,357.67 to pay property taxes to the Suffolk County Treasurer for Marcus's home at 146 Round Swamp Road, Huntington, New York (146 Round Swamp Road) (*id.*, Exh D);
>
> (d) $750,000.00, which was deposited into accounts established and maintained by defendant Housecapes, a corporation owned and controlled by Marcus, at JPMorgan Chase Bank (*id.*, Exh E);
>
> (e) at least $50,000.00 to and for the benefit of non-party "Windels Marx Lane and Mittendorf" for the purchase or

improvement of a property known as "Beach 67 Street" and "B-67 St.," which is unrelated to the Cobblestone Improvements (*id.*, Exh F);

(f) approximately $140,000.00 in the form of two checks made out to "Cash" which were negotiated by individuals having no relationship to the Cobblestone Improvements; and

(g) in excess of $3,000,000.00, which was deposited in accounts established and maintained by defendant Sheridan Gardens at JPMorgan Chase Bank for the benefit of Sheridan Gardens, Marcus and Batheja (*id.*, Exh G)"

(*id.*, ¶ 37 [380 Nassau, 41 Dune Road and 146 Round Swamp Road will hereinafter be referred to as the "Constructive Trust Properties"]).

With respect to 41 Dune Road, during the period of the diversion of funds from the Cobblestone Account to pay the mortgage on the property, title to the property was held in the name of Marcus and his wife, Janet Marcus. Janet Marcus passed away, and by January 2008, title was held solely in Marcus's name. On January 24, 2008, eight days after BNY sent the demand for payment on the promissory loans, Marcus switched the title to 41 Dune Road Property from his own name to that of the Spencer Group, a limited liability company which is controlled by him (*id.*, ¶ 38; 8/7/08 Helt Aff., ¶ 27). BNY alleges that the transfer of title was for no consideration (*id.*). According to internet databases, on August 5, 2008, Marcus put the146 Round Swamp Road property up for sale (8/7/08 Helt Aff., ¶ 28).

BNY asserts 11 causes of action in its complaint and seeks imposition of a constructive trust (first through sixth causes of action) as well as relief pursuant to New York Debtor and Creditor Law (DCL) § 274 (seventh cause of action); DCL § 276 (eighth cause of action); DCL § 276-a (ninth cause of action). BNY also seeks damages for conversion (tenth cause of action) and a permanent injunction (eleventh cause of action).

BNY alleges that the Transfers of the proceeds of the loans to the defendants and others as stated above (collectively, the "Transferees"), were made without consideration, and in violation of Cobblestone's statutory and contractual trust duties and obligations to hold the loan proceeds in trust, and use them solely to fund the Cobblestone Improvements, as well as in violation of Cobblestone's other contractual obligations. BNY asserts that the Transfers have left Cobblestone with insufficient funds to pay for the costs to complete the Cobblestone Improvements, and have left Cobblestone, and Marcus and Batheja, as guarantors of payment, with insufficient funds to pay its indebtedness to BNY. It urges that a "constructive trust" must be imposed on "any and all properties, personal and real" owned by the Transferees.

BNY also argues that a preliminary injunction is necessary to prevent further diversion and fraudulent transfers of the loan proceeds.

On December 12, 2008, this Court (Cahn, J) issued a temporary restraining order, prohibiting defendants from transferring any of their assets or personal or real property in

which they have an interest, including (1) the real property and improvements located at 146 Round Swamp Road and 41 Dune Road; (2) defendants' interests in the proceeds due under an Assignment and Assumption Agreement between Stoneridge and non-party Nassau Health Care Corporation relating to the real property and improvements located at 380 Nassau Road; or (3) any debts owed to defendants.

Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). If any one of these three requirements is not satisfied, the application must be denied (*Faberge Intl. v Di Pino*, 109 AD2d 235 [1st Dept 1985]).

BNY's motion for a preliminary injunction must be denied because it has not demonstrated a likelihood that it is entitled to the imposition of a constructive trust or that it will suffer irreparable harm in the absence of injunctive relief.

Significantly, BNY has not sufficiently demonstrated that it is entitled to a beneficial interest in any specific property defendants acquired as opposed to repayment of the money it loaned. The elements of a claim for constructive trust are: (1) the existence of a confidential relationship (2) a promise made by the defendant; (3) plaintiff's reliance on such promise; and (4) unjust enrichment by defendant (*see Sharp v Kosmalski*, 40 NY2d 119

[1976]). BNY does not allege that it was promised any interest in the property defendants acquired or any entitlement to the actual property as distinct from its ultimate right to recover a judgment (*cf. Braddock v Braddock*, 60 AD3d 84 [1st Dept 2009] [constructive trust may be available based on plaintiff's claimed right to certain property and alleged promise by defendant that he would receive ownership interest]). Nor has BNY demonstrated the existence of a fiduciary relationship between it and defendants (*Wachovia Securities, LLC v Joseph*, 56 AD3d 269 [1st Dept 2008]).

Additionally, BNY has not established that money damages would not make it whole. Indeed, a plaintiff often fears that the defendant will secrete property during the action's pendency and make a judgment uncollectable. That, however, is insufficient to justify extraordinary injunctive relief (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 548-549 [2000]).

Thus, BNY's motion for a preliminary injunction is denied.

The Promissory Note Action: Summary Judgment

Pursuant to an Acquisition Loan Note dated April 20, 2005 between Cobblestone as borrower and BNY as lender, BNY agreed to lend Cobblestone the principal amount of $6,500,000, together with interest (Amended Complaint, Promissory Note Action, ¶ 6; Exh A). Cobblestone's obligations under the Acquisition Loan Note are secured by a mortgage,

which was modified and extended pursuant to an Acquisition Loan Modification and Extension Agreement dated April 20, 2005 between Cobblestone and BNY, in the amount of $6,500,000 (the "Acquisition Loan Modification and Extension") (*id.*, ¶ 7; Exh B). Pursuant to the provisions of the Acquisition Loan Note, BNY advanced the principal amount of $6,500,000 to Cobblestone (*id.*, ¶ 8).

BNY and Cobblestone also entered into the Building Loan Agreement, pursuant to which BNY agreed to extend, and Cobblestone agreed to accept, the Building Loan in the aggregate principal amount of up to $17,000,000 (*id.*, ¶ 24; Exh D). Cobblestone's indebtedness to BNY under the Building Loan Agreement is evidenced by a Building Loan Note, dated April 20, 2005, in the principal amount of up to $17,000,000 (the "Building Loan Note"), made by Cobblestone in favor of BNY (*id.*, ¶ 25; Exh E).

In order to secure its obligations under the Building Loan Note and Building Loan Agreement, Cobblestone executed and delivered to BNY a Building Loan Mortgage and Security Agreement, dated April 20, 2005, in the amount of up to $17,000,000 (the "Building Loan Mortgage"), encumbering the Cobblestone Premises (*id.*, ¶ 26; Exh F).

Pursuant to the provisions of the Building Loan Agreement, Building Loan Note and Building Loan Mortgage (collectively, the "Building Loan Documents"), BNY advanced the principal amount of $7,610,447.40 to Cobblestone (*id.*, ¶ 27).

Pursuant to a Project Loan Agreement dated April 20, 2005 (the "Project Loan Agreement") between Cobblestone as borrower and BNY as lender, BNY agreed to lend Cobblestone the principal amount of up to $250,000 (*id.*, ¶ 43, Exh G). Cobblestone's indebtedness to BNY under the Project Loan Agreement to pay Project Loan Costs is evidenced by a Project Loan Note dated April 20, 2005 in the principal amount of $250,000 (the "Project Loan Note") (*id.*, ¶ 44; Exh H]).

In order to secure its obligations under the Project Loan Agreement and the Project Loan Note, Cobblestone executed and delivered to BNY the Project Loan Mortgage and Security Agreement dated April 20, 2005 in the amount of $250,000 (the "Project Loan Mortgage") (*id.*, ¶ 45; Exh I]).

Pursuant to the provisions of the Project Loan Agreement, Project Loan Note and Project Loan Mortgage (collectively, the "Project Loan Documents"), BNY advanced the principal amount of $250,000 to Cobblestone (*id*, ¶ 46).

Under the Acquisition Loan Note, the Building Loan Documents, and the Project Loan Documents, interest was payable on the principle amount on a monthly basis at the rate set forth in those documents, with the entire unpaid principal amount and all accrued and unpaid interest and expenses due and payable on April 20, 2007 (the "Maturity Date") (Acquisition Loan Note, ¶¶ 1, 15; Building Loan Note, ¶¶ 1, 15; Project Loan Note, ¶¶ 1, 15). By Amendment No. 1 to the Acquisition Loan Note, Amendment No. 1 to the Building Loan

Agreement and Note, and Amendment No. 1 to the Project Loan Agreement and Note, the Maturity Date was extended to June 20, 2007 (Amended Complaint, Promissory Note Action, ¶¶ 9, 28, 47). By Amendment No. 2 to the Acquisition Loan Note, Amendment No. 2 to the Building Loan Agreement and Note, and Amendment No. 2 to the Project Loan Agreement and Note, the Maturity Date was further extended to October 20, 2007 (the Final Maturity Date) (*id.*).

The Acquisition Loan Note, the Building Loan Documents and the Project Loan Documents further provide that the failure to make payment of any amount due under those documents constitutes an Event of Default (Acquisition Loan Note, ¶ 15; Building Loan Note,¶ 15; Building Loan Agreement, § 5.1 [a]; Project Loan Note, ¶ 15; Project Loan Agreement, § 5.1 [a]). Pursuant to those documents, upon an Event of Default, BNY, in its sole discretion, may declare the entire debt immediately due and payable (Acquisition Loan Note.,¶ 18; Building Loan Note, ¶ 18; Project Loan Note, ¶ 18). Upon an Event of Default, Cobblestone is obligated to pay interest on the unpaid principal balance of the debt at the default rate defined in the Acquisition Loan Note, the Building Loan Note and the Project Loan Note (Acquisition Loan Note, ¶ 15; Building Loan Note, ¶ 15; Project Loan Note, ¶ 15), as well as all costs of collection, including reasonable attorneys' fees, in connection with BNY's enforcement of the Acquisition Loan Note, the Building Loan Note and the Project

Loan Note (Acquisition Loan Note, ¶ 22; Building Loan Note, ¶ 22; Project Loan Note, ¶ 22).

Cobblestone defaulted under the Acquisition Loan Note, the Building Loan Note and the Project Loan Note by failing to pay all amounts due on the Final Maturity Date (Amended Complaint, Promissory Note Action, ¶ ¶14, 33, 52).

By letter dated January 16, 2008, BNY provided written notice to Cobblestone and the Guarantors that an Event of Default under the Acquisition Loan Note, the Building Loan Documents and the Project Loan Documents had occurred by reason of Cobblestone's failure to pay all amounts due thereunder on the Final Maturity Date, and demanded that all amounts due under the Acquisition Loan Note, the Building Loan Note and the Project Loan Note be made by February 16, 2008 (*id.*, ¶¶ 15, 34, 53; Exh C). However, Cobblestone and the Guarantors failed to remit the amounts due and owing under the Acquisition Loan Note, the Building Loan Documents and the Project Loan Documents to BNY (*id.*, ¶¶ 16, 34, 53).

BNY alleges that, as of June 11, 2008, there was due and owing: (1) on the Acquisition Loan Note, the principal amount of $6,500,000, together with $550,559.03 in accrued interest through June 11, 2008, plus interest at the per diem rate of $1,986.11, and late charges, legal fees and expenses and costs; (2) on the Building Loan Note, the principal amount of $7,610447.40, together with $644,615.46 in accrued interest through June 11, 2008, plus interest at the *per diem* rate of $2,325.41, and late charges, legal fees and expenses

and costs; and (3) on the Project Loan Note, the principal amount of $250,000, together with $21,175.35 in accrued interest through June 11, 2008, plus interest at the per diem rate of $76.39 thereafter, plus late charges, legal fee and expenses and costs (*id.*, ¶¶ 17,35, 54; 9/29/08 Aff. of Peter Helt, ¶¶ 19, 33, 47, 109-112; Exh 19 [chart calculating interest owed]).

Pursuant to a Guarantee of Payment dated April 20, 2005 made by Marcus and Batheja in favor of BNY (the "Guarantee"), Marcus and Batheja (the "Guarantors") absolutely and unconditionally, and jointly and severally, guaranteed to BNY payment of all of Cobblestone's obligations under the Acquisition Loan Note, Building Loan Note and Project Loan Note (Amended Complaint, Promissory Note Action, ¶ 62; Exh J). The Guarantee states that:

> "The Guarantors, jointly and severally, absolutely and unconditionally guarantee to the Lender ... the prompt payment when due, whether by acceleration or otherwise, of the principal amount of the Loans [the Acquisition, Building and Project Loans], whether outstanding or hereafter made or incurred, and all interest thereon, fees, expenses and other Liabilities"

(Guarantee, ¶ 1). The Guarantee further provides that:

> "The obligations of the Guarantors hereunder are joint and several, absolute and unconditional, under all circumstances and irrespective of the genuineness, validity, regularity, discharge, release or enforceability of the Liabilities (as defined in the Mortgages), or of any instrument evidencing any of the Liabilities or of any collateral therefore or of the existence or extent of such collateral or of the obligations of the Guarantors under this Guarantee"

(*id.*, ¶ 2[a]). Pursuant to the terms of the Guarantee, the Guarantors also agreed to pay to BNY all expenses, including reasonable attorneys' fees and expenses, in connection with the enforcement of the Guarantee (*id.*, ¶ 8 [k]).

The unconditional, and joint and several, Guarantee was reaffirmed by Marcus and Batheja by Reaffirmation of Guarantees, dated as of April 20, 2007, and Reaffirmation of Guarantees, dated as of June 20, 2007 (Amended Complaint, Promissory Note Action, ¶ 62).

BNY asserts that the Guarantors are in default under the Guarantee by reason of their failure to pay the amounts due thereunder (*id.*, ¶ 64). It alleges that, by reason of the foregoing, there was due and owing from the Guarantors under the Guarantee, as of June 11, 2008, the outstanding principal amount of $14,360,447.40, together with $1,216,349.84 in accrued interest through June 11, 2008, plus interest at the per diem rate of $4,387.91 thereafter, and late charges, legal fees and expenses (Amended Complaint, Promissory Note Action, ¶ 65; 9/29/08 Helt Aff., ¶¶ 53; 112).

BNY moves for summary judgment against Cobblestone on its first cause of action for judgment on the Acquisition Loan Note in the principal amount of $6,500,000, the third cause of action for judgment on the Building Loan Note in the principal amount of $7,610,447.40, and the fifth cause of action on the Project Loan Note in the amount of $250,000 (collectively, the Notes), for a total of $14,360,447.40. BNY also moves against Cobblestone on its second, fourth and sixth causes of action for attorneys' fees, legal

expenses and court costs incurred by it in connection with its efforts to enforce the Notes. Finally, BNY seeks judgment on its seventh and eighth causes of action against Marcus and Batheja for judgment on the Guarantee, as well as for its legal fees and expenses. BNY's motion for summary judgment with respect to these causes of action is granted.

In an action for non-payment of loan obligations created under loan documents, a *prima facie* case is established through proof of the note at issue, and the failure of the obligee to make payment in accordance with its terms (*see e.g. Interman Indus. Prod., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975], citing *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *accord Banco Popular North America v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]; *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

Similarly, in an action on a personal guarantee, a *prima facie* case is established through proof of (1) the guarantee; (2) a default on the underlying obligation secured by the guarantee; and (3) the defendant's failure to honor the guarantee (*see e.g. Valencia Sportswear, Inc. v D.S.G. Enter., Inc.*, 237 AD2d 171 [1st Dept 1997] [submission of an unconditional guarantee along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212]; *see also SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214 [1st Dept], *lv dismissed* 87 NY2d 1056 [1996]; *European American Bank & Trust Co. v Schirripa*, 108 AD2d 684 [1st Dept 1985]). A moving party is entitled to summary judgment

unless the other party produces evidentiary proof sufficient to raise an issue of fact regarding a defense to the instrument (*see Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2d Dept 2006]).

In its moving papers, BNY has established its *prima facie* entitlement to judgment as a matter by law by submitting the Notes executed by Cobblestone, pursuant to which it promised to pay the Acquisition Loan, Building Loan and Project Loan, and Helt's moving affidavit demonstrating Cobblestone's failure to repay the Notes by the Final Maturity Date (*see Solanki v Pandya*, 269 AD2d 189 [1st Dept 2000]; *SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, *supra*; *Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541 [1st Dept 1992]).

BNY has also established a *prima facie* case for summary judgment on the Guarantee by submitting the Guarantee, executed by the Guarantors. The Guarantee is unlimited, and provides that defendants Marcus and Batheja "absolutely and unconditionally guarantee to Lender ... the prompt pay when due, whether by acceleration or otherwise, of the principal amount of the Loans, whether outstanding or hereafter made or incurred, and all interest thereon, fees, expenses and other Liabilities" (Guarantee, ¶ 1). The Final Maturity Date has passed, and Cobblestone, Marcus and Batheja have not paid the amounts due under the Guarantee (Helt Aff., ¶¶ 16, 30, 44, 51).

Once the plaintiff has met its burden, it is incumbent upon the defendants to establish, by admissible evidence, that a triable issue of fact exists with respect to a bona fide defense (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, *supra; Silber v Muschel*, 190 AD2d 727 [2d Dept 1993]; *Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541, *supra*). Here, however, in response to BNY's prima facie showing, defendants' averments are insufficient to create a triable issue of fact, or to constitute a defense that would defeat BNY's motion. Thus, BNY's motion must be granted (*see Lorenz Diversified Corp. v Falk*, 44 AD3d 910 [2d Dept 2007]; *Takeuchi v Silberman*, 41 AD3d 336 [1st Dept 2007]).

Defendants' answer contains ten affirmative defenses, and five counterclaims. However, Cobblestone and the Guarantors are barred from asserting the defenses and counterclaims by the express terms of the original loan documents. In the original loan documents executed by Cobblestone for each loan, Cobblestone agreed to pay all sums due on the Notes, without offset, counterclaim or defense:

> "**Payment of Sums Due**. Mortgagor [Cobblestone] will punctually pay the principal and interest and all other sums to become due in respect of this Mortgage, the Note and any other Loan Document at the time and place and in the manner specified herein or in the Note or any other Loan Document, as applicable, according to the true intent and meaning thereof, *and without offset, counterclaim or defense*, and without deduction or credit for any amount payable for taxes, all in immediately available funds"

(Acquisition Loan Agreement, § 4.4; Building Loan Agreement, § 4.4; Project Loan Agreement, § 4.4). An agreement not to assert, or a waiver of, "any defense, set-off or counterclaim" in a note is binding on a borrower, and bars a borrower from raising defenses or counterclaims to the failure to pay a debt (*Bank of Suffolk County v Kite*, 49 NY2d 827 [1980]; *Perlstein v Kullberg Amato Picacone*, 158 AD2d 251 [1st Dept 1990]; *see e.g. Quest Commercial LLC v Rovner*, 35 AD3d at 576 [broad waiver of all "defenses, counterclaims and set-offs" in note precluded the defenses of forgery, duress, fraud, and a claim for set-off]; *New York Life Ins. Co. v Media/Communications Partners Ltd. Partnership*, 204 AD2d 235 [1st Dept 1994] [borrower's waiver of right to interpose a counterclaim in the promissory note precluded the borrower's counterclaim]).

Cobblestone, therefore, is barred from asserting the defenses and counterclaims raised in its answer.

Similarly, the Guarantors agreed in the Guarantee not to assert offsets, defenses or counterclaims to their obligations to BNY:

> "Each Guarantor hereby waives for the benefit of the Lender and its successors and assigns:
>
> (a) Any rights to claim or interpose any defense (except for any defense which, if not asserted, would be irretrievably lost), counterclaim or offset of any nature and description which he may have or which may exist between and among the Lender, the Borrower and/or Guarantors or to seek injunctive relief

(Guarantee, ¶ 4[b]).

> (b) Any defense or benefits that may be derived from or afforded by laws which limit the liability of or exonerate guarantors or sureties, or which may conflict with the terms of this Guarantee"

(*id.*, ¶ 4 [d]).

An absolute and unconditional guarantee, which contains an express agreement not to assert defenses, offsets or counterclaims, such as the Guarantee in this case, is binding on the guarantor, and precludes the guarantor from raising defenses, offsets or counterclaims to its obligation under such guarantee (*see e.g. Citibank, N.A. v Plapinger*, 66 NY2d 90 [1985] [broad waiver of defenses in guarantee precluded the raising of the defense of fraud]; *Red Tulip LLC v Neiva*, 44 AD3d 204 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008] [same]; *The Bank of New York v Cariello*, 69 AD2d 805, 805 [2d Dept 1979] ["The right to interpose a counterclaim was waived by defendants in the promissory note and guarantee," and thus could not be maintained]).

Furthermore, in conjunction with the execution of the amendments to the loan agreements and notes executed by Cobblestone, in Reaffirmations of Loan Documents and Indemnities, dated as of April 20, 2007, and as of June 20, 2007, Cobblestone again agreed that "there are no defenses or set-offs to the Indemnities and Loan Documents" (*see* 9/29/08 Helt Aff., Exhs 12 and 13). Likewise, the Guarantors executed Reaffirmations of Guarantee dated as of April 20, 2007, and as of June 20, 2007. In those Reaffirmations, the Guarantors reaffirmed that they had no defenses or set-offs, and reaffirmed the representations in the

Guarantee, which included the representations that the Guarantors did not have any counterclaims against BNY (*see id.*, Exhs 14 and 15).

An agreement by a borrower or guarantor, in a document executed after the original loan documents and guarantee were executed, and stating that the borrower or guarantor has no defenses, offsets or counterclaims to an obligation, again bars and waives any defenses and counterclaims of the borrower or guarantor as against the lender (*see e.g. RPT Metro Equities Ltd. Partnership v 129 Duane Equities, Inc.*, 1995 WL 387681 [SD NY 1995] [applying New York law]; *Federal Land Bank of Springfield v Saunders*, 108 AD2d 838 [2d Dept 1985]).

Accordingly, Cobblestone and the Guarantors are barred from asserting the defenses and counterclaims raised in the answer.

In response to the motion for summary judgment, defendants do not deny that they executed the Notes and the Guarantee, and that no payments were ever made on the Notes, and they do not contest BNY's calculation of interest owed. Instead, defendants submit copies of various documents relating to the Cobblestone Loan, and assert that certain of those documents, which were submitted in support of BNY's motion for summary judgment, are fraudulent, and that different forms of the same documents, which are attached to their papers, are, in fact, authentic.

However, the fraud-based claims raised and the documents cited in the affirmation of Sanjay Chaubey, Esq. and the affidavit of defendant Batheja were not alleged or pled in defendants' answer and counterclaim. It is well settled that defenses which have not been pled in an answer cannot be used as a basis for opposing – or avoiding – a motion for summary judgment on a note and guarantee (*see Gelmin v Sequa Capital Corp.*, 269 AD2d 492 [2d Dept 2000] [unpleaded defenses may not be the basis for avoiding summary judgment on a note and guarantee]). Since defendants did not raise or plead the fraud-based claims, and did not cite the alleged "fraudulent" documents in their answer or any other prior pleading, neither the allegations raised in the Chaubey Affirmation or the Batheja Affidavit, nor the cited documents can be a basis for denial of BNY's motion for summary judgment (*see id.*).

In any event, BNY presents evidence that the documents submitted by defendant as authentic are, in reality, alterations of the documents that were personally prepared for BNY by Emmet, Marvin & Martin, LLP (Emmet), BNY's attorneys, and which BNY submitted to Batheja for signature. BNY submits the affidavit of Eric M. Reuben, Esq, a partner with Emmet, who avers that Emmet uses a document system called Imanage, which creates a contemporaneous record of the date on which a document is created, and the dates, if any, on which the document is modified (Reuben Aff., ¶ 22). Reuben alleges that, after reviewing the documents attached to the opposition papers, he obtained copies of the Imanage history

of each of the relevant documents (*id.*, ¶ 23). He then compared the form of each of the documents, as maintained on Emmet's Imanage document management system, with the documents attached to defendants' opposition papers, including the documents labeled by them as authentic, and those labeled by them as fraudulent (*id.*, ¶ 24). Based on that review and comparison, he concluded that the documents that defendants allege are fraudulent are, in fact, the same documents which are stored on Emmet's Imanage system, and those documents are substantively different from the documents which defendants label as "authentic." In addition, the documents stored on the document management system do not contain the substantive changes that are contained in the documents alleged to be "authentic" (*id.*, ¶ 25).

Reuben further alleges that he obtained copies from Emmet's email archives of the email messages and attachments that John Uhelinger, the Emmet partner who prepared the documentation for the Cobblestone Loan, sent to Christopher Gregg and Elena Dokinaos, BNY's officers who were responsible for the Cobblestone Loan, pursuant to which he transmitted to them the forms of documents that are attached to defendants' opposition papers (*see id.*, Exhs A and B). These emails and the attachments were then sent to Batheja for execution (*id.*, ¶ 26). Reuben avers that the forms of the documents attached to those emails are the same forms still maintained in Emmet's documentation management system, and the same forms that were attached to Helt's moving affidavit (*id.*, ¶ 27).

Accordingly, BNY has presented persuasive evidence that the documents submitted by defendant as authentic are, in fact, alterations of the documents originally prepared by Emmet, and thus, defendants' claim that the documents attached to the moving papers are fraudulent is insufficient to raise an issue of fact.

Defendants also assert that Batheja and Marcus are not in default under the Guarantee, because the parties had "an agreement to agree" to extend the maturity date of the Cobblestone Loan. Defendants, however, fail to submit any evidence supporting any such agreement. In any event, an "agreement to agree" is not binding (*see Waterways Ltd. v Barclays Bank*, 202 AD2d 64 [1st Dept 1994]).

Finally, defendants' request for dismissal of the complaint and sanctions, denominated in their attorney's affirmation as a "cross motion," is denied. Defendants are not entitled to request affirmative relief from this court without first filing a separately noticed motion or cross motion (*see* CPLR 2214 [a]; *Arriaga v Michael Laub Co.*, 233 AD2d 244 [1st Dept 1996] [as plaintiffs failed to formally and specifically demand in notice of motion that counterclaims be stricken, the trial court did not err in denying such relief]; *Matter of City of New York*, 12 Misc 3d 1198[A], 2006 NY Slip Op 51625[U] [Sup Ct, Kings County 2006], *affd sub nom Matter of West Bushwick Urban Renewal Area Phase 2*, 50 AD3d 695 [2d Dept 2008] [refusing to address demands for relief made in the body of papers where the requests were not made by motion or cross motion]; *North American Van Lines, Inc. v American Intl.*

Co., 11 Misc 3d 1076[A], 2006 NY Slip Op 50576[U], * 4 [Sup Ct, NY County 2006], *affd* 38 AD3d 450 [1st Dept 2007] ["It would be procedurally improper to grant [defendant's] request, as [defendant] failed to include this request for relief in a notice of cross motion"]).

Accordingly, BNY is entitled to summary judgment against Cobblestone and the Guarantors in the principal amount of $14,360,447.40, together with $1,216,349.84 in accrued interest through June 11, 2008, and interest at the per diem rate of $4,387.91, plus late charges.

BNY is also entitled to summary judgment with respect to the liability of defendants to pay its costs, expenses and attorneys' fees incurred in connection with the enforcement of defendants' obligations under the Notes and the Guarantee. In the Notes, Cobblestone expressly agreed to pay "all reasonable attorney's fees and court costs incurred by Lender" in the event that the Notes "shall be collected by legal proceedings" (Notes, ¶ 22). Pursuant to the terms of the Guarantee, the Guarantors also agreed that, "[i]f any suit or proceeding is instituted by the Lender for the enforcement of any provisions of this Guarantee, the Guarantors shall pay to the Lender on demand all expenses of the Lender (including attorney's fees and disbursements) in connection with such suit or proceeding" (Guarantee, ¶ 8 [k]). Such language "is broad enough to encompass liability for the plaintiff's attorney's fees," and other costs (*Chase Manhattan Bank, N.A. v Marcovitz*, 56 AD2d 763, 763 [1st Dept], *appeal denied* 42 NY2d 807 [1977]; *accord International Bus. Mach. Corp. v Murphy*

& O'Connell, 183 AD2d 681 [1st Dept 1992], *appeal dismissed* 81 NY2d 783 [1993]; *CMI II, LLC v Interactive Brand Dev., Inc.*, 13 Misc 3d 1214[A], 2006 NY Slip Op 51818[U] [Sup Ct, NY County 2006]). BNY alleges that it has incurred, and will continue to incur, substantial costs and expenses, including attorneys' fees, in connection with the enforcement of defendants' obligations under the Notes and the Guarantee. Because no evidence has been submitted on this issue, the determination of the amount of such costs and attorney's fees will be referred to a Special Referee to hear and report.

The Court has considered the remaining arguments, and finds them to be without merit.

Accordingly,

With respect to *The Bank of New York Mellon v Cobblestone Estates, Inc.,* Index No. 111251/08, BNY's motion for a preliminary injunction is denied; and it is further

ORDERED that BNY's motion for summary judgment in *The Bank of New York Mellon v Cobblestone Estates, Inc., Gary Marcus and Ranjan Batheja*, Index No. 601156/08, is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff The Bank of New York Mellon and against defendants Cobblestone Estates, Inc., Gary Marcus and Ranjan Batheja in the amount of $14,360,447.40, together with $1,216,349.84 in accrued interest through June 11, 2008, plus interest at the per diem rate of $4,387.91 thereafter,

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of costs and attorneys' fees incurred by plaintiff in connection with the promissory notes at issue in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

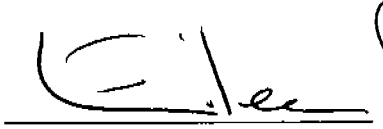
ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that BNY's counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (*see* **http://www.courts.state.ny.us/supctmanh/SRP 7-09no2.pdf**) upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 17, 2009

ENTER



Hon. Eileen Bransten