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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 101058/2009

ARBOR REALTY FUNDING LLC

vs

BROOKLYN FEDERAL SAVINGS BANK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/9/10

MOTION SEQ. NO. _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendant Brooklyn Federal Savings Bank pursuant to CPLR §2221(e) to renew its opposition to plaintiff's summary judgment motion and its cross-motion for summary judgment, as well as this Court's decision and order, dated November 23, 2009, is denied; and it is further

ORDERED that the branch of the motion by defendant Brooklyn Federal Savings Bank pursuant to CPLR §2221(d) to reargue its opposition to plaintiff's summary judgment motion and its cross-motion for summary judgment, as well as this Court's decision and order, dated November 23, 2009 is granted; and it is further

ORDERED that upon reargument, the Court adheres to its earlier determination, dated November 23, 2009; and it is further

ORDERED that defendant Brooklyn Federal Savings Bank serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/15/10

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY 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 35

----------X

ARBOR REALTY FUNDING LLC,

Plaintiff,

-against-

BROOKLYN FEDERAL SAVINGS BANK, EAST 51ST DEVELOPMENT COMPANY LLC, 964 ASSOCIATES LLC, INTERVALE GARDENS LLC and SEIDEN & SCHIEN, P.C.,

Defendants.

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Index No. 101058/09

Motion #002

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Brooklyn Federal Savings Bank ("BFSB") moves pursuant to CPLR §2221(d) and (e) to renew and reargue its opposition to plaintiff's summary judgment motion and its cross-motion for summary judgment, as well as this Court's decision and order, dated November 23, 2009, which granted plaintiff's motion and denied BFSB's cross-motion (the "Decision").

This action involves a dispute between two lenders over which has a superior perfected security interest in a certain purchase agreement (the "purchase agreement") to obtain certain 421-a Negotiable Certificates (the "certificates").

In May 2007, plaintiff Arbor Realty Funding, LLC's ("Arbor" or "plaintiff) made a series of loans to defendant East 51st Street Development Company LLC ("East 51st") (the "Arbor loans"), which were secured by, *inter alia*, certain mortgages encumbering certain real property on East 51st Street (the "mortgaged property"). As additional security for the Arbor loans, on May 8, 2007, East 51st executed and delivered to Arbor an Assignment of Contracts, Permits and Other Rights (the "assignment of contracts"), wherein East 51st assigned to Arbor East 51st's security

interest in all contracts East 51st executed in connection with the "construction, operation, management, leasing, sale . . .of the Property" and all "licenses . . . and certificates used in connection with the operation of the Property." (Section 2(a) and 2(c)).[1]

Arbor filed certain UCC-1 financing statements (the "financing statements"), which listed East 51st as the "Debtor," and described the collateral as including certain mortgages, as well as "all accounts receivable, contract rights,... relating to the [mortgaged property]."

On June 5, 2007, East 51st, as purchaser, entered into the purchase agreement with defendant Intervale Gardens LLC, as seller, to purchase 250 certificates (the "purchase agreement"). The purchase agreement referred to the mortgaged property on East 51st Street (see Page 1). In July 2007, Arbor loaned $4,000,000.00 to East 51st to enable East 51st to purchase the certificates.

In November 2007, without notice to Arbor or Intervale, and without Arbor's consent, East 51st executed an "Assignment and Assumption of Agreement," assigning its rights under the purchase agreement to defendant 964 Associates LLC ("964 Associates").

964 Associates entered into a loan agreement with BFSB for $18,825,000.00 (the "Brooklyn Federal loan"), to purchase real property located on 2nd Avenue. As additional security for the Brooklyn Federal loan, pursuant to the "Collateral Assignment of Contract, Permits and Development Rights," 964 Associates assigned and pledged to BFSB all of its rights under the purchase agreement. BFSB then filed certain financing statements pursuant to Article

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[1]The assignment of contracts also prohibited East 51st from making "any changes in or amendments to any of the General Intangibles without the prior consent of Lender" or "assign[ing] or grant[ing] a security interest in any of the General Intangibles to anyone other than Lender." It further provided Arbor with the right to step into the shoes of East 51st with regard to any agreements entered into by East 51st with respect to the mortgaged property.

9 of the UCC to perfect its security interest in the purchase agreement.

As a result of East 51st's default under the Arbor loan and 964 Associates's default under the Brooklyn Federal loan, and the conflicting claims between Arbor and BFSB regarding which party is entitled to the certificates, this action and the previous summary judgment motions ensued.

In their respective motions for summary judgment, plaintiff and BFSB argued that each had a superior perfected security interest in the purchase agreement.

In its Decision, the Court found in favor of Arbor, concluding:

> As a review of the record indicates that Arbor properly perfected a security interest in the purchase agreement, and since any purported interest that Brooklyn Federal has in the purchase agreement was not perfected until six months after Arbor had already perfected its security interest in the same, Arbor's rights under the purchase agreement are prior to, and paramount over, any rights that defendant Brooklyn Federal may have . . . .

The Court reasoned:

> . . . the purchase agreement expressly ties the certificates and their use to the mortgaged property. . . .
>
> * * *
>
> . . . certain emails between East 51st and Arbor reveals that it was East 51st and Arbor's intent that the assignment of contracts be amended so as to reflect the additional funding for the purchase of the certificates. This intent is also reflected in the First Amendment to Project Loan Agreement, ...
>
> * * *
>
> . . . the collateral described in the assignment of contracts is appropriately identified as those accounts and contracts specifically connected to the mortgaged property . . . .

In support of its present motion for renewal, BFSB argues that the assignment of contracts did not make any reference to the purchase agreement, which was effective approximately two months after the closing under the Arbor Loan. An understanding of the 421-a Program (and the intent of East 51st in connection therewith) will illustrate that the

purchase agreement is not an agreement relating to the construction, operation, management, leasing, sale, maintenance and repair of the Property as required under the assignment of contracts. The 421-a program provides that in exchange for the development of affordable housing, the program will issue certificates to such developer granting a declining exemption from real estate taxes on the new value that is created by the such development. As an added incentive to the developer, the program permits the developer to sell the certificates in the open market for profit.

BFSB argues that the after acquired collateral clause in the assignment of contracts does not adequately secure the purchase agreement. BFSB contends that in connection with East 51st entering into the purchase agreement, Arbor had East 51st sign an "unrecorded" First Amendment to Project Loan Agreement. It is undisputed that the assignment of contracts was never amended after its initial execution on or about May 8, 2007.

BFSB was not advised by Intervale (as Seller under the purchase agreement) or Intervale's then counsel, that any other party claimed an interest in the purchase agreement. Prior to the letter Arbor allegedly sent to Intervale on September 5, 2008 (16 months after its loan closing), Intervale had no knowledge that Arbor alleged an interest in the purchase agreement. It was not until a phone call in December 2008 from Alvin Schein, Esq. (counsel for Intervale and escrow agent under the purchase agreement) that BFSB first learned that Arbor alleged an interest in the purchase agreement. Alvin Schein's law firm also provided a legal opinion to BFSB with respect to the tax benefits offered under the certificates to be issued pursuant to the purchase agreement, and would have advised BFSB had it been aware that the purchase agreement had been previously assigned to Arbor.

The recently taken deposition of James Kennelly ("Kennelly"), a principal and manager of both East 51st and 964 Associates, illustrates that it was never East 51st's intent to grant Arbor a security interest in the purchase agreement. Such lack of intent on the part of Arbor is further evidenced by the commitment letter issued by Arbor in connection with the Arbor Loan (the "Arbor Commitment") and produced by Kennelly in connection with his deposition. The Arbor Commitment makes no mention of certificates or the pledge of the purchase agreement. The limiting language in the section entitled "Security" in the Arbor Commitment serves to limit "all contracts ... hereafter entered into by Borrower" to just those contracts that are consistent with the Arbor Commitment.

Kennelly initially represented that he would affirm certain matters (including the intent of East 51st with respect to the pledge of the purchase agreement) in support of BFSB's original papers. However, just prior to the filing deadline, Kennelly refused to do so, thereby requiring BFSB to subpoena Kennelly for a deposition. Kennelly testified that East 51st never intended to pledge the purchase agreement to Arbor. Rather, the funds advanced by Arbor under the purchase agreement were to be secured, and were in fact secured, by the Arbor $4,000,000 mortgage.

Kennelly's testimony also undermines the Court's conclusion that the certificates were inextricably tied to the mortgaged property. Kennelly testified that it was never East 51st's intent to use the certificates on any one particular property in the development concerning both the mortgaged property and the BFSB property.

This newly procured evidence is dispositive in overturning the Decision in that much of the Court's discussion is devoted to clarifying the admittedly imperfect language in the

assignment of contracts by evaluating the parties' intent in pledging the purchase agreement.

In support of reargument, BFSB contends that the Court's reading of section 2(a) of the assignment of contracts materially and substantially broadens the scope of the security instrument. The subject provision has language limiting the scope of such included agreements to those that are both: (i) in connection with the mortgaged property and (ii) with respect to the construction, operation, management, leasing, sale, maintenance and repair thereof. The Decision did not conclude that the certificates fell within the enumerated list of limiting conditions and only concluded that the certificates are "in connection with the property," a conclusion that is not only debatable, but even if assumed, should not be the end of the inquiry. In any event, the conclusion that the certificates were deemed "in connection with the property" ignores issues of fact as to the link between the mortgaged property and the purchase agreement. If the assignment of contracts specifically referred to the purchase agreement (as was the case in BFSB's security instrument attaching to the purchase agreement) there would be no need for the Court to discuss the alleged intent of the parties when entering into the assignment of contracts. Nothing in the sections referenced by the Court in its decision require the certificates to be used at the mortgaged property. Thus, the purchase agreement is not necessarily "tied" to the mortgaged property. The Court also conceded that there were more certificates purchased than could possibly be used at the mortgaged property. Thus, it was impossible for all of the certificates to be used at the mortgaged property, as confirmed by Kennelly.

Additionally, the Court concedes that the inquiry is first to the language of the security instrument and second to the intent of the parties. Based on the interpretation of the existing evidence (and the testimony of Kennelly) it cannot be said that plaintiff met its burden for

summary judgment. The conflict between the intent of East 51st (as bolstered by Kennelly's testimony) and the decision of the Court that the parties' intended for the purchase agreement to be pledged to Arbor, indicates that there is an issue of fact regarding the intent of the parties.

As to the Court's conclusion that "it was East 51st and Arbor's intent that the assignment of contracts be amended so as to reflect the additional funding for the purchase of the certificates," it is undisputed that said assignment of contracts was never amended and the First Amended Project Loan Agreement did not purport to, and was insufficient to, create a security interest in the purchase agreement. Further, emails indicate that Arbor's own counsel prior to East 51st executing the purchase agreement, acknowledged that they needed to fix the Arbor loan documents to cover the purchase agreement since their existing documentation failed to accomplish this.

And, the caselaw relied upon by Arbor and the Court is controlling only as to the concept of adequate perfection of an adequately attached security interest, not to the adequacy of the attachment of such security interest itself (*i.e.*, whether Arbor ever had a security interest in the purchase agreement to begin with). Thus, while the notice and inquiry case law is relevant when considering the adequacy of a description of collateral in a "security interest perfecting document" (such as a UCC financing statement), it is not appropriate for a "security interest attaching document" (such as the assignment of contracts). Additionally, any further investigation of the assignment of contracts would have lead to the same conclusion that such security interest did not cover the purchase agreement.

Finally, the Decision imposes an impossibly high standard on future secured parties to seek out existing secured parties in order for such existing secured parties to informally define

the own scope of their security interest after the fact. This application of the law will chill the secured lending community and will create an unreliable secured transactions regime. BFSB requests that the Court reconsider its decision in light of the factual and legal clarifications herein.

In opposition, plaintiff argues that BFSB failed to (i) offer any new evidence or (ii) cite any facts or applicable law overlooked or misapprehended by this Court. As to renewal, plaintiff points out that Kennelly's testimony is no different than the sworn statements made by David Kriss ("Kriss") and Marc Leno ("Leno") that were submitted with BFSB's original cross-motion papers. Just like Kennelly, (i) Kriss stated that in his conversations with Kennelly, and other principals of the borrower, it was represented to him that the borrower never granted a security interest in the purchase agreement to Arbor and never agreed to grant Arbor a security interest and (ii) Leno stated that Kennelly represented to him that Arbor did not have a security interest in the purchase agreement. Thus, as the Court was already presented with such evidence, Kennelly's testimony can in no way qualify as "new" evidence. Additionally, (i) Kennelly's testimony is in response to a series of leading questions, to a clearly cooperative witness, (ii) Arbor was not a party to the action in which Kennelly was deposed, (iii) Arbor had no notice of the deposition and (iv) Arbor was not given the opportunity to attend the deposition and cross-examine Kennelly. Thus, Kennelly's deposition is not admissible as evidence in chief. Finally, Kennelly's testimony is belied by the documentary evidence. As this Court determined, the assignment of contracts explicitly covers every contract related to the mortgaged property, whether then owned or thereafter acquired, and the purchase agreement itself specifically defines the "Purchaser's Property" as the mortgaged property.

The remaining portions of BFSB's motion merely a restate portions of their cross-motion papers and do not offer any facts or applicable law overlooked or misapprehended by this Court.

BFSB does not dispute that Arbor filed its security interests before BFSB or address the fact that the assignment of contracts explicitly covers all agreements related to the mortgaged property and that the purchase agreement specifically relates to the mortgaged property.

The Decision does set forth that the certificates fell within the list of limiting conditions contained in the assignment of contracts, in that the Court ruled that the assignment of contracts expressly assigned to Arbor all of Borrower's right, title and interest in and to any and all present or future contracts and agreements executed by Borrower in connection with the mortgaged property. "Property" is defined on the very first page of the assignment of contracts as the mortgaged property, and only the mortgaged Property, *via* reference to Exhibit A of the assignment of contracts. Section 2(a) of the assignment of contracts included all agreements in connection with the construction, operation, management, and sale of the mortgaged property, and Section 2(c) therein included all certificates used in connection with the operation of the mortgaged property including those obtained from any "Governmental Authority" or "private Person" concerning ownership, operation, use or occupancy of the mortgaged property. The tax savings resulting from the 421-a Tax Exemption are significant. Furthermore, the certificates are directly related to the sale and/or leasing of a residential property as they directly affect the marketability of a project. The difference in monthly taxes with and without the 421-a Tax Exemption is so substantial that it directly affects the sale and rental prices of residential units. That is, the certificates affect the construction, operation and sale of the property. Also, the certificates are covered under Section 2(c) of the assignment of contracts because they are

obtained from a Governmental Authority and concern the operation of the property.

The purchase agreement itself specifically delineated how the certificates fall within the conditions of Section 2 of the assignment of contracts, stating that the certificates will permit the mortgaged property's residential apartment units to qualify for partial exemption from certain real property taxes.

BFSB's reliance on emails by Efram Friedman and Daniel Gotlieb, Arbor's counsel during the loan transactions is misplaced. As Mr. Friedman affirms in his affirmation, submitted with Arbor's reply brief, the emails are fully consistent with Arbor's position that it holds a prior perfected security interest in the certificates. Furthermore, this Court already considered those emails and the parties' intent is a matter of law, based on the clear, unambiguous language of the assignment of contracts.

The Court also properly applied attachment case law, in that the Court addressed the language in the assignment of contracts and ruled that it covered the purchase agreement. The UCC financing statements and the assignment of contracts have the requisite level of specificity to alert any party performing a diligent search that Arbor possesses a perfected security interest in any and all contracts executed by Borrower related to the mortgaged property. The very first page of the purchase agreement clearly states that it is executed in connection with the mortgaged property. Furthermore, the purchase agreement states that the certificates would be utilized for the mortgaged property.

Plaintiff further argues that BFSB's public policy argument is misplaced and unpersuasive. BFSB admits that it (i) was provided with a copy of the assignment from Borrower to 964 Associates and (ii) was placed upon notice of Borrower's prior interest in the

purchase agreement, as purchaser thereunder. BFSB claims that it did a UCC search, and thus, should have been aware that, prior to Borrower's claimed assignment to 964 Associates, Borrower had granted a security interest in the purchase agreement to Arbor and Arbor possessed a prior perfected security interest. Accordingly, at the time it accepted the purchase agreement as security for its loan, BFSB possessed actual, constructive and/or inquiry knowledge of Arbor's prior rights as an assignee and as a secured party.

In reply, plaintiff maintains that, the intent of the parties indeed played a role in the Court's analysis. Thus, BFSB is entitled to reargument on the basis that the Court misapprehended East 51st's intent and relied upon inapposite case law in rendering its decision. The requirement that a motion for renewal be based upon newly-discovered facts is flexible, and a court, in its discretion, may grant renewal. Although Leno proffered statements to the Court regarding the understanding of the circumstances surrounding the origination of the loans by Arbor and BFSB to East 51st and 964 Associates, the present case involves the personal intent of a party. Thus, Leno's statements are of limited probative value - which is why BFSB intended on submitting the sworn testimony of Kennelly regarding his own personal knowledge. No party can proffer adequate testimony of the personal knowledge and intent held by Kennelly himself when the loans were originated. Thus, it cannot be said that Kennelly's testimony was included in BFSB's original motion papers.

Kennelly appeared at a deposition by virtue of subpoena; thus, Arbor's characterization of Kennelly's testimony as cooperative is inaccurate, and Kennelly was not "in the pocket" of BFSB.

Although Kennelly's deposition was conducted in a separate foreclosure action

commenced by BFSB against 964 Associates, Arbor provided no basis for its contention that it was entitled to notice and opportunity to cross-depose him. The standard of admissibility on summary judgment is different than the standard of admissibility at trial. On a summary judgment motion, where the sole issue is whether an issue of fact exists for resolution at trial, the statement of an unexamined witness, such as an affidavit, can be neutralized just by submitting opposing affidavits or other evidence.

As to reargument, BFSB argues that Arbor failed to address the Court's discussion of the intent of the parties existing beyond the four corners of the assignment of contracts. If the assignment of contracts was as clear and unambiguous as argued, there would have been no need for the Court to devote significant portions of its analysis to the presumed intent of the parties. In this regard, the email communications indicate the true intent of the parties. It is also undisputed that the assignment of contracts was never in fact amended and the First Amended Project Loan Agreement does not purport to, and is insufficient to, create a security interest in the purchase agreement. Arbor had an opportunity to fully describe the purchase agreement when they had East 51st execute the First Amended Project Loan Agreement and clearly elected not to do so.

Nor does Arbor cite any caselaw indicating that the Court did not err by applying perfection caselaw to an attachment case. The cases cited by the Court regarding its "notice-filing" analysis are not precedent on the issue of whether a security interest adequately attached to collateral. The caselaw relied upon by Arbor and the Court in its decision, is controlling only to the concept of adequate perfection of an already adequately attached security interest, not to the adequacy of the attachment of such security interest itself. Thus, the imperfections in the attachment document itself are not defensible under the notice and inquiry

theory cited by the Court, warranting reargument.

Finally, plaintiff fails to address BFSB's contention that the Court's decision imposes an impossibly high standard on future secured parties to effectively seek out existing secured parties in order for such existing secured parties to define the scope of their own security interest after the fact.

Discussion

A motion for leave to renew under CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed. 1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277).

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Here, renewal based on Kennelly's deposition is unwarranted. Notwithstanding that BFSB was unable to secure Kennelly's deposition and the Arbor Commitment prior to the filing of its original papers, such testimony is offered in support of its contention that East 51st never intended to pledge the purchase agreement to Arbor or that the Arbor Commitment did not contemplate the pledge of any such purchase agreement or similar agreement. The contents of Kennelly's deposition testimony, *i.e.*, to his understanding, when he signed the assignment of contracts, the certificates were not supposed to be collateral for the Arbor loan and the fact that documents made no mention of the certificates or the pledge of the purchase agreement, were facts presented before the Court, albeit though the testimony of Kriss and other documents. Particularly, Kriss previously stated in his affidavit that in his "conversations with James Kennelly . . . it has been represented to me that" East 51st "never granted a security interest in the" purchase agreement to Arbor (¶13). Thus, plaintiffs are not entitled to renewal of motion to dismiss as such renewal motion is based on the same facts asserted in opposition to the earlier motion to dismiss, although facts were contained in new documents (*William P. Pahl Equipment Corp. v Kassis,* 182 AD2d 22, 588 NYS2d 8 [1st Dept 1992] (concluding that plaintiffs were not

entitled to renewal where motion was based on the same facts alleged in opposition to earlier motions to dismiss, although facts were contained in new documents), leave to appeal dismissed in part, denied in part 80 NY2d 1005, 592 NYS2d 665, reargument denied 81 NY2d 782, 594 NYS2d 714).

However reargument in granted, in light of BFSB's arguments that the Court misapplied the law pertaining to whether Arbor's assignment of contracts ever created a security interest in the purchase agreement, that the notice and inquiry case law is not appropriate for a "security interest attaching document" such as the assignment of contracts, and that the Court's examination of records to determine the intent of the parties raised an issue of fact.

> Under Section 2 of the assignment of contracts, East 51st assigned to Arbor its:
>
> security interest in, all of Borrower's right, title and interest, *whether now owned or hereafter acquired*, in, to and under:
>
> (a) all agreements to which Borrower is a party executed in connection with the construction, operation, management, leasing, sale, maintenance and repair of the Property . . . (collectively, the "Contracts" or, singularly, a "Contract") . . .
>
> * * *
>
> (c) all licenses, permits, variances and certificates used in connection with the operation of the Property. . ., including without limitation, . . .all such other permits, licenses, and rights, obtained from any Governmental Authority . . .concerning ownership, operation, use or occupancy of the Property . . . . (the Contracts, together with the items referred to in subparagraphs (b) and (c) above, are sometimes herein collectively referred to as the "General Intangibles"); . . . .

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002]; *Barrow v Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept 1989]), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The

fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

Here, the unequivocal language of Section 2 of the assignment of contracts provides that East 51st clearly assigned to Arbor all of its rights, title and interest in any and all present and future contracts and agreements executed by East 51st in connection with the operation, management, leasing, and sale the mortgaged property.

Contrary to BFSB's contention, the purchase agreement relates to the sale and leasing of the property. As previously stated by the Court, the resulting tax exemption provides real estate tax savings, which could affect the operation, sale and rental prices of the residential units pursuant to Section 2(a). Moreover, the purchase agreement for the certificates clearly falls

under Section 2(c), as certificates obtained from a "Governmental Authority" to be used in connection with the operation and use or occupancy of the mortgaged property. Thus, since the assignment of contracts applies to the purchase agreement, the assignment likewise applies to the certificates.

The Court's discussion as to the intent of the parties is necessary to ascertain the intent of the parties as expressed in the four corners of the assignment of contracts, since "the best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). However, the Court recognizes that it need not consider both the language of the assignment of contracts and the intent of the parties based on extrinsic evidence, *i.e.*, emails and letters, since the assignment of contracts here is clear and unambiguous on its face (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 780 NE2d 166 [2002] (Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous)). BFSB's additional arguments as to the intent of the parties based on correspondence is insufficient, given that parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous *(Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 869 NYS 2d 511 [1st Dept 2008]).

Further, the Court previously addressed the sufficiency of the collateral description in order to address BFSB's claim that plaintiff's description in the assignment of contracts was insufficient under the UCC (See pages 16-17 of BFSB's memorandum of law, dated July 31, 2009, " . . .the standard to adequately describe the collateral at issue . . .must necessarily be higher and must require a more exacting description in order to properly identify the subject collateral.").

Therefore, upon reargument, the Court adheres to its earlier determination.

Conclusion

Based the foregoing, it is hereby

ORDERED that the branch of the motion by defendant Brooklyn Federal Savings Bank pursuant to CPLR §2221(e) to renew its opposition to plaintiff's summary judgment motion and its cross-motion for summary judgment, as well as this Court's decision and order, dated November 23, 2009, is denied; and it is further

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Dated: March 15, 2010

Hon. Carol Robinson Edmead, J.S.C.