SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

BANK OF SMITHTOWN,

Plaintiff(s),

-against-

JACO BUILDERS STERLING LANE LLC, CLIFFORD S. FETTNER, JEFFREY C. DANIELS, MARK GOLDMAN, JACO BUILDERS LTD., DANIEL PERLA ASSOCIATES LP, SCHLICK LANDSCAPING, INC., PETER CAPONE, PETER CAPONE DEFINED BENEFIT PENSION PLAN AND CHESAPEAKE HILLS GENERAL PARTNERSHIP,

Defendant(s).

MOTION DATE: 11/5/09
MOTION SEQ. NO.: 001, 002

INDEX NO.: 1845/09

The following papers read on this motion (numbered 1-4):

Notice of Motion For Summary Judgment and Related Relief in Mortgage Foreclosure Action.....1
Notice of Cross-Motion.....2
Affirmation in Opposition.....3
Reply Affirmation in Support of Defendants' Cross-Motion.....4

Plaintiff's motion for summary judgment pursuant to **CPLR §3212**, and the cross-motion by defendants PETER CAPONE, PETER CAPONE DEFINED BENEFIT PENSION PLAN, and CHESAPEAKE HILLS GENERAL PARTNERSHIP for leave to serve an amended answer pursuant to **CPLR §3025(b)** are determined as follows.

This is a commercial foreclosure action in which plaintiff BANK OF SMITHTOWN (plaintiff or the "Bank") seeks to foreclose on a second mortgage in the principal amount of $1,775,000 (the "Mortgage") given by defendant JACO BUILDERS STERLING LANE, LLC ("JBSL") upon real property located at 15 Sterling Lane, Sands Point, New York, Section 4, Block B and Lot 387 (the "Property"). The Mortgage and underlying indebtedness are reflected in the Building Loan Mortgage and Security Agreement [Motion Exh. Q] and the Building Loan Mortgage Note (the "Note") [Motion Exh, P], respectively, both executed on or about June 16, 2006. The Mortgage was

recorded in the Nassau County Clerk's Office in Liber 30704, Page 789, on July 10, 2006. According to plaintiff's counsel, the Mortgage is subject to and subordinate to a first mortgage given by JBSL to plaintiff in the principal amount of $1,800,000, reflected in a separate Building Loan Mortgage and Security Agreement recorded on the same date (July 10, 2006) in Liber 30704, Page 807 (not attached to motion). The indebtedness underlying the Note and Mortgage was guaranteed by each of defendants CLIFFORD S. FETTNER ("Fettner"), JEFFREY C. DANIELS ("Daniels"), MARK GOLDMAN ("Goldman") and JACO BUILDERS LTD. ("Jaco Builders") (collectively, the "Guarantors") pursuant to the Guarantee of All Liability and Security Agreement dated June 16, 2006 executed by each Guarantor (collectively, the "Guarantees") [Motion Exh. R].

The Complaint alleges that, by reason of JBSL's default in payment of principal and interest under Note, the Bank is entitled to foreclosure and sale of the Property and, after distribution of the proceeds, to collect any deficiency from JBSL and/or the Guarantors. The Bank now moves for Summary Judgment pursuant to **CPLR §3212**, an Order of Reference appointing a Referee to ascertain and compute the amount due to the Bank, including principal and interest under the Mortgage, and, upon the referee's report, a judgment of foreclosure and sale.

The Court notes that issue has not been joined with respect to five of the named defendants, including JBSL, Fettner, Goldman, Jaco Builders, and DANIEL PERLA ASSOCIATES, LP (the "Defaulting Defendants"), who have neither answered nor otherwise appeared in this action. Accordingly, summary judgment as against these defendants is unavailable. *See* **CPLR §3212.** The Court shall treat this application as a motion for summary judgment pursuant to **CPLR §3212**, as it pertains to the defendants who have appeared in this action, and as a motion for a default judgment pursuant to **CPLR §3215**, as it pertains to the Defaulting Defendants.

To establish a *prima facie* case of entitlement to a default judgment, the movant must submit proof of: (i) proper service of the summons and complaint, (ii) the default of each defendant in answering or appearing in the action, and (iii) the facts constituting the claim and the amount due. **CPLR §3215(f).** (In the case at bar, the additional notice requirements of **CPLR §3215(g)** do not apply. *See* **CPLR §§ 3215(g)(3)(iii) and 3215(g)(4)(iii).**)

The Court finds that plaintiff has met this burden. Attached to the motion papers are copies of the Affidavits of Service pertaining to the Defaulting Defendants. These affidavits appear, on their face, to show valid and proper service. [*See* Motion Exhs.C, D, E, F and G.] Further, the Bank's attorney has affirmed that none of the Defaulting

Defendants has served an answer or otherwise appeared in this action. [*See* Affirmation of Amy J. Zamir, dated August 7, 2009, ¶11.]

With respect to the facts constituting the claim, plaintiff has submitted the affidavit of Robert Staron, a Vice President of the Bank, attesting to the defendants' default in payment of principal and interest under the Note, and the amount due as of the date thereof (August 10, 2009). Plaintiff also submits copies of the executed Note, Mortgage and Guarantees. This satisfies the requirements of **CPLR §3215** regarding *prima facie* proof of the merits. *See* **FGH Realty Credit Corp. v. VRD Realty Corp.** 231 AD2d 489, 490.

The above proof also meets plaintiff's initial burden, for purposes of the summary judgment portion of this motion, to demonstrate, *prima facie*, the right to foreclosure and sale. *See* **FGH Realty Credit Corp.**. 231 AD2d at 490, **Pennsylvania Higher Education Assistance Agency v. Musheyev,** 888 NYS2d 911; **Neighborhood Housing Services of New York City, Inc. v. Meltzer,** 67 AD3d 872; **Rose v. Levine,** 52 AD3d 800. The burden thus shifts to the defendants who have appeared in this action to raise an issue of material fact warranting a trial. **Id.**

Defendants Daniels and SCHLICK LANDSCAPING, INC. ("Schlick Landscaping") have not submitted opposition to this motion. Daniels, in his Verified Answer, asserts two affirmative defenses: (1) that he is an improper party defendant because he was not a signatory to the Note or Mortgage; and (2) that the inclusion of a claim on his Guarantee constitutes a failure to elect remedies pursuant to **RPAPL §1301.** [*See* Motion Exh. I.] These defenses lack merit. Daniels is a proper defendant in this action by reason of his potential liability, as Guarantor, for any deficiency remaining after application of the proceeds from the sale of the Property. **RPAPL §1301** does not apply in this context.

Defendant Schlick Landscaping interposes a counterclaim in which it asserts that its mechanics lien in the amount of $22,416.00 has priority over the Mortgage. This is incorrect. The Notice of Mechanics Lien, dated August 27, 2008, was filed at least two years after the Mortgage (recorded on July 10, 2006), and is thus inferior to the Mortgage. *See* **RPL §291.**

In light of the above, the lack of opposition from defendants Daniels and Schlick Landscaping can be deemed a concession on their part. In any event, no issue of fact is raised by virtue of their affirmative defenses or counterclaim.

Defendants PETER CAPONE, PETER CAPONE DEFINED BENEFIT PENSION PLAN AND CHESAPEAKE HILLS GENERAL PARTNERSHIP (the "Capone

Defendants") oppose the instant motion, and cross-move for leave to file an Amended Verified Answer. They seek an order denying the relief sought by plaintiff, or in the alternative, directing the referee to hold all the proceeds of foreclosure in escrow pending a determination of the Capone Defendants' interest in the Property.

The factual allegations underlying the Capone Defendants' opposition and cross-motion are detailed in the proposed Amended Verified Answer [Motion Exh. 1] and the Affidavit of PETER CAPONE, sworn to on October 7, 2009. Essentially, the Capone Defendants claim that they were defrauded of $12 million dollars invested with defendants Goldman, Daniels or their company Goldan LLC ("Goldan") (collectively, the "Goldan Defendants") since late 2001. According to the Capone Defendants, they were led to believe that in exchange for their investments, they would be given ownership or security interests in several real properties held by Goldan, including the Property. These interests were never established by the necessary writings or filings, or were defeated by further encumbrances or transfers. With respect to the Property in particular, the Capone Defendants assert that in March 2008, they gave a loan to Goldman in the amount of $465,000, purportedly upon the security of a first mortgage on the Property. No mortgage was ever delivered or recorded.

To bolster their allegations, the Capone Defendants' refer to several legal proceedings arising out of the fraudulent activities of the Goldan Defendants, including a civil action in Nassau County, Federal and State criminal proceedings (including a federal prosecution in which Goldman pled guilty to wire fraud on June 17, 2003) and an Involuntary Chapter 7 Petition against Goldan (the "Goldan Bankruptcy").

The defense asserted by the Capone Defendants in the instant action rests on the allegation (unsubstantiated, but also undisputed) that Goldan owned 50% of JBSL at all relevant times. The essence of the Capone Defendants' argument is that the activities of JBSL are rendered suspect by virtue of the relationship between JBSL and the Goldan Defendants; particularly, that the acquisition of title to the Property by JBSL and the delivery of the Note and Mortgage to the Bank, are rendered suspect by the possibility that these transactions are part of a fraudulent scheme.

Although the Capone Defendants' allegations of fraud are credible, the defense is fatally flawed. The Note and Mortgage are regular on their face and recorded in the records of the Nassau County Clerk. There are no specific allegations, let alone evidence, of fraud pertaining to these instruments or to the transaction they reflect. The Capone Defendants cannot establish fraud by association or speculation. *See* **CPLR §3016; Morales v. AMS Mortg. Services, Inc.**, 2010 WL 114794.

Further, the Capone Defendants' interest in the Property was created, if at all, in March of 2008, almost two years after the recording of the Note and Mortgage (on July 10, 2006). Pursuant to the Recording Act, the Capone Defendants are charged with notice of the prior Note and Mortgage at the time of their $465,000 loan to the Goldan Defendants. *See* **RPL §291; Andy Associates, Inc. v. Bankers Trust Co.**, 49 N.Y.2d 13. Therefore, they cannot claim reliance upon the promise of a first mortgage.

Contrary to the Capone Defendants' intimations, there is no impediment to the instant foreclosure. The Capone Defendants assert that a Temporary Restraining Order, issued by Order to Show Cause dated December 23, 2008 in one of their New York State civil actions against the Goldan Defendants, remains in effect and prevents each of the Goldan Defendants from transferring any real property in which the Capone Defendants have an interest, including the Property. [*Peter Capone, et al. v. Mark Goldman, et al.*, Nassau County Index No. 022742/08; Cross-Motion Exh. 2, 4] According to the Unified Court's Case Management System, however, that civil action is marked "disposed" and the motion brought on by said Order to Show Cause is marked "withdrawn." Further, the Court cannot see how this Temporary Restraining Order, even if it remained in effect, would apply to the instant action. The Capone Defendants have produced no court order, arising out of the Goldan Bankruptcy or any other proceeding, which stays or precludes the instant foreclosure. Nor have they submitted any authority for the proposition that an automatic stay in the Goldan Bankruptcy would apply to the assets of JBSL, which is neither the bankruptcy debtor nor a party in the bankruptcy proceeding.

The Court finds that the Capone Defendants have not met their burden to raise an issue of fact warranting a trial on plaintiff's foreclosure cause of action. Further, insofar as the proposed defense is devoid of merit, the Capone Defendants are not entitled to amend their answer. *See* **Executive Fliteways, Inc. v. Caballero,** 52 A.D.3d 652.

Although the Capone Defendants' allegations are insufficient to defeat summary judgment, the evidence of fraud on the part of some participants in the loan transactions at issue here is cause for concern. The Court finds that heightened judicial scrutiny is warranted prior to the issuance of an order of reference or judgment of foreclosure and sale. Accordingly, the Court shall make its order granting summary judgment conditional upon the Bank's furnishing additional items of proof as follows: (i) a record of the chain of title and encumbrances upon the Property from the year 2000 to the present; (ii) a record of the funds advanced by the Bank to JBSL pursuant to the Note, including the amounts and dates of each advance; (iii) a record of JBSL's payment history pursuant to the Note, including the amounts and dates of each payment; and (iv) a record and copy of all closing documents pertaining to the transaction or transactions entered into in or about June of 2006 relating to the Property, including the acquisition of the Property by JBSL, and the conveyance of the first note and mortgage, the Note and Mortgage, and the

Guarantees, together with a record of the source and distribution of all funds exchanged or transferred in connection with the transaction(s).

Based upon the foregoing, it is

ORDERED, that plaintiff's motion [Motion Seq. 001] is **granted, conditionally**, in accordance with the above. Plaintiff shall resubmit, on notice to all parties, the proposed Order of Reference, together with the additional proof set forth in the preceding paragraph, within 60 days following entry of this Order; and it is further

ORDERED, that the cross-motion of the Capone Defendants [Motion Seq. 002] is **denied.**

This constitutes the Order of the Court. Plaintiff shall serve a copy of this Order on all parties, and shall furnish proof of such service with any subsequent application.

Dated: 2/26/10

J.S.C.

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE