

**Paradigm Credit Corp. v Pine Vil. Group Corp.**

2010 NY Slip Op 31994(U)

July 8, 2010

Supreme Court, New York County

Docket Number: 603163/2008

Judge: Shirley Werner Kornreich

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

JUSTICE SHIRLEY WERNER KORNREICH

PART 54

PRESENT.  
Index Number : 603163/2008

PARADIGM CREDIT

vs  
PINE VILLAGE GROUP

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/25/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4-9</u>
<u>10-12</u>

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 2/8/10 JUSTICE SHIRLEY WERNER KORNREICH  
  
J.S.C.

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

-----X  
PARADIGM CREDIT CORP., S&C INVESTORS  
LLC, and DENNIS A. HERMAN;

Plaintiffs,

-against-

PINE VILLAGE GROUP CORP., YOUNG SOOK YOO,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, NEW YORK CITY DEPARTMENT OF  
FINANCE, MUN SANG SUK, YEUNG OK SUK, 552 W.  
24<sup>TH</sup> ST. ASSOCIATES, INC., NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
(DEP), 552 W 24<sup>TH</sup> LLC, DANIEL LEE and JOHN DOES  
1-20, the last ten names being fictitious and unknown to  
plaintiff, the persons or parties intended being the tenants,  
occupants, persons or corporations, if any, having or claiming  
an interest in or lien upon the premises described in the  
complaint,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.

**DECISION & ORDER**

Index No.: 603163/2008

In this mortgage foreclosure proceeding, plaintiffs Paradigm Credit Corp. (Paradigm), S&C Investors, LLC (S&C) and Dennis A. Herman (collectively, Plaintiffs) move: pursuant to CPLR 3212, for summary judgment on the first through fifth causes of action; appointment of a referee to compute; to amend the caption to eliminate the fictitiously named defendants; to strike the affirmative defenses of defendants Pine Village Group Corp. (Pine Village) and Daniel Lee (Lee); to strike the affirmative defenses of defendants Mun Sang Suk and Yeung Ok Suk (collectively, the Suks), 552 W. 24th Street Associates, Inc. (552 Associates) and 552 W. 24th Street, LLC (552 LLC) (collectively, Suk defendants); to strike the Suk defendants'

counterclaims; for a deficiency judgment against Lee; and for sanctions against the Suk defendants.<sup>1</sup> The motion to amend the caption is not opposed and is granted.

In the first and second causes of action, Plaintiffs seek to foreclose a mortgage based upon two separate defaults by Pine Village. The third cause of action seeks foreclosure of Plaintiffs' security interest in the personal property and fixtures appurtenant to the mortgaged premises. The fourth cause of action seeks to foreclose Pine Village's assignment of the leases of the tenants of the mortgaged property and an order compelling the tenants to attorn to Plaintiffs. The fifth cause of action seeks a deficiency judgment against Lee.

Pine Village and Lee oppose summary judgment and cross-move: for summary judgment on their cross-claims for indemnification against the Suk defendants; to compel Plaintiffs to provide discovery; and to stay appointment of a referee to compute pending Plaintiffs' disclosure. The Suk defendants oppose both summary judgment motions and cross-move for summary judgment on their cross-claims against Pine Village and Lee.

### *I. Background*

This action seeks foreclosure of a May 20, 2008 mortgage loan in the principal amount of \$6,500,000.00 from Paradigm, as lender, to Pine Village, as borrower, on a commercial property located at 552-554 West 24th Street, New York, New York (Property). The loan was guaranteed personally by Lee. The mortgage note (Consolidated Note) consolidated into a single indebtedness (Consolidated Mortgage) the balances of seventeen (17) prior notes. Consolidated Note, ¶ 3. A corresponding Loan Assumption Agreement (Loan Agreement) refers to 552 Associates as "Prior Owner," the Suks as "Prior Guarantor," and collectively to them as

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<sup>1</sup>The defendants other than Pine Village, Lee and the Suk defendants defaulted in answering the motion.

“Original Borrowers.” The Consolidated Mortgage was recorded on June 5, 2008. As additional security, simultaneously with the Mortgage Agreement, Pine Village granted to Paradigm: 1) a first lien in all fixtures, chattels, equipment and personal property (Chattel Mortgage) appurtenant to the Property, which accorded Paradigm rights as a secured party under UCC, Article 9; and 2) an assignment of leases and rents (Assignment Agreement). Lee personally guaranteed the Chattel Mortgage.

Mr. Suk’s opposing affidavit alleges the following facts concerning the Loan Agreement. Prior to January 2008, the Suks were the sole shareholders of 552 Associates, whose only asset was the Property. Affidavit of Mun Sang Suk (M. Suk Aff.), dated January 20, 2010, ¶ 4. The Suks sought to develop a condominium with Lee, a real estate investor and developer. M. Suk Aff., ¶¶ 5-6. The Suks sold Lee their stock in 552 Associates and, as consideration, Lee promised them \$18,000,000, payable in installments, and the first two floors of the condominium building to be developed. M. Suk Aff., ¶ 7. Lee failed to make the payments and never commenced construction of the condominium. M. Suk Aff., ¶ 12. In April 2008, Lee and a representative of Paradigm approached the Suks with a plan, pursuant to which Paradigm would extend to Lee interim financing to develop the Property. M. Suk Aff., ¶ 14. Although the Suks would have been entitled to \$18,000,000 pursuant to the stock purchase agreement with Lee (M. Suk Aff., ¶ 17), Mr. Suk, as president of 552 Associates, conveyed the Property to Pine Village in return for its assumption of a \$5 million mortgage.

On October 16, 2008, the Suks and 552 Associates commenced an action, entitled *Suk v Lee*, Index No. 018953/2008 in Nassau County (Nassau Action), against Paradigm, S&C, Herman, Pine Village and Lee. On December 5, 2008, the Suks’ and 552 Associates’ claims

against Pine Village and Lee in the Nassau Action were settled (Settlement Agreement). Pursuant to the Settlement Agreement, Lee re-conveyed the Property to the Suks' designee, 552 LLC, for a purchase price of \$5,000,000.00, consisting of the \$9.5 million in mortgages encumbering the Property, less Pine Village's note to the Suks and/or 552 Associates for \$4,500,000. The two mortgages encumbering the Property were Paradigm's Consolidated Mortgage in the amount of \$6,500,000.00 and a collateral mortgage payable to defendant Young Sook Yoo (Yoo) in the amount of \$3,000,000.00 (Yoo Mortgage), the validity of which the Suk defendants disputed. M. Suk Aff., ¶ 18; Settlement Agreement, ¶ 2. In the Settlement Agreement, 552 LLC agreed to take title to the Property subject to the principal and interest due under the Consolidated Mortgage, and agreed to indemnify Pine Village and Lee from any non-default judgment secured by Paradigm for principal and interest referable to the Consolidated Mortgage, but not from the cost of defending the same. Settlement Agreement, ¶ 2.

On June 17, 2009, Hon. Timothy S. Driscoll dismissed the Suks' remaining claims in the Nassau Action, which paralleled their counterclaims in this action, for failure to state a cause of action (Nassau Judgment).<sup>2</sup> By decision and order dated September 24, 2009, this court dismissed, as barred by *res judicata*, the Suk defendants' counterclaims, including fraud, and precluded 552 LLC from asserting the same counterclaims. On April 12, 2010, after submission of these motions, the Suk defendants withdrew of their appeal from the Nassau Judgment. Hence, the Suk defendants are bound conclusively by the Nassau Judgment and their time to appeal from it has expired.

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<sup>2</sup>The Nassau Judgment references agreements, dated May 20, 2008, memorializing the conveyance from 552 Associates to Pine Village, which are not included in the parties' submissions on this motion.

The material facts underlying Plaintiffs' summary judgment motion are undisputed. Pursuant to the May 20, 2008 Loan Agreement, Pine Village gave the Consolidated Mortgage to Paradigm, and Paradigm advanced \$6,500,000.00 to Pine Village. Under the terms of the Loan Agreement, the Suk defendants, Pine Village and Lee released and discharged Paradigm from any and all claims against Paradigm "arising out of or with respect to any and all transactions relating to the Loan, [552 Associates'] Loan documents or the Loan documents occurring on or before [May 20, 2008]...." Loan Agreement, ¶ 5. Plaintiffs submit the affidavit of Stacy G. Rom-Jensen, in-house counsel to Paradigm, which establishes proof of service of the summons and complaint and authenticates the Consolidated Mortgage, the Loan Agreement, the Collateral Mortgage, the Assignment Agreement, and a Mortgage Consolidation, Modification and Extension Agreement (Mortgage Agreement), dated May 20, 2008. Affidavit of Stacy Rom-Jensen, dated January 4, 2010 (Rom-Jensen Aff.). Ms. Rom-Jensen also alleges, without contradiction, Pine Villages' default in payment on August 1, 2008, notice of the default on August 15, 2008 (Notice of Default), acceleration of the indebtedness and Pine Villages' failure to make further payments. *Id.* A failure to make payment within five days after the payment due date constituted an event of default under the Mortgage Agreement. Mortgage Agreement, ¶ D.1(a).

In addition, it is undisputed that Pine Village encumbered the Property with the Yoo Mortgage, on June 3, 2008, without Paradigm's consent, to secure a loan made by Yoo to Roosevelt, an affiliate of Lee. Mortgage Agreement, ¶ D.1(i). The Yoo Mortgage was recorded on October 21, 2008, CRFN # 2008000413973.

## *II. Discussion*

A. *Plaintiffs' Claims against Pine Village and Lee*

On a motion for summary judgment in a mortgage foreclosure proceeding, a *prima facie* case is established by submitting proof of ownership of the mortgage and a default. *Red Tulip LLC v Neiva*, 44 AD3d 204, 209 (1st Dept 2007), citing *LPP Mortgage v Card Corp*, 17 AD3d 103 (1st Dept 2005). In opposition, it is incumbent upon the mortgagor to come forward with evidence of a defense or raise an issue of fact. *Red Tulip, supra*, at 209.

Plaintiffs are entitled to summary judgment on liability on their first and second causes of action against Pine Village and Lee, who guaranteed all of the loan documents. The record establishes Plaintiffs' ownership of the Consolidated Mortgage and Pine Village's default in payment and encumbrance of the Property without Paradigm's permission, all of which is undisputed. Pine Village and Lee have failed to raise a triable issue of fact in defense. Their sole opposition is Plaintiffs' failure to respond to unsigned discovery demands, which were served for the first time as an exhibit to their cross-motion. Spindler Aff., ¶5. Pine Village and Lee assert that the Consolidated Note is based upon seventeen prior underlying notes, which are in Plaintiffs' exclusive possession and concerning which they need discovery. Spindler Aff., ¶¶ 3-4. The first affirmative defense that the second cause of action, relating to the Yoo Mortgage, duplicates the first cause of action, is stricken. Both events of default were established.

Lee and Pine Village cannot forestall summary judgment due to outstanding disclosure because they did not request it before the note of issue was filed, failed to move to strike the note of issue, and have not established that the disclosure sought would aid their defense. Disclosure from parties following the Note of Issue is only available upon a showing that "unusual or unanticipated circumstances" developed after the filing, which is not shown here. 22 NYCRR

202.21(d); *Orr v Yun*, 901 NYS2d 835 (1st Dept 2010); *Newell v Hirsch*, 65 AD3d 1108, 1109 (2nd Dept 2009). Further, the Loan Agreement contains a particularized list of all underlying notes, and a list of the underlying mortgages secured by those notes, including the dates, amounts and contracting parties. Loan Agreement, pp. 15-16. In the Loan Agreement, Pine Village and Lee warranted that they had thoroughly read and reviewed the terms and provisions of the prior owner's loan documents and that they had full power and authority to perform the obligations under the agreement and under the prior owner's loan documents. Loan Agreement, ¶¶ 2(c)(6) and 2(c)(7) (Pine Village); ¶¶ 2(d)(5), 2(d)(6) and 2(d)(7) (Lee). Discovery would be unavailing because Pine Village and Lee are bound by the terms of the Loan Agreement and its underlying notes.

Plaintiffs also are entitled to summary judgment on liability against Pine Village and Lee on their third cause of action to foreclose the Chattel Mortgage. A foreclosure judgment as to real property does not extinguish a security interest in personal property. *Board of Managers of the Horizon Condominium v Glick Development Affiliates*, 276 AD2d 386, 387 (1st Dept 2000); see McKinney's UCC §9-501(4). Personal property may be foreclosed upon as a separate cause of action, in which a secured party has a right to "foreclose...by any available judicial procedure." McKinney's UCC §9-501(1); see *Bank of Tokyo Trust Co v Urban Food Malls Ltd.*, 229 AD2d 14 (1st Dept 1994). Pine Village and Lee's second affirmative defense, alleging that Plaintiffs' third cause of action fails to state a claim, is stricken.

Plaintiffs further are entitled to summary judgment against Pine Village on their fourth cause of action to the extent of permitting enforcement of the Assignment Agreement against Pine Village. Pursuant to the Assignment Agreement, Pine Village granted Paradigm both a

security interest and rights, title and interests as landlord in all leases affecting the Property and all rents due or which become due. Assignment Agreement, ¶ 1. Pine Village retained a license to exercise all the rights of a landlord as long as there was no event of default, but in the event of a default, Paradigm could revoke that right and at its option enforce payment and collection of rents, among other rights. Assignment Agreement, ¶ 3. Contrary to the third affirmative defense, which hereby is stricken, the Assignment Agreement did not create a new or further indebtedness and therefore did not require payment of a recording tax. *Suffolk County Federal Sav and Loan Ass'n v Bragalini*, 5 NY2d 579, 584 (1959); *Albee Fuel Corp v Gallman*, 42 AD2d 323 (3rd Dept 1973). However, an assignment of leases and rents cannot be foreclosed. *Sudarov v Ogle*, 149 Misc2d 906, 908 (App Term, 2d Dept 1991). The Assignment Agreement is a separate security agreement, and Plaintiffs are entitled to have all rents applied to the payment of the deficiency judgment, if any. Assignment Agreement, ¶ 6(d).

Pine Village's and Lee's fourth affirmative defense, that the transfer of title from Pine Village to 552 LLC occurred with the knowledge and consent of Plaintiffs, is stricken. This court already granted Plaintiffs' motion to add 552 LLC as a necessary party. Decision and Order, dated September 24, 2009. Pine Village and Lee's fifth affirmative defense asserting that "the complaint impermissibly split plaintiffs' claim into multiple causes of action" is not a defense to foreclosure in terms of the first through fifth causes of action and is stricken. Pine Village and Lee's sixth affirmative defense, which simply reads "Release" also is stricken as abandoned.

Finally, Plaintiffs' are entitled to summary judgment on liability on the fifth cause of action against Lee for a deficiency judgment. Lee personally guaranteed payment of the

Consolidated Note and all related loan documents.

*B. The Suk Defendants' Opposition to Plaintiffs' Summary Judgment Motion and Plaintiffs' Motion for Sanctions*

The Suk defendants raised three issues in opposition to Plaintiffs' motion for summary judgment: 1) the appeal from the Nassau Judgment was pending; 2) Plaintiffs' refused to modify the Consolidated Mortgage to reflect market value; 3) and Paradigm entered into the Consolidated Mortgage as part of a fraudulent scheme perpetrated in concert with Lee and Pine Village. These defenses are unavailing.

The Suk defendants' withdrew their appeal from the Nassau Judgment, which is *res judicata* as to their counterclaims alleging fraud and which bars all claims that were actually raised or could have been raised. *Thomas v City of New York*, 239 AD2d 180 (1st Dept 1997); *CRK Contracting of Suffolk, Inc. v Brown & Assoc.*, 260 AD2d 530 (2d Dept 1999). The Suk defendants cite *Indymac Bank FSB v Yano-Horoski*, 26 Misc3d 717 (Sup Ct, Suffolk County 2009), for the proposition that the loan should be modified in the exercise of the court's equity jurisdiction. *Thomas* involved foreclosure of a private home. It does not apply to this action to foreclose on a vacant commercial lot.

Plaintiffs' motion for sanctions is denied. Plaintiffs assert that the Suk defendants opposition is frivolous because the court already dismissed their counterclaims. The court does not find that the assertion of claims pending appeal rises to the level of frivolous conduct.

*C. Pine Village's and Lee's Cross-Motion for Summary Judgment against the Suk Defendants*

Pine Village and Lee cross-move for summary judgment on their cross-claim for indemnification against the Suks and 552 LLC. By affirmation of Gail E. Spindler, Pine Village

and Lee allege that, pursuant to the Settlement Agreement, 552 LLC agreed to take title to the Property, subject to all obligations relating to the Consolidated Mortgage, and to indemnify Pine Village and Lee for any non-default judgment secured by Paradigm for principal and interest owed under the Consolidated Mortgage, but not from the cost of defending same. Spindler Aff., ¶ 6; Settlement Agreement, ¶ 2.

The Suk defendants oppose and cross-move for summary judgment dismissing the cross-claim for indemnification by Pine Village and Lee. The Suk defendants contend that, pursuant to the Settlement Agreement, their indemnification of Pine Village and Lee is limited to the principal and interest under the original \$5,000,000 mortgage, not the additional amounts secured by the Consolidated Mortgage. Kretzing Aff., ¶ 12. Also, the Suk defendants assert that indemnification of Pine Village and Lee is premature until entry of a deficiency judgment against Pine Village or Lee.

With respect to the amount of the indemnification, the Settlement Agreement provided that the purchase price of the Property was deemed to be \$5,000,000, consisting of \$9,500,000 in mortgages encumbering the Property, less Pine Village's note to the Suks and/or 552 Associates for \$4,500,000. Settlement Agreement, ¶ 2. The mortgages encumbering the Property were identified as the existing consolidated first mortgage in the originally consolidated principal sum of \$6,500,000 held by the Plaintiffs in this action and the Yoo Mortgage. *Id.* Therefore, the amount is not \$5,000,000 as asserted by the Suk defendants.

However, the court holds that Pine Village and Lee are entitled, under the Settlement Agreement, to summary judgment of indemnification on liability by 552 LLC only for the principal and interest due under the Consolidated Mortgage in the amount of \$6,500,000,

excluding defense costs, minus an offset for the amount due the Suks and/or 552 Associates under Pine Village's \$4,500,000 note and any other payments Pine Village and Lee still owe under the Settlement Agreement. *Loudee Iron & Metal Co., Inc. v D. Alper & Co., Inc.*, 286 AD 707 (1st Dept 1955); *National Surety Co. v Pastor*, 2212 AD 546 (1st Dept 1925). The cross-claim of Pine Village and Lee for indemnification against the Suk defendants, other than 552 LLC, is dismissed with prejudice, based upon the explicit language of the Settlement Agreement indemnification clause.

The court, *sua sponte*, severs the indemnification claim of Pine Village and Lee. CPLR 603. The issues of the amount of the indemnification and the offset to which 552 LLC and/or the Suks are entitled, if any, is referred to a Special Referee to hear and report with recommendations. CPLR 4317. The reference shall be scheduled after the judgment of foreclosure and sale is entered on Plaintiffs' claims.

The remaining contentions of the parties have been considered and have been found to be without merit. Accordingly, it is

ORDERED that the motion to amend the caption to strike the names of "John Does" #1-20 is granted on default and the caption is hereby amended as follows:

PARADIGM CREDIT CORP., S&C INVESTORS  
LLC, and DENNIS A. HERMAN;

Plaintiffs,

-against-

PINE VILLAGE GROUP CORP., YOUNG SOOK YOO,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, NEW YORK CITY DEPARTMENT OF  
FINANCE, MUN SANG SUK, YEUNG OK SUK, 552 W.

24<sup>TH</sup> ST. ASSOCIATES, INC., NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
(DEP), 552 W 24<sup>TH</sup> LLC, DANIEL LEE,

Defendants,

and it is further

ORDERED that Plaintiffs shall submit an order granting summary judgment on the first through fifth causes of action, disposing of the affirmative defenses and counterclaims thereto in accordance with this decision, and appointing a referee to compute; and it is further

ORDERED that the cross-motion of PINE VILLAGE GROUP CORP. and DANIEL LEE for summary judgment on their cross-claim for indemnification against MUN SANG SUK, YEUNG OK SUK and 552 W 24TH LLC is denied as to MUN SANG SUK and YEUNG OK SUK, and is granted on liability as against 552 W 24TH LLC for the principal and interest due under the Consolidated Mortgage in the amount of \$6,500,000, offset by any amounts due to 552 W 24TH LLC and/or MUN SANG SUK and YEUNG OK SUK under the Settlement Agreement, dated December 5, 2008, including but not limited to the \$4,500,000 note of PINE VILLAGE GROUP CORP. to 552 W 24TH LLC and/or MUN SANG SUK and YEUNG OK SUK; the court, *sua sponte*, severs said cross-claim for indemnification, which shall continue as a separate action, and refers it to a Special Referee, to hear and report, the issue of the amount of said indemnification and said offset; and it is further

ORDERED that the cross-motion of PINE VILLAGE GROUP CORP. and DANIEL LEE for disclosure is denied; and it is further

ORDERED that PINE VILLAGE GROUP CORP. and DANIEL LEE shall serve a copy of this order with notice of entry on the Clerks of the Trial Support Office (Room 158M), the

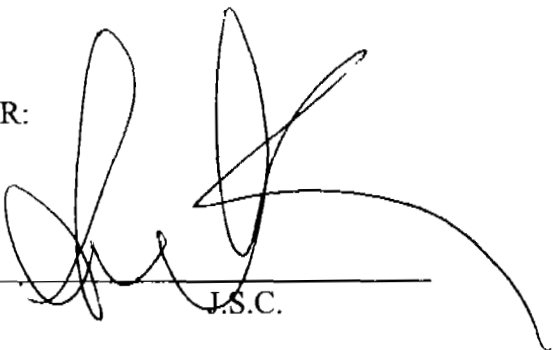
court and the Reference Part (Room 119), and the Clerk of the Reference Part shall arrange and notify the parties of the date for the hearing, which shall be scheduled after the judgment of foreclosure and sale is entered herein, and the Clerks of the court and the Trial Support Office shall note the severance in their records; and it is further

ORDERED that the motion of MUN SANG SUK, YEUNG OK SUK, 552 W 24TH LLC and 552 W. 24TH ST. ASSOCIATES, INC., to dismiss the cross-motion of PINE VILLAGE GROUP CORP. and DANIEL LEE is denied; and it is further

ORDERED that the motion of Plaintiffs, PARADIGM CREDIT CORP., S&C INVESTORS, LLC, and DENNIS A. HERMAN, for imposition of sanctions on MUN SANG SUK, YEUNG OK SUK, 552 W 24TH LLC and 552 W. 24TH ST. ASSOCIATES, INC., is denied.

Dated: July 8, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

JUL 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE