

**Bank of Smithtown v 415 W. 150 LLC**

2011 NY Slip Op 30008(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 117868/09

Judge: Judith J. Gische

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

PRESENT: GISCHE  
*Justice*

PART 10

BANK OF SMITHTOWN  
- v -  
415 WEST 150 LLC

INDEX NO. 117868/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007  
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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

JAN 05 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

*pc set for 2/10/11 @ 9:30*

Dated: 1/3/11

[Signature]  
HON. JUDITH J. GISCHES.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Bank of Smithtown,

Plaintiff,

-against-

415 West 150 LLC, State of New York  
Department of Taxation and Finance,  
David Diamond,  
MJM Construction Services LLC,  
Outerbridge Plumbing Group LLC,  
Magnusson Architecture & Planning PC,  
Ameritrans Capital Corporation and  
John Doe 1 to 25, being persons whose real  
names are unknown who may be tenants  
of the premises described herein, or occupy or may

Defendants.  
-----X

**DECISION/ ORDER**

Index No.: 117868/09

Seq. No.: 001, 002, 007

**PRESENT:**

Hon. Judith J. Gische

J.S.C.

**FILED**

**JAN 05 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
<b>Motion Seq # 001</b>	
Notice of Motion, ACP affd., RS affd., exhibits.....	1
NRS affirm., exhibits.....	2
MW affd., SDS affirm., exhibits.....	3
ACP reply affirm., exhibits.....	4
<b>Motion Seq # 002</b>	
Notice of Motion, ACP affd., exhibits.....	1
JMR affirm., exhibits.....	2
ACP reply affirm., exhibits.....	3
<b>Motion Seq # 007</b>	
OSC, JMR affirm., DD affd., exhibits.....	1
ACP reply affirm.....	2
NRS affirm., exhibits.....	3
JMR Reply affirm., exhibits.....	4

-----X  
*Upon the foregoing papers the decision and order of the Court is as follows:*

There are presently three motions before the court. The first motion (seq # 001) is brought by plaintiff. It is for summary judgment, the appointment of a referee, striking of certain claims and other related relief. The second motion (seq # 002), also brought by plaintiff, seeks the appointment of a temporary receiver. Defendants David Diamond and 415 West 150 LLC (collectively "Diamond defendants") have separately moved (seq # 007) to stay the plaintiff's motions for summary judgment, etc. and the appointment of a receiver; and to allow for the filing of an amended answer. Since the motions have some overlapping issues and interrelated papers, they are consolidated for consideration and determination in this single decision and order.

This is an action to foreclose three separate mortgages, all of which are collateralized by the property located at 415 West 150<sup>th</sup> Street, New York, New York ("property"). The summons and complaint were served. A joint answer was interposed by 415 West 150 LLC and David Diamond. Co-defendant, MJM Construction Services, LLC ("MJM"), interposed a separate answer, with a counterclaim and cross-claims.

Motion to Serve an Amended Answer (seq. # 007)

The Diamond defendants, who retained new counsel, now seek to interpose an amended answer. The original answer denied the material allegations of the complaint. The proposed answer contains affirmative defenses and counterclaims that were not previously plead. It also contains cross-claims against co-defendants MJM Construction Services LLC and Magnusson Architecture & Planning, PC. The Diamond defendants also seek, in the interim, to stay the Court's determination on the motions for summary judgment and a temporary receiver. This motion is opposed by plaintiff and partially

opposed by MJM.

Leave to amend and supplement pleadings should be freely given upon such terms as may be just, as a matter of discretion, and in the absence of prejudice or surprise. CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltrami, 157 AD2d 590 (1<sup>st</sup> dept., 1990). This is true, particularly when the denial of the motion would create a greater prejudice than would granting it. Murray v. City of New York, 43 NY2d 400 (1977). Leave, however, may not be granted where the amended pleading fails to state a cause of action. Stroock & Stroock & Lavan v. Beltrami, *supra*. The party seeking leave to amend is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st Dept 1990).

Because the proposed affirmative defenses and counterclaims lack merit, the court denies the motion to amend and the collateral relief of a stay. The first five affirmative defenses are boilerplate and bear no particular relevance to the case at hand. The arguments that underlie the sixth affirmative defense and two counterclaims are raised by the Diamond defendant in opposition to summary judgment. For the reasons set forth in connection with the discussion on summary judgment, these arguments plainly lack merit.

The cross-claims primarily sound in breach of contract. MJM argues that the cross-claims against them completely lack merit under the actual terms of the parties' construction contract, which it has provided to the Court. The Diamond defendants do not refute this argument, nor do they point to any particular part of the actual contract that supports their cross-claims. The court, therefore, denies leave to amend the

answer to assert cross-claims against MJM.

The cross-claim against Magnusson Architecture & Planning, PC. also sounds in breach of contract. It has no bearing on the underlying action to foreclose the mortgages held by plaintiff. The Court, therefore, denies the Diamond defendants' request for leave to interpose cross-claims in this action.

The motion by the Diamond Defendants to amend their answer to assert affirmative defenses, counterclaim and cross-claims is denied. Since the Court is denying leave to amend the answer, there is no basis to stay determination on plaintiff's motions. The motion for a stay of plaintiff's motions is, therefore, denied.

Summary Judgment on the Complaint for Mortgage Foreclosure (Seq. # 001).

Plaintiff seeks dispositive relief, pursuant to CPLR §§ 3212, 3211(b), 3211(a)1, 6, and 7. It also seeks the appointment of a referee to compute.

Issue has been joined and the Note of Issue has not yet been filed. Summary judgment may, therefore, be considered by the Court. CPLR 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). The motion is separately opposed by the Diamond defendants and MJM.

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact, also through admissible evidence Alvarez v.

Prospect Hosp., 68 N.Y.2d 320, 324 91986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1<sup>st</sup> Dept 2003). On a motion for summary judgment, it is for the court to decide any issues of law that are raised. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003).

In support of its motion for summary judgment, plaintiff has provided the underlying notes and mortgages. It has also provided the sworn statement of Robert Staron, vice president of plaintiff. He asserts that a first mortgage on the property ("first mortgage"), made with 415 West 150 LLC, in the principal amount of \$3,000,000, matured and became fully due and owing on February 24, 2010, but it remains unpaid. He further asserts that a second mortgage on the property ("second mortgage"), made with 415 West 150 LLC, in the principal amount of \$4,638,150, matured and became fully due and owing on February 24, 2010, but remains unpaid. He further asserts that a third mortgage ("third mortgage") on the property, made with 415 West 150 LLC, in the principal amount of \$1,605,286.92 matured and became fully due and owing on February 24, 2010, but it remains unpaid. This is sufficient to establish a *prima facie* case of entitlement to foreclosure. New York State Mortgage Loan Enforcement and Administration Corporation v. North Town Phase II Houses, Inc., 191 AD2d 151 (1<sup>st</sup> Dept. 1993).

In opposition, the Diamond defendants acknowledge that they are technically in default, but argue that the bank engaged in "complicity, negligence, and bad faith" by creating the default. The three loans were made in connection with the purchase of land and to develop a condominium project on the property. The Diamond defendants contend that the loans were not supposed to be paid prior to the developers receiving

proceeds from the sales of the individual condominium units. In addition, an interest reserve fund was set up by the plaintiff with certain loan proceeds, that were used to pay ongoing interest on the loans and other soft costs associated with the project. The Diamond defendants argue that it was plaintiff's decision to stop paying interest from the reserve fund, which triggered the defaults supporting the underlying foreclosure actions. They contend that this "bad faith" by the plaintiff should preclude them from foreclosing on the mortgages.

Plaintiff claims that its obligation to pay loan interest with loan proceeds was contingent upon the mortgagor not otherwise being in default under the mortgages. It argues, however, that because the mortgagor permitted the filing of four mechanics liens against the property, plaintiff no longer had an obligation under the terms of the parties' agreements to continue to make payments from the reserve fund. Thus, plaintiff argues, that it did not trigger any default. In any event, it claims, the failure to pay principal on each of the mortgages is the basis for the foreclosure.

The Diamond defendants implicitly acknowledge that plaintiff's obligation to pay interest from the reserve fund was contingent upon 415 West 150 LLC not otherwise being in default on the mortgages, by arguing that the underlying defaults were either waived and/or orally modified. They also argue that promissory estoppel prevents the plaintiff from proceeding to foreclose on its mortgages even though it has not paid the principal that has come due.

At the outset, the court holds that reason why foreclosure is appropriate in this case is that the loans all matured and, under their express terms, the principal was due and owing. The failure of 415 West LLC to pay the principal due under the mortgages

was not a technical default and it was not triggered by any actions by the plaintiff. The failure to pay principal when due under the mortgages in this case carried with it the right to foreclose on the collateral. Thus, the Diamond defendants' arguments about whether plaintiff should have paid interest from the reserve fund is a red herring. Regardless of whether interest was paid, the loans were in default for failure to pay principal and foreclosure is an appropriate remedy available to plaintiff..

The court rejects the Diamond defendants' defense of "promissory estoppel" which they argue is based upon the Court of Appeals decision in Nassau Trust Co. v. Montrose (56 NY2d 175 [1982]). Nassau Trust Co., supra, concerned a claim of a waiver of a default by a bank, based on promises explicitly made after the default occurred. It is a narrowly applied doctrine. See: Export-Import Bank of US v. Asia Pulp & Paper Co., Ltd., 2008 WL 465169 (SDNY 2008); Security Pacific Mortg. and Real Estate Services, Inc. v. Canadian Land of America, NV, 690 F Supp 1214 (SDNY 1988). The facts claimed by the Diamond defendants are inapposite. At bar, the Diamond defendants generally claim "Bradley Rock Jr., our loan officer, in particular, made these explicit acknowledgments to [Martin Weise] and agreed to wait until the sale of the units for the Bank to get repaid." (Weise affidavit 4/23/10, ¶14). These statements, even if true, do not amount to a waiver of the payment of the principal due under the actual terms of the loan<sup>1</sup>. In the first place, Mr. Weise does not expressly state that these statements were made to him after the loans finally matured. Extensions of the original maturity date were negotiated and incorporated into

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<sup>1</sup>Mr. Rock has submitted an affidavit denying that he made the statements attributed to him.

contracts. There were no similar extensions of the final maturity date.

Moreover, the statements are otherwise consistent with the parties' overall agreement that the plaintiff would finance the project under an expectation that if the project is successful, the sale of the units would provide the source of funds for the mortgagor to meet its commitments. There is no indication that the plaintiff intended to be a partner in the project, with payment on the loans occurring only if the developers were successful in selling the condominium units.

The Diamond defendants' other claims of waiver are even more attenuated. Under the terms of the mortgage documents, the mortgagor was required to pay \$1,200,000 into the project at its inception. It is also undisputed that the mortgagor was required to retain a certain percentage of funds on hand to cover project costs. Even assuming that the plaintiff did not insist upon compliance with certain conditions of the mortgage (which is disputed by plaintiff), it would be an untenable leap to conclude that the mortgagor was, as a result, absolved of paying the loan principal when it came due. This argument lacks credulity as a matter of law.

The Diamond defendants' claim that the economic climate changed while the project was underway and that there were change orders, requiring more capital to complete the project. While these facts may explain the default, they do not constitute a defense to it.

As related relief in the motion for summary judgment, plaintiff seeks to "strike" MJM's answer with counterclaim and cross-claims because: MJM's mechanics lien does not have priority over plaintiff's mortgages and MJM's cross-claims are unrelated to plaintiff's complaint. The first four cross-claims are asserted against 415 West 150

LLC and all concern allegations that MJM did work on the project, but was not paid for it. The counterclaim is to foreclose a mechanic's lien on the property. The mechanic's lien was filed based upon MJM's claims that it was not paid for the work it did on the property.

MJM has a right to foreclose its mechanics lien, notwithstanding any issues about who has priority in the collateral. It would have a right to share in the surplus, if there be any, following any foreclosure sale. There is no basis for the severing the counterclaim to foreclose the mechanics lien from the action in chief to foreclose the mortgages, since both foreclosures will result in the sale of the property and the property can only be sold once. MJM's counterclaim, however, does not otherwise impact the court's award of summary judgment on plaintiff's causes of action to foreclose its mortgages with 415 West 150<sup>th</sup> LLC and compel a sale of the collateral. See: Valley National Bank of Long Island v. Levy, 45 AD2d 771 (2<sup>nd</sup> dept. 1974).

Plaintiff and MJM raise the issue about which of their claims have priority to the collateral. Since issue has not been joined on MJM's counterclaim, consideration of this issue is made under CPLR § 3211. Plaintiff has provided copies of the mortgages, notes and proof of recording. The documentary evidence shows that each of the three mortgages were recorded on September 19, 2007. The documentary evidence also shows that MJM's mechanic's lien was not filed until November 4, 2009. In general, where a mortgage is recorded prior in time, it has priority, even over a mechanic's lien, provided certain conditions are met. Lien Law §13. MJM argues in opposition that it still has viable claims that plaintiff failed to comply with lien law §22 on the second and third mortgages. Lien Law §22 requires that a building loan contract be filed on or

before the date of recording the building loan mortgage. At bar, the building loan agreement associated with the second mortgage was filed with the New York County Clerk on September 4, 2007 as index# 317, control #002310157-01. The last advance on this loan was made July 21, 2009, before MJM filed its mechanic's lien. The third mortgage is a project loan mortgage, which by its terms was not used for "costs of improvement," but instead used to cover other costs, such as ongoing interest on the other mortgages. Lien Law §2.5. Thus, Lien Law §22 does not apply.

The documents, consisting of the note, mortgage agreements and proof of recording are documentary evidence that definitively dispose of MJM's claim of priority, Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> dept. 1995), but do not otherwise affect MJM's right to otherwise foreclose on the lien.

For the reasons already stated in this decision, MJM's arguments in opposition to the motion, that piggyback on the Diamond defendant's defenses are rejected.

The cross-claims arise out of MJM's disputes with 415 West 150 LLC. They do not impact the plaintiff's right to foreclose its mortgages. They do impact on the amount that may be recovered by way of foreclosure of the mechanics lien. Therefore, they should not be stricken or dismissed.

Plaintiff's primary concern is that by allowing the cross-claims to proceed, its right to foreclose will be delayed. The sale, however, can go forward. Moreover, since plaintiffs have priority to the collateral, the cross-claims will not delay plaintiff's right of recovery against the collateral.

The next item of relief requested is the appointment of referee. A preliminary procedural issue needs to be addressed. Plaintiff seeks to strike the answers of the

defendants who have appeared, so that it can have this Court appoint a referee to compute pursuant to RPAPL §1321. While the Court has granted plaintiff summary judgment, there is no basis to strike the answers, which in any event are the procedural predicate for the granting of summary judgment. A reference can still be made; however, that reference should be made under CPLR article 40. See: Mortgage Electronic Registration Systems, Inc. v. Maki, 9 Misc.3d 986 (NY Sup. 2005, Sen Co.). To the extent that MJM argues that appointment of a referee is premature because no note of issue has been filed, it is rejected. The issues to be considered by the referee arise by virtue of plaintiff's motion for summary judgment, and therefore plaintiff's failure to file a note of issue before requesting a referee is not an impediment to the appointment of a referee. CPLR §4015.

Plaintiffs are entitled to summary judgment on their causes of action to foreclose the three mortgages and the matter is referred to a special referee to hold a hearing and report back to the court a computation of the amounts due plaintiff and to examine and report whether the mortgaged premises can be sold in parcels. Since the reference is made under the CPLR and not the RPAPL, the referee should make its report only after holding a hearing. CPLR§ 4301 et. seq.

#### Appointment of Receiver

Plaintiff seeks the appointment of a temporary receiver, pending conclusion of the foreclosure sale.

CPLR § 6401 (a) states, as follows:

"Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of the

summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. . . .”

Primarily, temporary receivers serve to avoid the dissipation of assets and conserve property. See Chaline Estates Inc. v. Furcraft Associates, 278 AD2d 141 (1<sup>st</sup> dept. 2001). There must be clear and convincing evidence of the danger of irreparable loss or damage. McBrien v. Murphy, 156 A.D.2d 140 (1st Dept. 1989). The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property and is to be granted only where the applicant makes a clear evidentiary showing of necessity and there is clear proof of danger of irreparable loss or damage. See In Re Armienti, 309 A.D.2d 659 (1st Dept. 2003); Schachner v. Sikowitz, 94 A.D.2d 709 (2d Dept. 1983); Groh v. Halloran, 86 A.D.2d 30 (1st Dept. 1982). Appointment of a receiver may be denied where the property is sufficient security for the debt and the property is not in danger. Eastbank N.A. v. Malneut Realty Corp., 180 A.D.2d 442 (1st Dept. 1992).

A mortgage provision which provides for the ex parte appointment of a receiver upon default is valid and binding on the parties. RPL §254.10. The court, however, still maintains discretion over such appointment. Naar v. I.J. Litwak & Co., 260 AD2d 613 (2<sup>nd</sup> dept. 1999); Clinton Capital Corp. v. One Tiffany Place Developers, Inc., 112 AD2d 911 (2<sup>nd</sup> dept. 1985).

The motion for a receiver is denied at this time without prejudice to renew. There is simply no showing on plaintiff's motion that, without the appointment of a receiver, the asset will be dissipated. The Diamond defendants argue that there are no

outstanding violation on the property and the property is not otherwise at risk. Plaintiff provides not information to the contrary.

It is unclear whether this is currently a productive piece of property, including whether it is producing any income at this time. Plaintiff speculates that the property produces \$9,750 a month, but this is a development project and it is unclear from what source this speculated income is derived. It is unclear what expenses must be paid on an ongoing basis and whether there is income sufficient for any receiver appointed to pay the expenses. Plaintiff has not offered to pay ongoing expenses on the collateral and/or the cost of a receiver pending sale.<sup>2</sup>

The court understands that the circumstances of the property may change over time. Therefore, the motion for the appointment of a temporary receiver is denied without prejudice to renew.

### **Conclusion**

In accordance herewith it is hereby:

ORDERED that , and it is further

ORDERED that plaintiff's motion for summary judgment (Seq. # 001) is granted on the complaint, and it is further

ORDERED that plaintiff's motion for the appointment of a referee (Seq. #001 is

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<sup>2</sup>Where the monies available from the building are insufficient to meet the expenses, a plaintiff cannot be compelled to advance the necessary funds. Litho Fund Equities, Inc. v. Alley Spring Apartment Corp., 94 AD2d 13 (1<sup>st</sup> dept. 1983); East Chatham Corp. v. Iacovone, 25 AD2d 622 (1<sup>st</sup> dept. 1966). While CPLR § 8004(b) permits a Court to order, at the end of the receivership, that the party who sought the appointment in the first place pay the receiver's commissions under certain circumstances (Sun Beam Enterprises, Inc. v. Liza Realty Corp., 210 AD2d 153 [1<sup>st</sup> dept. 1994]), there is no authority to pay ongoing expenses..

granted to the extent that Miriam Marcia Breier with offices at 156 5<sup>th</sup> Avenue, Ste 600, New York, New York, (212 791 3900) is hereby appointed as special referee to hold a hearing and report back to the court on the computation of the amounts due plaintiff and to examine and report whether the mortgaged premises can be sold in parcels and it is further

ORDERED that plaintiff's motion to strike MJM Construction Services LLC's answer (Seq. # 001) is denied, and it is further

ORDERED that plaintiff's motion for a temporary receiver (Seq. # 002) is denied without prejudice to renew, and it is further

ORDERED that the motion by 415 West 150 LLC and David Diamond to amend their answer and stay plaintiff's motion (Seq. #007) is denied in all respects, and it is further

ORDERED that answers to MJM Construction Services LLC's counterclaims and cross-claims are due within 20 days of the date of this decision and it is further

ORDERED that a preliminary conference is set for **February 10, 2011 at 9:30 am** in Part 10, 60 Centre Street, Room 232 and it is further

ORDERED that any requested relief not otherwise expressly granted is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY  
January 3, 2011

**FILED**

**JAN 05 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED:

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

