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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. STEVEN M. JAEGER,**
Acting Supreme Court Justice

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| MARATHON NATIONAL BANK OF NEW YORK,<br><br>Plaintiff,<br><br>-against-<br><br>GREENVALE FINANCIAL CENTER, INC., ANNETTE APERGIS, PETER ZAPHIRIS, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA, GREENVALE FINANCIAL CENTER INC., IVY TESTTAKERS REVIEW, INC., R. GREENSPAN INTERNATIONAL INC., AND "JOHN DOE" #1 THROUGH "JOHN DOE" #20, THE NAMES OF THE LAST 20 DEFENDANTS BEING UNKNOWN, THE PARTIES INTENDED BEING TENANTS OR PERSONS IN POSSESSION OF THE PREMISES DESCRIBED HEREIN OR HAVING AN INTEREST OR LIEN UPON THE PREMISES, DESCRIBED IN THE COMPLAINT,<br><br>Defendants. | TRIAL/IAS, PART 43<br>NASSAU COUNTY<br>INDEX NO.: 09-021794<br><br>MOTION SUBMISSION DATE: 3-9-11<br><br>MOTION SEQUENCE NO. 3 |

The following papers read on this motion:

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| Notice of Motion, Affirmation, Affidavit, and Exhibits | X |
| Affirmation in Opposition and Exhibit | X |
| Affirmation in Reply | X |

Plaintiff moves for an Order: (1) granting summary judgment pursuant to CPLR §3212 against Defendants, Greenvale Financial Center, Inc., a Delaware corporation (hereinafter "Greenvale Del") and Annette Apergis (hereinafter "Apergis"); (2) directing that Plaintiff shall recover from Apergis the deficiency amount in accordance with

RPAPL §1371; (3) granting a default judgment pursuant to CPLR §3215 against Defendants, Peter Zaphiris (hereinafter "Zaphiris"), People of the State of New York (hereinafter "New York"), United States of America (hereinafter "United States"), Greenvale Financial Center, Inc. a New York limited liability company (hereinafter "Greenvale NY"), Ivy Testtakers Review, Inc. (hereinafter "Ivy"), R. Greenspan International, Inc. (hereinafter "Greenspan"), Recal Associates, Ltd. (hereinafter "Recal"), G. Marshall Communications, Inc. (hereinafter " Marshall"), LCK Services Corp. (hereinafter "LCK"), Reichenbach & Associates, Inc. (hereinafter "Reichenbach"), Richard Martin Gordon (hereinafter "Gordon"), United Signatures, Ltd. (hereinafter "United"), RMG Financial Group, Inc. (hereinafter "RMG"), Aurora Capital (hereinafter "Aurora"), and Titan Realty & Construction, LLC (hereinafter "Titan"); (4) appointing a Referee to compute the sum due Plaintiff; (5) substituting Recal in place and stead of John Doe #1, substituting Marshall in place and stead of John Doe #2, substituting LCK in place and stead of John Doe #3, substituting Reichenbach in place and stead of John Doe #4, substituting Gordon in place and stead of John Doe #5, substituting United in place and stead of John Doe #6, substituting RMG in place and stead of John Doe #7, substituting Aurora in place and in stead of John Doe #8, and substituting Titan in place and stead of John Doe #11; (6) amending the caption to reflect all substitutions; and (7) amending the caption to strike and remove therefrom the names of "John Doe Nos. 9, 10 and 12 through 20". Defendants Greenvale Del and Apergis oppose the summary judgment portion of the motion.

Plaintiff's motion is granted in its entirety.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissable form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974).

Plaintiff has met its initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law. The affidavit of Christian Dahl, a vice president of Plaintiff, sufficiently establishes that Plaintiff is entitled to foreclose on both the first and second commercial mortgage loans that are the subject of the instant action.

In opposition, Greenvale Del and Apergis contend by an affirmation of counsel only that Plaintiff lacks standing, the amendment to the mortgage was not signed by

Plaintiff, and Plaintiff did not permit Defendants to enter into an agreement that would have permitted the selling of rights to put a cell tower on the subject premises. None of these allegations by counsel raise a triable issue of fact to defeat the granting of summary judgment.

Defendants allege that Plaintiff lacks standing because the mortgage and security agreement dated April 15, 2002 is with Interbank of New York and not with Plaintiff, and that there was never an assignment of the mortgage from Interbank of New York to Plaintiff. However, as Interbank of New York was merged into Plaintiff, pursuant to CPLR §602, the receiving bank is to be considered the same entity as the bank merged with and all property, rights, and powers of the merged bank vests in the receiving bank. As such, an assignment of the mortgage is not required. See *Landino v. Bank of America*, 52 AD3d 571 (2d Dept. 2008). Plaintiff has submitted sufficient evidence to establish that Interbank of New York merged with Plaintiff, including the January 23, 2004 merger approval letter from the Comptroller of the Currency.

The amendment and modification of the mortgage executed in February 2009 was not signed by Plaintiff. However, the amendment and modification was limited to a short period of time to benefit Defendants by allowing Defendants to only pay interest for the designated time period. Although Plaintiff did not sign the amendment and modification, Plaintiff honored the agreement. Additionally, the amendment and modification does not impact the amount of principal allegedly owed, and therefore does not create an issue as to whether Defendants defaulted.

Finally, Defendants allege that Plaintiff should not be entitled to summary judgment because Plaintiff did not permit Defendants to enter into a non-disturbance agreement that would have allowed Defendants to enter into a cell phone tower rooftop lease in exchange for a payment of $527,009. Notwithstanding the fact that Plaintiff was not obligated to enter into such an agreement, even if Plaintiff had permitted it the payment would have represented only a fraction of the sum allegedly owed by Defendants. As such, the default would not have been cured.

A review of the documentation presented reveals that all necessary parties have been served with notice of this application, and further, that the relief requested is appropriate.

Accordingly, it is hereby

ORDERED, that the portion of Plaintiff's motion seeking summary judgment against Greenvale Del and Apergis is granted; and it is further

ORDERED, that the portion of Plaintiff's motion seeking recovery from Apergis of the deficiency amount in accordance with the requirements of RPAPL §1371, is granted; and it is further

ORDERED, that the portion of Plaintiff's motion seeking default judgment against the remaining Defendants, is granted; and it is further

ORDERED, that the portion of Plaintiff's motion seeking the appointment of Referee to compute the total amount due, is granted; and it is further

ORDERED, that the portion of Plaintiff's motion seeking substitution of "John Doe" through "John Doe No. 8" and "John Doe No. 11" by the entities as

aforementioned, and amending the caption to reflect same, is granted, and it is further

ORDERED, that the portion of Plaintiff's motion seeking to amend the caption to strike and remove the names of "John Doe Nos. 9, 10, and 12 through 20", is granted; and it is further

ORDERED, that the Clerk of the Court is directed to amend the caption consistent with this decision; and it is further

ORDERED, that Plaintiff shall submit, on notice, a proposed Order of Reference for the appointment of a Referee to Compute and all other relief granted herein.

This constitutes the Decision and Order of the Court.

Dated: May 3, 2011

STEVEN M. JAEGER, A.J.S.C.

ENTERED

MAY 06 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE