

Lehman Bros. Holdings, Inc. v 25 Broad, LLC

2011 NY Slip Op 31931(U)

June 13, 2011

Sup Ct, NY County

Docket Number: 100886/2009

Judge: Emily Jane Goodman

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SCANNED ON 6/17/2011

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 100886/2009
LEHMAN BROTHERS HOLDINGS
VS.
25 BROAD, LLC
SEQUENCE NUMBER : 011
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 *by Plaintiff and*
CWS motions are deleted per attached

FILED

JUN 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/13/11



EMILY JANE GOODMAN J.S.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: IAS PART 17

-----X
LEHMAN BROTHERS HOLDINGS, INC.,

Plaintiff,

Index. No.
100886/2009

- against-

25 BROAD, LLC, KENT M. SWIG, MARJAM SUPPLY CO.,
INC., STERLING GROUP, ALPHA INTERIORS INC.,
PINNACLE CONTRACTORS OF NY, INC., SHEHADI
COMMERCIAL CARPET & FLOORING, EUROPEAN
CONTRACTING GROUP LLC, SEASONS INDUSTRIAL
CONTRACTING CORP., SCOUT MECHANICAL, LLC,
OLYMPIA PLUMBING & HEATING CORP., SITE
SAFETY LLC, ENVIRONMENTAL CONSULTING &
MANAGEMENT SERVICES, INC., AMENDOLA MARBLE &
STONE CENTER, INC., P.C. RICHARD & SON LONG ISLAND
CORP., JD SCAFFOLD INC., COMMERCIAL
FLOORING SPECIALIST, LTD. A/K/A COMMERCIAL
FLOORING SPECIALISTS, LTD., ALMAR SHEETMETAL
INC., INFINITY PAINTING CO. INC., SILK AIR
CORPORATION, TRADESOURCE INC., MELE
CONTRACTING MANAGEMENT INC., FINE
CONSTRUCTION SPECIALTIES LLC, NOVA
DEVELOPMENT GROUP INC, STADIUM MARBLE & TILE,
INC., LIPPOLIS ELECTRIC, INC., BENCHMARK
FURNITURE MANUFACTURING INC., ENVIRONMENTAL
CONTROL BOARD OF THE CITY OF NEW YORK, NEW
YORK STATE DEPARTMENT OF TAXATION & FINANCE, "JOHN
DOE 1-50", "MARY ROE 1-50," "XYZ CORP. 1-50" AND
"ABC, LLC 1-50"

FILED

JUN 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

The names of the "John Doe 1-50" "MARY ROE 1-60,"
"XYZ CORP. 1-50" and "ABC, LLC 1-50"
Defendants being fictitious and unknown to the
Plaintiff, the persons and the entities being parties
having an interest in or lien against the
premises sought to be foreclosed herein,
as owner, tenant, licensee, occupant or
otherwise.

Defendants.

-----X

EMILY JANE GOODMAN, JSC.:

Plaintiff Lehman Brothers Holdings, Inc. moves for an order, as mortgagee, pursuant to CPLR 3212, granting it summary judgment against defendant mortgagor/owner 25 Broad, LLC (25 Broad), giving plaintiff the right to foreclose on the mortgaged premises. Plaintiff seeks attorneys' fees in relation to this action.

Plaintiff also moves for an order, pursuant to CPLR 3212, granting summary judgment against the defendants defined below as the Non-Challenging Lienors, declaring, pursuant to Real Property Law § 291, that the liens of the Non-Challenging Lienors are junior to plaintiff's mortgage liens, and dismissing the affirmative defenses of these defendants with respect to the foreclosure.

With respect to the Challenging Lienors, as defined below, plaintiff moves for an order, pursuant to CPLR 3212 (e), granting it partial summary judgment declaring, pursuant to Real Property Law § 291, that the Senior Mortgage has priority over the liens of the Challenging Lienors. Plaintiff seeks to sever the remaining claims, cross claims and counterclaims of the Challenging Lienors, and also seeks to dismiss the affirmative defenses of such defendants which challenge the validity of the priority of the Senior Mortgage.

Plaintiff moves, pursuant to CPLR 3215 (a), for a default

judgment against defendants Stadium Marble & Tile, Inc. (Stadium), Environmental Control Board of The City of New York (ECB), and New York State Department of Taxation & Finance (New York State).

Plaintiff requests a referee to ascertain and compute the amount due to plaintiff under the various mortgage documents, and to report on whether the mortgaged premises can be sold in one or more parcels.

Plaintiff seeks to have the caption amended to delete defendants John Doe 1-50, Mary Roe 1-50, XYZ Corp. 1-50 and ABC, LLC 1-50 from the caption.

Seasons Industrial Contracting Corp. (Seasons) cross-moves, pursuant to CPLR 3212 (e), for an order granting partial summary judgment in Seasons' favor on its first counterclaim, and declaring that Seasons' mechanic's lien has priority over plaintiff's mortgages.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff/Lender is seeking to foreclose on three commercial mortgages made in connection with three commercial loans secured by liens on real property located at 25 Broad Street in New York (property). 25 Broad is the mortgagor and owner of the property. Kent M. Swig (Swig) is joined as the guarantor of the loans.

Senior Mortgage:

On March 9, 2007, plaintiff entered into a commercial loan

transaction (Senior Loan) with 25 Broad and Swig in which 25 Broad borrowed and agreed to repay the principal sum of \$231,677,693.00. Amended Complaint, ¶ 38. A loan agreement and a restated promissory note were signed which set forth the terms and conditions of the loan. Plaintiff states, the "Senior Loan was fully advanced on March 9, 2007 for the purpose of re-financing the acquisition costs of the Mortgaged Property." Slama Affirmation, ¶ 6. The amended and restated loan agreement "amends and restates the original senior loan mortgage which was executed between plaintiff and 25 Broad Street on August 23, 2005 in the amount of \$231,677,693.00." Plaintiff's Exhibit A, at 5. The promissory note is a consolidation of the previous promissory notes secured by previous mortgages. These mortgages include the following:

A) Mortgage in the original principal amount of \$7,000,000 made by 25 Broad Street Realty Corp. to Home Savings Bank, FSB dated 5/30/96 and recorded 6/19/96

B) Mortgage in the original principal amount of \$3,865,400 made by Broad Street LLC to The Union Labor Life Insurance Company dated 8/14/96 and recorded 8/20/96

C) Building Loan Mortgage, Security Agreement and Financing Statement in the original principal amount of \$42,134,600 made by Broad Street LLC to The Union Labor Life Insurance Company dated 8/14/96 and recorded 8/20/96

1. Said mortgage C was assigned by The Union Labor Life Insurance Company to Credit Suisse First Boston Mortgage Capital LLC by Assignment of Mortgage dated 12/23/97 and recorded 6/19/98

D) Replacement Mortgage (A) in the original principal

amount of \$6,000,000 made by 21 West LLC to Chase Federal Bank, FSB dated 7/12/96 and recorded 9/6/96 ...

E) Replacement Mortgage (B) in the original principal amount of \$9,000,000 made by 21 West LLC to Chase Federal Bank, FSB dated 7/12/96 and recorded 9/6/96 ...

F) Mortgage in the original principal amount of \$7,000,000 made by Broad Street LLC to Credit Suisse First Boston Mortgage Capital LLC dated 12/23/97 and recorded 6/19/98 ...

G) Mortgage in the original principal amount of \$161,627,157.82 made by 25 Broad, LLC to Lehman Brothers Holdings Inc. dated 8/23/2005 and recorded 9/30/05 ...

1. Said mortgages A through G were consolidated to form a single lien of \$231,677,693 by Consolidation and Extension Agreement made between 25 Broad, LLC and Lehman Brothers Holdings Inc. dated 8/23/2005 and recorded 9/23/2005 ...

Amended Complaint, Schedule 1, at 50-53.

In connection with the other Senior Loan documents, 25 Broad signed and returned to plaintiff a mortgage and related documents (Senior Mortgage) in the same principal amount of \$231,677,693.00. The Senior Mortgage is a consolidation of the previous mortgages as set forth in Schedule 1 above.

On March 20, 2007, the Senior Mortgage was recorded in the Office of the City Register of the City of New York.

According to the terms of the loan agreement, the "[b]orrower shall use the proceeds of the Senior Loan to refinance the existing financing encumbering the Property (and for no other purpose)." Plaintiff's Exhibit A, at 24. Plaintiff

states that the Senior Mortgage constitutes a first priority lien demonstrating indebtedness under the Senior Loan.

Building Mortgage:

On March 9, 2007, 25 Broad and Swig executed a commercial building loan transaction (Building Loan) by which 25 Broad borrowed and agreed to repay plaintiff \$19,633,826.00, plus interest. A Building Loan Agreement, explaining the terms of the Building Loan, was signed and filed on March 22, 2007 with the New York County Clerk Records Office. According to the Building Loan Agreement, in pertinent part:

Borrower shall use the proceeds of the Building Loan to pay or reimburse itself for Hard Costs actually incurred in connection with the construction and renovation of the Project Improvements if and to the extent that such Building Loan Costs are reflected in the Building Loan Budget, subject to reallocation pursuant to this Agreement"

Plaintiff's Exhibit F, at 35.

Along with the Building Loan, plaintiff filed a notice of lending on March 13, 2007 with the New York County Clerk's Office. The notice of lending set forth the maximum amount allowed for improvement of the property as \$19,633,826.00, and also identified \$8,991,379.60 of the Building Loan as being advanced prior to March 9, 2007. Plaintiff's Exhibit I, at 1.

Along with the Building Loan Agreement and the promissory note, 25 Broad, as mortgagor, executed and delivered to plaintiff a Building Mortgage in the amount of \$19,633,826.00. The

Building Mortgage consolidates, amends and restates the original principal amount of \$19,633,826.00 which was lent to 25 Broad from plaintiff on August 23, 2005. Amended Complaint, ¶ 60. The original building loan was recorded on September 30, 2005 in the Office of the City Register of the City of New York.

The Building Mortgage, along with accompanying documents, was filed with the Office of the City Register of the City of New York on March 20, 2007. Plaintiff labels the Building Mortgage as a second priority lien demonstrating the indebtedness due under the Building Loan Agreement. Amended Complaint, ¶ 61.

Project Mortgage:

Also on March 9, 2007, plaintiff entered into a commercial project loan transaction (Project Loan) with 25 Broad and Swig in which 25 Broad borrowed and agreed to repay the principal sum of \$26,658,481.00. Amended Complaint, ¶ 71. A loan agreement and a restated promissory note were signed which set forth the terms and conditions of the loan. The promissory note consolidates, amends, and restates the original amount of \$26,658,481.00 made by plaintiff to 25 Broad in August 23, 2005 and recorded on September 30, 2005 with the Office of the City Register of the City of New York. *Id.*, ¶ 74.

Along with the Project Loan Agreement and the promissory note, 25 Broad, as mortgagor, executed and delivered to plaintiff a Project Mortgage in the amount of \$26,658,481.00. The Project

Mortgage consolidates, amends and restates the original principal amount of \$26,658,481.00 which was lent to 25 Broad from plaintiff on August 23, 2005, and recorded on September 30, 2005 with the Office of the City Register of the City of New York. Id., ¶ 77. The Project Mortgage, along with its accompanying documents, was recorded on March 20, 2007 with the Office of the City Register of the City of New York.

Plaintiff states that the Project Mortgage is a third priority lien which demonstrates the indebtedness under the Project Loan.

25 Broad defaulted on the terms of the various loan documents, and owes plaintiff at least \$270,000,000.00.

On November 25, 2009, plaintiff filed a summons and complaint seeking to foreclose on the three commercial mortgages made in connection with the three commercial loans, along with other related relief.

Mechanic's Lienors

Various contractors and subcontractors provided labor, material and/or equipment for construction on the property, and were not paid in full for their services. They filed mechanic's liens with the New York County Clerk in 2008 and 2009. These mechanic's lienors were named as parties in the above action. Some of the lienors served notices of appearance and/or challenged the lien priority of plaintiff's mortgages. Fine

Construction Specialties, LLC settled with plaintiff. A default judgment was issued October 30, 2009 against Site Safety, LLC, Almar Sheetmetal Inc., Infinity Package Co. Inc., Silk Air Corporation, and Tradesource, Inc. but that judgment did not prohibit said defendants from claiming a share of any surplus proceeds.

In response to plaintiff's motion, 10 mechanic's lienors have submitted opposition papers. These include: Seasons, Amendola Marble & Stone Center, Inc. (Amendola), Alpha Interiors, Inc., Commercial Flooring Specialists, Ltd. (Commercial), Pinnacle Contractors of NY, Inc., European Contracting Group, LLC, Olympia Plumbing & Heating Corp., Benchmark Furniture Manufacturing Inc., Lippolis Electric, Inc. (Lippolis), Mele Contracting Management, Inc. (collectively, Challenging Lienors).¹

Seasons cross-moves, pursuant to CPLR 3212 (e), for an order granting partial summary judgment in Seasons' favor on its first counterclaim, and declaring that Seasons' mechanic's lien has priority over plaintiff's mortgages. Seasons' counterclaim seeks to enforce its lien in the amount of \$1,489,990.50, plus interest. Amendola is represented by the same counsel and joins in Seasons' motion.

¹ Although plaintiff claims that Amendola did not raise any challenge to the priority of plaintiff's mortgages in its answer, the record indicates that Amendola's answer did submit a challenge to plaintiff's priority.

All of the other Challenging Lienors except for Commercial, state in their opposition papers that they join in the opposition to plaintiff's motion for summary judgment submitted by Seasons and Amendola.

The Non-Challenging Lienors include the following: Marjam Supply Co., Inc., Sterling Group, Shehadi Commercial Carpet & Flooring, Scout Mechanical, LLC, Environmental Consulting & Management Services, Inc., P.C. Richard & Son Long Island Corp., JD Scaffold Inc., and Nova Development Group, Inc.

Plaintiff argues that its Senior Mortgage has priority over all of the other mechanic's liens since it was filed on March 20, 2007, which is prior to any of the other liens being filed. Plaintiff explicitly states that the Senior Mortgage is the only mortgage upon which it seeks to foreclose by way of this motion for partial summary judgment, and requests that the court not decide the issue of the priority of the Building Mortgage and the Project Mortgage. The Challenging Lienors claim that the Senior Mortgage is really a building loan contract or building loan mortgage which requires additional filings pursuant to Lien Law § 22. Since plaintiff did not make these filings, the Challenging Lienors believe that their liens should have priority over the Senior Mortgage. The Challenging Lienors request that the court decide the priority of all three mortgages.

DISCUSSION

I. Summary Judgment:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Senior Mortgage:

Plaintiff argues that the Senior Mortgage is not a building loan contract and was properly recorded well before any of the mechanic's lienors', thereby entitling plaintiff to priority on its Senior Mortgage, pursuant to Lien Law § 13 (1).

Seasons argues that plaintiff's "so-called Senior Mortgage is really a building loan contract that was required to be filed with the New York County Clerk's Office" pursuant to Lien Law § 22². Rothman Affirmation, ¶ 17. In addition, Seasons maintains that the Senior Mortgage is a building loan contract because any default in the Completion Guaranty dated March 9, 2007 (executed simultaneously with the amendment and restatement of the Senior Mortgage), such as not completing improvements, constitutes a default under the Senior Mortgage, and, because a promise to make improvements is implied in the Senior Mortgage because 25 Broad would be in default under the Senior Mortgage, if it defaulted under the Building Loan Agreement. Given that no filing was made pursuant to Lien Law §22, Seasons maintains that its liens (as well as the other mechanic's lienors'), have priority over the Senior Mortgage.

Seasons further argues that the Senior Mortgage is a building loan mortgage because it consolidates the liens of multiple mortgages from 1996, one of which was a building loan mortgage. Since no building loan contract was filed, Seasons claims that its liens have priority over the Senior Mortgage. Rothman Affirmation, ¶ 25. As Seasons sets forth, citing to

²At times, Seasons uses the terms building loan mortgage and building loan contract interchangeably. A building loan mortgage is made pursuant to a building loan contract. Lien Law § 22's filing requirement only applies to a building loan contract.

Atlantic Bank of New York v Forrest House Holding Co. (234 AD2d 491, 492 [2d Dept 1996]), where a loan is partly a building loan and partly an acquisition loan, the entire loan is subject to the filing requirements of Lien Law § 22. Any failure to make the requisite filings subordinates the entire loan. *Id.* Similarly, Commercial argues that the three 2007 mortgages were consolidated into one mortgage, thereby morphing them into a building loan contract. Although plaintiff seeks to have Commercial's opposition and amended answer with counterclaim rejected as untimely, Commercial's late service of papers does not prejudice plaintiff and is excused.³

Plaintiff maintains that these arguments have no merit because the definition of building loan contract precludes a finding that the Senior Mortgage is a building loan contract because the Senior Mortgage does not contain any requirement that 25 Broad perform any work on the premises, and that there is no provision that the funds were to be advanced as the work progressed.

Lien Law § 2 (14) defines a "building loan mortgage" as, "a mortgage made pursuant to a building loan contract and includes an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien

³Likewise, plaintiff seeks to have Lippolis's opposition rejected as untimely. The court accepts Lippolis's opposition and notes that it was only untimely by a matter of days.

upon the mortgaged property."

Lien Law § 2 (13) defines a "building loan contract" as the following, in pertinent part:

a contract whereby a party thereto, in this chapter termed "lender," in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property, whether such advances represent moneys to be loaned or represent moneys to be paid in purchasing from or in selling for such owner bonds or certificates secured by such mortgage upon such real property

Lien Law § 22 requires the filing of the building loan contract with the New York County Clerk's Office; otherwise other liens will have priority over this contract. As summarized in *Howard Savings Bank v Lefcon Partnership* (209 AD2d 473, 474-475 [2d Dept 1994]), Lien Law § 22 states, in pertinent part, that a "building loan agreement, as well as any modification thereof, must be in writing and must show the consideration paid for the loan, all related expenses incurred or to be incurred in connection with the loan, and the net sum available to the borrower for the improvement [internal quotation marks omitted]." Failing to comply with the filing requirements subordinates the mortgage to the subsequently filed liens. *Id.*

This court is not persuaded that the plaintiff's Senior Mortgage is a really a building loan contract or a building loan mortgage. Contrary to Commercial's contentions, the record indicates that plaintiff's mortgages remain three separate liens

on the property, and were never consolidated.

The purpose of filing a building loan contract is to "permit contractors and subcontractors to ascertain how much money will be made available to the owner in connection with the project and thus, the ability of the owner to pay for any services and materials provided." *Howard Savings Bank v Lefcon Partnership*, 209 AD2d at 475.

Courts have interpreted a building loan contract to be "an agreement to provide a loan for the purpose of erecting a building and to be advanced in installments from time to time as might be rendered safe by the condition of the building [internal quotation marks and citations omitted]." *Alden State Bank v Sunrise Builders, Inc.*, 48 AD3d 1162, 1164 (4th Dept 2008).

The Senior Mortgage, as evidenced by its language, does not meet the definition for a building loan mortgage or a building loan contract under the Lien Law. First and foremost, the Senior Mortgage did not advance any funds for the purpose of making improvements to the property. As set forth in the loan agreement, according to the terms of the loan agreement, the "[b]orrower shall use the proceeds of the Senior Loan to refinance the existing financing encumbering the Property (and for no other purpose)." Exhibit A, at 24. Second, the funds were provided to 25 Broad in one lump sum. As plaintiff states, the funds were fully advanced on March 9, 2007.

As the Court held in *Pawling Savings Bank v Jeff Hunt Properties, Inc.* (225 AD2d 678, 679 [2d Dept 1996]), "[a] building loan agreement is an agreement by which one undertakes to advance another money to be used primarily in the erection of a building and not merely to pay existing mortgages and bonuses to the lender for making the loan [internal quotation marks and citation omitted]." Moreover, although the definition of building loan mortgage under Lien Law §2 (14) "includes an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien upon the mortgaged property" and one of the many mortgages which were consolidated in 2005 included a building loan mortgage dated August 14, 1996, the mortgage still must be made pursuant to a building loan contract under Lien Law §2 (14). That in turn requires "the express promise of an owner to make an improvement upon real property" under Lien Law §2 (14). Here, there is no evidence of any express promise (or of a continuing promise) in the Senior Mortgage, made by the owner to improve the real property, and, presumably, all of the funds to be advanced in 1996 under the building loan mortgage dated August 14, 1996, were already advanced. See *Amsterdam Savings Bank v Terra Domus Corp.*, 97 AD2d 41, 44 (3d Dept 1983) (Lien Law §22 statement not required for a loan of \$50,000, even though that loan was consolidated under one mortgage with two other loans that

advanced money for improvements, because there was no express promise to improve the property). This is consistent with the Court's interpretation as set forth in *Atlantic Bank of New York v Forrest House Holding Co.* (234 AD2d 491, *supra*), the case cited to by Seasons, which penalizes the lender for "shirking" the responsibility of its Lien Law § 22 filing requirements. *Id.* at 492. Plaintiff here did not "shirk" its responsibility to inform the contractor what sum of money was available under the loan for the project, since the funds advanced in the Senior Mortgage were used for the sole and exclusive purpose of refinancing the existing mortgage debt and no additional funds were being advanced, either in 2005 or as amended in 2007, for the purpose of improving the property. See *In re 455 CPW Associates*, 192 BR 85, 90 (Bankr SD NY 1996), *affd* 1999 WL 675972, US Dist LEXIS 13306 (SD NY 1999), *affd* 225 F3d 645 (2d Cir 2000) ("it is clear from the relevant loan documents that the Greater Loan is not a Building Loan Contract within the meaning of section 22 of the Lien Law. Moreover, the purpose behind the Lien Law statutes has not been subverted here"). Accordingly, the argument that the Senior Mortgage is subordinate to their liens because it is really a building loan mortgage subject to the requirements of Lien Law §22, by virtue of the consolidation with the 1996 building loan, is unpersuasive.

Likewise, Seasons' other arguments regarding the Senior

Mortgage, which have not been addressed by plaintiff, are without merit. Seasons cites no authority for its argument that, because the Completion Guaranty guaranties completion of the improvements under the Building Loan, but also guaranties other obligations under the Senior Loan, the Guaranty transforms the Senior Mortgage into a building loan contract. Additionally, the fact that 25 Broad would be in default under the Senior Mortgage if it defaulted under the Building Loan Agreement does not suggest that 25 Broad had an express promise to make improvements. As the Court held in *Amsterdam Savings Bank v Terra Domus Corp.* (97 AD2d at 44, *supra* "[a] review of the documents related to this transaction ... reveals that there was no express promise by [Owner] to improve property, a promise which is required for there to be a 'building loan contract.' [T]he documents ... [are] merely a mortgage note and mortgage which contain provisions usually associated with a permanent loan."

Seasons argues that the plaintiff's motion is premature since there is outstanding discovery. However Seasons cannot defeat summary judgment merely by claiming a lack of discovery. Seasons, nor the other Challenging Lienors, have not shown that any facts exist, which cannot be stated at this time, that would defeat summary judgment. *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 (1st Dept 1993), citing CPLR 3212 (f). "The mere hope of defendants that evidence sufficient to defeat such a

motion may be uncovered during the discovery process is not enough [internal quotation marks and citation omitted]." *Id.* See also *Amsterdam Savings Bank v Terra Domus Corp.* (97 AD2d at 45), "[t]here is no evidence to show that what [defendant] is seeking may actually exist and CPLR 3212 (subd [f]) does not permit fishing expeditions." Moreover, Seasons itself has cross-moved for summary judgment on the same issues of lien priority.

Accordingly, as no issues of fact remain, the Senior Mortgage, being duly filed on March 20, 2007, has priority over all of the later-filed mechanic's liens. As such, plaintiff is granted summary judgment declaring priority of its Senior Mortgage to the later-filed mechanic's liens, and Seasons is denied summary judgment with respect to the Senior Mortgage.

Building Mortgage:⁴

Seasons argues that it and the other mechanic's lienors are entitled to priority over the Building Mortgage since the alleged modifications have not been filed with the New York County Clerk as required by Lien Law § 22. As an example of an alleged material modification, Seasons provides a letter written on May 23, 2008, from plaintiff to 25 Broad. The letter refers to a

⁴Despite plaintiff's belief that the court "should not waste its time and resources on the hypothetical question of priority" unless there are surplus proceeds from the sale of the mortgaged property (*Mizrahi Affirmation*, ¶ 44), there is no reason to delay decision regarding the priority of the Building Mortgage and Project Mortgage, as no evidence has been submitted as to the likelihood of any surplus.

schedule of direct advances, which is not attached as an exhibit. The letter purportedly addresses the way that the funds were to be disbursed. As a result, Seasons claims that this may impact the availability of funds to pay for the project. Seasons also attaches other written correspondence between plaintiff and 25 Broad and Swig.

Seasons also claims that it is impossible to determine if the original 2005 Building Mortgage was filed as required under Lien Law § 22.

Lien Law § 22 requires that any modification to the building loan agreement "must be filed within ten days after the execution of any such modification." If a modification is material, the failure to file the modification entitles subsequently filed mechanic's liens priority over the building loan mortgage. *Howard Savings Bank v Lefcon Partnership*, 209 AD2d at 475. A modification is material if it either "(1) alters the rights and liabilities otherwise existing between the parties to the agreement or (2) enlarges, restricts or impairs the rights of any third party beneficiary [internal quotation marks and citation omitted]." *Id.*

Plaintiff claims that none of the letters relied on by Seasons contains any language which modifies the terms of the Building Mortgage. Plaintiff avers that the letters were either protective advance letters, reservations of rights letters or

minutes of meetings, all of which contained written confirmation that no modifications were made.

Seasons has not demonstrated that the evidence submitted indicates that there was a material modification and therefore, summary judgment is denied on this issue.⁵

Project Mortgage:

Seasons argues that its mechanic's liens should have priority over the Project Mortgage since plaintiff's Project Loan Agreement is really a building loan agreement, subject to additional filing requirements which were not made with the New York County Clerk because the terms therein provide for payments in consideration for making improvements.

Seasons points to section 2.8.3 of the Project Loan Agreement (among other sections) which states in pertinent part:

2.8.3 Conditions of Final Construction Advance.
(d) Payment of Costs: Evidence satisfactory to Lender that all sums due in connection with the construction of the Project Improvements have been paid in full (or will be paid out of the funds requested to be advanced) and that no party claims or has a right to claim any statutory or common law lien arising out of the construction of the Project Improvements or the supplying of labor, material, and/or services in connection therewith.

Plaintiff's Exhibit J, at 53.

⁵Since the 2007 Building Mortgage amends and restates all prior agreements between the parties, it is irrelevant if a building loan agreement was filed in 2005. Plaintiff filed a Building Loan Agreement with the New York County Clerk's Office in 2007, which was prior to the filing of the mechanic's liens.

Project Improvements are defined in the Project Loan Agreement as "the renovation and construction work shown on the Plans and Specifications, as the same will be constructed in all material respects in accordance with the Plans and Specifications and all Legal Requirements." *Id.* at 22.

Plaintiff claims that the proceeds of the Project Mortgage were for related project costs that were not costs of the improvement on the Mortgaged Premises based on its attorney's statement. Slama Affirmation, ¶ 8. Plaintiff also contends that the Project Mortgage has no express promise to improve the property, and points to a treatise that defines a project loan mortgage as one that secures advances for "development-related costs" that do not pay for improvements (Reply Mem at 20). Seasons points out that the definition of building loan contract under Lien Law §2 (13) does not distinguish between "hard costs" and "soft costs" as the only relevant criteria is whether money is advanced in consideration of an express promise of an owner to make "an improvement upon real property."

The court finds that Seasons has properly pled that the Project Mortgage is really a building loan contract. Even if not labeled a building loan contract, the Project Mortgage can still be denominated as a building loan contract if it meets the Lien Law's requirements of a building loan. *See Lincoln First Bank, N.A. v Spaulding Bakeries, Inc.*, 117 Misc 2d 892 (Sup Ct, Broome

County 1983). Plaintiff avers that the proceeds for the project mortgage were not to be used for improvement of the mortgaged premises but were to be used for other projects. However, plaintiff provides no evidence as to what these projects were.

As previously mentioned, Lien Law § 2 (13) defines a "building loan contract" as one where the lender agrees to advance money to the owner in consideration for making improvements to the property. Improvements are defined under Lien Law §2 (4). There can be no dispute that the Project Loan Agreement provides for loan payments, in consideration of making improvements to the property, as that term is used under the Lien Law. Accordingly, the Project Loan Agreement is a building loan contract, and, because it was not filed with the New York County Clerk, the Project Mortgage is subordinate to the mechanic's liens.

Seasons and the other Challenging Lienors are granted summary judgment with respect to the priority of their liens over the plaintiff's Project Mortgage.

Summary Judgment on the Foreclosure Action:

Plaintiff seeks to foreclose on the mortgaged premises to recover debt due under the three loans. 25 Broad admits that it defaulted on the loans and consents to summary judgment being granted in plaintiff's favor. Swig affirms this information. Accordingly, plaintiff is granted summary judgment with respect

to foreclosing on the mortgaged premises. However, as a result of this decision, plaintiff is only granted summary judgment foreclosing on the Senior Mortgage and the Building Mortgage.

Plaintiff is entitled to recover reasonable attorneys' fees pursuant to the loan documents. See e.g. Plaintiff's Exhibit 1-C, at 7.1 (h) (vii).

A referee shall be appointed to examine and report on how the parcel should be sold and to ascertain the amounts due to the plaintiff under the Senior and Building Loan documents.

Plaintiff's Request for Default Judgment Against ECB, New York State and Stadium:

Plaintiff has served ECB, New York State and Stadium with the complaint. None of these parties has answered the complaint, nor have they sought additional time to do so. Plaintiff requests that a default judgment be entered against these defendants declaring that any of these defendants' interest is junior to plaintiff's mortgage liens and that they are barred from any share of the mortgaged premises but are not barred from any surplus proceeds, if any.

Since Stadium has failed to answer the complaint or appear and plaintiff has demonstrated a prima facie case that Stadium's mechanics lien is junior to the Senior Mortgage, a default judgment is granted against Stadium, but it is not prohibited from sharing in any surplus. However, a default judgment is

denied against ECB and New York State because plaintiff has not made any effort to demonstrate that the Senior Mortgage is superior to these liens (including what appears to be a tax lien on the property).

Various Other Relief:

Seasons argues that plaintiff's motion should be denied because plaintiff did not attach copies of its replies to Seasons' and some other defendants' counterclaims to the motion. The court is not persuaded by this argument. Plaintiff has cured any potential alleged defects in its pleadings and this alleged defect has not prejudiced the defendants in any way. See CPLR 2001 ("[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity ... if a substantial right of a party is not prejudiced ...").

Since plaintiff has ascertained that no other parties, other than the defendants served, have an interest in the property, the caption is amended to delete defendants John Doe 1-50, Mary Roe 1-50, XYZ Corp. 1-50 and ABC, LLC 1-50.

CONCLUSION

Accordingly, the foreclosure motion for summary judgment brought by plaintiff is granted to the extent of allowing plaintiff to foreclose on the mortgaged premises as set forth in

the decision, granting reasonable attorneys' fees in connection with this action, and appointing a referee to compute the amount due for principal and interest and to determine if the mortgaged premises can be sold in one or more parcels, as well as to determine the amount of attorneys' fees owed.

Plaintiff's motion for partial summary judgment, declaring, pursuant to Real Property Law § 291, that the Senior Mortgage has priority over the liens of the Challenging and Non-Challenging Lienors, is granted in its entirety.

Seasons and the other Challenging Lienors are denied summary judgment with respect to the priority of their liens over the Building Mortgage and are granted summary judgment with respect to the priority of their liens over the Project Mortgage.

A default judgment against defendants Stadium Marble & Tile is granted as described herein but is denied as to Environmental Control Board of The City of New York and New York State Department of Taxation & Finance.

The caption is amended to delete defendants John Doe 1-50, Mary Roe 1-50, XYZ Corp. 1-50 and ABC, LLC 1-50.

Submit proposed Order on Notice.

This Constitutes the Decision and Order of the Court.

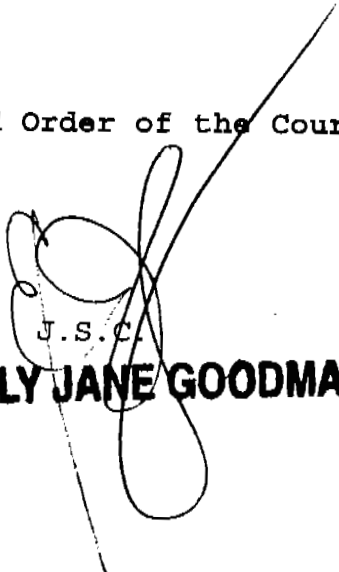
Dated: June 13, 2011

FILED

JUN 16 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER



J.S.C.

EMILY JANE GOODMAN