Community Preserv. Corp. v Golden Gate Residence, LLC
2011 NY Slip Op 33299(U)
November 14, 2011
Supreme Court, Queens County
Docket Number: 25603/2010
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

Community Preservation Corp., x

Plaintiff,

-against-

Golden Gate Residence, LLC, et al.

x

Index Number 25603 2010

Motion Date September 20, 2011

Motion Cal. Number 8

Motion Seq. No. 2

The following papers numbered 1 to 33 read on this motion by plaintiff pursuant to CPLR 6401 and Real Property Law § 254 for leave to appoint a temporary receiver for the real property known as 83-30 Kew Gardens Road, Kew Gardens, New York (Block 3356, Lot 30) (the subject property); this motion by defendants Golden Gate Residence, LLC (Golden Gate) and Bahram Kamali (the Golden Gate defendants) pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint asserted against them; this cross motion by plaintiff (1) pursuant to CPLR 3212 and Real Property Actions and Proceedings Law § 1321 for summary judgment in its favor against defendants Elegant HVAC, Inc. d/b/a Elegant Air Conditioning and Refrigeration (Elegant), and dismissing the defenses asserted in Elegant's answer, (2) pursuant to CPLR 3211(e) and 3215, and RPAPL 1321 to fix the defaults of defendants Golden Gate and Kamali, for failing to plead, and instead, making a second pre-answer motion, (3) pursuant to CPLR 3025 for leave to amend the caption deleting reference to defendants "John Doe #1" through "John Doe #50," (4) pursuant to CPLR 3215 and RPAPL 1321 to fix the defaults of defendants GK Building & Paint Depot d/b/a Hillside Paint Depot, Astoria Paint Place, Inc., Abraham Joselow P.C., Seong Jin Electric Inc., Master Architectural Metal & Glass Inc., Jeong Hi-Tech Inc., D&JR Inc., Daniel S. Inc., Bethel General Contracting Inc., Thousand Plumbing Inc., New Color Construction Corp., Sherman Advertising Associates, Bayard Advertising Agency, Inc. and the New York City Environmental Control Board, (5) to appoint a referee to ascertain and compute the sums due plaintiff under the note and mortgage and examine and report whether the real property should be sold in one or more parcels, and for an award of counsel fees, costs and disbursements.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits........1-10
Notice of Cross Motion - Affidavits - Exhibit....11-16
Answering Affidavits - Exhibits..................17-25
Reply Affidavits.................................26-33

Upon the foregoing papers it is ordered that these motions and cross motion are consolidated for the purposes of a single decision and order, and are determined as follows:

In March 2007, defendant Golden Gate obtained a loan from plaintiff, in the principal amount of $1.97 million, for the purpose of rehabilitating the premises and constructing improvements on the subject property. In connection with the loan, defendant Golden Gate executed and delivered various documents, including a building loan agreement, a consolidated and restated note (the note), and a consolidated mortgage in the principal amount of $1.97 million (or so much thereof as advanced) (the mortgage), against the subject property. Under the building loan agreement, a portion of the loan proceeds were to be disbursed by plaintiff in several advances at such times and in such amounts as plaintiff determined in accordance with the procedures set forth therein. As further security for repayment of the loan as evidenced by the note, the Golden Gate defendants executed and delivered a guaranty, guaranteeing repayment of the loan, including all sums evidenced secured by the note, mortgage and other loan documents.

On December 3, 2009, plaintiff commenced a foreclosure action entitled *Community Preservation Corp. v Golden Gate Residence, LLC* (Supreme Court, Queens County, Index No. 32405/2009) against the Golden Gate defendants, among others, in relation to the mortgage and to adjudicate the Golden Gate defendants to be liable pursuant to the payment guaranty, and also a completion guaranty, in the event any deficiency remained after a foreclosure sale.

In lieu of filing an answer in the action under Index No. 32405/2009, the Golden Gate defendants moved, on February 12, 2010, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint asserted against them based upon, among other things, plaintiff’s failure to satisfy the notice requirements of the mortgage prior to commencement of suit. The Golden Gate defendants asserted plaintiff’s letter dated March 25, 2009, in which plaintiff elected to cancel the automatic extension of the

April 1, 2009 maturity date of the loan, was not properly served. They also asserted the March 25, 2009 letter could not constitute a written demand for payment in satisfaction of the mortgage's condition precedent to suit because it was served prior to April 1, 2009, the date alleged by plaintiff to be the date of the event of default. By order dated June 29, 2010, and entered on July 15, 2010, the court granted the Golden Gate defendants' motion to dismiss to the extent of dismissing the claims asserted against them. The court determined, among other things, that the service of the March 25, 2009 letter was improper, and thus, plaintiff failed to provide the Golden Gate defendants with proper written notice of election to cancel any extension of the maturity date, and in addition, the March 25, 2009 letter did not fulfill the mortgage condition requiring written demand for payment as precedent to suit insofar as the alleged date of the event of default was April 1, 2009. The court also determined the Golden Gate defendants were entitled to treat the letters dated March 25, 2009 and November 3, 2009 as nullities.

Plaintiff thereafter commenced this action by filing a copy of the summons and complaint with the County Clerk on October 8, 2010, and filed a new notice of pendency. Plaintiff seeks foreclosure of the same mortgage as was the subject of the prior action under Index No. 32405/2009, and to adjudicate defendant Kamali to be liable pursuant to the same payment guaranty in the event a deficiency remains after the foreclosure sale. In the complaint, plaintiff alleges, among other things, that it is the holder of the mortgage, defendant Golden Gate defaulted under the note and mortgage by failing to pay the interest which became due and payable on November 1, 2009, and each subsequent month. Plaintiff also alleges that on July 23, 2010, it sent a notice to defendant Golden Gate to cure its default in payment of the outstanding installments of interest, but that the Golden Gate defendants did not cure the default in response thereto, and as a consequence, plaintiff elected, by notice dated September 21, 2010, to accelerate the mortgage debt. Plaintiff further alleges that the mortgage debt remains outstanding.

Plaintiff thereafter moved, by order to show cause dated October 20, 2010, within the confines of the action under Index No. 32405/2009, to discontinue such action, and cancel the prior notice of pendency.

Prior to the final submission of the motion to discontinue the action under Index No. 32405/2009, the Golden Gate defendants entered into a stipulation dated November 16, 2010 in this action, whereby they appeared by counsel, acknowledged service of the summons and complaint and notice of pendency, and waived the

defense of lack of personal jurisdiction. In consideration of the waiver, plaintiff extended the time of the Golden Gate defendants to answer or otherwise move with respect to the complaint until December 20, 2010.

By order dated February 24, 2011, the motion to discontinue was granted without prejudice, and the notice of pendency was cancelled without cost to any party. The Clerk was directed, upon payment of any fees due and owing, to cancel the notice of pendency.

Meanwhile, on the same date, the Golden Gate defendants, who were unaware of the February 24, 2011 order, moved to dismiss the instant action pursuant to CPLR 3211(a)(4), on the ground there was a prior action pending (i.e., the action under Index No. 32405/2009). That motion was marked fully submitted, but prior to determination of the motion, the instant action, including the submitted motion, was reassigned to this Part, pursuant to a directive of the Administrative Judge dated March 9, 2011. This court, by order dated June 3, 2011, denied the motion as moot, because the prior action (Index No. 32405/2009) had been discontinued without prejudice pursuant to the February 24, 2011 order. Plaintiff served a copy of the notice of entry of the June 3, 2011 order upon the Golden Gate defendants on June 22, 2011, thus beginning the running of the 10-day period pursuant to CPLR 3211(f) in which the Golden Gate defendants had to serve a timely answer. The Golden Gate defendants entered into a stipulation with plaintiff dated July 11, 2011, whereby their time to answer, move or otherwise respond to the complaint was extended until August 2, 2011. The stipulation also provided:

> "[i]n the event the Golden Gate Defendants deem it appropriate to serve a pre-answer motion instead of an answer, plaintiff may oppose the motion on any basis it deems appropriate, including that the motion violates the limitation contained in CPLR 3211(e) (with the Golden Gate Defendants reserving their right to argue that no such violation has occurred on the ground that their prior pre-anser motion was decided on the merits, and instead was denied as moot)...."

The Golden Gate defendants now move to dismiss the complaint asserted against them herein pursuant to CPLR 3211(a)(1) and (7) on the ground of a defense founded upon documentary evidence and for failure to state a cause of action. They assert that plaintiff, by its July 23, 2010 letter, fabricated a retroactive extension of the mortgage loan through October 1, 2010, improperly demanded payment of interest in arrears at improper rates, and improperly demanded

payment of interest and late charges through July 31, 2010, notwithstanding interest and late charges for the period July 23, 2010 through July 31, 2010 had yet to accrue. They contend the July 23, 2010 letter therefore was ineffective to trigger a right of acceleration, or a right to enhanced rates of interest and penalties. As a consequence, the Golden Gate defendants argue that plaintiff had no right to accelerate the mortgage debt by means of the September 21, 2010 notice, and commence this action based upon failure to pay the balance of the mortgage debt. They also argue that because plaintiff prematurely declared occurrences of defaults in payment of interest and late charges for the period July 23, 2010 through July 31, 2010, it did not fulfill the mortgage's condition precedent to suit, of providing a written demand for payment after the happening and continuation of an "Event of Default."

Plaintiff opposes the motion by the Golden Gate defendants, asserting they, in making this motion, have violated CPLR 3211(e), which allows for the making of only one motion to dismiss on one or more of the grounds set forth in CPLR 3211(a). It also asserts the Golden Gate defendants should be deemed in default in the action for having failed to serve an answer. Plaintiff cross moves for summary judgment as against defendant Elegant, to fix the defaults of the Golden Gate defendants and defendants GK Building & Paint Depot d/b/a Hillside Paint Depot, Astoria Paint Place, Inc., Abraham Joselow P.C., Seong Jin Electric Inc., Master Architectural Metal & Glass Inc., Jeong Hi-Tech Inc., D&JR Inc., Daniel S. Inc., Bethel General Contracting Inc., Thousand Plumbing Inc., New Color Construction Corp., Sherman Advertising Associates, Bayard Advertising Agency, Inc. and the New York City Environmental Control Board, for leave to amend the caption deleting reference to defendants "John Doe #1" through "John Doe #50 and to appoint a referee to ascertain and compute the sums due plaintiff under the note and mortgage and examine and report whether the real property should be sold in one or more parcels.

Counsel for defendant Elegant prepared an affirmation, dated September 1, 2011, in opposition to the motion of plaintiff for leave to appoint a temporary receiver, and in support of the motion by the Golden Gate defendants to dismiss the complaint asserted against them. Counsel for defendant Elegant also prepared an affirmation dated September 12, 2011, in which he sought an adjournment of the motion by plaintiff for leave to appoint a receiver and the cross motion by plaintiff for summary judgment against Elegant. Counsel for defendant Elegant thereafter sent a letter dated September 15, 2011 to plaintiff's attorneys by facsimile transmission, indicating that defendant Elegant had decided not to "oppose" the "action and motion for summary

judgment," and in effect, consented to withdraw its opposition to plaintiffs' motions conditioned upon plaintiff's agreement not to seek costs and disbursements against Elegant. Plaintiff's counsel states in his reply affirmation dated September 19, 2011 that plaintiff does not seek costs and disbursements as against defendant Elegant. That branch of the motion by plaintiff for summary judgment as against defendant Elegant and to dismiss the defenses asserted in the answer of defendant Elegant is granted without opposition and without costs and disbursements.

The court shall entertain the Golden Gate defendants' motion to dismiss the complaint by the Golden Gate defendants. Under CPLR 3211(e), a motion to dismiss a complaint pursuant to CPLR 3211(a) may be made at any time before service of the responsive pleading is required but no more than one such motion shall be permitted (*see Ramos v City of New York*, 51 AD3d 753 [2008]). This "single-motion" rule is meant to prevent repetitive motions to dismiss (*see* CPLR 3211[e]; *Schwartzman v Weintraub*, 56 AD2d 517 [1977]), or subsequent motions to dismiss on alternative grounds (*see e.g. McLearn v Cowen & Co.*, 60 NY2d 686 [1983]). The original motion by the Golden Gate defendants to dismiss the complaint pursuant to CPLR 3211(a)(4) was denied as moot, and thus, not decided on the merits. Under such circumstances, the motion by the Golden Gate defendants to dismiss pursuant to CPLR 3211(a)(1) and (7) does not violate CPLR 3211(e) (*see Rivera v Board of Educ. of City of New York*, 82 AD3d 614 [2011]; *Curtis v Chetrit*, 243 AD2d 423 [1997]; *Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86 [1993]; *Chester Med. Diagnostic, P.C. v State Farm Mut. Auto. Ins. Co.*, 26 Misc 3d 126[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2009]; *Breiterman v Haidt*, 4 Misc 3d 130 [A] [App Term, 1st Dept 2004]).

> "When determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88; *Cayuga Partners v 150 Grand*, 305 AD2d 527 [2003]). 'In assessing a motion under CPLR 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,' and if the court does so, 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Leon v*

> *Martinez*, 84 NY2d at 88 [internal quotations marks omitted]).
>
> 'A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"' (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]; *see Leon v Martinez*, 84 NY2d at 88)"

(*Uzzle v Nunzie Court Homeowners Assn, Inc.*, 70 AD3d 928 [2010]).

Construed liberally, the complaint herein states a valid cause of action against the Golden Gate defendants for foreclosure and a proper request that defendant Kamali be adjudged to pay any remaining deficiency following a foreclosure sale (CPLR 3211[a][7]).

With respect to that branch of the motion to dismiss based upon CPLR 3211(a)(1), the Golden Gate defendants have failed to demonstrate the documentary evidence they submitted in support of their motion resolves all factual issues in their favor as a matter of law, and conclusively disposes of plaintiff's claims. The Golden Gate defendants have failed to prove that they were not in default in payment of mortgage interest at the time of the sending of the notice of default/notice to cure.

The mortgage provides that the mortgagor pay to the mortgagee the sums due and owing pursuant to its terms and the note. Under the note, the maturity date was set for April 1, 2009, but was subject to extension for up to three consecutive periods of six months each. The note calls for monthly payments of interest on the principal outstanding balance of the loan at a variable rate equal to the "LIBOR"[1] interest rate plus 2.8% (the LIBOR Rate) until the maturity date (as may have been extended), when the principal amount or the amount thereof outstanding, with all

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[1] The acronym "LIBOR" refers to "London Interbank Offered Rate," which is defined as a "daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year" (Black's Law Dictionary (9th ed. 2009).

accrued interest thereon was due and owing. Paragraph 1 of the note also calls for the payment of interest denominated as the "Supplemental Interest Rate Spread," in addition to the LIBOR Rate, during any extension period.[2] Paragraph 17 of the note provides as follows:

> Extension Provisions. The Maturity Date shall be subject to extension for up to three (3) consecutive periods of six (6) months each (each, an "**Extension Period**"), upon and subject to the provisions of this Paragraph 17, as follows;
>
> > (a) In the event that the Completion Conditions are not satisfied by the Maturity Date originally set forth in this Note, then, without limiting any other rights of [plaintiff] under this Note or the Loan Documents, including, without limitation, any rights of [plaintiff] arising on account of the failure by Maker to satisfy the Completion Conditions or on account of the occurrence of an Event of Default, (i) the Maturity Date shall automatically be extended for a period of six (6) calendar months, (ii) the Supplemental Interest Rate Spread for such Extension Period shall be one and one-half percent (1.5%), and (iii) unless [plaintiff] sends an Extension Cancellation Notice ..., interest on the outstanding principal balance of this Note shall not accrue pursuant to Paragraphs 3 or 4(b) ... at the Involuntary Rate.
> >
> > (b) In the event that the Completion Conditions are not satisfied by the Maturity Date set forth in this Note, as extended pursuant to Paragraph 17(a) above, then, without limiting any other rights of [plaintiff] under this Note or the Loan Documents, including, without limitation, any rights of [plaintiff] arising on account of the failure by Maker to satisfy the Completion Conditions or on account of the occurrence of

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[2] The note denominates the aggregate of the LIBOR Rate and the Supplemental Interest Rate Spread as the "LIBOR Interest Rate."

> an Event of Default, (i) the Maturity Date shall automatically be extended for an additional period of six (6) calendar months, (ii) the Supplemental Interest Rate Spread for such Extension Period shall be three percent (3.0%), and (iii) unless [plaintiff] sends an Extension Cancellation Notice ..., interest on the outstanding principal balance of this Note shall not accrue pursuant to Paragraphs 3 or 4(b) ... at the Involuntary Rate.
>
> (c) In the event that the Completion Conditions are not satisfied by the Maturity Date set forth in this Note, as extended pursuant to Paragraph 17(b) above, then, at the sole and absolute discretion of plaintiff, and without limiting any other rights of [plaintiff] under this Note or the Loan Documents, including, without limitation, any rights of [plaintiff] arising on account of the failure by Maker to satisfy the Completion Conditions or on account of the occurrence of an Event of Default, by written notice from plaintiff, the Maturity Date may be extended for an additional period of six (6) calendar months and, in the event that the Maturity Date is so extended, the Supplemental Interest Rate Spread for such Extension Period shall be four percent (4.0%).
>
> ...."

(emphasis in the original).

In addition, the note provides that if any installment due under the note or mortgage remains past due for 30 calendar days or more, the "outstanding principal balance of this Note shall bear interest during the period in which [defendant Golden Gate] is in default at a rate equal to the lesser of four percent (4%) above the interest rate then in effect [under the note]," or "the maximum interest rate which may be collected from [defendant Golden Gate] under applicable law (the 'Involuntary Rate')." The note also calls for the payment of late charges for any payment overdue under it or the mortgage for a period in excess of 15 days, in an amount of 4% of any such overdue payment, and deems the late charge to be part of the indebtedness evidenced by the note.

[* 10]

An "Event of Default" is defined under the mortgage to mean "the events and circumstances described as such in Section 3.1 hereof" (section 1.1). Section 3.1 of the mortgage describes an "Event of Default," as, among other things, the circumstances where there is a:

> "(i) default ..."in the payment of any interest due under the Restated Note, or in the payment of any installment of principal due under the Restated Note," "when and as the same shall become due and payable, and such default shall have continued for a period of fifteen (15) days, or (ii) default shall be made in any other payment of the principal of the Restated Note, when and as the same shall become due and payable, whether at maturity or by acceleration ....

Section 3.3. of the mortgage, in pertinent part, states:

> "(a) In the case an Event of Default shall have happened and be continuing, then, *upon written demand* of the Mortgagee, the Mortgagor will pay to the Mortgagee the whole amount which then shall have become due and payable on the Restated Note, for principal or interest or both, as the case may be, and after the happening of said Event of Default and the acceleration of the Indebtedness secured hereby, the Mortgagor will also pay to the Mortgage interest at the Involuntary Rate on the then unpaid principal of the Restated Note, and the sums required to be paid by the Mortgagor pursuant to any provision of this Mortgage, and in addition thereto such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Mortgagee, its agents and counsel and any expenses incurred by the Mortgagee hereunder. In the event the Mortgagor shall fail forthwith to pay such amounts *upon such demand*, the Mortgagee shall be entitled and empowered to institute such actions or proceedings at law or in equity as may be advised by its counsel for the collection of the sums so due and unpaid, and may prosecute any such action or proceedings to judgment or final decree, and may enforce

> any such judgment or final decree against the Mortgagor and collect, out of the property of the Mortgagor wherever situated, as well as out of the Mortgaged Property, in any manner provided by law, moneys adjudged or decreed to be payable...."

(emphasis supplied).

In its July 23, 2010 notice to cure, plaintiff advised that it deemed the loan's maturity date to have been extended to through October 1, 2010, and that defendant Golden Gate had failed to pay or cause to be paid the monthly installments of interest as required pursuant to paragraphs 1, 2, 4 and 17 of the note on and after November 1, 2009. Plaintiff demanded payment of interest and late charges totaling $1,721,623.77 within 15 days and indicated that it had assessed defendant Golden Gate with certain amounts of interest at different rates, including "extension" rates (of 3% and 4%) and a default rate, for specified periods. Plaintiff indicated in its September 21, 2010 notice that defendant Golden Gate failed to cure the default within the fifteen-day cure period, and its election to accelerate the mortgage debt.

To the extent Golden Gate defendants assert the July 23, 2010 notice improperly called for payment of interest beyond that which was due and owing, the effect of the June 29, 2010 order was that the loan maturity date was automatically extended for a period of six months from April 1, 2009 to October 1, 2009 pursuant to paragraph 17 of the note. The Golden Gate defendants previously argued in the action under Index No. 32405/2009 that the extension cancellation notice dated March 25, 2009 was a nullity due to improper service, and made no claim that the completion conditions were satisfied by April 1, 2009. The documentary evidence presented by the Golden Gate defendants in connection with this motion does not demonstrate that the completion conditions were satisfied by April 1, 2009 or October 1, 2009, the first extended maturity date, or that a written notice of election to cancel any second extension of the maturity date was provided to them by plaintiff. The documentary evidence also does not demonstrate that the completion conditions were satisfied by April 1, 2010, the second extended maturity date. Thus, the Golden Gate defendants have failed to demonstrate by documentary evidence that plaintiff was not entitled to demand payment of the supplemental interest rate spread at 3% in addition to the LIBOR Rate for the extension period October 1, 2009 and March 31, 2010.

However, to the extent plaintiff demanded payment of a supplemental interest rate spread at the rate of 4% retroactively

for the period April 1, 2010 through July 23, 2010, the July 23, 2010 letter cannot serve as a written notice of the "granting" of an additional (third) extension of the maturity date to October 1, 2010 since plaintiff makes no claim that its belated grant was made at the request, or with the consent, of the Golden Gate defendants. Although plaintiff contends its right to grant the extension is unlimited by any time frame, it is clear under the plain language of the note that absent prior notice from plaintiff to the borrower, there would be no basis for the borrower to believe plaintiff had extended the loan for a third time, or expect the interest was accruing at the LIBOR Rate plus a Supplemental Interest Rate Spread at 4%. Hence, plaintiff was not entitled to demand payment of the 4% supplemental interest spread in addition to the LIBOR Rate for the period following April 1, 2010. Plaintiff also improperly demanded, in its letter dated July 23, 2010, the payment of default/involuntary rate interest in addition to the 3% supplemental interest rate spread for the period October 1, 2009 and March 31, 2010 because plaintiff makes no claim it sent any extension cancellation notice (other than the March 25, 2009 notice previously found to have been a nullity). Plaintiff also acted prematurely, by improperly demanding the payment of interest and late charges for a period which had yet to occur (July 23, 2010 through July 31, 2010). Notwithstanding these improper demands, the July 23, 2010 notice was sufficient to apprise the Golden Gate defendants they were in default in payment of the monthly mortgage installment payment due on November 1, 2009 and thereafter, and they needed to cure such default. The Golden Gate defendants consequently have failed to prove by documentary evidence that the July 23, 2010 notice did not fulfill the mortgage's requirement that plaintiff provide written notice of default (*see* section 3.3 of the mortgage) and opportunity to cure as a condition precedent to suit.

That branch of the cross motion by plaintiff for leave to fix the defaults of various defendants is granted only to the extent of granting leave to fix the defaults of defendants GK Building & Paint Depot d/b/a Hillside Paint Depot, Astoria Paint Place, Inc., Abraham Joselow P.C., Seong Jin Electric Inc., Master Architectural Metal & Glass Inc., Jeong Hi-Tech Inc., D&JR Inc., Daniel S. Inc., Bethel General Contracting Inc., Thousand Plumbing Inc., New Color Construction Corp., Sherman Advertising Associates, Bayard Advertising Agency, Inc. and the New York City Environmental Control Board. That branch of the motion for leave to amend the caption deleting reference to defendants "John Doe #1" through "John Doe #50" is granted.

That branch of the motion for leave to appoint a referee is denied at this juncture (*see* RPAPL 1321(1); *Scharaga v Schwartzberg*, 149 AD2d 578 [1989]).

With respect to the motion by plaintiff for leave to appoint a temporary receiver, section 3.4 of the mortgage authorizes the appointment of a receiver without notice and without regard for the adequacy of the security for the debt (*see* Real Property Law § 254[10]; *Essex v Newman*, 220 AD2d 639 [1995]; *366 Fourth St. Corp. v Foxfire Enters.*, 149 AD2d 692 [1989]; *Clinton Capital Corp. v One Tiffany Place Developers*, 112 AD2d 911 [1985]). However, under appropriate circumstances and in an exercise of discretion, a court of equity may nevertheless deny such application (*see Essex v Newman*, 220 AD2d 639 [1995], *supra*; *366 Fourth Street Corp. v Foxfire Enterprises, Inc.*, 149 AD2d 692 [1989], *supra*; *Clinton Capital Corp. v One Tiffany Place Developers, Inc.*, 112 AD2d 911 [1985], *supra*).

In this case, the property is improved by a building, with multiple residential units, and a parking garage. It is undisputed that at this time, the building, which had been under construction, is unoccupied and the City of New York has refused to issue a certificate of occupancy for the premises on the basis that the building is not in compliance with a zoning resolution governing side yard setback specifications. It is also undisputed that the premises is generating no income and plaintiff has failed to demonstrate that the property is legally capable of being rented in the absence of a certificate of occupancy, or otherwise capable of generating profits at this time. To the extent plaintiff asserts that a receiver should be appointed with requisite authority to work towards a resolution of the zoning issue, and the obtaining of a certificate of occupancy, the granting of such authority to a temporary receiver would be a drastic remedy not contemplated under the terms of the mortgage (see section 3.4) or under Real Property Law § 254(10). In addition, the appointment of a temporary receiver with the usual powers would be inappropriate here where the property is not generating rent, and plaintiff has failed to demonstrate there is any other income, profits or funds out of which to pay taxes, liens or other expenses (*see Grusmark v Echelman*, 162 F Supp 49 [DC NY 1958], *citing Holmes v Gravenhorst*, 263 NY 148 [1933]; *see also Societe Generale v Charles and Company Acquisition, Inc.*, 157 Misc 2d 643 [1993]). Plaintiff also has made an insufficient demonstration that in the absence of the appointment of a receiver, the property will be in danger of being destroyed or suffering irreparable loss. Under these circumstances, the motion by plaintiff for appointment of a

receiver is denied in an exercise of discretion.

Dated: November 14, 2011

AUGUSTUS C. AGATE, J.S.C.