MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK **PART 17**
COUNTY OF QUEENS **HON. ORIN R. KITZES**

CITIBANK, N.A.,
Plaintiff,

-against-

NCF EQUITIES LLC, LEVEL 7 DEVELOPMENT LLC, ASSAF FITOUSSI, BEN NASH a/k/a CHAIM NASH, ARI CHITRIK, ELI NOY, ADS WINDOWS, INC., WAUSAU TILE, INC., THOMAS MANUFACTURING, INC., THAK CONSTRUCTION INC., PHOENIX SHEET STEEL, CORP., JC RYAN EBCO/H&G, LLC, MOZART IRON CRAFT CORP., NACIREMA INDUSTRIES, INC., MALDONADO CONSTRUCTION CORP, SAFETY AND QUALITY PLUS INC., NEW YORK STEEL ERECTORS, INC., MASPETH CONTRACTING CORP., RENT A UNIT NY INC., FRANK SETA & ASSOCIATES LLC, KARL FISCHER ARCHITECTURE PLLC and CLOSERS CONSULTING, ROTAVELE ELEVATOR INC., LUSO CONSTRUCTION CORP., WOOD FLOORS BY CLASSIC, INC., THE GOLD GROUP, GUMA CONSTRUCTION CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOES 1-50, MARY ROES 1-50, XYZ CORP. 1-50 and ABC, LLC 1-50,
Defendants

INDEX NO. 27823/10
MOTION CAL NO.: 5
MOTION DATE: 7/13/11

NEW YORK STEEL ERECTORS, INC.
Defendant/Third-Party Plaintiff

-against-

LES CONSTRUCTIONS BEAUCE-ATLAS, INC., HARTFORD FIRE INSURANCE COMPANY AND RIDGEWOOD EQUITIES, LLC,
Third-Party Defendants.

Index No.: 350105 /11

DATE: July 19, 2011

Plaintiff's motion for the following Orders: (1) pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff, on its First Cause of Action for Foreclosure of the Mortgaged Property against NCF Equities, LLC ("NCF") on default together with attorneys' fees, costs and disbursements pursuant to the loan documents that are the subject of this action, (2) Pursuant to CPLR 3212: (I) striking out the Affirmative Defenses from the Answers of the defendants Eli Noy ("Noy") and Assaf Fitoussi ("Fitoussi"); and (ii) directing the entry of partial summary judgment in favor of the Plaintiff and against defendants Noy, Fitoussi, and Ari Chitrik ("Chitrik") for the relief demanded in its First Cause of Action of the Complaint on the ground that there is no defense to the First Cause of Action, (3) Pursuant to CPLR 3212: (I) granting Plaintiff summary judgment on its First Cause of Action against defendants Luso Construction Corp. ("Luso"), Wausau Tile, Inc. ("Wausau"), Rotavele Elevator Inc. ("Rotavele"), Safety and Quality Plus, Inc. ("Safety"), JC Ryan EBCO/H&G LLC ("JC Ryan"), Ads Windows, Inc. ("ADS"), Thomas Manufacturing, Inc. ("Thomas") and New York Steel Erectors, Inc ("NYSE") (collectively the "Appearing Mechanic's Lienors"), by reason of their failure to challenge the lien priority of Plaintiff and, pursuant to Real Property Law § 291; (ii) striking out the Affirmative Defenses from the Answers of the defendants Safety, JC Ryan, ADS and NYSE; and (iii) ordering that the Appearing Mechanic's Lienors' liens are junior and inferior to Plaintiff's mortgage liens, (4) Pursuant to CPLR 603: (I) severing the cross-claims asserted by Noy, Fitoussi, Safety, ADS and NYSE against NCF and/or the remaining co-defendants; and (ii) dismissing or alternatively severing the counterclaims asserted by JC Ryan, ADS and NYSE, on the grounds that the cross-claims and counterclaims are unrelated to the issue in this mortgage foreclosure action and severance will avoid undue delay, (5) Pursuant to CPLR 3212, granting Plaintiff summary judgment on its Second Cause of Action, amending the legal description of the Mortgaged Property in the Mortgages to reflect the creation of the Condominium in February 2009 in which Block 415, Lots 11, 19, and 23 were designated Block 415, Lot 11 and thereafter designated as Block 415, Tax Lots 1201 through 1352, (6) Pursuant to CPLR 3212, granting partial summary judgment for a conditional deficiency judgment against Chitrik, Noy, Fitoussi and Level 7 Development, LLC ("Level 7") (collectively the "Guarantors"), on Plaintiff's Fourth and Fifth Causes of Action for Enforcement of the Guaranties, based on the unconditional and absolute guaranties executed by Chitrik, Noy, Fitoussi and Level 7, (8) Pursuant to CPLR 3215(a) for a default judgment on its First Cause of Action for Foreclosure of the Mortgaged Property against Thak Construction Inc., Phoenix Sheet Steel, Corp., Mozart Iron Craft Corp., Nacirema Industries, Inc., Maldonado Construction Corp., Rent A Unit NY Inc., Frank Seta & Associates, LLC, Karl Fischer Architecture PLLC, Closers Consulting, Level 7, Wood Floors By Classic, Inc., The Gold Group, Guma Construction Corp., New York State Department of Taxation and Finance ("New York State") and New York City Environmental Control Board ("ECB"), due to their failure to answer the Complaint or otherwise appear in the action or challenge the lien priority of Plaintiff and, pursuant to Real Property Law § 291, ordering that any lien of the above listed

Defendants is junior and inferior to Plaintiff's mortgage liens, (9) Referring this action to a referee ("Referee") to ascertain and compute the amount due Plaintiff under the Loan Documents, as set forth in the Complaint, and for any other amounts due and owing to Plaintiff, and directing that the Referee examine and report whether or not the Mortgaged Property can be sold in parcels and to report to this Court with all convenient speed, (10) Amending the caption of this action by directing that the "John Does 1-50", "Mary Roes 1-50", XYZ Corp. 1-50", "ABC, LLC 1-50" and "Ben Nash a/k/a Chaim Nash" defendants be deleted from the caption, is granted, and defendants NCF and Ari Chitrik cross-motion pursuant to CPLR §3012(d) for leave of the Court to permit NCF Equities LLC and Ari Chitrik to submit late Answers to the Complaint in this matter, in the form annexed hereto, is denied, for the following reasons:

Initially, pursuant to a stipulation, defendant Noy has withdrawn his cross-motion for summary judgment, and opposition to Plaintiff's motion for summary judgment in the within action, dated April 8, 2011 and consented to the main motion. Pursuant to that same stipulation, plaintiff withdrew that portion of its pending Motion for Summary Judgment, which seeks, inter alia, a conditional deficiency judgment against Noy with prejudice.

Plaintiff commenced this action, pursuant to Article 13 of New York Real Property Actions and Proceedings Law to foreclose on certain mortgages in the total principal amount of $51,053,871.00, together with interest and other sums secured thereby. The mortgages encumber, among other things, certain real property located in Queens County at 41-23 Crescent Street, Long Island City, New York which were at the time of execution designated as Block 415, Lots 11, 19 and 23 and which, pursuant to a Declaration of Condominium, executed and recorded after the execution of the subject mortgages are now designated as Block 416, Lots 1201 through 1352 (f/k/a Lot 11, f/k/a lots 11, 19, 23) on the Tax Map of the City of New York, County of Queens, together with all of the property rights and interests set forth in said mortgages (the "Mortgaged Property").

Plaintiff alleges in its complaint that on or about December 7, 2006, Citibank and NCF entered into an Acquisition Loan Agreement, pursuant to which Citibank agreed to lend, and did in fact lend, NCF the principal amount of $4,400,155.00 ("Acquisition Loan"). The Acquisition Loan is evidenced by the Amended and Restated Promissory Note ("Acquisition Loan Note"), dated December 7, 2006, made by NCF to the order of Citibank in the original principal amount of $4,400,155.00. As security for the payment of the Acquisition Loan, NCF executed and delivered to Citibank that certain Amended and Restated Acquisition Loan Mortgage ("Acquisition Loan Mortgage"), dated December 7, 2006. The Acquisition Loan Mortgage was duly recorded in the Office of the City Register of the City of New York on March 1, 2007, under City Register File Number 2007000112195.

Plaintiff also alleges that Citibank, as lender, and NCF, as borrower, entered into a certain Building Loan Agreement ("Building Loan Agreement") on or about December 7, 2006, pursuant to which Citibank agreed to make loan advances to NCF up to the principal amount of

$42,353,119.00 ("Building Loan"). The Building Loan is evidenced by the Building Loan Mortgage Note ("Building Loan Note"), dated December 7, 2006, made by NCF to the order of Citibank in the maximum principal amount of $42,353,119.00. As security for the Building Loan Note, NCF executed and delivered to Citibank that the Mortgage (the "Building Loan Mortgage"), dated December 7, 2006. The Building Loan Mortgage was duly recorded in the Office of the City Register of the City of New York on March 1, 2007, under City Register File Number 2007000112196. Smith Affirm., Exs. X, A at 54. Citibank made advances to NCF pursuant to the terms of the Building Loan Agreement from time to time after December 7, 2006.

Plaintiff also alleges that Citibank, as lender, and NCF, as borrower, entered into a Project Loan Agreement ("Project Loan Agreement"), dated December 7, 2006, pursuant to which Citibank agreed to make loan advances to NCF in the aggregate principal amount of $4,300,597.00. The Project Loan is evidenced by the Project Loan Mortgage Note ("Project Loan Note"), dated December 7, 2006, made by NCF to the order of Citibank in the aggregate principal amount of $4,300,597.00. As security for the Project Note, NCF executed and delivered to Citibank the, ("Project Loan Mortgage"), dated December 7, 2006. The Project Loan Mortgage was duly recorded in the Office of the City Register of the City of New York on March 1, 2007, under City Register File Number 2007000112197. Citibank made advances to NCF pursuant to the terms of the Project Loan Agreement from time to time after December 7, 2006. Pursuant to the terms of the Acquisition Loan Mortgage, Building Loan Mortgage and Project Loan Mortgage (collectively the "Mortgages"), NCF mortgaged, granted, bargained, sold and conveyed to Citibank all of NCF's right, title and interest then existing or thereafter arising in and to the Mortgaged Property.

Plaintiff also alleges that pursuant to the terms of the Acquisition Loan Note, Building Loan Note and Project Loan Note (collectively the "Loan Notes"), the outstanding principal balance of the Acquisition Loan, Building Loan and Project Loan (collectively the "Loans") were to bear interest at the rates set forth therein. Citibank also alleges that it is the current owner and holder of the Notes and the Mortgages and that it is also the owner of the right, title, and interest in the various debt instruments and loan documents evidencing or referring to the Mortgages.

Plaintiff also alleges that on or about December 7, 2006, Ari Chitrik ("Chitrik"), Assaf Fitoussi ("Fitoussi"), and Eli Noy ("Noy") executed a Joint and Several Guaranty of Payment of Specific Obligations (the "Payment Guaranty") in favor of Citibank, dated December 7, 2006, pursuant to which they jointly and severally guaranteed, inter alia, the repayment of the debt due and owing pursuant to the Loan Documents, in the amount up to $12,763,467.75, plus interest as set forth in the Mortgage Notes. In addition, they agreed in said guaranties that they would indemnify and hold Citibank harmless against any loss, liability, cost or expense including reasonable attorneys fees in connection with actions to enforce the sums due and owing pursuant to the Loan Documents.

Plaintiff also alleges that Chitrik, Fitoussi and Noy executed a Completion Guaranty ("Completion Guaranty"), on or about December 7, 2006. Likewise, on or about April 7, 2008, Level 7 and Ben Nash unconditionally and irrevocably executed a Completion Guaranty. Pursuant to the above referenced Completion Guaranties, the guarantors agreed, inter alia, to keep the Mortgaged Property free of all mechanic's liens on the Mortgaged Property. Despite the obligation to keep the Mortgaged Property free of mechanic's liens, the Mortgaged Property is presently encumbered by numerous mechanic's liens. In addition, pursuant to the terms of the Completion Guaranties, each guarantor also agreed to pay on written demand any and all out-of-pocket expenses, including, without limitation, reasonable attorneys' fees and disbursements, actually incurred by the Lender in enforcing, obtaining advice of counsel with respect to, or collecting any or all of the Guaranteed Obligations under the Completion Guaranty.

Plaintiff also alleges that on February 10, 2009, NCF executed and filed a declaration of condominium (the "Declaration of Condominium"), which created the Crescent Club Condominium which declaration was recorded on February 27, 2009 in the office of the Clerk of Queens County under CRFN 2009000058963. The Declaration of Condominium established two commercial units; Block 415, Lots 1201, 1202, and 150 residential units; Block 415, Lots 1203 through 1350. At the time that the Declaration of Condominium was filed, the description of the Mortgaged Property was not modified on the Mortgages so as to reflect the creation of the Condominium. NCF was contractually obligated to advise Citibank of the establishment of the Condominium and the description change as a result thereof; however, NCF provided no notice to Plaintiff of this modification. Pursuant to the terms of the mortgages referenced above, NCF mortgaged, conveyed and assigned all of its right, title and interest in, to and under the Condominium Documents as defined in the mortgages and all of the rights and benefits accruing thereunder.

Plaintiff also alleges that on or about June 7, 2008, the Maturity Date of the Loan Documents was extended, pursuant to an extension agreement to December 6, 2008. On or about December 6, 2008, the Maturity Date of the Loan Documents was again extended pursuant to an omnibus second extension letter and modification to Loan Documents to December 7, 2009. The Mortgage Notes matured on December 7, 2009 and NCF did not pay the outstanding principal and interest due pursuant to the Mortgage Notes on the Maturity Date. On June 24, 2010, Citibank demanded the payment of all outstanding principal and interest due on the Mortgage Notes within ten days after the date of the demand. NCF subsequently failed to pay the outstanding principal and interest due on the Mortgages within ten (10) days after due demand had been made upon it. The failure to pay the Loans when due was an event of default under the Mortgages and Mortgage Notes. Pursuant to the terms of the Mortgage Notes, upon the failure to pay such loan upon the maturity date, NCF is required to pay interest at the rate of 5% plus the Base Rate and a late payment charge. NCF defaulted in its repayment obligations pursuant to the Loans and owes the Plaintiff in excess of $47,433,698.76.

NCF and Chitrik each filed what they styled a "Notice of Limited Appearance and Demands" in response to Plaintiff's Complaint. In their Limited Notices of Appearance, NCF and Chitrik reserved their right to answer the Complaint and joined and incorporated by reference any and all responses to the Complaint filed by any other appearing or responding defendants. Neither NCF nor Chitrik has raised any defenses or material facts to deny or dispute the allegations in the Complaint regarding the defaults of NCF, demand and acceleration of the outstanding principal amount by Plaintiff, or the amount due on the Mortgages. None of the other appearing and responding defendants raised any triable issues of material fact, i.e., any defenses or counterclaims that dispute Plaintiff's entitlement to foreclosure of the Mortgaged Property. Noy, Fitoussi, ADS, Thomas, JC Ryan, Safety, Maspeth and NYSE each filed answers to the Complaint, and Luso, Wausau, and Rotavele served notices of appearance in the action. None of these defendants have asserted any issues of material fact or defense to the foreclosure. ADS, JC Ryan and NYSE are the only defendants that have challenged Plaintiff's lien priority. Thak, Phoenix Steel, Mozart Iron, Nacirema, Maldonado, Level 7, Rent A Unit, Frank Seta & Assoc., Karl Fischer, Closers, Wood Floors, The Gold Group, Guma, and New York State and ECB have failed to answer the Complaint within the time required by the CPLR.

By order of this Court, dated November 24, 2010, Stephen Nuzzolo of Alvarez & Marsal Real Estate Advisory Services was appointed as receiver for the Mortgaged Property. Mr. Nuzzolo has filed periodic reports as required by this Court and his role as receiver is unaffected by the outcome of this motion.

Regarding the branch of plaintiff's motion seeking summary judgment on its first cause of action, for foreclosure, a plaintiff must establish its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. Wells Fargo v. Webster, 61 A.D.3d 856, 856 (2d Dept. 2009), *citing* Republic Natl. Bank of N. Y. v. O'Kane, 308 A.D.2d 482, 482 (2d Dept. 2003), *quoting* Village Bank v. Wild Oaks Holding, 196 A.D.2d 812, 812 (2d Dept. 1993). In Wells Fargo, *supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.* Once plaintiff's burden has been met, it becomes incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a bona fide defense. *Id*.

Here, this Court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its claims for foreclosure of the Mortgage, and demonstrated that there are no material issues of fact in dispute with respect to these claims. More specifically, plaintiff has submitted to the Court copies of the duly executed Note, Mortgage, default and acceleration. This evidence has established that borrower defendants have failed to make, or cause to be made, payment in accordance with the terms of the Note and Mortgage.

NEW YORK STEEL ERECTORS, INC. ("NYSE"), has submitted partial opposition to plaintiff's motion to foreclose, and to dismiss the mechanic's lien of New York Steel Erectors,

Inc. NYSE claims it has a valid and extant mechanic's lien against the subject property located at 41-17 Crescent Street, Astoria, NY. Such lien has been bonded off by a discharge of mechanic's lien bond posted by Les Constructions Beauce Atlas Inc. ("CBA") from Hartford Fire Insurance Company, ("Hartford"). By virtue of such bond, the NYSE mechanic's lien has been shifted from the realty to the bond, that is, the security for this lien is now the bond guarantee, and not the realty. In view of this bond, NYSE need only establish and enforce its lien, and not foreclose on the real property itself. Accordingly, NYSE opposes the Citibank motion to dismiss and sever its lien, but has no objection, otherwise, to the foreclosure.

Defendants Chitrik and NCF Equities LLC, ("NCF"),oppose the motion for foreclosure, claiming an issue of fact exists. According to them, Chitrik and NCF , through NCF, did obtain the subject loan from the plaintiff to develop the property located at 41-23 Crescent Street, Long Island City, New York. The mortgage was for a certain construction loan to build this new construction at the Property and it was not funded all at one time, but instead, funds were released over a long period of time when requests for disbursements were made. They claim that there were repeated, substantial delays in the plaintiff releasing funds. These delays ultimately played a substantial role in the entire project failing. In support of their claims, they have submitted an affidavit of Chitrik claiming procedures set up by plaintiff caused delays in funding that caused NCF to not timely pay subcontractors. The subcontractors stopped work and the project could not be completed on time. This caused people to rescind on contracts to purchase apartments due to the failure to timely complete.

The Court finds that NCF and Chitrik have failed to meet their burden on summary judgment, which required them to lay bare their proof and show facts sufficient to require a trial. (CPLR 3212(b)). They have merely set forth conclusory facts and unsubstantiated allegations. *See, e.g.*, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) ("[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment); Chance v. Felder, 33 A.D.3d 645, 645-646 (2d Dep't 2006) (once a movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact"); CPLR 3212(b) (a motion for summary judgment shall be denied "if any party shall show facts sufficient to require a trial of any issue of fact"). Chitrik and NCF have not submitted any evidence regarding a specific instance in which plaintiff failed to provide timely funding. Nor have they submitted any evidence of the rescission of a contract. Moreover, plaintiff has submitted a document, dated January 4, 2009, that was signed by Chitrik as managing member of NCF, wherein, he acknowledged that "as of the date hereof [December 6, 2008] there are no offsets, defenses or counterclaims to the Borrower's obligations under the Loan [made pursuant to the Building Loan Agreement and the Project Loan Agreement]" Consequently, Chitrik has, in essence admitted that plaintiff was not in breach of its obligations and thereby contradicts his instant opposition. Finally, there is nothing in the Loans or Guaranties which would permit Borrower or Chitrik to escape foreclosure or liability as a result of any delay in granting, or

failure to grant Borrower's requisition requests. The Amended and Restated Acquisition Loan Mortgage, the Building Loan Mortgage and the Project Loan Mortgage requires that had Citibank actually improperly delayed advances as claimed, the sole remedy was for them to seek injunctive relief or specific performance, a remedy Chitrik and NCF have never sought. Accordingly, defendants have failed to raise a genuine issue of material fact to whether plaintiff improperly refused to advance funds for completed work items. Consequently, the branch of the motion seeking summary judgment in plaintiff's favor on the first cause of action for foreclosure is granted. Based on this finding, and the lack of opposition from Noy and Fitoussi, the branch of the motion seeking summary judgment against the defendants Chitrik, Noy and Fitoussi (collectively the "Appearing Guarantors") is granted.

The branch of the motion seeking summary judgment against the Appearing Mechanic's Lienors is granted. According to plaintiff each of the mechanic's lienors filed notices of mechanic's lien subsequent to the recording of plaintiff's mortgage liens on March 1, 2007. Plaintiff also claims that JC Ryan, ADS and NYSE are the only mechanic's lienors that have asserted priority over Plaintiff's mortgage liens, and JC Ryan and ADS set forth no support for the assertions that Plaintiff's mortgage liens are subordinate to the mechanic's liens despite the prior filing of the mortgage liens. Furthermore, plaintiff claims that although NYSE asserted priority over Plaintiff's mortgage liens, NYSE has no claim against the Mortgaged Property because its lien has been discharged. NYSE was given a bond discharging its lien from Les Constructions Beauce-Atlas Inc., as principal and Hartford Fire Insurance Company, as surety, in the sum of $337,281.00, which is 110% of NYSE's $306,619.00 lien. Thus, NYSE's purported lien was discharged by the bond and it has no claim for which relief can be sought against plaintiff since its recovery must be based on the bond, not the Mortgaged Property. Plaintiff further claims that even if plaintiff's mortgage liens were deemed to be subordinate to JC Ryan, ADS or NYSE's purported mechanic's lien, that subordination would have no bearing on plaintiff's entitlement to summary judgment for foreclosure.

In opposition, NYSE acknowledges it received a discharge of Mechanic's Lien Bond from the Hartford which was posted by Les Constructions Beauce Atlas Inc. Such bond provides as follows:

> NOW, THEREFORE, THE CONSIDERATION of this obligation is such that if the above bounded Principal, its executors, administrators, successors and assigns, shall well and truly pay any judgment which may be rendered against said property for the enforcement of such private lien, not exceeding the sum of Three hundred thirty seven thousand two hundred eight one / 100 ($337,281) dollars, then this obligation is void; otherwise to remain in full force and effect. (Emphasis supplied.)

According to NYSE, the legal effect of such bond is to discharge the lien from the property; the lien shifts to the undertaking, and an action to foreclose the lien, if it has been

commenced at the time the undertaking is given, is converted to an action to establish the validity of the lien and to procure a judgment on the undertaking. Moreover, NYSE claims it must be allowed to continue the foreclosure action to judgment, and such judgment should then include a provision requiring Hartford to pay any amount found due on the lien.

As stated above, NYSE does not oppose the motion for summary judgment so long as its counterclaims are not severed. NYSE's counterclaim seeks foreclosure of its mechanic's lien. As there is a surety bond, its counterclaim should be severed pursuant to CPLR 603. *See e.g.*, Bankers Trust N.Y. Corp. v. Renting Office, Inc., 91 A.D.2d 1140 (2d Dep't 1983) (where court declined to interrupt foreclosure and instead severed counterclaims for money damages which were protected by a surety bond). Any judgment NYSE is entitled to will be enforced against the Bond, not the Mortgaged Property. *See* Neighborhood Housing Services of N.Y. City, Inc. v. Meltzer, 67 A.D.3d 872, 874 (2d Dep't 2009). Where a counterclaim is based upon acts occurring subsequent to the issuance of the mortgage, and does not relate to the inception of the mortgage, or is not inextricably intertwined with or inseparable from the obligation, severance of the counterclaim should be granted. *See* HSBC Bank USA v. Merrill, 37 A.D.3d 899 (3d Dep't 2007). NYSE's lien is not related to the Mortgage and its lien foreclosure claim can be separately litigated in a severed action without prejudice to NYSE. Accordingly, the branch of plaintiff's motion seeking to sever NYSE's counterclaim and third-party claim to foreclose its lien is granted. Furthermore, the branch of plaintiff's motion seeking severance of JC Ryan's Cross-claims is granted, on consent of JC Ryan and without opposition from other defendants.

Based on the above, this Court grants plaintiffs motion for summary judgment against NCF, the Appearing Guarantors and Appearing Mechanic's Lienors on its First Cause of Action, orders that the mechanic's liens of the Appearing Mechanic's Lienors are junior and inferior to Plaintiff's mortgage liens, and declares that NYSE cannot recover on the Mortgaged Property because its lien has been discharged.

The branch of the motion by plaintiff seeking summary judgment on its second cause of action to amend the legal description on the mortgages is granted, without opposition. On February 10, 2009, NCF executed and filed a declaration of condominium (the "Declaration of Condominium"), which created the Crescent Club Condominium. At the time that the Declaration of Condominium was filed, the description of the Mortgaged Property was not modified on the Mortgages to reflect the creation of the Condominium. There are no material facts or law in dispute regarding this amended legal description of the Mortgaged Property. Accordingly, this Court grants plaintiff judgment amending the description of the Mortgaged Property to reflect the creation of a Condominium on February 10, 2009.

The branch of the motion by plaintiff seeking summary judgment for a conditional deficiency judgment in its favor on its fourth and fifth Causes of Action, which seek to enforce, respectively, the Joint and Several Guaranty of Payment of Specific Obligations ("Payment Guaranty") and the Completion Guaranties (collectively, the "Guaranties") is granted. To establish a prima facie case that [plaintiff] is entitled to recover on a guarantee under New York

law, [a plaintiff] must show: (1) that it is owed a debt from a third party, (2) that the defendant guaranteed payment of that debt, and (3) that the debt has not been paid by either the third party or the defendant. *See*, Samsung Am., Inc. v. Noah, 209 A.D.2d 367 (1st Dep't 1994); 117-14 Union Turnpike Assocs., L.P. v. County Dollar Corp., 187 A.D.2d 357 (1st Dep't 1992.)

Here, there is no dispute that Chitrik, Fitoussi and Noy executed a Payment Guaranty in favor of Plaintiff, dated as of December 7, 2006, pursuant to which they jointly and severally guaranteed, inter alia, the repayment of the debt due and owing pursuant to the Loan Documents, in the amount up to $12,763,467.75, plus interest. It is also undisputed that they agreed that they would indemnify and hold Plaintiff harmless against any loss, liability, cost or expense, including reasonable attorneys' fees in connection with actions to enforce the sums due and owing pursuant to the Loan Documents. There is similarly no dispute that Chitrik, Fitoussi and Noy executed a Completion Guaranty, dated December 7, 2006. It is also undisputed that Level 7 executed a Completion Guaranty, dated April 7, 2008. Pursuant to the Completion Guaranties, Chitrik, Fitoussi, Noy and Level 7 ("the Guarantors") agreed, inter alia, to keep the Mortgaged Property free of all mechanic's liens. However, there are numerous mechanic's liens purportedly encumbering the Mortgaged Property. Pursuant to the terms of the Guaranties, the Guarantors are obligated to the Plaintiff. The Guarantors have asserted no defense to enforcement of the Guaranties. As set forth above, NCF is presently indebted to plaintiff for the entire outstanding amount of the debt pursuant to the Mortgages. Accordingly, there is no genuine issue of material fact that pursuant to the unconditional and irrevocable Guaranties, Chitrik, Noy and Fitoussi are each jointly and severally liable to plaintiff, at least for any deficiency that remains up to $12,763,467.75, plus interest, following the foreclosure sale sought by this action, and for reasonable attorneys' fees. Accordingly, the branch of the plaintiff's motion seeking summary judgment against the Guarantors on its Fourth and Fifth Causes of Action to enforce the Guaranties is granted.

The branch of the motion by plaintiff seeking a default judgment be entered against CLOSERS, WOOD FLOORS, GUMA, FRANK SETA & ASSOC., KARL FISCHER, PHOENIX STEEL, NACIREMA, MALDONADO, MOZART IRON, LEVEL 7, THAK, RENT A UNIT, THE GOLD GROUP, ECB AND NEW YORK STATE declaring that: (I) any mechanic's liens filed by Closers, Wood Floors, Guma, Frank Seta & Assoc., Karl Fischer, Phoenix Steel, Nacirema, Maldonado, Mozart Iron, Thak, Rent A Unit, or The Gold Group against the Mortgaged Property are junior and subordinate to Plaintiff's mortgage liens on the Mortgaged Property; (ii) any and all right, title or interest ECB or New York State may have against the Mortgaged Property is junior and subordinate to Plaintiff's mortgage liens on the Mortgaged Property; and (iii) all of the Defaulting Defendants are barred and foreclosed of and from all estate, right, title, interest, claim, lien and equity of redemption of, in and to the Mortgaged Property and each and every part and parcel thereof, but are not barred from claiming a share of any surplus proceeds, if any, after payment of the entire debt owed to Plaintiff, is granted without opposition.

The branch of the motion by plaintiff seeking a judgment against NCF for the attorneys' fees, costs and disbursements incurred in prosecuting this foreclosure action is granted. Attorneys' fees are recoverable in a mortgage foreclosure action "if the mortgage document obligates the mortgagor to pay such a fee for the expenses incurred in that action." Kingsland Group, Inc. v. J.B. Satcin Realty Corp., 16 A.D.3d 380, 381 (2d Dep't 2005); Levine v. Infidelity, Inc., 2 A.D.3d 691, 692 (2d Dep't 2003). Pursuant to the terms of the Mortgages, NCF is liable for Plaintiff's attorneys' fees and the costs and disbursement of this action. Each of the Mortgages includes the following language:

> If default in the performance of any of the covenants of the Mortgagor herein occurs, the Mortgagee may, at its discretion, remedy the same… If the Mortgagee shall remedy such a default or appear in, defend, or bring any action or proceeding to protect its interest in the Mortgaged Property or foreclose this Mortgage or collect the Debt, the costs and expenses thereof (including reasonable attorneys' fees to the extent permitted by law), with interest as provided in this paragraph, shall be paid by the Mortgagor to the Mortgagee upon demand.

The branch of the motion seeking to appoint a referee to determine the amounts due to plaintiff under the loan documents is granted. Plaintiff has established its right and entitlement to summary judgment, and therefore, plaintiff is also entitled to an order of this Court referring this action to a referee: (a) to ascertain and compute the amounts due Plaintiff for principal and interest under the Loan Documents, and any other amounts due and owing; and (b) to report those amounts to the Court with all convenient speed. The Referee can address any potential discrepancy regarding the amount due and can take testimony on this issue if necessary.

The branch of the motion seeking to amend the caption is granted. Plaintiff has established that no parties other than the defendants previously served in this action, have an interest in or lien upon the Mortgaged Premises. Accordingly, this Court directs that names of all the John Doe, Mary Roe, XYZ Corp., ABC, LLC defendants be deleted from the caption of this action. Pursuant to the agreement between Plaintiff and Defendant Ben Nash (a/k/a Chaim Nash), this action has been discontinued against Defendant Ben Nash. Accordingly, this Court directs that Ben Nash be deleted from the caption of this action.

The cross-motion by Chtrik and NCF pursuant to CPLR §3012(d) for leave of the Court to permit NCF and Chitrik to submit late Answers to the Complaint is denied. They claim that NCF, previously appeared in this action pursuant to a certain Notice of Limited Appearance with Demands, dated November 11, 2010, and Chitrik previously appeared in this action, pro se, pursuant to a certain Notice of Limited Appearance with Demands, dated November 18, 2011. Although Chitrik appeared in this action pro se, one attorney prepared both Notices of Appearances annexed hereto, and advised Mr. Chitrik that the filing of these documents would be deemed a general denial of the allegations set forth in the Complaint in this action, and

would preserve the rights of both NCF and Chitrik to assert Affirmative Defenses and/or Counterclaims during this litigation. It was only when Chitrik received the instant motion by plaintiff's that he realized that an amendment of his and NCF's pleadings would be necessary. According to them, since the within request for leave to serve late/amended pleadings in this case is not willful, and there is no evidence that plaintiff will be prejudiced, the motion should be granted. Plaintiff opposes this cross-motion.

It is well-settled that leave to amend pleadings is freely given "absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983). However, an amendment which is plainly lacking in merit will not be permitted. Sunrise Plaza Assocs., LP v International Summit Equities Corp., 288 AD2d 300 (2d Dept 2001.) The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing. Lucido v. Mancuso, 49 AD3d 220 (2d Dept 2008.)

In this case, the proposed late/amended Answer contains a counterclaim for "Breach of Agreement(s)", Chitrik and NCF assert that "some or all of the above-referenced loans … required that [Citibank] make timely periodic payments and disbursements in connection with the construction of the Property" and that Citibank breached the various loans by failing and refusing to make timely payments or disbursements to NCF after receiving appropriate requests from NCF for such payments and disbursements. The proposed counterclaim asserts that as a result of the breach, NCF was unable to complete the construction of the Property, resulting in the failure of NCF to repay the Loans and alleged damages in the amount of not less than $50,000,000.

These identical claims were set forth by defendants in their opposition to the motion by plaintiff for summary judgment and were rejected by this Court, as set forth above. Accordingly, the counterclaim is palpably without merit and the cross-motion is denied.

Settle order.

ORIN R. KITZES, J.S.C.