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MEMO DECISION & ORDER

INDEX No. 18729/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/17/13
ADJ. DATES
Mot. Seq. # 003 - MD
CDISP Y____ N XX

NORTH COUNTRY DEVELOPERS, LLC., Plaintiff, - against - FAIRWAY ROCK, LLC, GREAT ROCK GOLF, INC., JBGR, LLC, INSURENEWYORK AGENCY, LLC ELLIOTT WR GOLF, LLC, MCAVOY WR GOLF, LLC, DEMPSEY WR GOLF, LLC, WALSH WR, GOLF, LLC, HURNEY WR GOLF, LLC, SPILIOTIS WR GOLF, LLC, THE SUFFOLK COUNTY NATIONAL BANK PAUL ELLIOT, "ABC" CORP., JOHN DOE and JANE DOE, 1-5, being and intended to be tenants or other persons in possession of the premises or having any claims subordinate to the claim of the plaintiff herein, Defendants.	KLEIN & VIZZI, LLP Attys for Plaintiff 370 Sunrise Hwy. Suite B West Babylon, NY 11704 CIARELLI & DEMPSEY, P.C. Attys. for Defendants Fairway Rock, Elliot & the LLC Defendants 737 Roanoke Ave Riverhead, NY 11901 FIDELITY NATIONAL LAW GROUP Attys. for Suffolk County National Bank 350 Fifth Ave Suite 3000 New York, NY 10118

Upon the following papers numbered 1 to 6 read on this motion by defendant Suffolk County National Bank for its substitution and for renewal and/or reargument of its prior cross motion (#002) for surplus monies; Notice of Motion/Order to Show Cause and supporting papers 1 -3; Notice of Cross Motion and supporting papers _____; Answering papers 4-5; Replying papers ____; Other 6 (Proposed stipulation of counsel conditionally consenting to substitution of defendant bank); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#003) by defendant Suffolk County National Bank for an order permitting the substitution of its successor-in-interest, namely, Hayden Asset V,

LLC., by indorsement of its mortgage note is granted to the extent that the court has "so-ordered" the stipulation of counsel submitted with the moving papers wherein such counsel stipulated, under certain terms and conditions, to such substitution and an amendment of the captions to reflect same; and it is further

ORDERED that the remaining portions of this motion wherein the former plaintiff seeks leave to reargue and renew its prior cross motion wherein it sought an award of surplus monies is denied.

The plaintiff commenced this action to foreclose a September 29, 2006 mortgage given by defendant, Fairway Rock, LLC (hereinafter Fairway or borrower defendant) to secure a mortgage loan in the amount of $950,000.00 evidenced by a note executed by Fairway on the same day as the mortgage. A written guaranty of the obligations of the corporate borrower defendant was executed on September 29, 2006 by defendant Paul Elliott. The mortgage appears to encumber two parcels situated on Sound Avenue in Wading River, New York that are used in aid of the operation of a golf course thereon or nearby. This mortgage was recorded in the office of the Suffolk County Clerk on October 6, 2006. Since, however, the names of the mortgagor (Fairway Rock) and the mortgagee (North Coast Developers) were reversed on the recording page issued by the Clerk, a correction mortgage dated December 11, 2008 was recorded with the Clerk in January of 2009. Except for the guarantor defendant, Paul Elliott, all other known defendants listed in the caption were joined herein as party defendants by virtue of their ownership interests in mortgages, all of which are alleged to be subordinate to the mortgage lien of the plaintiff.

Following service of the plaintiff's summons and complaint upon the known defendants listed in the caption, defendant Fairway, its guarantor co-defendant Paul Elliott and each of the LLC defendants appeared herein by service of a single answer. The Suffolk County National Bank defendant (hereinafter SCNB) also appeared herein by service of its separate answer. No affirmative defenses were asserted in this answer and its denial of the plaintiff's pleaded claim that SCNB's joinder was due to its ownership of subordinate mortgages is asserted upon denial of information sufficient to form a belief as to the truth of such claim. However, by way of a joint counterclaim and cross claim, SCNB asserted that it was the owner of a 1999 mortgage on a parcel situated on Sound Avenue denominated as Parcel I which was the subject of a 2008 Consolidation, Modification, Extension and Spreader Agreement, by which, SCNB's 1999 mortgage was consolidated with a new December 11, 2008 mortgage that encumbered Parcel II as well as Parcel I. These transactions culminated in the formation of a single lien in favor of SCNB on both Parcel I and Parcel II.

In response to the plaintiff's December 21, 2012 motion (#001) for accelerated judgments against all defendants and an order appointing a referee to compute amounts due, defendant SCNB cross moved (#002) for summary judgment on its joint counterclaim/cross claim for an award of surplus monies that was advanced in its answer. Without putting the issue of the priority of its consolidated mortgage over that of the plaintiff's 2006 mortgage by the assertion of an affirmative claim for a declaration with respect thereto, SCNB demanded the following relief in its counterclaim/cross claim:

> In the event that this Court determines that Plaintiff's claimed mortgage has priority over the SCNB Liens on Parcel II, in whole or in part, and any portion of

> Parcel II is sold pursuant to a judgment of foreclosure and sale obtained by the Plaintiff and results in a surplus, SCNB hereby claims title to such surplus monies or so much thereof as is necessary to satisfy the SCNB liens.
>
> WHEREFORE, Defendant SCNB demands judgment awarding SCNB all surplus monies or so much thereof as is necessary to satisfy the SCNB liens, in the event that this Court determines that Plaintiff's claimed mortgage has priority over the SCNB Liens on Parcel II, in whole or in part, and any portion of Parcel II is sold pursuant to a judgment of foreclosure and sale obtained by the Plaintiff and results in a surplus.

By memo decision and order dated March 5, 2013, the court denied SCNB's cross motion for summary judgment on its claim for surplus monies, finding that such an award was premature due to the absence of satisfaction of statutory conditions precedent and the absence of observance of the jurisdictional requirements that are imposed upon the granting of that relief by the provisions of RPAPL §1361. The court went on to note that SCNB was not entitled to the relief contemplated by RPAPL §1351(3) and §1354(3). These statutory provisions provide a mechanism by which a sole subsequent encumbrancer whose mortgage is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, may, upon motion of the holder of such mortgage made without valid objection of any other party, obtain an order directing that the final judgment of foreclosure direct payment of the subordinate mortgage debt from the proceeds in accordance with subdivision 3 of section 1354. In this regard, the court found on page 6 of its March 5, 2013 memo decision and order as follows:

> Here, the cross moving papers include no allegations, let alone proof, that SCNB's 2008 mortgage lien encumbering Parcel II is subordinate only to the 2006 mortgage lien of the plaintiff for which foreclosure is sought. Indeed, the record suggests otherwise. Moreover, there are no allegations or proof that SCNB's 2008 mortgage is entitled to priority over all other liens and encumbrances as required by RPAPL § 1351(3), except those prioritized under subsection 2 of RPAPL §1354. SCNB thus failed to establish the statutory requirement that there be "no more than one other mortgage on the premises which is then due" and that its mortgage "is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354" (*see* RPAPL §1351[3]).
>
> Finally, the court finds that the claim that SCNB lacks standing to collect surplus monies, advanced by the mortgagor, guarantor and LLC defendants, and premised on SCNB's post-commencement assignment of its 2008 mortgage has not been shown to be without merit as a matter of law. While the court acknowledges the appellate case authorities issued under the permissive, rather than mandatory substitution provisions of CPLR 1018 upon which SCNB relies to defeat the lack of standing defense (*see* ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2012]; *see also* ***Mortgage Electronic Registration Systems, Inc. v Korolizky***, 100 AD3d 605, 952 NYS2d 902 [2d Dept 2012]; ***Mortgage Electronic Registration Sys., Inc. v Thompson***, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012],

> none of these case authorities involve an unripened claim for surplus monies such as the one asserted by SCNB in this action. For these reasons and those set forth above, the court denies the cross motion by SCNB

By the instant motion, defendant SCNB, jointly with its transferee, Hayden Asset V, LLC seek an order pursuant CPLR 1018 substituting Hayden for defendant SCNB in this action in accordance with the terms of a stipulation signed by counsel for all appearing parties. That application is granted, as the court has "so-ordered" such stipulation. Hayden Asset V LLC is thus substituted in the place and stead of defendant SCNB under the terms and condition set forth in the stipulation and the captions are amended to reflect such substitution. All future proceedings shall be captioned accordingly.

In the remaining portions of this motion, the co-movants seek to reargue and/or renew SCNB prior cross motion for summary judgment on its joint counterclaim/cross claim for an award of surplus monies that was advanced in its answer. For the reasons stated below, this application is denied.

It is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason, mistakenly arrived at its determination (*see* ***Anthony J. Carter, DDS, P.C. v Carter***, 81 AD3d 819, 916 NYS2d 821 [2d Dept. 2011]; ***Everhart v County of Nassau***, 65 AD3d 1277, 885 NYS2d 765 [2d Dept 2009]; ***McDonald v Stroh***, 44 AD3d 720, 842 NYS2d 727 [2d Dept 2007]). CPLR 2221 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced. Nor is it one that provides a platform for the presentation of arguments different from those already presented (*see* ***V. Veeraswamy Realty v Yenom Corp.***, 71AD3d 874, 895 NYS2d 860 [2d Dept 2010]; ***Woody's Lumber Co., Inc. v Jayram Realty Corp.***, 30 AD3d 590, 817 NYS2d 391 [2d Dept 2006]; ***Williams v Board of Educ. of City School Dist. of New York City***, 24 AD3d 458, 805 NYS2d 126 [2d Dept 2005]; ***Simon v Mehryari***, 16 AD3d 543, 792 NYS2d 543 [2d Dept 2005]).

Upon application of these legal maxims to the application before the court, the court finds that neither of the movants are entitled to leave to reargue. The moving papers failed to establish that the court misapprehended or overlooked material facts presented on the prior application or that it misapplied controlling principles of law in arriving at its determination of such prior application (*see* ***Anthony J. Carter, DDS, P.C. v Carter***, 81 AD3d 819, *supra*; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]). The newly posited arguments for relief pursuant to RPAPL § 1351 and §1354, which were not expressly advanced on the prior application, are not the proper subject of a motion for reargument. Those portions of this motion wherein the movants seek such relief are thus denied.

The movants' demands for renewal of the prior cross motion are also denied. Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on prior motion that would change the prior determination, and shall contain reasonable justification for the failure to

present such facts on the prior motion" (***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Siegel v Morsey New Sq. Trails Corp.***, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). The new contentions and material advanced by the movants that were not proffered by SCNB on its prior application rest upon the submission of an incomplete, unsigned "foreclosure search" that was purportedly attached to the plaintiff's motion-in-chief (#001). These new materials do not, however, warrant a change in the court's prior determination as they fail to establish as a matter of law each element of the statutory criteria for the granting of the relief contemplated by RPAPL § 1351(3). (*see* CPLR 2221[e]; ***Brabham v City of New York,*** 105 AD3d 881, 963 NYS2d 332 [2d Dept 2013]; ***Arthur J. Gallagher & Co. v Marchese***, 96 AD3d 791, 946 NYS2d 243 [2d Dept 2012]; ***Mellon v Izmirligil,*** 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011] ***Peycke v Newport Media Acquisition II, Inc.***, 40 AD3d 722, 837 NYS2d 167 [2d Dept 2007]; ***Siegel v Morsey New Sq. Trails, Corp.***, 40 AD3d 960, *supra*; ***Williams v Nassau Med. Ctr.***, 37 AD3d 594, 829 NYS2d 645 [2d Dept 2007]). The relied upon "foreclosure search", which is not in admissible form, fails to provide due proof that Hayden is the holder of a sole subsequent mortgage that is due and that such mortgage has priority over all other liens and encumbrances attached to the mortgaged premises except the governmental liens set forth in RPAPL § 1354(2).

Moreover, a motion for leave to renew must set forth a reasonable justification for the failure to present such facts on the prior motion (*see* ***Wells Fargo Bank, N.A. v Russell***, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]; ***Healy v Damus***, 88 AD3d 848, 931 NYS2d 243 [2d Dept 2011]; ***Leone Prop., LLC v Board of Assessors for Tn. of Cornwall***, 81 AD3d 649, 916 NYS2d 149 [2d Dept 2011], *quoting*, ***Sobin v Tylutki***, 59 AD3d 701, 702, 873 NYS2d 743 [2d Dept 2009]. "A motion 'to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (***Sobin v Tylutki***, 59 AD3d at 702, 873 NYS2d 743 [2d Dept 2009], *quoting* ***Renna v Gullo***, 19 AD3d 472, 473, 797 NYS2d 115 [2d Dept 2005]; *see* ***Rubinstein v Goldman***, 225 AD2d 328, 329, 638 NYS2d 469 [2d Dept 2005]). "The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (***Leone Prop., LLC v Board of Assessors for Tn. of Cornwall***, 81 AD3d 649, *supra,* quoting ***Sobin v Tylutki***, 59 AD3d at 702, *supra*); *see* ***Worrell v Parkway Estates, LLC***, 43 AD3d at 437, 840 NYS2d 817 [2d Dept 2007]). Here, the moving defendants failed to demonstrate a reasonable justification for failing to advanced the new contentions and material on the earlier cross motion (*see* ***Wells Fargo Bank, N.A. v Russell***, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]). Those portions of this motion (#003) wherein renewal is requested is denied.

The denial of relief to the moving defendants is without prejudice to the interposition a new and direct application, upon due proof, for relief pursuant to RPAPL § 1351 by the newly substituted defendant Hayden, at the time the plaintiff moves for judgment.

DATED: 5/30/13

THOMAS F. WHELAN, J.S.C.