SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** 59

Justice

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HARLEM 2201 GROUP LLC,

Plaintiff,

- v -

KAREEM AHMAD, EL-BEY TRUST, KAREEM AHMAD EL-BEY, GLOBAL INVESTMENT STRATEGIES TRUST, TOMER Y. GOLDSTEIN P.C. IN ITS CAPACITY AS ESCROW AGENT,

Defendants.

INDEX NO. 651345/2016

MOTION DATE 12/23/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this application to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion to amend the complaint herein is granted, and the complaint is deemed amended in the caption to read Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, and it is further

ORDERED that the caption shall be deemed amended upon service of a copy of this order with notice of entry with proof of service on the Clerk of the Trial Support Office (Room 158M)

and the County clerk (Room 141B), who are directed to mark the court's records to reflect such amendment; and it is further

ORDERED that the branch of Harlem 2201 Group LLC's motion, which seeks a default judgment against Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, is denied; and it is further

ORDERED that the branch of the cross motion of Kareem Ahmad El-Bey and Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, which seeks an extension of Kareem Ahmad El-Bey Trust's time to answer is denied; and it is further

ORDERED that the branch of Harlem 2201 Group LLC's motion, which seeks an order granting it summary judgment on its second cause of action against, and declaring that defendants Tomer Y. Goldstein, P.C., Kareem Ahmad El-Bey, and Global Investment Strategies Trust breached the contract with Harlem 2201 Group LLC, is denied; and it is further

ORDERED that the branch of Harlem 2201 Group LLC's motion, which seeks an order granting it summary judgment on its second cause of action against Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, is granted, and plaintiff is granted judgment on its second cause of action against Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, and it is further

ADJUDGED, DECLARED and DECREED that defendant Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, breached the January 2015 contract with Harlem 2201 Group LLC, and that Harlem 2201 Group LLC is entitled to the return of its $250,000.00 deposit, and it is further

ADJUDGED, DECLARED and DECREED that neither Kareem Ahmad El-Bey, individually, nor Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, is entitled to receive or retain that $250,000.00 deposit, and it is further

ADJUDGED, DECLARED and DECREED that from any assets of the Kareem Ahmad El-Bey Trust, plaintiff shall have prejudgment interest at the rate of 9% per annum on the $250,000.00 contract deposit, from the date of September 10, 2015 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and such second cause of action is severed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion, which seeks an order under its second cause of action directing Tomer Y. Goldstein, P.C. to return the contract deposit, is granted to the extent that, in the event that Tomer Y. Goldstein, P.C. has

not yet deposited Harlem 2201Group LLC's $250,000.00 contract deposit with the Clerk of the Court, New York County, Tomer Y. Goldstein, P.C. is directed to refund that $250,000.00 deposit to Harlem 2201 Group LLC, within 20 days of service of a copy of this order with notice of entry, and if Tomer Y. Goldstein, P.C. has deposited such funds with the Clerk of the Court, New York County Clerk, Tomer Y. Goldstein, P.C. is, directed, within that same twenty (20) day period, Tomar Y. Goldstein, P.C. shall send written advice thereof to plaintiff's counsel, Jeffrey Fleischmann of the Law Office of Jeffrey Fleischmann P.C.; and it is further;

ORDERED that the branch of plaintiff's motion, which seeks an order on the second cause of action directing the New York City Department of Finance to return the contract deposit, is granted to the extent that, in the event that Tomer Y. Goldstein, P.C. has deposited the $250,000.00 contract deposit with the Clerk of the Court, New York County, and if the Clerk of the Court has transmitted that $250,000.00 contract deposit to the New York City Department of Finance, then, upon service of a copy of this order with notice of entry on the New York City Department of Finance, it shall promptly refund to Harlem 2201 Group LLC's $250,000.00 contract deposit, deducting any administrative fee(s) to which the New York City Department of Finance may be entitled, to Harlem 2201 Group LLC having an

address at_____

_____; and it is further

ORDERED that if the New York City Department of Finance has not received the $250,000.00 contract deposit from the Clerk of the Court, New York County, the New York City Department of Finance shall provide written advice thereof to Harlem 2201 Group LLC's counsel, Jeffrey Fleischmann of the Law Office of Jeffrey Fleischmann P.C., 26 Broadway, 21st Floor, New York, New York, 1004, within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of Harlem 2201 Group LLC's motion, which seeks an order dismissing Kareem Ahmad El-Bey Trust and Kareem Ahmad El-Bey's counterclaim and any discovery demands made therein, is granted, and that counterclaim and any discovery demands made therein are dismissed; and it is further

ORDERED that the branch of the cross motion of Kareem Ahmad El-Bey, as trustee of the Kareem Ahmad El-Bey Trust, and Kareem Ahmad El-Bey, which seeks leave to serve an amended answer in the form annexed to its cross-moving papers, is denied, without prejudice; and it is further

ORDERED that the action shall continue as to the first, and third through sixth causes of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, 60 Centre Street, Room 331, on June 5, 2018, 10 A.M.

DECISION

This Lawsuit

In this action, plaintiff Harlem Group LLC (Harlem) seeks, inter alia, a declaration that defendant El-Bey Trust breached a contract (Contract) in which it agreed to sell plaintiff a vacant and unfinished 35-unit Manhattan condominium building, located at 2201 7th Avenue (property).

Harlem now moves for an order, pursuant to CPLR 3212, granting it summary judgment on its second cause of action, which seeks a judgment declaring that defendants breached the Contract by refusing to return Harlem's $250,000.00 deposit after it cancelled the Contract during the due diligence period, and that the deposit be delivered to Harlem.

Harlem seeks a further order directing the escrow agent, defendant Tomer Y. Goldstein, P.C. (Goldstein, P.C.), or the New York City Department of Finance (Department of Finance) to deliver the deposit, with prejudgment interest, to Harlem. Harlem also requests that it be awarded the costs and disbursements of this action.

Harlem moves, in addition, for an order, pursuant to CPLR 3211, dismissing the pro se counterclaim of defendants Kareem Ahmad El-Bey Trust (El-Bey Trust) and Kareem Ahmad El-Bey (El-Bey), its sole trustee, arguing that the counterclaim does not comport with CPLR 3013's pleading requirements and appears merely to constitute discovery demands. Alternatively, Harlem seeks a default judgment against El-Bey Trust, urging that a trust is required to appear by counsel, rather than by El-Bey, a layman, who served an answer on behalf of himself and El-Bey Trust. Upon granting that default judgment, Harlem requests that Goldstein P.C. or the Department of Finance refund its deposit, with prejudgment interest.

El-Bey Trust and El-Bey, now represented by counsel, oppose Harlem's motion and cross-move for an order, pursuant to CPLR 3025 (b), granting them leave to serve a proposed amended answer and counterclaim in the form annexed. Alternatively, El-Bey Trust cross-moves, pursuant to CPLR 2004 and CPLR 3012 (d), for an order extending its time to answer the complaint.

Background

In 2005, 2201 7th Avenue Realty LLC (7th Avenue), the property's owner of record at that time, obtained a $2,600,000.00 acquisition loan and executed a note and mortgage on the property. See 1180 President Funding, Inc. v 2210 7th

Ave. Realty LLC, Sup Ct, NY County, Index No. 650956/2010 (1180 action.

In December 2006, such note and mortgage were assigned to Banco Popular North America (Banco Popular). At the same time, 7th Avenue executed a building loan agreement and note secured by a mortgage and a project loan agreement and note secured by another mortgage, when it borrowed, respectively $11,117,200.00 and $2,030,800.00 from Banco Popular. The three mortgages and notes were amended and the mortgages were recorded in 2009. Trevor Whittingham (Wittingham), 7th Avenue's sole member, guaranteed all three mortgages.

The project ran into financial trouble, and numerous contractors filed mechanics' liens against the property, beginning in October 2009. In addition, starting in November 2009, 7th Avenue defaulted on its mortgage payments to Banco Popular.

In February 2010, one of 7th Avenue's contractors, Galaxy General Contracting Corp. (Galaxy), commenced an action in this court (Galaxy action) to foreclose its mechanic's lien in the principal amount of approximately $2,750,000.00 and filed a notice of pendency. Harlem Contracting LLC v 2201 7th Ave Realty LLC, NY County Clerk Index No. 102131/2010 (Galaxy action). Among those named as defendants in that action were 7th Avenue and Trevor Whittingham, Inc.

(Whittingham, Inc.), the property's prior owner and an entity wholly owned by Whittingham.

In May 2010, a deed, purportedly executed on July 8, 2007, (that indicates that the deed was backdated), which transferred the property from 7th Avenue to Global Investment Strategies Trust (Global), a trust which Whittingham allegedly established for his sole benefit, was recorded and filed. There is also evidence that, at one point, Whittingham and/or his counsel claimed that Whittingham was tricked into signing away his rights to Global. According to Whittingham, Global was managed by trustees Garret Everett (Everett) and Naeem Salim (Salim), and, over time, El-Bey "was added as the Managing Trustee to administer the affairs of the trust."

In June 2010, Global recorded an April 2010 Memorandum of (long-term) Lease (of the property) to WA Integrity Trust, apparently controlled by Whittingham, which lease was executed by Global's then managing trustee, David Goldberg (Goldberg).

In July 2010, Banco Popular commenced a foreclosure action, including against 7th Avenue, Whittingham, Whittingham, Inc., Global Investment Strategies Trust (Global), WA Integrity Trust, and various lien holders. The complaint in that action alleges numerous defaults under the loan documents, including 7th Avenue's failure to pay interest and principal when due, its transfer of title to Global, and the granting of a possessory

interest to WA Integrity Trust, both without Banco Popular's requisite permission. Banco Popular asked for, and was eventually granted, the appointment of a receiver to protect and manage the property, and the authority to employ watchmen. Joseph Sanchez, Esq. (Sanchez) answered for 7th Avenue, Whittingham, and possibly for Global in Banco Popular's foreclosure action, and acted for them. See 1180 action.

By order dated March 28, 2011, Justice Carol Edmead (Justice Edmead) of this court, who was assigned the Galaxy action, denied Galaxy's motion, which sought, among other relief, a default judgment against 7th Avenue for failing to answer and appear, but granted a default judgment against the other defendants. Galaxy appealed the denial of the default judgment as to 7th Avenue. On January 5, 2012, Galaxy assigned its mechanic's lien and its claims in its action to Harlem Contracting LLC (Harlem Contracting), which was managed by one Moishe "Mark" Tress (Tress). On the same day, an entity related to Harlem Contracting, 1180 President Funding, LLC (1180), which was also managed by Tress, purchased Banco Popular's interest in the three mortgages and their related documents, and several months later was substituted as plaintiff for Banco Popular in its foreclosure action. See 1180 action. Galaxy stipulated that the three mortgages assigned by Banco Popular to 1180 had priority over Galaxy's lien, that any judgment in Galaxy's favor

would not affect 1180's lien status, and that the sale of Galaxy's lien would be subject to the liens of 1180's three mortgages.

In March 2012, Justice Fried, who was assigned the 1180 action, so-ordered the parties' stipulation consolidating that action with the Galaxy action for the purposes of joint discovery and trial. That stipulation was signed by Sanchez as counsel for 7th Avenue, Whittingham, Inc., Whittingham, Global, and WA Integrity Trust. Justice Edmead then ordered that the Galaxy action be transferred to Justice Fried.

By order to show cause, signed in August 2012 by Justice Marcy Friedman (Justice Friedman), who had been assigned by Justice Fried (then retired)'s caseload, Sanchez moved to withdraw as counsel under the index number and caption in the Galaxy action. Justice Friedman denied the motion because Sanchez failed to submit a copy of the transcript for so-ordering, as directed by the court.

Meanwhile, in May 2012, the Appellate Division, First Department reversed Justice Edmead's denial of Galaxy's motion for a default judgment against 7th Avenue, granted Galaxy's motion, and directed the Clerk to enter judgment accordingly. Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC, 95 AD3d 789, 790 (1st Dept 2012).

In December 2013, Justice Friedman granted 1180 summary judgment, on liability, in its action, against Whittingham, 7th Avenue, and Global; entered a default against Whittingham, Inc., WA Integrity Trust, and the other non-appearing defendants; and appointed a referee to compute.

In April 2014, Everett, one of Global's trustees, in the presence of a co-trustee, Salim, executed, on Global's behalf, a quitclaim deed of the property to the irrevocable El-Bey Trust.

On January 12, 2015, Herman Jacobowitz (Jacobowitz), a member of plaintiff Harlem, entered into the Contract with El-Bey Trust to buy the property, which the Contract represented as having an assessed value of $40,000,000.00, for $9,000,000.00. El-Bey executed the Contract on El-Bey Trust's behalf. Harlem gave a $250,000.00 deposit to El-Bey Trust's counsel, Tomer Y. Goldstein (Goldstein), to be placed in escrow by his firm, Goldstein, P.C. The buyer was to hold the escrowee harmless, except if it were grossly negligent or acted in bad faith or in willful disregard of the Contract. Contract, § 2.05 (b); see also Contract rider (Rider), ¶ 5. The Rider, provides that Harlem accepted the property subject to one mortgage of record and to all mechanics' liens. Rider, ¶¶ 9,10. Additionally, El-Bey Trust was required to make all mortgage interest and principal payments, when payable and due, and to make all deposits due under any existing mortgage. Contract, § 9.01.

Notwithstanding that Global was a defendant in the 1180 action, and the likelihood that its managing trustee, El-Bey, had knowledge of that action's pendency for more than four years, El-Bey Trust represented in the Contract that, if the property was encumbered by any mortgages, "no written notice had been received from the mortgagee[] asserting that a default or breach exists thereunder which remains uncured and that no such notice shall have been received and remain uncured on the Closing Date." Contract, § 4.02. The Contract's schedule C recites, in part, that "[t]he purchase price shall be paid as follows . . . (c) [b]y acceptance of title subject to the following mortgage(s): STax Lien Sale, dated 8/8/2013, and all other liens."

If Harlem defaulted in performing its Contract obligations, El-Bey's only remedy was to retain the down payment as liquidated damages. Id., § 13.04. If the seller were unable to convey title, as provided in the Contract/Rider, or if Harlem had another basis under the Contract to refuse to consummate the deal, it could terminate the Contract, in which case, it would only be entitled to the refund of its down payment. Contract, § 13.02. The purchaser could, instead, go forward with the deal and receive a limited credit toward the purchase price. Id. El-Bey Trust was required to convey fee simple title to the property and, at the closing, had to deliver, among other

things, a marketable bargain and sale deed, in conformity with the Contract's requirements, and the consent of the mortgagee. Contract, §§ 1.02, 10.01, 10.07; Rider, ¶ 9.

The Contract provided that the closing was to occur on February 11, 2015, about a month after the Contract signing, and that time was of the essence. Rider, ¶ 5. If Harlem failed to close on that date, it would forfeit its deposit. Id. El-Bey Trust was entitled to adjourn the closing for up to 60 days to correct any title defects or objections. Contract, § 13.01. After the parties signed the Contract documents, Harlem was required to immediately order an examination of title. Further, Harlem was afforded a due diligence period to examine the property and anything involving it. That period was to end on January 27, 2015 at 6 p.m., EST. Rider, ¶ 5. The Rider provided notice of intent to rescind the contract was to be made in writing to Seller's counsel by fax or email, at the fax number or email address provided "below." Id. If Harlem so advised El-Bey Trust's counsel, on or before the foregoing day and time, that it wished to rescind the Contract, El-Bey Trust was to refund the deposit. Id. Otherwise, the deposit became non-refundable. Id.

The fax number and email addresses of El-Bey Trust's counsel, Goldstein, and of Harlem's counsel, Abraham Raab (Raab), were set forth at Rider paragraph 16. That paragraph

also recites that the parties' respective counsel were authorized to agree to adjournments of any of the contract dates, "without limitation," including the date of closing, and that all notices under the contract could be given by and to the parties' counsel, which notices were to be sent, among other ways, via fax and email. Id., ¶ 16. The provision concluded that copies of notices to the seller shall be sent to Goldstein, and that copies of notices to the purchaser shall be sent to Raab, followed by their respective contact information.

During the due diligence period, Harlem was unable to ascertain the amounts due under the three mortgages. Therefore, on January 26, 2015, Harlem's counsel, Raab, emailed El-Bey Trust's counsel, Goldstein, asking that he confirm counsels' prior conversation and agreement to extend the due diligence period "until 3 business days after the seller has delivered copies of all payoffs to the purchaser with notice that a copy of all payoffs are attached." On January 21, 2015, possibly in response to that prior agreement, Goldstein, who was also Global's counsel in the 1180 action, at least from December 2014 until seemingly March 2015, when Soleil replaced him, emailed Michael Bonneville (Bonneville) of Kenneth Horowitz's (Horowitz) firm, counsel for 1180 in that action. Goldstein attached a copy of the deed from Global to El-Bey Trust and requested a payoff for the mortgages, but Horowitz denied that request

because Justice Fried's decision annulled the transfer of the property from 7th Avenue to Global. On January 26, 2015, Goldstein emailed Raab agreeing to extend the due diligence period "until 3 business day after the mortgage payoffs are all delivered by seller to purchaser."

On March 2, 2015, about the same time that Soleil appeared for Global and 7th Avenue in the 1180 action, Goldstein emailed Raab that he had been discharged as El-Bey Trust's counsel, and that El-Bey Trust had retained new counsel, Soleil. The email set forth Soleil's address and phone number. Goldstein indicated that he was still holding the deposit in escrow, that "his client" had requested him to transfer the funds to "his new attorney," but that Goldstein would not transfer the funds without Raab's written authorization. On March 18, 2015, Goldstein sent a follow-up email to Raab, reiterating that he no longer represented the seller, and that "he" (evidently El-Bey) obtained new counsel, Soleil. Goldstein further advised that the "seller" had asked him to transfer the funds to "his" new attorney, and asked Raab whether Goldstein was authorized to transfer the funds to Soleil. Goldstein sent additional follow-up emails to Raab on April 30, and May 27, 2015, adding in the latter email that he had not heard from Raab or the seller's attorney in a long time.

On the morning of June 4, 2015, Soleil appeared in court with Whittingham and El-Bey, Global's managing trustee, for motion hearings, evidently in the 1180 action. Both El-Bey and Whittingham asked Soleil about whether Goldstein's file on the sale of the property to Harlem and the escrow deposit had been transferred to him. Later that day, seemingly to reassure El-Bey and Whittingham that Soleil was following through on the matter, he sent Raab and Goldstein an email, with a 7th Avenue subject line, copying El-Bey and Whittingham, advising them of the foregoing that had transpired that morning. Soleil stated that Goldstein's transfer of the file for the sale of the property to Harlem remained incomplete, and that Harlem's deposit had never been transferred from Goldstein to him. Soleil asked that the transfer issue be resolved immediately, adding that he could see no reason why the matter had persisted for three months, i.e., since he had been retained. That day, Goldstein replied by email to Soleil, copied to Raab, El-Bey, and Whittingham, stating that, within a few weeks of his discharge, he had sent Soleil a copy of his entire file, as he further stated that he was required to do when discharged by a client, and when that client requested that he send over the paperwork. Goldstein stated that, if Soleil had not received the papers, he should let him know, and that Goldstein would send Soleil anything missing. Goldstein indicated that the only

thing withheld was the deposit, because he was awaiting Harlem's authorization to release it to Soleil. Goldstein stated that he could not release the funds without both parties' consent, especially that of the party to whom the money legally belonged. Goldstein added that he did not have time to move to have the funds deposited in the court, but that Soleil was welcome to do so. On July 15, 2015, Goldstein emailed Raab, advising that it had "been a very long time since I was relieved as counsel for this case. Please discuss with your client if I can release the funds to my clients [sic] new counsel."

Meanwhile, by letters dated March 11 and 23, 2015, in the 1180 action, Soleil, who advised that he had been newly retained by 7th Avenue, Global, Whittingham, Inc., and by "the owner of the premises," Whittingham, sought payoff letters from 1180's counsel, Horowitz. On May 19, 2015, Horowitz responded to Soleil, by letter apprising him that the amount due as of May 20, 2015 was $21,366,539.50. Horowitz attached a statement detailing that amount. He also advised that such amount did not include the lender's costs and expenses incurred in collecting the debt (e.g., attorneys' fees), any additional advances made by the lender to preserve the property, including the amounts provided to the receiver, and all accruing interest. A copy of that letter and its attachments were provided to Harlem "on or about" May 20, 2015.

It is undisputed that Harlem requested changes in that payoff letter, and that El-Bey agreed to obtain the changes. Id., ¶ 26. Soleil, by order to show cause signed on May 22, 2015, moved for an order, in the 1180 action, compelling 1180 to issue a payoff letter and discharging the accumulated interest. On that application's June 4, 2015 return date, the same date Soleil had emailed Raab and Goldstein that Whittingham and El-Bey had appeared with him in court, Justice Friedman heard counsel on that application. Horowitz stated that Soleil had complained about the insufficiency of the payoff amount set forth in Horowitz's May 2015 letter, but that such matter could be resolved without a motion because he was in the process of ascertaining the amounts of the items which were excluded from that letter. Soleil withdrew that application by letter dated July 8, 2015.

However, on July 9, 2015, Soleil moved on behalf of his clients in the 1180 action to compel 1180 to provide a payoff letter and to accept redemption from 7th Avenue, and for sanctions against 1180, for failing to provide payoff information, despite numerous alleged requests, and for not diligently pursuing the foreclosure action after summary judgment and the order of reference had been granted. That application was supported by Whittingham's affidavit, in which he averred that he had to know the payoff information to redeem,

and that, once that amount was known, he required about 30 days to redeem. In opposing that motion, Tress, on August 14, 2015, asserted, on 1180's behalf, that it had provided payoff letters, including the latest updated letter dated August 11, 2015; that most of movants' purported payoff requests were not in fact payoff requests; that at no time had movants indicated that they had a lender ready, willing, and able to pay the amounts due; and that 7th Avenue never notified 1180 of a scheduled closing to effect redemption. In November 2015, during oral argument of that motion, Soleil continued to urge, notwithstanding receipt of the August 11 payoff letter, that his clients in that action had never received a proper payoff letter.

In the meantime, on August 13, 2015, "Emperor" El-Bey emailed Goldstein, asking him to forward to Raab and Harlem a copy of the August 11, 2015 payoff letter, which Horowitz had addressed and sent to Soleil as 7th Avenue's counsel in the 1180 action. The August 11 letter advised Soleil that, as of September 10, 2015, the amount due the lender would be $21,964,485.23, about $600,000 more than was set forth in the May 2015 payoff letter. That new amount was stated not to include the unpaid costs and fees of the receiver, any additional advances of the lender to protect and preserve the property until the date of payment, or the amount attributable to the lender's further costs and expenses incurred in the

foreclosure action, including counsels' fees. Horowitz's letter informed Soleil that the payoff was subject to final verification, revision, and adjustment, and that the amounts, which were not included for the foregoing items, were not presently known, and advised him to verify all figures before tendering payment. Goldstein, in an August 13, 2015 email to "Emperor" El-Bey, copied to Soleil, Raab, and a broker on the Contract deal, forwarded a copy of the August payoff letter.

The following day, Raab emailed Goldstein and Soleil, asserting that, at the Contract signing, the amount owed was anticipated to be $15,000,000, and that the current payoff amount was more than $21,000,000, and was incorrect and incomplete. Raab requested that "you" confirm, via email, an extension of the due diligence period for an additional 14 days from the date the purchaser received a "copy of the revised and final payoff as shall be signed off and ordered by the Supreme Court." Raab reminded them that, until the due diligence period's end, the buyer had the right to cancel the contract by email notice, and that, on such cancellation, the deposit was to be immediately returned. Within an hour, Soleil emailed Raab "[a]greed."

At 12:06 a.m. on August 18, 2015, not hearing from Goldstein, Raab emailed him, advising that he had received Soleil's confirmation and understood that Soleil was El-Bey

Trust's new attorney. Raab informed Goldstein that he awaited his confirmation. Goldstein replied that day, that: there was no confirmation for him to give; he had been awaiting Soleil's confirmation, which he (Goldstein) was left out of; he was no longer the seller's counsel; he had no say in any extension; and that he was simply holding the money until "payday." Goldstein concluded that, if Soleil gave the extension, that should be sufficient.

In the meantime, on July 17, 2015, i.e., about three years after the Appellate Division issued its determination that Galaxy was entitled to a default judgment against 7th Avenue, the plaintiff in the Galaxy action, which action had largely been dormant, filed the remittitur in this court. The next week, Kevin Cullen (Cullen) of Cullen & Associates, P.C., which was retained as "of counsel" to Doyle & Broumand LLP, counsel of record for the original plaintiff, Galaxy, submitted a proposed judgment in that action to Justice Edmead, without advising her of the transfer and consolidation, for joint discovery and trial, of the two actions more than three years earlier. Justice Edmead signed the judgment of foreclosure against 7th Avenue on July 28, 2015, and appointed a referee to confirm the amount due Galaxy, determine whether the property could be sold in parcels, and to give public notice of the sale. On August 3, 2015, a copy of that judgment was served on 7th Avenue and

Whittingham, via service on Sanchez, who had never properly withdrawn as counsel in the Galaxy action.

It is unclear when El-Bey learned of that judgment and the referee's appointment, which presented the possibility of an imminent sale and the termination of the right to redeem, and that Soleil had extended Harlem's due diligence period. However, on September 9, 2015, Soleil sent an email with a 7th Avenue subject line to Raab and Goldstein, which was copied to El-Bey and Whittingham, apologizing for the "confusion," and asserting that Soleil's office had been closed for the final three weeks of August 2015; that he had unspecified eye surgery on August 11, which prevented him from seeing out of his right eye; that he was recovering, while on unidentified types and amounts of narcotics; and, that he was, thus, "under narcotic influence when making his "void [extension] agreement." Soleil also claimed not to have remembered this agreement when his "clients" questioned him about it. On his "clients" behalf, Soleil stated that he repudiated his August 14 reply, and advised that, after consultation with his "clients," "we" do not agree to the extension. Soleil further informed Raab that "we" were, nevertheless, open to a more equitable extension, and did not intend to repudiate the entire deal. The following day, Raab emailed Soleil and Goldstein, whose firm was still acting as the escrow agent, stating that, after having read Soleil's

email, they should take notice that he requests the immediate return, via overnight mail, of his client's deposit, by check payable to Raab as attorney.

Soon thereafter, the referee in the Galaxy action submitted her September 21, 2015 report, which indicated that $4,188,559.90 was owed to the plaintiff in that action and that the property should be sold in one parcel.

On December 23, 2015, Harlem Contracting, the entity which was related to 1180, and to which Galaxy had previously assigned its mechanic's lien, was the winning bidder at the Galaxy foreclosure sale, having submitted a $4,100,000.00 credit bid. On February 3, 2016, Harlem Contracting was substituted for Galaxy, as plaintiff. A few days later, the referee issued her deed to Harlem Contracting.

By decision in the 1180 action, dated March 10, 2016, Justice Friedman rejected Whittingham's claim that he had requested payoff letters before March 2015, when Soleil first sought a payoff letter, and found that 1180 provided such a letter in May 2015, as to principal and interest, which 1180 updated by an August 11, 2015 payoff letter. Justice Friedman observed that the fact that interest, costs, and fees would thereafter continue to accrue, did not render the August payoff letter inadequate. The court, thus, denied that part of Soleil's July 2015 application which sought to compel 1180 to

provide another payoff letter. Although the court found that 7th Avenue was entitled to some relief from accrued interest, because 1180 delayed in moving to confirm the referee's report of the amount due, the court otherwise confirmed the referee's report. The court also granted the branch of 1180's motion which was for a judgment of foreclosure and sale and a default against various defendants, including Whittingham, Inc. and WA Integrity Trust, and instructed that a judgment be settled on or before April 11, 2016. Justice Friedman, shortly thereafter, learned of Justice Edmead's entry of the default judgment against 7th Avenue, the sale of the property, and the issuance of the referee's deed in the Galaxy action.

In August 2016, Whittingham, 7th Avenue, Global, and Whittingham, Inc., all represented by Soleil, moved, by order to show cause in the consolidated Galaxy and 1180 actions, for an order vacating 7th Avenue's default in the Galaxy action, and rescinding the sale and award of the property to Harlem Contracting. These parties alleged, among other things, that because 1180 and Harlem Contracting were related entities, both managed by Tress, these entities acted unfairly toward Whittingham and 7th Avenue in submitting the proposed default order of foreclosure and sale in the Galaxy action to Justice Edmead, when that case had been transferred, and later reassigned, to Justice Friedman. Soleil further contended that

Cullen intentionally served the notice of entry of that default judgment on Sanchez, when counsel in the consolidated action were aware, from Soleil's notices of appearance (which, in fact, seem to bear only the caption and index number of the 1180 action) that Soleil was counsel for 7th Avenue and Whittingham, Inc. in the Galaxy action.

Justice Friedman transferred the motion in the Galaxy action to Justice Edmead, because she had "entered the default judgment." In September 2016, Harlem Contracting's counsel and Soleil, appearing for 7th Avenue, Whittingham, Inc., and Global (seemingly not a named defendant in the Galaxy action) appeared before Justice Edmead on that motion. Justice Edmead issued an order that day in which she determined that, based on the conference transcribed by the court reporter, it was ordered, in accordance with the rulings on the transcript, that defendants' motion was "denie[d] . . . in its entirety, on procedural and substantive grounds." In November 2016, Justice Edmead so-ordered the conference transcript. The transcript does not clearly reflect that Justice Edmead decided that application, because she repeatedly stated, after hearing Soleil's arguments, that she was not signing the order to show cause, because she found the application to be so without merit as not rise to the level warranting her signature, while also stating that the application was denied.

After the instant motion and cross motion were fully submitted, Justice Friedman referred to Justice Edmead another order to show cause, seeking relief from the referee's deed in the Galaxy action. Specifically, Soleil, on behalf of Whittingham (who does not appear to have been a party to the Galaxy action), 7th Avenue, and Whittingham, Inc., sought to void that deed and stay the foreclosure sale pending the resolution of the 1180 action. Among the grounds urged for the requested relief was that Harlem Contracting's bid, while more than 10% of the property's value, and, thus, not unconscionably low, was only 13.6% of the value, but effectively amounted to 0% of the property's value because it was a credit bid, which enabled Harlem Contracting to pay nothing. Harlem Contracting opposed that application, arguing that the defendants had defaulted and were, therefore, not entitled to affirmative relief, absent vacatur of their default. Soleil sent the court a letter purporting to withdraw that application, "without prejudice." Harlem Contracting's counsel objected to Soleil's unilateral attempt to withdraw that application, without prejudice, asserting that its withdrawal must be "with prejudice." Soleil replied that he had additional grounds for his application, and asked that the application be withdrawn without prejudice, so that he could submit a new application. The parties, thereafter, appeared before Justice Edmead in June

2017, and, after hearing the parties on the record, she issued an order, holding that the motion was permitted to be withdrawn, but, that, over the defendants' objection, the withdrawal was with prejudice, and that the "matter is closed and there is no open issue before this Court."

The Instant Action, Motion, and Cross Motion

In March 2016, Harlem commenced this action against El-Bey, El-Bey Trust, Global, and Goldstein, P.C. The complaint alleges breach of contract and unjust enrichment causes of action against El-Bey Trust, a declaratory judgment cause of action against all defendants, fraudulent concealment and negligent misrepresentation causes of action against El-Bey and El-Bey Trust, and a cause of action for a vendee's lien against the premises, pursuant to Contract paragraph 13.04 [sic], presumably meaning paragraph 13.05.

Harlem now moves for an order, pursuant to CPLR 3212, granting it partial summary judgment against the defendants on the second cause of action for declaratory relief, and directing Goldstein, P.C. or the Department of Finance to deliver the deposit to Harlem, with prejudgment interest. The second cause of action, incorporates the allegations of the first cause of action, which alleges that El-Bey Trust breached the Contract by refusing to return Harlem's down payment, after due demand and Harlem's performance of its required contractual obligations.

The second cause of action further alleges that, without a declaration that defendants breached the Contract, Harlem would be unable to obtain its deposit. Based on those allegations, by its second cause of action, plaintiff seeks a declaration that defendants breached the Contract and are not permitted to retain the deposit, and directing Goldstein, P.C. or such other relevant person or entity to deliver the deposit to Harlem, with prejudgment interest, costs, and disbursements of the action.

Harlem claims that it is entitled to summary judgment because, on August 14, 2015, Soleil granted an extension of the due diligence period until 14 days after Harlem received a copy of the final payoff amount, as set by the Supreme Court in the 1180 action, an extension which Soleil was cloaked with actual or apparent authority to grant. Harlem contends that no final payoff amount was ever set by Justice Friedman in that action, so that its demand for the immediate return of its deposit was timely. In addition, Harlem observes that Soleil's attempt, after conferring with his clients, to revoke the extension he granted, constituted an assertion that he would not honor the agreement he made on El-Bey Trust's behalf. Harlem also notes El-Bey Trust's action in failing to comply with Raab's demand for the deposit's immediate return. Based upon the foregoing, Harlem maintains that it is entitled to summary judgment on its second cause of action.

Harlem also seeks an order, pursuant to CPLR 3211, dismissing the cross-movants' counterclaim, urging that it is "nonsensical," improperly pled, and merely constitutes discovery demands. Alternatively, Harlem requests a default judgment against El-Bey Trust, pursuant to CPLR 3215 (a), claiming that a trust, like a corporation or "any other entity," cannot appear without counsel, and, upon the grant of such judgment, seeks an order directing Goldstein, P.C. or the Department of Finance to deliver the Contract deposit to Harlem, with prejudgment interest. Harlem also requests an award of costs and disbursements of this action.

In response, El-Bey Trust and El-Bey, who answered the complaint for them both, without counsel, cross-move, via newly retained counsel, Scott Steinberg (Steinberg), of Lasky & Steinberg, P.C., to amend their answer with counterclaim in the form annexed to their papers, pursuant to CPLR 3025 (b). The cross-moving defendants' answer denies the complaint's prefatory allegations common to all causes of action, and alleges that evidence is lacking that Soleil was El-Bey Trust's attorney or that he ever extended the due diligence period.. The answer also denies the allegations of the second cause of action, as well as the allegations of the breach of contract cause of action (first cause of action), upon which the second cause of action is partially based. The answer adds, as to the second cause of

action, that there was no extended due diligence period, and that there is no evidence that Harlem satisfied its contractual obligations or demanded its deposit back, or that the Contract was breached. The answer, by its wherefore clause, further alleges that Harlem is not entitled to the deposit's return or to any disbursements. The counterclaim essentially alleges that Harlem breached the contract and defaulted under it, and that El-Bey Trust and El-Bey are, therefore, entitled to keep the deposit. The "counterclaim" proceeds to seek discovery, and concludes that El-Bey Trust and El-Bey are also entitled to the balance of the contract amount, various costs and fees, and to treble damages, including of the Contract deposit, all totaling more than $27,000,000.00.

The proposed amended answer alleges twelve "affirmative defenses." Additionally, it asserts a counterclaim solely on El-Bey Trust's behalf, based on its purported performance of its contractual obligations, and on Harlem's claimed failure to cancel the Contract during the original due diligence date or by "any extension thereof." The proposed counterclaim seeks a judgment declaring that the deposit is nonrefundable and that the Contract is canceled and null and void, and directing Goldstein, the County Clerk, or anyone else holding the deposit, to remit it to El-Bey Trust.

In the event this court were to find that El-Bey, as managing trustee, lacked the capacity to answer the complaint for El-Bey Trust, it cross-moves, pursuant to CPLR 3012 (d) and CPLR 2004, for an order extending its time to answer. Nevertheless, El-Bey asserts that, under New York law, a trustee may appear for the trust, and further claims that Harlem waived any lack of capacity defense when it failed to reject the answer and replied to the counterclaim without asserting a lack of capacity.

El-Bey and El-Bey Trust also oppose Harlem's motion. El-Bey asserts that it is undisputed that Goldstein granted an extension of the due diligence date period until three business days after a mortgage payoff letter was delivered, and that, after delivery of the May 2015 payoff letter, Harlem requested changes in the payoff letter, which El-Bey admittedly agreed to provide, and sought from counsel for the plaintiff in the 1180 action. El-Bey contends that the three-day extended due diligence period expired three business days after Harlem received the May 2015 payoff letter, or, at the latest, after receipt of the August 2015 updated payoff letter. El-Bey then asserts, in conclusory fashion, that "the plaintiff-Purchaser refused to proceed to closing", and, thus, defaulted, forfeiting its deposit. El-Bey further maintains that the August 2015 updated payoff letter was sufficient. Moreover, El-Bey claims

that Harlem's assertion, that El-Bey Trust could not convey title because of the sale and referee's deed in the Galaxy action, which cut off 7th Avenue's right to redeem, is unavailing, because the sale to Harlem Contracting occurred in December 2015, and the deed was conveyed to it in February 2016, i.e., after Harlem received the August 2015 payoff letter. El-Bey, therefore, suggests that the sale to Harlem could have occurred before the right to redeem was terminated.

As for the extension granted by Soleil, El-Bey denies that Soleil and his firm ever represented El-Bey Trust on the sale. El-Bey claims that he never authorized Soleil to extend the due diligence period. El-Bey maintains that Harlem was aware, "at all times," that it was Goldstein who was representing El-Bey Trust in the transaction. To support this assertion, El-Bey Trust appends Soleil's affidavit, in which he claims that he was never El-Bey Trust's attorney on the sale, and that it was his understanding that it was Goldstein who represented El-Bey Trust in that capacity. Additionally, Soleil contends that El-Bey and El-Bey Trust never authorized him to communicate with Harlem on any matter regarding the sale, including the extension of the due diligence period. Soleil further asserts that he never informed Harlem that he represented El-Bey Trust on the sale. Soleil avers that, after he granted the August 14, 2015 extension, he informed Raab (almost four weeks later) that he

could not see out of one eye, as he was recovering from surgery performed three days earlier, was on narcotics and other unspecified drugs, and was not in the correct state of mind when he granted that extension. Although not set forth in the email in which he sought to revoke the extension, Soleil further contends, without elaboration, that he told Raab that he was not authorized to grant an extension.

In reply, and in opposition to El-Bey and El-Bey Trust's cross motion, Raab maintains that, before the sale to Harlem Contracting, the prior owner of the premises was not El-Bey Trust, but was Global, as set forth in a copy of the Office of the City Register's records. Raab urges that, therefore, El-Bey Trust could not have been ready, willing, and able to sell the property to Harlem. Raab further claims that because, in admittedly extending Harlem's due diligence period without attempting to set a closing date at any time after issuance of the May 2015 payoff letter, El-Bey Trust failed to continue to make time of the essence and did not evince any intent that time was of still the essence: thus, it cannot claim that Harlem was in default on the contract. Harlem's counsel, Fleischmann, urges that because El-Bey Trust never served a notice demanding performance, never attempted to negotiate a new closing date, and never set a reasonable time to close, while warning that Harlem's failure to do so would constitute a default, time was

not of the essence. Moreover, Fleischmann maintains that because El-Bey Trust never did any of that before the property was sold and a deed was issued, Harlem cannot tender performance, thereby warranting the granting of summary judgment to Harlem.

Raab points out that, during the time when Soleil was simultaneously acting as counsel for El-Bey Trust and, in the 1180 action, for Global, Whittingham, 7th Avenue, and Whittingham Inc., Soleil continuously sought relief from Justice Friedman in that action, regarding the claimed inadequacy of the May and August payoff letters. Raab notes that El-Bey was the managing trustee of Global, which was represented by Soleil in that action, starting in late February or early March 2015. Raab observes that Soleil, in representing Global and 7th Avenue in the 1180 action, moved in July 2015 for various relief, including for the issuance of a proper payoff letter, relief he continued to press for, even after receipt of the August 2015 letter. Since Justice Friedman granted relief to Soleil's clients on that motion in the form of reduced interest payments, Raab posits that El-Bey is judicially estopped from asserting that the May and August 2015 payoff letters were sufficient, and that their receipt triggered the three-business-day due diligence period. In addition, Raab contends that El-Bey Trust and El-Bey promised to provide Harlem with payoff letters for

all outstanding liens, including Galaxy's and other mechanic's and tax liens, but that such letters were never provided.

Raab urges that the documentary evidence, including the emails sent by Goldstein and Soleil regarding the Contract and sale of the property, establishes that Soleil replaced Goldstein as El-Bey Trust's counsel, that Goldstein was acting solely as the escrowee under the Contract, and that Soleil had both the actual and apparent authority to extend that due diligence period, which he did on August 14, 2015. Raab observes that El-Bey never responded to those emails, which were either addressed or copied to him, or asserted that Soleil or Goldstein was mistaken about anything set forth therein. Raab contends that El-Bey's silence constitutes an admission as to Goldstein's discharge and Soleil's replacement of him as counsel on the sale transaction.

Raab claims that, had Soleil refused to grant Harlem a further extension on August 14, 2015, Harlem would immediately and timely have demanded the deposit's return, i.e., within the previously extended due diligence period of three business days after the seller delivered copies of all payoff letters to the buyer. Raab asserts that, were Soleil's attempted extension revocation upheld, and were the receipt by him of the August 2015 payoff letter held to trigger the start three-business-day's running of the end of Harlem's due diligence period,

Harlem would suffer prejudice in that it lost its opportunity to timely terminate the Contract on or before August 18, 2015. Accordingly, Raab maintains that El-Bey and El-Bey Trust's positions on this motion, that Goldstein was their counsel on the sale of the property at the time Soleil granted the extension, that Soleil was not El-Bey Trust's counsel, and that Soleil lacked authority to grant the extension, are patently without merit and were concocted to avoid summary judgment. Raab, therefore, asserts that Harlem is entitled to summary judgment declaring that El-Bey Trust breached the Contract and is not entitled to the deposit, and that the deposit must be delivered to Harlem, with prejudgment interest, and the costs and disbursements of this action.

In reply to Harlem's reply papers, Steinberg claims that "factual issues exist," and that Harlem's summary judgment motion must be denied. Steinberg also asserts regarding Harlem's summary judgment motion, that there has been no chance to conduct discovery. Defense counsel further contends that the referee's deed in the Galaxy action was improperly issued, and relies on to the application referred to Justice Edmead, seeking to void the referee's deed and vacate the default judgment against 7th Avenue in the Galaxy action. El-Bey and El-Bey Trust add that judicial estoppel is inapplicable because: El-Bey Trust was not a party to the 1180 action, Global did not prevail

in that action: and Soleil did not represent El-Bey in any capacity. In this latter regard, defense counsel submits a letter, dated October 1, 2015, from Goldstein to El-Bey, "Re: El-Bey Trust," in which Goldstein advises that he will soon be closing his practice and cannot represent "you," and that El-Bey should find new counsel in "your legal matters." The bottom of the page contains an acknowledgment line, containing El-Bey's typed name below a signature line, which El-Bey signed and dated on October 1, 2015, the same date as Goldstein's letter. El-Bey maintains that October 1, 2015 was the date upon which he "formally" discharged Goldstein. El-Bey urges that because Soleil never represented El-Bey Trust in any capacity, his statements in the 1180 action do not bar El-Bey Trust from asserting that the May and August 2015 payoff letters were proper.

El-Bey further contends that El-Bey Trust took title to the property upon Global's conveyance, but that the deed from Global to El-Bey Trust was never recorded. In addition, El-Bey indicates that El-Bey Trust provided a payoff only for the "mortgage" [sic], and that Raab never sought payoffs for any other types of liens. El-Bey maintains that El-Bey Trust complied with its obligations "by providing the mortgage payoff." Defense counsel contends that Harlem was provided with the May and August 2015 payoff letters and that, after such

receipt, Harlem was required to close on the purchase. Further, El-Bey claims that Harlem knew it could only seek an extension of the due diligence period from Goldstein and that Soleil had no authority to grant an extension, because Raab addressed his August 14, 2015 request for a further extension to Goldstein. El-Bey adds that Goldstein's copying of the August 2015 payoff letter to Raab several days before Raab sought that extension, demonstrates that Soleil was not El-Bey Trust's attorney.

ANALYSIS

Harlem's reliance on Michael Reilly Design, Inc. v Houraney (40 AD3d 592, 593 [2d Dept 2007]), and on CPLR 321 (a), for the proposition that, like any other entity, El-Bey Trust must appear by counsel and that El-Bey, its sole trustee, cannot appear for it, is misplaced.

CPLR 321 (a) provides, as is relevant, that a party may appear in person or by counsel to prosecute or defend a civil action, but that corporations and other voluntary associations must appear by counsel. CPLR 321 (a) does not require that all entities appear by counsel. See e.g. Gilberg v Lennon, 212 AD2d 662, 664 (2d Dept 1995) (CPLR 321 [a]'s requirement that certain entities appear by counsel is inapplicable to partnerships and professional corporations). Although in Michael Reilly Design, Inc. (40 AD3d at 593) the Appellate Division held that LLCs fell within the purview of that statute's requirement that certain

entities appear by counsel, it so held because "[a]n LLC, like a corporation or voluntary association, is created to shield its members from liability and, once formed, is a legal entity distinct from its members. Id. Trusts are not so created.

An express trust is "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." Restatement (3d) of Trusts, § 2. The trust consists of the whole of the fiduciary relationship: "the legal relationship between the parties with respect to the property that is its subject matter, including not merely the duties of the trustee, to the beneficiaries and others, but also the rights, privileges, powers, and immunities of the beneficiary, against the trustee and others." M. Scott, A.W. Scott, W.F. Fratcher, Scott and Ascher on Trusts, § 2.1.4 (5th ed 2006). "[A]n express trust vests in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary does not take any legal estate in the property but may enforce the trust." EPTL 7-2.1 (a). The trustee, having legal title to the estate, is granted a wide array of duties and powers (see EPTL 11-1.1), including the power to sell any trust property on terms in keeping with the trustee's role as a fiduciary. Id.,

subsection b (5) (B). As the trust's legal owners, trustees traditionally have sued and been sued in their individual capacity. Kirschbaum, v Elizabeth Ortman Trust of 1977, 3 Misc 3d 1110(A), 2004 NY Slip Op 50545(U) *2 (Sup Ct, Suffolk County 2004); see also Haag v Turney, 240 App Div 149, 151 (1st Dept 1934). That is because "the general rule was that all obligations incurred during the course of trust administration were personal obligations of the trustee." Scott and Ascher on Trusts, § 26.1. Generally, and absent proof to the contrary, a trustee who enters into an executory contract with a third party, involving new and independent consideration, incurs personal obligations in such dealings with that third party, who, therefore, "cannot look to the trust estate to satisfy [the trustee's] obligations." East Riv. Sav. Bank v 245 Broadway Corp., 284 NY 470, 476-477 (1940).

There is, however, a modern trend which views the trustee as the trust's administrator, rather than as its owner in third-party dealings, and, thereby, relieves the trustee of liability to a third party who contracts with the trustee. In that case, the third party may seek relief directly from the trust by suing the trustee in his/her representative capacity. Scott and Ascher on Trusts, § 26.1. Under New York law, where, pursuant to a contract, the trustees have limited their obligations to exclude personal liability for the contract's breach, the

trustees will not be personally liable. East River Sav. Bank, 284 NY at 478; Sisler v Security Pac. Bus. Credit, 201 AD2d 216, 220 (1st Dept 1994) (where "in executing the assignment, [the trustee] clearly indicated that he was acting in his representative capacity as trustee, he is, as a matter of law, not personally liable for the trust's inability to honor the assignment"). The document in issue does not have to state explicitly that the trustee is immune from personal liability to absolve the trustee of personal liability. East Riv. Sav. Bank, 284 NY at 478. It was held sufficient, for example, where the contract indicated that the trustees were acting as a class, rather than as individuals or jointly and severally, the trustees signed in their capacities as trustees, the contract referred to the trust instrument and set forth that instrument's contents, including the trustees' power to act and their limitations of liability, evidently in relation to the trust's beneficiaries, and advised that it was a public document and where it could be found. Id. at 478-479; see also Chase Natl. Bank of City of N.Y. v Engel, 262 App Div 55, 55-56 (1st Dept 1941).

Clearly, whether viewed as the trust's legal owner or as someone akin to the trust's administrator, the trustee is not required, under CPLR 321 (a), to appear by counsel, notwithstanding that the failure of the trustee to retain

counsel when acting in a representative capacity in an action or proceeding may, depending on the circumstances, constitute a breach of fiduciary duty. Given the foregoing, the branch of the motion which seeks a default judgment against El-Bey Trust is denied, and the branch of the defendants' cross motion, which seeks an extension of El-Bey Trust's time to answer the complaint, is denied as moot.

Turning to Harlem's motion for summary judgment on its second cause of action, the movant on a summary judgment motion has the burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Winegrad v New York Univ Med Ctr, 64 NY2d 851, 853 (1985). The failure to meet that burden mandates the denial of the application, irrespective of the opposing papers' sufficiency. Id. Where the movant makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact. Ferluckaj v Goldman Sachs & Co, 12 NY3d 316, 320 (2009). "A shadowy semblance of an issue" is an insufficient basis upon which to deny the motion. S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974) (internal quotation marks and citations omitted). Similarly, feigned issues are unavailing in attempting to resist summary judgment. See Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 (1968) (court on summary judgment cannot weigh the

affiant's credibility, "unless it clearly appears that the issues are not genuine, but feigned"); Jin-Rong Yu v 2030 Embassy LLC, 83 AD3d 562, 563 (1st Dept 2011).

Harlem's second cause of action is alleged against "all defendants." Thus, to the extent, if any, that Harlem seeks an order granting it summary judgment declaring that named defendants Global and Goldstein, P.C. breached the contract, such application is denied, because they were not parties to the Contract, and there is no claim, at this point in the litigation, that Goldstein, P.C., as escrow agent, has acted in bad faith, with gross negligence, or in willful disregard of the Contract. See Contract §2.05 (b). As for the named defendant El-Bey Trust, although it should have been named in the caption as Kareem Ahmad El-Bey, as trustee for the Kareem Ahmad El-Bey Trust, El-Bey clearly understood that, as El-Bey Trust's sole trustee, he could appear and answer for El-Bey Trust, which is precisely what he did, in this case where the answer asserted no claim of improper service (see CPLR 3211 [e]). Thus, El-Bey Trust's name in the caption is hereby deemed amended to read Kareem Ahmad El-Bey, as trustee for the Kareem Ahmad El-Bey Trust.

As for whether it is El-Bey or El-Bey Trust that will bear liability to Harlem in the event of any breach of contract, it is apparent from the Contract that liability was only to be

imposed on El-Bey Trust. Specifically, the Contract recites that it was between Harlem, as buyer, and El-Bey Trust, as seller. Under the Contract's terms, the obligations, responsibilities, and liabilities, aside from those of the purchaser and escrowee, were imposed on El-Bey Trust. In fact, the trustee is not mentioned in the Contract or Rider. The typed seller's name under the Contract and the Rider's signature lines is El-Bey Trust, not El-Bey. Additionally, when El-Bey signed for El-Bey Trust he wrote "by" before he signed the Contract for El-Bey Trust. The use of "by" is for those individuals signing for such entities as corporations, not for trusts, to avoid personal liability, but Raab, as an attorney, necessarily understood what was intended by that word's use. It is manifest that the Contract intended that it would be between Harlem and El-Bey Trust, and that it would be El-Bey Trust, rather than El-Bey, which would bear any liability. As observed by the Appellate Division, First Department, "[i]t is certainly unjust to the trustee to impose upon him a liability which he did not intend to assume and which the other party to the contract did not believe that he intended to assume." Chase Natl Bank of City of NY, 262 App Div at 56 (internal citation and quotation marks omitted).

Further, it is apparent from Harlem's complaint that it understood the Contract as such. The complaint recites that the

Contract was between Harlem and El-Bey Trust, and the breach of contract and the unjust enrichment causes of action, respectively, the first and third causes of action, are alleged only against El-Bey Trust, not El-Bey. The complaint does not allege that El-Bey was a trustee, nor does it seek any relief from El-Bey based on his role as a trustee. Indeed, that the complaint's first cause of action, for breach of contract, was alleged only against El-Bey Trust, supports that Harlem was not asserting a breach of contract claim against El-Bey as a predicate for Harlem's claimed entitlement to a declaratory judgment under its second cause of action, especially since the second cause of action was asserted against "all defendants," which would also include Goldstein and Global. The only causes of action that are asserted specifically by name against El-Bey are labeled fraudulent concealment and negligent misrepresentation, both torts, which are based on his allegedly false statements. These two causes of action, which are also alleged against El-Bey Trust, are premised on El-Bey having falsely represented that there was only one mortgage on the premises (Rider, ¶ 9), when there were three; that the payoff amount was about $15,000,000.00, when it comprised a significantly greater amount, and was still growing; and by the failure to provide an accurate payoff letter. These two causes of action, were apparently asserted against El-Bey, because,

even were El-Bey acting for the trust when he made any such false statements, and were such claims found to be compensable as torts, that would not insulate him from any tortious behavior on his part. See Sisler, 201 AD2d at 221, 222. In view of the foregoing, to the extent that Harlem seeks an order declaring that El-Bey breached the Contract, such application is denied.

Raab's claim that judicial estoppel applies to bar El-Bey and El-Bey Trust from asserting that both the May and August 2015 payoff letters were adequate, is without merit. That 7th Avenue, in the 1180 action, obtained some relief on its motion from the overdue interest on the three mortgages is irrelevant to the wholly separate issue of whether 1180 should be compelled to provide another payoff letter. Soleil's clients did not prevail on their application for injunctive relief regarding the payoff letters, and no judgment has been entered in their favor because of the positions they took with respect to the payoff letters. See Kalikow 78/79 Co v State of New York, 174 AD2d 7, 11 (1st Dept 1992) (judicial estoppel bars a party which has successfully taken a position in a proceeding and obtained a judgment in its favor because of that position, from assuming a contrary position in a subsequent proceeding, merely because its interests have changed). In addition, Raab's position, that El-Bey promised that the due diligence period would not expire until payoff letters were received as to all liens, including

the mechanics' and tax liens, is not supported by the record presented on this motion. Although, when seeking Harlem's first extension of the due diligence period, Raab requested that the period be extended until three business days after the seller delivered copies of all payoffs, Goldstein responded that it was extended until three business days after the "mortgage" payoffs were "all" delivered to the buyer.

Harlem's claim that El-Bey Trust never owned the property, simply because it failed to record its deed from Global, is without merit. Recording one's deed serves to protect a good faith purchaser for value from a prior unrecorded interest, where the subsequent purchaser's interest was the first to be duly recorded. See Wachovia Bank, N.A. v Swenton, 133 AD3d 846, 847 (2d Dept 2015). Real Properly Law §§ 291, 294. The Contract advised Harlem that El-Bey Trust's deed of the property from Global was never recorded. Rider, ¶ 13. Further, Whittingham abandoned any claim that the property was fraudulently transferred from 7th Avenue to Global, which then allegedly transferred the property to El-Bey Trust. Nevertheless, while the property may have been conveyed to El-Bey, any such conveyance was subject to the rights of those with superior interests in the property, including those with prior recorded liens.

Cross-movants' position, that 7th Avenue's right to redeem was not necessarily cut off by the sale and issuance of the referee's deed to Harlem Contracting in the Galaxy action, because Soleil moved, in August 2016, to vacate 7th Avenue's default and to rescind the sale, is unavailing. Justice Edmead either determined not to entertain that application, or found it to be without merit. In either case, she declined to take any action to vacate the default judgment against 7th Avenue or to set aside the sale. Additionally, as previously noted, although the instant applications were submitted before Soleil again moved to have the deed voided, Justice Edmead permitted that application to be withdrawn, but held that such withdrawal was with prejudice.

As for defense counsel's claim, that the cross-moving defendants have not had the chance to conduct discovery, a party opposing summary judgment is entitled to discovery if facts which support that party's claims might exist, but cannot then be stated. Schlichting v Elliquence Realty, LLC, 116 AD3d 689, 690 (2d Dept 2014). This is especially so where "the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hosp., 108 AD3d 525, 526 (2d Dept 2013) (internal quotation marks and citation omitted). To take advantage of CPLR 3212 (f) to delay or avoid summary judgment, one must show that the required proof

is within the movant's exclusive knowledge, that the claims in opposition to summary judgment "are supported by something other than mere hope or conjecture," and that the party has attempted to discover facts undercutting the movant's proof. Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP, 44 AD3d 557, 557 (1st Dept 2007); see also Progressive Northeastern Ins. Co. v Penn-Star Ins Co, 89 AD3d 547, 548 (1st Dept 2011) (summary judgment not premature where defendant "failed to present any evidentiary basis [for its] suggest[ion] that discovery may lead to relevant evidence" [internal quotation marks and citation omitted]).

Here, Steinberg's bald and conclusory assertion, in his reply affirmation, that Harlem's partial summary judgment motion is premature in "that there has been no discovery, nor any opportunity to conduct discovery," is, standing alone, an insufficient basis to deny summary judgment. Neither defense counsel, nor El-Bey, indicates what discovery is needed to rebut any of the evidence submitted by Harlem. Whether Soleil was representing El-Bey Trust is within El-Bey's knowledge, and Soleil, as is evident from the fact that he provided the cross-moving defendants with his affidavit, is cooperating with those defendants. While El-Bey also knows whether the contents of Soleil and Goldstein's emails are accurate as to who was representing El-Bey Trust at the time Harlem sought the

extension in August 2015, he states, in his reply affidavit, only that Soleil did not represent El-Bey Trust, without addressing the emails submitted by Harlem establishing that Goldstein was discharged as El-Bey Trust's counsel in March 2015, and that Soleil immediately replaced Goldstein. Additionally, El-Bey knows whether and when, acting for El-Bey Trust, he discharged Goldstein, but merely claims in his reply affidavit that he "formally" discharged him on October 1, 2015. Further, although El-Bey addressed claims raised in Harlem's reply papers, El-Bey did not dispute that he had received the emails which were addressed or copied to him.

El-Bey's assertion, that he did not believe that another payoff letter was necessary after Harlem was provided with the May 2015 payoff letter, but that he agreed to provide a further payoff letter, is irrelevant. The fact is that El-Bey did agree to provide another payoff letter on the mortgages, knowing that the three-day period, granted by the January 2015 extension, began running after all payoff letters were provided, and that Harlem, as part of its due diligence, needed a further letter because the May 2015 letter excluded, among other things, the lender's costs and expenses in collecting the debt, including all the counsels' fees, as well as all the receiver's fees. The allegation that such due diligence period extension did not expire before Harlem received the August 2015 payoff letter, is

supported by the undisputed assertion that El-Bey Trust never sought to reschedule the closing date after the receipt of the May 2015 payoff letter.

Further, in his role as counsel for 7th Avenue, Global, Whittingham, and Whittingham, Inc. in the 1180 action, Soleil, from the inception of his representation in that action, sought payoff letters and moved to compel 1180 to provide a proper payoff letter, supported, on one such application, by Whittingham's affidavit asserting that he needed a payoff letter so that he would be aware of the amount required to redeem the mortgages. Soleil sought such relief from the court after receipt of both the May and August 2015 letters, asserting that neither was sufficient. Soleil's repeated applications for such relief demonstrate that not only did Harlem need the August 2015 payoff letter, but that 7th Avenue and Global needed it in the 1180 action, thereby undermining El-Bey's claim that he thought that a further payoff letter, following the one of May 2015, was unnecessary. In any event, El-Bey's attorney effectively concedes that the due diligence period was extended until at least three business days of Harlem's receipt of the August 11, 2015 payoff letter. Moreover, Soleil's continuous quest for payoff letters in the 1180 action, including during his November 2015 oral argument of his July 2015 application, when he urged that the August payoff letter was inadequate, renders it

understandable why he so promptly agreed to grant Harlem a second extension in August 2015.

As for whether Soleil replaced Goldstein as the seller's counsel in the Contract transaction, it should be noted, as a threshold matter, that the evidence on this issue was offered by Harlem in its reply papers in response to El-Bey's assertion, in his opposing and cross moving papers, that Soleil was never counsel for El-Bey Trust relating to the property's sale, and that Goldstein was its counsel. Reply papers, as a general matter, are intended to address issues raised in the opposing papers, and not to introduce new arguments and grounds in support of the summary judgment motion. Here, Harlem's reply papers served the former goal. However, even if Harlem's reply papers served the latter goal, under the circumstances presented on these applications, the evidence presented in Harlem's reply papers will be considered. Matter of Kennelly v Mobius Holdings LLC, 33 AD3d 380, 381-382 (1st Dept 2006). Specifically, the cross movants not only raised, in their reply papers, a new issue in opposition to the summary judgment motion [summary judgment premature because discovery necessary]), but also used their cross-moving reply papers to respond to arguments raised in Harlem's reply paper, including Harlem's claim that Soleil, rather than Goldstein, was seller's counsel.

El-Bey's claim, that he "formally" discharged Goldstein on October 1, 2015, by signing Goldstein's letter, of that same date, indicating that he was closing his practice and that El-Bey should find new counsel, is unavailing and constitutes an after-the-fact creation to avoid the effect of Soleil's August 2015 extension, and to support his September 2015 attempted extension revocation. El-Bey opposed Harlem's motion, arguing that Soleil was never El-Bey Trust's lawyer on the property's sale, and that Goldstein was its lawyer. Yet, El-Bey first provided the October 1, 2015 letter in his reply to Harlem's opposition to El-Bey and El-Bey Trust's cross motion, when Harlem had no opportunity to respond to it. Moreover, El-Bey's assertion, that Goldstein was "formally" discharged on October 1, 2015, is not only conclusory, but is directly contraindicated by Goldstein's numerous emails to Raab and Soleil, including Goldstein's email of March 2, 2015, in which he advised Raab of his discharge and his replacement by Soleil, and Goldstein's January 13, 2016 email addressed to El-Bey, in which Goldstein indicates, in essence, that he withdrew from representing the seller before the issuance of the August 2015 payoff letter, and that the extension was granted by seller's attorney, i.e., not Goldstein.

As for El-Bey's statement that Harlem had no reason to seek an extension from Soleil because Harlem knew that Goldstein,

rather than Soleil, was El-Bey Trust's counsel, such assertion is without evidentiary weight, in that El-Bey has no knowledge as to what was in the mind of Harlem's principal or its attorney, Raab. Additionally, the fact that the email seeking the extension was also sent to Soleil undercuts that hypothesis, and suggests that Raab was not certain whether Goldstein's approval was still needed, possibly because his firm was still holding the deposit. Furthermore, in Raab's August 18, 2015 follow up email to Goldstein, sent after Raab received no response to his extension request, Raab stated that he awaited Goldstein's confirmation, and advised that he had obtained the consent of Soleil, who Raab "understood" was the new attorney on the case, thus, undercutting El-Bey's assertion that Raab knew that Goldstein was El-Bey Trust's counsel.

Soleil's vague assertion, that he advised Raab, on an unspecified date and under unspecified circumstances, that he was not authorized to grant the extension, does not avail him. As for Soleil's contention, that El-Bey never authorized him to extend the due diligence period, irrespective of what El-Bey allegedly told Soleil, the Contract provides that "[t]he respective attorneys of the parties are hereby authorized to agree to adjournments of the dates sets [sic] forth in the contract, including without limitation, the closing date." Rider, ¶ 16. That provision applies to due diligence dates,

where, as here, the Contract set the original due diligence date as a specific date. Rider, § 5.

As Soleil replaced Goldstein as El-Bey Trust's attorney on the sale of 7th Avenue to Harlem, he was authorized, under Rider paragraph 16, to grant Harlem's timely August 9, 2015, request for a further extension of the due diligence period. Rider, ¶ 16. The obvious intent of that Rider provision, dealing with the respective side's counsel's giving of notices and their authorizations to agree to adjournments of all Contract dates, is that it applies to each party's counsel at the time in issue, not to counsel who had previously been discharged or had withdrawn, as demonstrated by Goldstein's response to Raab. Further, any doubt on Harlem's part, as to whether it had to obtain Goldstein's authorization to adjourn the due diligence period, rather than to obtain the agreement of the "respective attorneys for the parties" (Rider, ¶ 16), was dispelled by Goldstein, when he advised Raab that: he had no extension to give; because he was no longer the attorney, he had no say in extensions; he was merely holding the escrow; and that, if Soleil gave an extension, that should be all that was necessary. As merely the escrowee, Goldstein was not considered an agent of either party (Contract, § 2.05 [a]), and, therefore, was not serving El-Bey Trust in that role. Moreover, not only did Soleil become counsel for El-Bey Trust and for the 1180 action

defendants, 7th Avenue and Global, whose managing trustee was El-Bey, at virtually the same time, but also Soleil, replaced Goldstein as counsel both for El-Bey Trust and for Global in the 1180 action, at about the same time.

In addition, Harlem, on Friday, August 14, 2015, one day after Raab received the August 2015 payoff letter, requested a further due diligence period extension because interest and penalties, as well as 1180's expenses, including attorneys' fees, were increasing, and Harlem had no way of controlling how long the mortgage foreclosure action would continue or when, or if, 7th Avenue and/or Global would be able to redeem, and El-Bey Trust would be able to convey clear title to Harlem. Soleil immediately granted the extension, and Goldstein informed Raab at 12:30 a.m., on Tuesday, August 18, 2015, the third business day after the payoff letter's receipt, that he had no consent to give because he was no longer counsel on the matter and that Soleil's consent should suffice. Assuming, that the receipt of the August 2015 payoff letter triggered the running of the three business-day period, at the end of which Harlem's due diligence period expired, Harlem timely received the extension from Soleil. Soleil's attempted revocation of that extension almost four weeks later, and after the due diligence period, granted in January 2015, had expired, would prejudice Harlem, which gave up its right to timely cancel the Contract on August 18, 2015 in

reliance on Soleil's agreement to the extension and on Goldstein's statement reassuring Harlem that he had no consent to give and that Soleil's consent should suffice. Moreover, at the time that Soleil granted the extension and Goldstein advised that, as counsel, he was out of the picture, both were aware that Harlem's right to cancel had not yet expired, because Raab's extension request made it clear that Harlem had the right to cancel. Soleil had to know that cancellation of the Contract was likely if he did not consent.

Further, while El-Bey asserts that Goldstein's providing a copy of the August 2015 payoff letter to Raab constitutes proof that Goldstein was El-Bey Trust's counsel, El-Bey fails to explain why Goldstein also provided a copy of that payoff letter to Soleil. Goldstein would not need to provide a copy of the payoff letter to Soleil for purposes of the 1180 action, because the original payoff letter was addressed directly to Soleil by Horowitz, 1180's counsel. Plainly, Goldstein sent it to Soleil because he was El-Bey Trust's counsel on the Contract, as repeatedly indicated by Goldstein and Soleil.

Soleil's conclusory claim, that it was his "understanding" that Goldstein represented El-Bey Trust, is without evidentiary weight because Soleil does not purport to have personal knowledge in that regard. Soleil's assertion made in opposition to Harlem's motion, that he never represented El-Bey Trust

regarding the sale is unavailing, and it is unclear whether he is playing with semantics, i.e., that he retained by El-Bey, not El-Bey Trust. Soleil's contention, that El-Bey never authorized Soleil to communicate on any matter involving the trust, is contradicted by Soleil's June 4, 2015 email to Raab and Goldstein and copied to El-Bey and Whittingham, in which El-Bey and Whittingham asked Soleil about the transfer of the file and the deposit. The only way that Soleil could ensure their transfer was to communicate with Goldstein and Raab to obtain their cooperation and consent. That email also demonstrates that Soleil, irrespective of who retained him, represented El-Bey Trust on the Contract and sale of the property to Harlem. With the exception of Soleil's bare claim, that El-Bey Trust never authorized the extension which he granted in his August 14, 2015 email, and El-Bey's assertion, that Soleil informed Raab that he had undergone eye surgery three days before he agreed to the extension, could not see out of his right eye, and was on narcotics when "improperly grant[ing] the extension", Soleil, El-Bey, and Goldstein submit virtually nothing on the instant application in an attempt to refute or even address the many emails or their substance.

El-Bey and El-Bey Trust provide no affidavit from Goldstein, a party to this action, addressing or rebutting any of his emails asserting that: he had been discharged by March 2,

2015; "[h]e" (presumably El-Bey, the sole trustee, acting on behalf of El-Bey Trust, the seller) had retained new counsel, Soleil, by that date (which corresponds to the same time that he was retained as Global and 7th Avenue's counsel); "the seller" had asked Goldstein to have the escrow funds transferred, which Goldstein could not do without Raab's consent); Raab should authorize the transfer of the deposit from Goldstein to the seller's new counsel, Soleil (a request which was made numerous times, beginning on March 2, 2015, and including on July 15, 2015, when in seeking the transfer of the escrow deposit to "new counsel," Goldstein averred that it had "been a very long time since [he had been] relieved as counsel"); he transferred the file regarding the sale of 2201 7th Avenue to Soleil; Goldstein had no consent to give as to an extension of the due diligence period because he was no longer counsel, having been discharged; and that new counsel Soleil's consent should suffice. Cross-movants do not assert that they were unable to obtain Goldstein's affidavit.

Further, neither Soleil nor El-Bey addresses, explains, or specifically rebuts Goldstein's assertions, made in his many emails involving the prospective sale, demonstrating that he had been discharged as counsel the sale, that Soleil had been retained as the new counsel, that Goldstein was eager to relieve himself of his role of escrow agent, and that "he," the seller,

presumably El-Bey, requested that Goldstein transfer the escrow funds to "his" new counsel, Soleil.

Soleil and El-Bey also fail to explain why El-Bey and Whittingham would be asking Soleil whether Goldstein's file, and the Contract deposit, had been transferred to Soleil, or why Soleil would be complaining to Goldstein, in Soleil's June 4, 2015 email to him and Raab, and copied to El-Bey and Whittingham, that Goldstein only transferred the incomplete "file for the sale" of 2201 7th Avenue, that Soleil had not received the Contract deposit, and that Soleil could not understand why the matter of the transfer of the complete file and the escrow deposit had persisted for three months, i.e., since at least March 2, 2015, when Goldstein emailed Raab that he had been discharged as seller's counsel, and that seller's new counsel was Soleil. Soleil and El-Bey also fail to explain on these applications why, in Goldstein's June 4, 2015 email to Soleil, regarding 2201 7th Avenue, which email was copied to Raab, Whittingham, and El-Bey, Goldstein replied that he had sent the entire file to Soleil within weeks of his discharge, as he stated that he was required to do when a client who has discharged him had requested that he send over the paperwork. Moreover, El-Bey does not address Goldstein's assertion that his client had discharged him and directed him to send the file to his new counsel, Soleil. Nor does El-Bey deny that he asked

Goldstein to send the file to Soleil. Soleil and El-Bey also fail to address why Goldstein further advised them, regarding the escrow funds, that he was awaiting Raab's response, and that Soleil was free to move in court if he wished to have the escrow funds deposited in court. If Soleil were not, in fact, counsel for El-Bey Trust regarding the sale to Harlem, El-Bey fails to explain why, after receipt of Soleil and Goldstein's June 4, 2015 emails, he never took any prompt action or wrote to Soleil and Goldstein correcting their assertions in those emails, including that Goldstein had been discharged, that Soleil had replaced him as counsel, and that El-Bey had requested that Goldstein send the file on the sale to Soleil.

Further, on receipt of Goldstein's January 13, 2016 email, addressed directly to El-Bey, Soleil, and Raab, containing the subject line 2201 7th Avenue - El-Bey Trust to Harlem, and an attachment line, indicating that the Contract, the Rider, and a schedule were appended, in which email Goldstein again attempted to extricate himself as the escrow agent, admittedly his "sole[]" role in the matter after he "withdrew from representation of seller," Goldstein states that, thereafter, and upon the buyer's receipt of the August 2015 payoff letter, the "sellers [sic] counsel," i.e., not Goldstein, granted the buyer's request for an extension of the due diligence period, and later revoked that prior grant. Neither El-Bey nor Soleil

have presented any evidence that, upon receipt of that email, they responded by denying or questioning Goldstein's assertions, that he was no longer representing the seller when the extension was granted and revoked and that he was only the escrowee, or Goldstein's effective assertion that Soleil was the seller's counsel at that time.

Moreover, it is evident from Soleil's September 9, 2015 email to Raab and Goldstein, which was copied to El-Bey and Whittingham, in which Soleil attempted to revoke his August 14, 2015, due diligence period extension, "which he did not remember making," that Soleil was indeed El-Bey Trust's counsel and had the authority to grant the extension. If he were not El-Bey Trust's counsel or lacked authority, all that he had to do was state that the extension was invalid because he was not El-Bey Trust's counsel and/or because he lacked the authority to grant the extension, rather than asserting that the extension was made "under narcotic influence" and an inability to see out of one eye, while recovering from eye surgery. Instead, Soleil stated that the repudiation of his consent was made on "behalf of [his] clients," and advised that, after consulting with them, "we" did not agree to that extension, but were open to discussing a more equitable one (presumably before the sale in the Galaxy action to permit the sale to Harlem to close), and that "[w]e do not intend to repudiate the Contract, thus verifying that Soleil was

indeed counsel for El-Bey Trust. El-Bey does not address, on the instant application, this email's contents. Soleil selectively addresses this email's contents merely by claiming that he could not see out of his right eye, and that he was prescribed narcotics and was not in the right state of mind.

Soleil's assertion, that he could not see out of his right eye due to unspecified eye surgery performed three days before he agreed to the extension, is unpersuasive, because he could see out of the other eye well enough to promptly respond and agree to the extension request. Even if Soleil could not see well enough to read Raab's extension request, El-Bey Trust would still be bound by Soleil's agreement. See Lansco Corp. v NY Brauser Realty Corp., 63 AD3d 513, 514 (1st Dept 2009). In addition, Soleil has provided no physician's affirmation establishing that, at the time he read and responded to Raab's extension request, he was physically unable to read it. Soleil has also failed to meet his burden of establishing that his agreement to extend Harlem's due diligence period was a consequence of mental incapacity. Thomas v Gray, 121 AD3d 1091, 1092 (2d Dept 2014); Sears v First Pioneer Farm Credit, ACA, 46 AD3d 1282, 1284 (3d Dept 2007). Specifically, Soleil does not indicate what narcotic he was taking, what dosage he was prescribed, and when and what dosage he last took before agreeing to extend Harlem's due diligence period. Soleil also

neglects to submit a physician's affirmation to establish that the dosage Soleil last took before agreeing to the extension necessarily rendered him incompetent to comprehend the nature of the request for the extension and how such an extension might affect his client. See Zurenda v Zurenda, 85 AD3d 1283, 1284 (3d Dept 2011); Lansco Corp, 63 AD3d at 514-515; Sears at 1284-1285.

In addition, upon receipt of the September 9, 2015 email, El-Bey did not, or have his alleged attorney Goldstein, contact Raab and inform him that Soleil was not El-Bey Trust's counsel in connection with the Contract and sale, and/or that Soleil lacked the authority to grant an extension of the due diligence period; nor did El-Bey deny any of Soleil's statements in that email indicating that he was El-Bey Trust's counsel, including that: he had consulted with his "clients"; his clients questioned the extension agreement; on his "clients'" behalf, he repudiated such agreement; and that, after consulting with his clients, "we" did not intend to repudiate the Contract and were open to discussing an extension that was equitable to all parties. El-Bey also presents no evidence here that, upon receipt of that email, he contacted or had Goldstein contact Soleil to ascertain why he sent such an email to Raab, when Soleil allegedly was not El-Bey Trust's counsel.

As to the aforementioned emails which were copied or addressed directly to El-Bey, each of which had a subject lines advising El-Bey that it referred to 7th Avenue, or to the sale of 7th Avenue to Harlem, El-Bey's failures, as the sole trustee of El-Bey Trust, to submit any evidence that he, personally, or through his alleged counsel, Goldstein, promptly contacted Raab to inform him that Soleil did not represent either El-Bey Trust or El-Bey and that any extension which Soleil purported to grant was not binding on them, or that he promptly responded to and denied the assertions set forth in the foregoing emails, constitute tacit admissions of the statements made in those emails. People v Allen, 300 NY 222, 225 (1949); People v Lord, 103 AD2d 1032, 1033 (4th Dept 1984); Cohen v Toole, 184 App Div 70, 74 (1st Dept 1918); see also NY PJI § 1:56, Comment at 68. Such emails, thereby, demonstrate that: at least three months before Soleil's June 4, 2015 email, El-Bey Trust had discharged Goldstein as its counsel in connection with the Contract and the sale of the property and retained new counsel, Soleil; El-Bey had directed Goldstein to send Soleil the file on the Contract to sell the property to Harlem; as of September 9, 2015, Soleil was still El-Bey Trust's counsel in connection with the Contract and the sale of the property; and that El-Bey Trust and Soleil were amenable to discussing an extension of the due diligence period that was more equitable, presumably to El-Bey Trust, and

were willing to go forward with the Contract, at least with a revoked extension.

The clear and unequivocal emails, which Harlem submitted to refute El-Bey and El-Bey Trust's sparse and conclusory claims that Soleil never represented El-Bey Trust, and that Goldstein was El-Bey Trust's counsel "at all times in question" demonstrate that El-Bey and El-Bey Trust's position is feigned and designed merely to overcome summary judgment. On a summary judgment motion, a court is not "required to shut its eyes to the patent falsity of a defense." MRI Broadway Rental v United States Min. Prods. Co., 242 AD2d 440, 443 (1st Dept 1997), affd 92 NY2d 421 (1998); Sexstone v Amato, 8 AD3d 1116, 1117 (4th Dept 2004); see also Bank of N. Y. v 125-127 Allen St. Assoc., 59 AD3d 220, 200 (1st Dept 2009) (where defendants' managing agent's affidavit contained allegations contradicted by documentary evidence to the contrary, those allegations were feigned rather than genuine, thereby warranting summary judgment in favor of plaintiff); Matter of Fisch v Aiken, 252 AD2d 556, 556-557 (2d Dept 1998).

Based on the foregoing, this court finds that, by March 2, 2015, Soleil replaced Goldstein as El-Bey Trust's counsel. In addition, the evidence, including the Contract's terms and El-Bey and El-Bey Trust's failure to address, explain, and deny the substance of the foregoing emails provided by Harlem to refute

El-Bey's claims that Soleil was never El-Bey Trust's counsel and that Goldstein was its counsel, and El-Bey and El-Bey Trust's failure to provide Goldstein's affidavit doing the same, warrant this court granting partial summary judgment in favor of Harlem against El-Bey Trust on Harlem's second cause of action. Cf Gaudio v Gonzalez, 117 AD3d 490, 490-491 (1st Dept 2014); (where defendants demonstrated their entitlement to summary judgment dismissing the complaint, and plaintiff failed to raise any issue of fact, because his expert's affirmation was conclusory, and "failed to controvert, let alone address," defense experts' assertions, defendants were entitled to summary judgment); see also Abalola v Flower Hosp, 44 AD3d 522 (1st Dept 2007). Accordingly, Harlem is entitled to a declaration that El-Bey Trust breached the Contract, that Harlem is entitled to the return of its $250,000.00 deposit, and that neither El-Bey, nor El-Bey Trust, is entitled to that deposit.

Goldstein, P.C. was not required to hold the deposit in an interest-bearing account (Contract § 2.05 [a]), and did not do so, as stated in Goldstein's affirmation in support of his motion, pursuant to CPLR 1006 (f), to deposit the $250,000.00 in this court. This court, by order entered on June 6, 2016, granted that motion, but because the order did not set forth the amount of money to be deposited, the Clerk of the Court refused to accept the funds. This court issued an order, which was

entered on May 17, 2017, which amended its prior order, and directed Goldstein, P.C. to deposit $250,000.00 with the Clerk of the Court, New York County, who was directed to accept and hold such amount until further order of this court. If, Goldstein, P.C. has not yet deposited the $250,000.00 with the Clerk of the Court, Goldstein, P.C. is directed to refund that deposit, without interest, to Harlem, within 20 days of service of a copy of this order with notice of entry. If Goldstein, P.C. has deposited the $250,000.00 with the Clerk of the Court, then, within the same 20-day period, Goldstein, P.C. shall so advise Harlem's counsel, Jeffrey Fleischmann of the Law Office of Jeffrey Fleischmann PC. If the Department of Finance is in possession of the deposit, then, upon service of a copy of this order with notice of entry on the Department of Finance, it is directed, after deducting any fee to which it may be entitled, to refund the balance of the $250,000.00, without interest, to plaintiff Harlem 2201 Group LLC. If the Department of Finance is not in possession of the deposit, it shall advise Harlem's counsel, as ordered hereinafter.

Harlem's request, based on El-Bey Trust's breach of contract, for prejudgment interest on its deposit of $250,000.00, and costs and disbursements, is granted, and, as hereinafter ordered, El-Bey, as trustee of the El-Bey Trust, is directed to pay out of any of El-Bey Trust's assets Harlem's

costs and disbursements and prejudgment interest, beginning on September 10, 2015, the date after which Soleil attempted to revoke, on El-Bey Trust's behalf, the extension of the due diligence period, and the day on which Raab's demanded the immediate refund of Harlem's deposit.

El-Bey Trust and El-Bey's counterclaim, which attempts to plead a breach of contract claim against Harlem, and, thus, seeks a judgment permitting El-Bey Trust and El-Bey to retain the deposit, is, based on the foregoing, without merit, and is dismissed. Further, only El-Bey, as trustee of El-Bey Trust, and not El-Bey, individually, would be entitled to assert a breach of contract counterclaim under the Contract and circumstances of this case. Moreover, the defendants' counterclaim is unsupported by any factual allegations detailing Harlem's alleged breach of contract and, therefore, fails to show that El-Bey Trust would be entitled to retain the deposit. See CPLR 3013. Additionally, that part of the counterclaim, which seeks to compel Harlem to provide disclosure, is an inappropriate means of obtaining discovery, and is also dismissed.

The branch of El-Bey Trust and El-Bey's cross motion, which seeks an order permitting them to serve an amended answer in the form annexed to their cross-moving papers, is denied. Although absent surprise or prejudice leave to amend ought to be given

freely, the court is required to examine the proposed pleading's merits to "conserve judicial resources." 360 W 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept 2011). A party moving to amend its pleadings, including to assert affirmative defenses, is required to provide "appropriate substantiation" for its proposed amendments. Guzman v Mike's Pipe Yard, 35 AD3d 266, 266 (1st Dept 2006); see also McBride v KPMG Intl, 135 AD3d 576, 580-581 (1st Dept 2016). Here, the cross-moving defendants and their counsel do not mention or specifically refer to any of their twelve proposed "affirmative defenses," which are, in any event, devoid of any factual allegations, and, for the reasons previously discussed in granting Harlem, to the extent previously indicated, partial summary judgment on its second cause of action, the proposed counterclaim is patently devoid of merit. See Batsidis v Wallack Mgt, Co., Inc., 126 AD3d 551, 552 (1st Dept 2015) (application to amend complaint to add a breach of contract claim denied where proposed amendment lacked merit).

Therefore, the branch of the cross motion, which seeks leave to amend El-Bey and El-Bey Trust's answer in the form proposed must be, and hereby is, denied, without prejudice to any application that El-Bey Trust and El-Bey are advised to make on a proper showing to amend their answer.

4/2/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE