Emigrant Bank v Rosabianca
2019 NY Slip Op 30071(U)
January 3, 2019
Supreme Court, New York County
Docket Number: 850136/2014
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

EMIGRANT BANK, as successor-by-merger with EMIGRANT SAVINGS BANK – MANHATTAN,

Plaintiff,

- against -

LUIGI ROSABIANCA, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, CARMELO ROSABIANCA, VIVIAN ROSABIANCA, BOARD OF MANAGERS OF THE CIPRIANI CLUB RESIDENCES, LITTLE BAY INVESTMENT CORP., SECURED LENDING CORP., FRANCES GIBNER, DEBORAH A. GENGER as Executrix of the Estate of FRANCES GIBNER, SANTO ROSABIANCA, and JOHN SMITH (name refused),

Defendants.

DECISION AND ORDER

Index No. 850136/2014

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendant Securing Lending Corp. to vacate a judgment entered in default (motion sequence no. 007), the motion of defendant Securing Lending Corp. for summary judgment dismissing the complaint (motion sequence no. 008), and the motion of defendant Securing Lending Corp. to vacate a judgment and order (motion sequence no. 010).

Papers	**NYSCEF Documents Numbered**
motion sequence no. 007	
Defendant's Notice of Motion	303
Defendant's Affirmation in Support and Exhibits	304-321
Defendant's Memorandum of Law in Support and Exhibits	322-330
Plaintiff's Affirmation in Opposition and Exhibits	331-348
Plaintiffs' Memorandum of Law	349
Defendant's Reply Memorandum of Law	352
Defendant's Reply Affidavit	353
Plaintiff's Letter Application for a Sur Reply	354
Plaintiff's Letter Enclosing Exhibit No. 5	355
Defendant's Letter in Response	356
Plaintiff's So-Ordered Letter	360
Plaintiff's Sur-Reply	364
Defendant's Notice of Motion (motion sequence no. 008)	369
Defendant's Affirmation in Support and Exhibits	370-377
Defendant's Affidavit in Support	378
Plaintiff's Affirmation in Opposition and Exhibits	382-415
Plaintiff's Memorandum of Law in Opposition	416
Plaintiff's Affidavit in Opposition and Exhibits	419-426

Adam Leitman Bailey, P.C. (Colin E. Kaufman, of counsel), for plaintiff.
Law Office of Mitchell Cantor (Mitchell Cantor, of counsel), for defendant Secured Lending Corp.

GERALD LEBOVITS, J.:

This is a mortgage-foreclosure action affecting real property located at 55 Wall Street, Unit 540, New York, New York 10005 (Block 27, Lot 1010) (the Wall Street Property) and 2342 Benson Avenue, Brooklyn, New York 11214 (Block 6874, Lot 50) (the Benson Avenue Property).

Motion sequence nos. 007, 008, and 010 are consolidated for disposition herein.

In motion sequence no. 007, defendant Secured Lending Corp. (SLC) moves under CPLR 2005 and 5015 (a), for an order vacating its default in failing to oppose plaintiff's prior motion for an order striking its answer, and for an order granting SLC leave to oppose that application (motion sequence no. 006). In motion sequence no. 008, SLC moves under CPLR 3212 for summary judgment on plaintiff's second cause of action for equitable subrogation. In motion sequence no. 010, SLC moves under CPLR 2221 to vacate the judgment and order signed March 20, 2018 and entered on March 27, 2018.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Mortgages

As of March 6, 2008, the Wall Street Property was encumbered by a mortgage in the principal sum of $1.04 million held by nonparty Larry Levi, which was recorded in the Office of the City Register on March 5, 2010 (the Levi Mortgage) (*id.*, ¶ 42), and a mortgage in the principal sum of $400,000 held by nonparty Andrew Berg, which was recorded in the Office of the City Register on March 5, 2010 (the Berg Mortgage) (*id.*, ¶ 44).

On May 14, 2008, defendant Luigi Rosabianca (Luigi) executed an adjustable-rate note (the EMC Note) in the principal amount of $1.76 million in favor of Emigrant Mortgage Company, Inc. (EMC), which subsequently merged with plaintiff in 2012 (complaint [NY St Cts Elec Filing (NYSCEF) Doc No. 1], ¶¶ 2 and 14). As collateral security for the EMC Note, Luigi executed a mortgage (the EMC Mortgage) encumbering the Wall Street Property and the Benson Avenue Property. The Benson Avenue Property is owned by Luigi's parents, defendants Carmelo Rosabianca (Carmelo) and Vivian Rosabianca (Vivian). On October 30, 2009, EMC assigned the EMC Note and EMC Mortgage to plaintiff (*id.*, ¶ 16). The EMC Mortgage and the

assignment were not recorded in the Office of the City Register until April 20, 2012 and June 11, 2012, respectively (*id.*, ¶¶ 15-16).

It is alleged that the proceeds from the EMC Mortgage were used to pay off the Levi Mortgage and the Berg Mortgage, with satisfactions for those two mortgages recorded in the Office of the City Register on August 15, 2011 and May 6, 2010, respectively (*id.*, ¶¶ 43 and 45).

On August 8, 2011, Luigi obtained a $500,000 loan from defendant Little Bay Investment Corp. (Little Bay), which was secured by a mortgage on the Wall Street Property (*id.*, ¶ 47). Little Bay recorded its mortgage in the Office of the City Register on September 21, 2011 (affirmation of Colin E. Kaufman [Kaufman] on mot. seq. no. 008, exhibit 12 [NYSCEF Doc No. 396] at 1). Little Bay then assigned its note (the Little Bay Note) and mortgage (the Little Bay Mortgage) to SLC by written assignment dated February 11, 2014 and recorded in the Office of the City Register on February 24, 2014 (complaint [NYSCEF Doc No. 1], ¶ 48).

B. The Foreclosure Action

After Luigi failed to pay the monthly installment due August 1, 2011 (complaint [NYSCEF Doc No. 1] ¶ 26), plaintiff commenced this action seeking to foreclose on the EMC Mortgage.

In an order of reference and partial judgment signed July 22, 2016, the undersigned granted plaintiff's unopposed motion for a default judgment against Luigi, Carmelo and Vivian, appointed a Referee to compute the amount due on the EMC Note and EMC Mortgage, severed plaintiff's second cause of action for equitable subrogation against SLC, and dismissed Little Bay from the action, along with other relief[1] (NYSCEF Doc No. 220). The Appellate Division, First Department affirmed this court's denial of Carmelo's and Vivian's motion for leave to interpose a late answer to the complaint (*see Emigrant Bank v Rosabianca*, 156 AD3d 468, 468 [1st Dept 2017]). The court also notes that Luigi has been disbarred from the practice of law (*see Matter of Rosabianca*, 131 AD3d 215, 219 [1st Dept 2015]), and that he was sentenced to serve four to 12 years in prison after pleading guilty to grand larceny (*see Emigrant Bank*, 156 AD3d at 469 n1). Much of the litigation since entry of the default judgment concerns the equitable subrogation claim.

By notice of motion dated August 20, 2015, SLC moved for summary judgment dismissing the complaint against it (affirmation of Michael Cantor [Cantor] on mot. seq. no. 008, exhibit C [NYSCEF Doc No. 373] at 1). SLC had argued that plaintiff could not maintain a claim for equitable subrogation because the Little Bay Mortgage was recorded first (Cantor affirmation on mot. seq. no. 008 [NYSCEF Doc No. 370], ¶ 14). In a decision and order dated April 25, 2016 (the April 2016 Decision), this court denied SLC summary judgment because it had "presented insufficient evidence about whether defendant Little Bay . . . had actual or constructive knowledge of the EMC Mortgage" (*Emigrant Bank v Rosabianca*, 2016 NY Slip Op 30793[U], *2 [Sup Ct, NY County 2016]).

On October 12, 2016, plaintiff served a subpoena duces tecum and ad testificandum upon nonparty Manuel Asensio (Kaufman affirmation on mot. seq. no. 008, exhibit 26 [NYSCEF Doc

[1] The court may take judicial notice of its own file maintained for this action (*see Leary v Bendow*, 161 AD3d 420, 421 [1st Dept 2018]).

No. 410] at 1), who plaintiff has alleged is the life partner of SLC's president, Hatun Aytug, and who has represented SLC as a special limited advisor (plaintiff's memorandum of law in opposition to mot. seq. no. 007 [NYSCEF Doc No. 349] at 6). On November 11, 2016, plaintiff served a subpoena duces tecum and ad testificandum upon nonparty Llorena Llivichuzca (Kaufman affirmation on mot. seq. no. 008, exhibit 28 [NYSCEF Doc No. 412] at 1), who plaintiff has alleged is SLC's "apparent bookkeeper/agent"[2] (plaintiff's memorandum of law on mot. seq. no. 007 [NYSCEF Doc No. 349] at 10).

On May 31, 2017, plaintiff moved, pursuant to CPLR 3126, for an order striking SLC's answer and affirmative defenses, entering a default judgment against SLC, and declaring that the issues raised in its post-deposition discovery demands were resolved in its favor (Cantor affirmation on mot. seq. 007, exhibit L [NYSCEF Doc No. 316] at 1-2). The parties twice stipulated to adjourn the return date of the motion (Kaufman affirmation on mot. seq. no. 007, exhibits 9 and 10 [NYSCEF Doc Nos. 340 and 341] at 1). By letter dated July 17, 2017, SLC requested an additional adjournment so that it could respond (Cantor affirmation on mot. seq. no. 007, exhibit M [NYSCEF Doc Nos. 317] at 1), and the motion was adjourned once more. Despite having been granted a "final" return date of August 8, 2017 (Kaufman affirmation on mot. seq. no. 007, exhibit 12 [NYSCEF Doc No. 343] at 2), SLC requested yet another adjournment by letter dated August 7 (Cantor affirmation on mot. seq. no. 007, exhibit N [NYSCEF Doc Nos. 318] at 1). The discovery motion was granted without opposition in a decision dated August 31, 2017, and the parties were directed to "settle order" (*id.*, exhibit P [NYSCEF Doc No. 320] at 1). Less than one week later, SLC moved to vacate its default (SLC notice of motion [NYSCEF Doc No. 303] at 1). On October 25, 2017, plaintiff filed a notice of settlement and proposed order striking SLC's answer (NYSCEF Doc Nos. 357 and 358).

Before the vacatur motion was submitted for disposition and before the proposed order striking SLC's answer was signed, on March 14, 2018, SLC moved for summary judgment (SLC notice of motion [NYSCEF Doc No. 369]), on the ground that the April 2016 Decision "in effect granted Secured partial summary judgment as to the amount of the Berg Mortgage even while ostensibly denying it" (Cantor affirmation on mot. seq. no. 008 [NYSCEF Doc No. 370], ¶ 16).

On March 27, 2018, one week after the court signed the proposed order on the earlier discovery motion, the Clerk of the Court entered a judgment striking and then dismissing SLC's answer and entering a default judgment against it, declaring that the Little Bay Mortgage was subordinate to the EMC Mortgage, and awarding plaintiff monetary sanctions for its costs and expenses incurred in discovery (Kaufman affirmation on mot. seq. 008, exhibit 2C [NYSCEF Doc No. 386]). On May 31, 2018, the Clerk of the Court entered a separate monetary judgment for $40,891.63 in plaintiff's favor for costs related to the discovery motion (NYSCEF Doc No. 447).

By notice of motion filed August 17, 2018, SLC moved, pursuant to CPLR 2221, to vacate the judgment entered by the Clerk on March 27, 2018 (SLC notice of motion [NYSCEF Doc No. 462]).

[2] Asensio described Llivichuzca as the comptroller of his company, Asensio & Company, Inc. (ACO) (Asensio aff [NYSCEF Doc No. 353], ¶ 5).

DISCUSSION

A. Motion Sequence No. 007

SLC's motion to vacate its default under CPLR 5015 (a) (1) for failing to submit opposition to plaintiff's motion for an order striking its answer is granted, and plaintiff's prior motion seeking to strike SLC's answer (motion sequence no. 006) is granted in part.

A party seeking to vacate a default under CPLR 5015 (a) (1) must demonstrate both a reasonable excuse for the failure to appear and a meritorious defense to the action (*see Dormitory Auth. of the State of N.Y. v M.T.P. 59 St. LLC*, 103 AD3d 602, 602 [1st Dept 2013]). What constitutes a reasonable excuse generally rests within the discretion of the court (*see Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]), taking into consideration the length of the delay, prejudice to the opposing party, and this State's public policy favoring resolution of matters on the merits (*see Mejia v Ramos*, 113 AD3d 429, 430 [1st Dept 2014] [citations omitted]; *accord Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]). A default that is the result of deliberate, willful, or contumacious conduct will not be excused (*see May v Lex Terrae of N.J.*, 303 AD2d 213, 214 [1st Dept 2003] [refusing to vacate the plaintiffs' default for failing to appear on the date set for trial because the plaintiffs were aware of the date as the court had rejected their previous request for an adjournment]).

Absent a reasonable excuse, the court need not determine whether the defendant has presented a meritorious defense to the action (*see Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602, 602 [1st Dept 2013]; *accord Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). To demonstrate a meritorious defense, the movant must tender "an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). "The affidavit must make sufficient factual allegations; it must do more than merely make conclusory allegations or 'vague assertion[s]" (*id.* [internal quotation marks and citations omitted]). However, "the quantum of proof needed to prevail on a CPLR 5015 (a) (1) motion is less than that required when opposing a summary judgment motion" (*Inwald Enters., LLC v Aloha Energy*, 153 AD3d 1008, 1010 [3d Dept 2017] [internal quotation marks and citations omitted]).

As a preliminary matter, plaintiff urges the court to reject the new arguments raised in SLC's reply in support of vacatur as well as Asensio's affidavit. It is well settled that the function of reply papers is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992] [citation omitted]). Likewise, a party cannot "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply" (*Ford v Weishaus*, 86 AD3d 421, 422 [1st Dept 2011] [internal quotation marks and citation omitted]). Nonetheless, the court will consider SLC's arguments as there has been no prejudice to plaintiff, who had requested and has been granted leave to serve a sur reply[3] (*see Valure v Century 21 Grand*, 35 AD3d 591, 592 [2d Dept 2006]).

[3] NYSCEF Doc Nos. 354 and 360.

As to the reasonable excuse component of CPLR 5015 (a) (1), SLC submits that it has had difficulty responding to plaintiff's post-deposition discovery demands because it did not exercise dominion or control over several nonparties, including Little Bay, Blue Water Advisors, Inc. (Blue Water), and Asensio, who were in possession of responsive information. Plaintiff has alleged that the principals behind Little Bay, Blue Water, and SLC were affiliated with Luigi, Aytug, Asensio, and nonparty Antonio I. Mendieta Diaz (Mendieta Diaz), among others, and that they may have knowledge of the circumstances surrounding the Little Bay/Luigi transaction, SLC's purchase of the Little Bay Note, and the assignment of the Little Bay Mortgage (Kaufman affirmation on mot. seq. no. 007, exhibit 5 [NYSCEF Doc No. 336] at 3-7). Plaintiff's demands, served after Aytug's deposition was held, sought documents related to those persons and entities (*id.* at 620-639). Asensio, though, averred that Luigi had no direct interaction with Little Bay or Blue Water concerning the Little Bay/Luigi transaction, as ACO served as the intermediary on that transaction (Asensio aff [NYSCEF Doc No. 353], ¶¶ 16-17). Also, in connection with a prior motion, Little Bay's president, Mendieta Diaz, affirmed that Little Bay enjoyed a lender/borrower relationship with Luigi, nothing more[4] (Mendieta Diaz affirmation [NYSCEF Doc No. 167], ¶ 3). Even after the court granted plaintiff's motion to strike SLC's answer and before either party settled the order, by letter dated August 29, 2017 to plaintiff, SLC repeated its assertion that it had no relationship with Luigi, and that the bulk of plaintiff's post-deposition demands were not applicable to it (Cantor affirmation on motion seq. no. 007, exhibit O [NYSCEF Doc No. 319] at 1). SLC also argues that there has been no evidence of willful neglect of its discovery obligations, and that it intended to respond to the discovery motion.

The court finds that the excuse SLC has proffered to explain its default is less than convincing. Significantly, Asensio's averment that he is the managing member of nonparty Secured Lending LLC, the successor in interest to SLC (Asensio aff [NYSCEF Doc No. 353], ¶ 1), and counsel's admission that he attempted to facilitate the scheduling of Asensio's and Llivichuzca's nonparty depositions undermines SLC's contention that it lacked control over them. Had they been true nonparties, then it is unclear why SLC chose to orchestrate a "combined response . . . with [the] other non-party individuals" when those nonparties were not under its control[5] (SLC's memorandum of law on mot. seq. 007 [NYSCEF Doc No. 322] at 10). Nevertheless, Little Bay, Blue Water and SLC are separate legal entities, with Little Bay and Blue Water based in Panama. The fact that Asensio may have been associated with Little Bay, Blue Water, or SLC as an agent or representative at the time of the Little Bay/Luigi transaction or the Little Bay/SLC transaction does not conclusively demonstrate that those companies, along with Asensio and Luigi, operated as a single entity.

Additionally, other factors favor vacating SLC's default. First, there has been no evidence that SLC willfully neglected to respond to the prior motion, as evidenced in its two letters to the court requesting additional time. Second, SLC moved to vacate its default within one week after the court had rendered its decision. Thus, there was minimal prejudice to plaintiff from the one-week delay. SLC's failure to oppose the prior motion appears to be an isolated incident as opposed to a pattern of willful neglect (*see Santiago v Valentin*, 125 AD3d 459, 460

[4] Although SLC did not attach a copy of Mendieta Diaz's affirmation to its reply or refer to the electronic docket number (*see* CPLR 2214 [c]), the court has located the document referred to in SLC's papers.

[5] The court notes that plaintiff, SLC and Secured Lending LLC have not moved for an order of substitution (*see* CPLR 1018).

[1st Dept 2015]; *Xiao Jia Lin v Engleton*, 121 AD3d 483, 483 [1st Dept 2014]; *cf. Spivey v City of New York*, — AD3d —, 2018 NY Slip Op 08557, *1-2 [1st Dept 2018]).

SLC also has presented a potentially meritorious defense to the equitable subrogation claim. The doctrine of equitable subrogation provides as follows:

> "[W]here the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance"

(*King v Pelkofski*, 20 NY2d 326, 333-334 [1967]). Application of the doctrine turns on whether a mortgagee had actual knowledge of the intervening, unrecorded interest (*see RTR Props., LLC v Sagastume*, 145 AD3d 697, 699 [2d Dept 2016]), as constructive knowledge or notice of the intervening interest does not bar application of the doctrine (*see Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1150 [2d Dept 2012], citing *King*, 20 NY2d at 333-334, and *Elwood v Hoffman*, 61 AD3d 1073, 1075 [3d Dept 2009]). Ultimately, the doctrine is meant to prevent unjust enrichment (*see Great E. Bank v Chang*, 227 AD2d 589, 589 [2d Dept 1996], *lv dismissed* 88 NY2d 1064 [1996]), and "prevents a junior lienor from converting the mistake of the lender 'into a magical gift for himself'" (*Arbor Commercial Mtge., LLC*, 95 AD3d at 1149, quoting *United States v Baran*, 996 F2d 25, 29 [2d Cir 1993]).

However, SLC has raised Real Property Law § 291 as an affirmative defense. The relevant portion of Real Property Law § 291 reads, in part, as follows:

> "A conveyance of real property, within the state . . . may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof . . . in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees, if such contract is made in good faith and is first duly recorded."

Hence, "[u]nder New York's Recording Act (Real Property Law § 291), a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage" (*Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 743 [2d Dept 2012], *lvs dismissed* 19 NY3d 834, 992 [2012], quoting *Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d 793, 797 [2d Dept 2008], *lv dismissed* 10 NY3d 911 [2008] [finding that the

defendant good faith second mortgagee's defense under the Recording Act defeated the equitable subrogation claim of the plaintiff first mortgagee]).

SLC argues that because the Little Bay Mortgage was recorded on September 21, 2011, it takes priority over the EMC Mortgage, which was recorded on April 20, 2012. Asensio explained that a law firm ACO had retained to conduct due diligence on the loan transaction between Little Bay and Luigi discovered the Levi Mortgage, but none of the other, earlier mortgages on the Wall Street Property (Asensio aff [NYSCEF Doc No. 353], ¶ 14). Little Bay agreed to bankroll the loan "only after Rosabianca provided proof of satisfaction of the . . . Levy [sic] Mortgage" (*id.*, ¶ 15). Additionally, Mendieta Diaz affirmed that at the time Little Bay entered into the loan transaction with Luigi, it had no knowledge of the EMC Mortgage (Mendieta Diaz affirmation [NYSCEF Doc No. 167], ¶¶ 5-6). As an "assignee . . . is not entitled to stand in a better position than that of its assignor" (*Portfolio Recovery Assocs., LLC v King*, 14 NY3d 410, 416 [2010], *rearg denied* 15 NY3d 833 [2010]), SLC possesses a potentially meritorious defense to the equitable subrogation claim under Real Property Law § 291 as a potential good faith lender for value.

Given the "the strong public policy of this State that matters be decided on their merits" (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 257 [1st Dept 2001] [citations omitted]), SLC's default in failing to oppose plaintiff's discovery motion is granted.

The court also finds that the drastic penalty of striking SLC's answer for failing to produce court-ordered discovery is not warranted. Therefore, the court hereby recalls and vacates its decision dated August 31, 2017 granting plaintiff's motion to strike SLC's answer without opposition (motion sequence no. 006), and substitutes the instant decision therefor.

Where a party refuses to obey an order for disclosure, CPLR 3126 permits the court to strike the offending party's pleadings, stay the proceedings until the order is complied with, or render a judgment by default against the disobedient party (*see CDR Creánces S.A.S. v Cohen*, 23 NY3d 307, 317 [2014]). A party's pleading may be stricken "for failure to comply with a discovery order . . . only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD36 498, 504 [1st Dept 2011] [internal quotation marks and citation omitted]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*id.* [citation omitted]). As "a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]), a party's repeated noncompliance that is "'dilatory, evasive, obstructive and ultimately contumacious'" warrants the striking of that party's pleadings (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *rearg denied* 13 NY3d 762 [2009], *cert denied* 559 US 905 [2010], quoting *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 375 [1st Dept 1990]).

Applying these precepts to the present action, the court finds that SLC's conduct insofar as it relates to producing discovery was not willful or contumacious. SLC twice changed counsel following service of plaintiff's initial discovery demands, which accounts for at least part of its failure to timely produce discovery, and SLC served belated responses to those initial demands in 2016. After Aytug's deposition, plaintiff served post-deposition discovery demands consisting of 36 items upon SLC by letter dated October 26, 2016, and requested that SLC respond by November 11 (Kaufman affirmation on mot. seq. no. 007, exhibit 5 [NYSCEF Doc No. 336] at 620). On November 9, SLC agreed, by so-ordered stipulation, to respond to those post-

deposition demands by November 23 (Kaufman affirmation, exhibit 5 [NYSCEF Doc No. 336] at 643). At a compliance conference on February 8, 2017, the court directed SLC to respond to the same demands by February 23 (*id.* at 681). Although the majority of plaintiffs' requests pertained to documents within the alleged custody of several nonparties, SLC failed to explain why it could not have provided a response insofar as the requests sought documents within its own possession. Notably, plaintiff has served subpoenas upon Asensio and Llivichuzca seeking documents and testimony related to the Little Bay Mortgage.

Nevertheless, "any sanction levied by a court must be proportionate to the conduct at issue" (*Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013]). However misguided SLC's decision to secure compliance from the nonparties, the court finds that plaintiff is not entitled to an order striking SLC's answer. Plaintiff, though, is entitled to a conditional order striking SLC's answer in the event that SLC fails to respond to the post-deposition demands dated October 26, 2016 by the date set forth below (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]). Additionally, if SLC is unable to locate documents responsive to those demands within its possession, then SLC shall furnish plaintiff with an affidavit from an individual with personal knowledge describing the "thorough search [for documents that was] conducted in good faith" (*Henderson-Jones*, 87 AD3d at 505). The affidavit shall describe in detail the date, time, and location of the search, the manner in which the search was conducted, and identify each person who conducted the search. Thus, plaintiff's motion to strike the answer of SLC is granted to the extent that SLC shall furnish plaintiff with responses to plaintiff's post-deposition discovery demands dated October 26, 2016 within 30 days after the date of this order, together with an affidavit from a person with knowledge describing in detail the search for responsive documents if no such documents are found, or else its answer shall be stricken.

To the extent that plaintiff seeks to recover its costs incurred in obtaining discovery, the court finds that monetary sanctions are warranted (*Vizcaino v Western Beef, Inc.*, 161 AD3d 632, 633 [1st Dept 2018]; *accord Lucas v Stam*, 147 AD3d 921, 926 [2d Dept 2017] [concluding that "the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure"]). However, absent from plaintiff's moving papers was a detailed description of its fees, and, therefore, its recovery of $36,640, exclusive of interest, appears to be unreasonable on its face. Moreover, the court declines to award fees for plaintiff's "good faith efforts at securing compliance with Plaintiff's [previous] discovery demands" (Kaufman affirmation on mot. seq. no. 007, exhibit 4 [NYSCEF Doc No. 335] at 2). Recovery of plaintiff's fees shall be limited to those incurred in moving for relief on the motion to strike SLC's answer (motion sequence no. 006).

B. Motion Sequence No. 010

As a consequence of the foregoing, and notwithstanding SLC's improper invocation of CPLR 2221, SLC's motion seeking to vacate the judgment entered March 27, 2017, striking SLC's answer, declaring the Little Bay Mortgage subordinate to the EMC Mortgage, and awarding plaintiff a money judgment $36,640, exclusive of interest, for its fees incurred in making the discovery motion along with fees incurred while seeking SLC's compliance with discovery is granted, and the judgment (NYSCEF Doc No. 380) is vacated in its entirety. The monetary judgment of $40,891.63 entered May 31, 2018 (NYSCEF Doc No. 447) is vacated in its entirety as well.

C. Motion Sequence No. 008

Because the judgment entered against SLC is vacated, as discussed supra, SLC's motion is not procedurally improper, as plaintiff suggests. Thus, the court will entertain SLC's application, and hereby denies the motion.

In moving for summary judgment, SLC invokes the doctrines of res judicata and the law of the case. The doctrine of res judicata, or claim preclusion, "broadly bars the parties or their privies from relitigating issues that were or could have been raised in that action" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [internal quotation marks and citation omitted]). The burden rests upon the proponent of the doctrine to demonstrate the its applicability (*see Seabrook v City of New York*, 306 AD2d 68, 68 [1st Dept 2003]). Res judicata, though, is inapplicable as SLC seeks to use the doctrine to bar litigation of a prior issue allegedly raised in the present action, not an earlier action.

As for SLC's law of the case argument, "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975], *motion to amend remittur denied*, 37 NY2d 818 [1975] [internal quotation marks and citations omitted]; *see also People v Evans*, 94 NY2d 499, 503 [2000], *rearg denied* 96 NY2d 755 [2001] [stating that the doctrine is a "concept regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation"]). The parties must have had a full and fair opportunity to litigate the issue (*see Wells Fargo Bank Minn., N.A. v Perez*, 70 AD3d 817, 817 [2d Dept 2010], *lv denied* 14 NY3d 710 [2010], *cert denied sub nom. Perez v Wells Fargo Minn., N.A.*, 562 US 1063 [2010]). Where a prior statement is not "'essential to the determination of the [prior motion],'" then the statement itself constitutes obiter dictum, and the law of the case doctrine is inapplicable (*Palmatier v Mr. Heater Corp.*, 163 AD3d 1228, 1230 [3d Dept 2018], quoting *Karol v Polsinello*, 127 AD3d 1401, 1402-1403 [3d Dept 2015]; *accord Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333 [2d Dept 2005], *lv denied* 5 NY3d 702 [2005] [concluding that "[t]he Supreme Court's misstatement was not essential to the resolution of the motion on the merits" and, therefore, "it was mere dicta"]).

SLC had moved previously for summary judgment on the ground that the Little Bay Mortgage was entitled to priority over the EMC Mortgage because EMC or plaintiff had waited until 2012 to record the EMC Mortgage (Cantor affirmation on mot. seq. no. 008 [NYSCEF Doc No. 370], ¶ 14). SLC had raised the priority of its mortgage as a first affirmative defense (*id.*, exhibit B [NYSCEF Doc No. 372] [SLC answer]). Hence, Little Bay's knowledge of the EMC Mortgage was relevant on the issue of whether SLC's Real Property Law § 291 defense could potentially defeat the equitable subrogation claim. SLC's motion, though, was denied, because it failed to meet its prima facie burden on summary judgment by showing that Little Bay had no actual or constructive knowledge of the EMC Mortgage (*Emigrant Bank*, 2016 NY Slip Op 30793[U], *2).

SLC now argues that the April 2016 Decision effectively granted it partial summary judgment on plaintiff's equitable subrogation claim insofar as it pertains to the Berg Mortgage, and that the same conclusion now applies to the Levi Mortgage. The relevant portion of the April 2016 Decision reads, in part, that "[p]laintiff is not entitled to be equitably subrogated to Berg's

position" (*Emigrant Bank*, 2016 NY Slip Op 30793[U], *4). However, immediately preceding the discussion of the interplay between a mortgagee's equitable subrogation claim and Real Property Law § 291 is the sentence, "[e]ven if SLC had satisfied its burden to prove its priority, SLC's motion for summary judgment will still be denied" (*Emigrant Bank*, 2016 NY Slip Op 30793[U], *3). The phrase "even if" indicates that any subsequent text is "merely advisory" (*Matter of James v National Arts Club*, 2013 NY Slip Op 30697[U], *16 [Sup Ct, NY County 2013], discussing *Bobrow v Bobrow*, 181 AD2d 556, 557 [1st Dept 1992]). Consequently, inclusion of the subject sentence, "[p]laintiff is not entitled to be equitably subrogated to Berg's position," was not meant to be given preclusive effect. Therefore, the court finds that the language which SLC contends constitutes the law of the case was not relevant to the determination of the prior summary judgment motion (*see Palmatier*, 163 AD3d at 1230).

In addition, it is well settled that "[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010] [citation omitted]; *accord Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]). "'Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment'" (*Phoenix Four v Albertini*, 245 AD2d 166, 167 [1st Dept 1997], quoting *Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 [1st Dept 1962]). Here, SLC's second summary judgment motion includes an affidavit from Llivichuzca in which she discusses the due diligence investigation she performed on behalf of Little Bay related to the Little Bay Mortgage. Normally, evidence elicited from nonparties after a prior motion for summary judgment was denied is not violative of the rule against successive summary judgment motions (*see Coccia v Liotti*, 101 AD3d 664, 666 [2d Dept 2012], *lv dismissed* 21 NY3d 985 [2013] [considering that "branch of the defendant's motion which was based on deposition testimony of nonparty witnesses not elicited until after the defendant's earlier cross motion for summary judgment was denied"]). As such, SLC's second motion does not violate the rule against multiple summary judgment motions, despite Llivichuzca's alleged affiliation with SLC or Little Bay.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

The court finds Llivichuzca's affidavit deficient. Llivichuzca did not attach any of the title reports upon which she relied in advising Little Bay or SLC in making the initial loan to Luigi, nor did she state that she reviewed any of ACO's business records prior to executing her affidavit. Furthermore, whether certain facts should have placed Little Bay on inquiry notice of the EMC Mortgage, as plaintiff argues, or whether Little Bay lacked actual or constructive

knowledge of a prior unrecorded lien only affects its status as a good faith lender for value, and does not preclude plaintiff from maintaining an equitable subrogation claim. To be sure, if SLC was deemed a bona fide lender for value, then its recorded lien would be superior to plaintiff's subsequently recorded lien. The ultimate issue on an equitable subrogation claim, though, is equity, and whether it would be inequitable to allow SLC to prevail under its Real Property Law § 291 defense and foreclose plaintiff from recovering on the EMC Mortgage.

When EMC made the $1.76 million loan to Luigi in 2008, the Little Bay Note and Little Bay Mortgage did not yet exist. Although plaintiff did not record the EMC Mortgage until 2012, its records, which were submitted in opposition, established that proceeds from the EMC Mortgage were used to pay off the Berg Mortgage and the Levi Mortgage. Importantly, plaintiff has produced copies of correspondence setting forth the payoff amounts for the Berg Mortgage and the Levi Mortgage prior to the closing (affidavit of Rachel Lynch [Lynch aff], exhibit E [NYSCEF Doc No. 423] at 2-4), the loan disbursal authorization form setting forth each check number and the amounts paid (*id.*, exhibit F at 1), and the canceled checks (*id.*, exhibit G at 7-8). The HUD-1 Statement reflected payments of $400,000 to Berg and $1.04 million to Michael Katz, an attorney who represented Levi (*id.*, exhibit D [NYSCEF Doc No. 422] at 1). Lynch, an assistant treasurer for plaintiff, averred that plaintiff maintained these documents as part of its business records (Lynch aff [NYSCEF Doc No. 418], ¶ 2).

The facts herein mirror those in *Rite Capital Group, LLC* (91 AD3d at 741), cited in the court's April 2016 Decision. The plaintiff in that action loaned $400,000 to a defendant, LMAG, LLC (LMAG), which was secured by a mortgage on real property LMAG owned in Kings County (91 AD3d at 742). LMAG's principal used $207,114.20 from the loan proceeds to pay off an existing mortgage on the property that was held by a nonparty (*id.*). LMAG's principal then obtained a loan of $300,000 from another defendant, Zeg Enterprises, Inc. (Zeg), which was secured by a mortgage on the same Kings County property (*id.*). Zeg recorded its mortgage less than one week before the plaintiff recorded its mortgage. The Court held that "Zeg established, prima facie, that it was a good-faith lender for value, and that it recorded its mortgage first without actual or constructive notice" of the plaintiff's mortgage (*id.* at 743). Nonetheless, the Court concluded that the plaintiff's mortgage was equitably subrogated to the position of the prior nonparty mortgagee's position because "Zeg's mortgage did not exist" when the nonparty mortgagee's mortgage was satisfied (*id.*).

As with Zeg's mortgage, the Little Bay Mortgage did not exist until one year after proceeds from the EMC Mortgage were used to pay off the Berg Mortgage and Levi Mortgage. Although the satisfaction of the Levi Mortgage was recorded one week after Little Bay recorded its mortgage, it appears that Little Bay was aware that the Levi Mortgage had been satisfied, but not the manner by which it was paid off. Thus, it would be inequitable to reward SLC with "priority under the race-notice statute (Real Property Law § 291) only because the bank caused the other . . . mortgages to be satisfied at a cost to the bank" (*Zeidel v Dunne*, 215 AD2d 472, 473 [2d Dept 1995]; *see also Surace v. Stewart*, 58 AD3d 715, 716 [2d Dept 2009]; *Whitestone Sav. & Loan Assn. v Moring*, 286 App Div 1042, 1043 [2d Dept 1955], *rearg denied* 1 AD2d 681 [2d Dept 1955]). As a consequence, SLC has not demonstrated that it is entitled to summary judgment on the second cause of action for equitable subrogation.

Accordingly, it is

ORDERED that the motion of defendant Secured Lending Corp. seeking to vacate its default (Motion Sequence No. 007) is granted, and defendant Secured Lending Corp.'s default in failing to oppose plaintiff's prior motion to strike its answer is hereby vacated; and it is further

ORDERED that the decision dated August 31, 2017 (NYSCEF Doc No. 301) granting without opposition plaintiff's motion for an order striking defendant Secured Lending Corp.'s answer (Motion Sequence No. 006) is hereby recalled and vacated in its entirety, and the answer of defendant Secured Lending Corp. is reinstated; and it further

ORDERED that plaintiff's motion for an order striking defendant Secured Lending Corp.'s answer (Motion Sequence No. 006) is restored to the court's calendar, and plaintiff's motion for an order striking Secured Lending Corp.'s answer (Motion Sequence No. 006) is granted and the answer of defendant Secured Lending Corp. is stricken unless, within 30 days from service of a copy of this order with notice of entry, defendant Secured Lending Corp. furnishes plaintiff with responses to plaintiff's post-deposition discovery demands dated October 26, 2016, and, if no responsive documents are located, with an affidavit from a person with knowledge describing in detail the search for responsive documents; and plaintiff shall notify the court if Secured Lending Corp. fails to comply; and it is further

ORDERED that defendant Secured Lending Corp. is directed to pay plaintiff's attorneys' fees, costs, and expenses incurred in connection with the motion seeking to strike its answer (Motion Sequence No. 006); and it is further

ORDERED that the amount of attorneys' fees and costs due to plaintiff is referred to a Special Referee to hear and determine, as permitted by CPLR 4317 (b); and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the motion of defendant Secured Lending Corp. (Motion Sequence No. 010) is granted, and the judgment entered March 27, 2018 (NYSCEF Doc No. 380) and the judgment entered May 31, 2018 (NYSCEF Doc No. 447) are hereby vacated in their entirety; and it is further

ORDERED that upon presentation of a certified copy of this order, along with payment of the appropriate fees, if any, the New York County Clerk is respectfully directed to enter upon its books and records that the judgment entered March 27, 2018 (NYSCEF Doc No. 380) and the judgment entered May 31, 2018 (NYSCEF Doc No. 447) are vacated in their entirety; and it is further

ORDERED that upon presentation of a certified copy of this order, along with payment of the appropriate fees, if any, the Office of the City Register of the City of New York, New York County, is respectfully directed to enter upon its books and records that the judgment entered March 27, 2018 (NYSCEF Doc No. 380) against the property located at 55 Wall Street, Unit 540, New York, New York 10005 (Block 27, Lot 1010) is vacated in its entirety, and that the recording of the judgment in its books and records is canceled; and it is further

ORDERED that upon presentation of a certified copy of this order, along with payment of the appropriate fees, if any, the Kings County Clerk is respectfully directed to enter upon its books and records that the judgment entered March 27, 2018 (NYSCEF Doc No. 380) and the judgment entered May 31, 2018 (NYSCEF Doc No. 447) are vacated in their entirety; and it is further

ORDERED that upon presentation of a certified copy of this order, along with payment of the appropriate fees, if any, the Office of the City Register of the City of New York, Kings County, is respectfully directed to enter upon its books and records that the judgment entered March 27, 2018 (NYSCEF Doc No. 380) against the property located at 2342 Benson Avenue, Brooklyn, New York 11214 (Block 6874, Lot 50) is vacated in its entirety, and that the recording of the judgment in its books and records is canceled; and it is further

ORDERED that the motion of defendant Secured Lending Corp. for summary judgment (Motion Sequence No. 08) is denied; and it is further

ORDERED that counsel for defendant Secured Lending Corp. shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel are directed to appear for a status conference in Part 7, Room 345, 60 Centre Street, New York, New York, on March 13, 2019, at 10:00 a.m.

1/3/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	X	REFERENCE