SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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PATMOS FIFTH REAL ESTATE INC., PATMOS WESTBURY LLC,

Plaintiffs,

- v -

MAZL BUILDING LLC, PABA ABRAMOV, NYA BUILDING CONSTRUCTION CORP, SHIMON WOLKOWICKI, HIGH LINE HOLDINGS LLC,

Defendants.

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INDEX NO. 108421/2011

MOTION DATE

MOTION SEQ. NO. 011, 012

DECISION + ORDER ON MOTION

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MAZL BUILDING LLC, HIGH LINE HOLDINGS LLC,

Third-Party Plaintiffs,

-against-

AUGUSTO REITANO, A.T.A. CONSTRUCTION CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, JOHN DOE # 1-50, SAID JOHN DOE DEFENDANTS BEING FICTITIOUS, IT BEING INTENDED TO NAME ALL OTHER PARTIES WHO MAY HAVE SOME INTEREST IN OR LIEN UPON THE PREMISES SOUGHT TO BE FORECLOSED,

Third-Party Defendants.

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Third-Party
Index No. 590836/2013

The following e-filed documents, listed by NYSCEF document number (Motion 011) 294-324, 356-391, 393, 395-409, 444, 448

were read on this motion for renew.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 325-355, 394, 410-441, 445

were read on this motion to amend caption/pleadings.

In this commercial real estate action, plaintiffs/counterclaim defendants Patmos Fifth Real Estate, Inc. and Patmos Westbury, LLC (together, Patmos) move for leave to renew their opposition to defendants' earlier motion for summary judgment while defendants/third-party plaintiffs Mazl Building LLC (Mazl) and High Line Holdings (High Line) oppose and cross-move for an order seeking leave to renew their motion for partial summary judgment, or, in the alternative, for partial summary judgment to foreclose on the mortgage (together, mot. seq. no. 011). Patmos additionally moves for leave to serve and file an amended answer with affirmative defenses (mot. seq. no. 012). The motions are consolidated for decision.

I. BACKGROUND

The facts of this action are recounted in several previous decisions. Those bearing on these motions are summarized.

Mazl and High Line initially sought to foreclose on a $16 million consolidated mortgage secured by a condominium building owned by Patmos, located at 214-216 East 52nd Street in Manhattan (condominium) and by condominium apartment unit 6D in a building located at 15 East 69th Street in Manhattan (apartment). (NYSCEF 303). The original maturity date of the consolidated mortgage, December 31, 2008, was extended by agreement to October 1, 2009, with the proviso that Patmos deliver to Mazl the condominium deed to be held in escrow. (*Id.*). Patmos delivered the deed and, as it had defaulted on the October 1, 2009 payment date, Mazl and High Line recorded the deed, assumed ownership of the condominium, and began selling apartment units over Patmos's objection. (*Id.*; NYSCEF 295).

Patmos commenced this action for a judgment declaring that defendants had violated Real Property Law (RPL) § 320 by illegally taking possession of the condominium. Mazl and High Line answered and advanced counterclaims for: 1) foreclosure; 2) breach of guaranty; 3) a

declaratory judgment; 4) unjust enrichment; and 5) legal fees. (NYSCEF 53).

Mazl and High Line then moved to dismiss the complaint (mot. seq. 001), and by decision and order dated July 29, 2013 (NYSCEF 20), the motion was denied, and affirmed on appeal. (*Patmos Fifth Real Estate Inc. v Mazl Bldg., LLC*, 124 AD3d 422 [1st Dept 2015]). The Court therein found that the deed held in escrow was "given as security for [Patmos's] debt," therefore constituting a mortgage, and that "[t]he holder of a deed given as security must proceed in the same manner as any other mortgagee - by foreclosure and sale - to extinguish the mortgagor's interest." (124 AD3d at 426 [internal citations and quotation marks omitted]).

Patmos's motion for summary judgment on its complaint was later denied on the ground that issues of fact remained (NYSCEF 107), which was modified to the extent of granting Patmos judgment on its claim for a declaration that it is and has been the sole owner of the property since December 23, 2009 and dismissing defendants' affirmative defenses of laches and estoppel (140 AD3d 527 [1st Dept 2016]).

Mazl and High Line thereafter successfully moved for partial summary judgment on their foreclosure counterclaim and a Special Referee was directed to determine the amounts due and owing on that counterclaim. (NYSCEF 139).

Mazl and High Line's motion to amend their answer to add counterclaims was denied (NYSCEF 228), and it was affirmed on appeal, with the Court observing that the proposed counterclaim for equitable subrogation was "founded upon the interest of nonparties Avi Weiss, Batsheba Weiss, Zvi Gotian, and Hana Gotian (collectively, Weiss) in the consolidated mortgage – an interest that was previously undisclosed – which accrued when plaintiffs defaulted under the terms of the consolidated mortgage on October 1, 2009." (169 AD3d 453 [1st Dept 2019]). Mazl and High Line's proposed counterclaim for a declaration pursuant to RPAPL Article 15 that they

are the holder and owner of the 62.5 percent interest that Weiss held in the mortgage was rejected as time-barred. (*Id.*).

The matter presently pends before the Special Referee, largely due to Mazl's and High Line's dilatory conduct which obligated Patmos to seek orders compelling defendants' compliance with the hearing process and to oppose defendants' unwarranted procedural applications (NYSCEF 312, 315, 317).

II. CONTENTIONS

A. Patmos (NYSCEF 295, 323, 395)

Patmos observes that the proceedings before the Special Referee have yielded various pleadings in which Mazl and High Line admit that they do not hold a 100 percent ownership interest in the consolidated mortgage on which they seek to foreclose. (NYSCEF 295, ¶ 19). Rather, Mazl's and High Line's manager, co-defendant Abramov, admits that on February 21, 2008, he assigned Mazl's 62.50 percent interest in the consolidated mortgage to co-defendant Wolkowicki who, on March 3, 2008, assigned it to a group of non-parties, the Weisses. (*Id.*, NYSCEF 314). On November 10, 2010, the Weisses executed a release discharging their 62.50 percent interest in the consolidated mortgage and released their secured interest in the condominium, assigning their 62.50 percent interest in the apartment back to Wolkowicki the same day. (NYSCEF 295).

Patmos asserts that this documentary evidence demonstrates that Mazl now holds only a 37.50 percent interest in the consolidated mortgage secured by the condominium and that High Line holds no interest in either the consolidated mortgage or the condominium. (*Id.*, ¶¶ 15-16). Thus, Patmos asserts that as the partial grant of summary judgment to defendants on June 21, 2016 was erroneously based on the assertion that Mazl and High Line held a consolidated 100

percent interest in the consolidated mortgage, it is entitled to renewal based on the new disclosures.

Along with renewal, Patmos seeks leave to serve and file an amended answer with affirmative defenses to Mazl's and High Line's counterclaims and third-party claims against them (mot. seq. no. 012): 1) standing against Mazl; 2) standing against High Line; 3) release; and 4) unclean hands. (NYSCEF 353). The affirmative defenses of standing are directed at defendants' foreclosure counterclaim, the third defense is directed at the counterclaim seeking a declaratory judgment, and the fourth is directed at the counterclaim for unjust enrichment.

Patmos argues that the defendants' lack of standing is revealed by the assignments to Wolkowicki and the Weisses, and by the Weisses's release, which together demonstrate that Mazl has standing to pursue only a 37.50 percent interest in the consolidated mortgage on which it seeks to foreclose, and that High Line possesses no interest. (NYSCEF 354, at 10-12; NYSCEF 335, 342). It maintains that the merits of its proposed affirmative defense of release are reflected in the Weisses's November 2010 release. (NYSCEF 354 at 13-14; NYSCEF 343), and that its proposed affirmative defense of unclean hands is meritorious given defendants' "false and repeated" misrepresentation of their 100 percent ownership interest in the condominium. (NYSCEF 354, at 14-15).

B. Mazl and High Line (NYSCEF 357, 391, 405, 409)

Mazl and High Line argue that Patmos waited too long to seek leave to amend (NYSCEF 431, at 7-10), and that it waived its objection to their standing to foreclose on the entire amount of the consolidated mortgage by failing to raise the affirmative defense in its reply to defendants' counterclaim. (NYSCEF 431, at 10-11). Mazl and High Line also assert that as they physically hold the notes, they are authorized to foreclose on 100 percent of the consolidated mortgage.

(NYSCEF 431, at 11-16).

Mazl and High Line maintain that Patmos's release defense lacks merit because the documentary evidence shows that "when the Mazl loan was repaid, the interests assigned to the Weiss parties and Wolkowicki would all revert back to Mazl." (NYSCEF 431, at 16-17). And, as the defense of unclean hands is equitable in nature, it is unavailable in a mortgage foreclosure proceeding. (NYSCEF 391. at 18-19). They also maintain that Patmos's renewal motion should be denied "because it is based on publicly available information from 2008." (NYSCEF 391, at 20-25).

In support of their cross motion, Mazl and High Line ask that I grant leave to renew and permit them to foreclose on the statutory mortgage (NYSCEF 391, at 25-28), quoting the Appellate Division's January 8, 2015 decision finding that the condominium deed which Patmos had placed in escrow pursuant to the extension agreement legally constituted a mortgage on which defendants were obliged to foreclose. (*Patmos*, 124 AD3d at 425-426). They also assert that "the partial release from 2010 [i.e., the Weiss parties' release] does not in any way affect the scope of the security interest embodied in the escrow deed." (NYSCEF 391, at 27).

C. Reply (NYSCEF 404)

Patmos blames them for the delay entailed in concealing their limited ownership interest in the condominium until 2017, and alleges that their dilatory conduct had been acknowledged by me. (NYSCEF 432). Patmos again relies on defendants' concealment of their actual interest in the condominium, asserting that CPLR 3025(c) permits a party to amend its pleadings "before or after judgment to conform them to the evidence" (NYSCEF 432, at 7-8), and leave to amend is liberally granted "at any time." According to Patmos, Mazl and High Line "ignore that [they] made affirmative misrepresentations about the public record and intentionally misled Patmos and

the court for years - including through sworn affidavits" (NYSCEF 405, at 5-6), and thus whether or not any information was publicly available earlier is irrelevant.

III. DISCUSSION

A. Leave to amend (mot. seq. no. 012)

Pursuant to CPLR 3025(b) "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." The motion should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. (CPLR 3025; *Crossbeat N.Y., LLC v LIIRN, LLC*, 169 AD3d 604, 604 [1st Dept 2019], quoting *CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2016]; *Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015], quoting *Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012] ["movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit"]).

Where there is "some indication that the [party seeking to amend] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] [internal citation omitted]). Given the actions of Mazl and High Line, Patmos did not waive its right to assert its proposed affirmative defense.

Here, as Patmos had no reason to suspect that defendants' interest in the condominium was less than 100 percent, and given Mazl's and High Line's prior dilatory conduct, Patmos has set forth a sufficient basis for the requested relief. In any event, Mazl and High Line allege no surprise or prejudice arising from the amendment.

The assignments to Wolkowicki and the Weisses include the notes as well as the mortgage, and the Weisses's release discharged 62.50 percent of both the notes and the mortgage. And when the Weisses released their 62.50 percent interest in the condominium, they also assigned their 62.50 percent interest in the apartment back to Wolkowicki. (NYSCEF 343, 348). While the latter interest eventually reverted to Mazl, the former interest was extinguished. Thus, absent a factual basis for Mazl and High Line's argument, or demonstrable prejudice, Patmos's motion for leave to interpose affirmative defenses of a lack of standing and "release" to defendants' declaratory judgment counterclaim is meritorious.

The defense of unclean hands has been sustained in mortgage foreclosure actions where the proponent "sufficiently alleged that the plaintiff engaged in concealment of material facts" (*Golden Eagle Capital Corp. v Paramount Mgt. Corp.*, 88 AD3d 646, 648 [2d Dept 2011], citing *Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 889 [1st Dept 2010]). Here, Patmos has sufficiently alleged that Mazl and High Line concealed materials facts. Thus, there is no legal impediment to asserting the equitable affirmative defense of unclean hands in response to defendants' equitable counterclaim of unjust enrichment.

Accordingly, all of Patmos's proposed affirmative defenses are meritorious.

B. Leave to renew (mot, seq. no. 011)

Pursuant to CPLR 2221(e)(2) and (3), "a motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." The new facts must be material, and "although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the

court." (*Matter of Weinberg*, 132 AD2d 190, 209-210 [1st Dept 1987], *citing Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). "Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." (*Chelsea Piers MGT. v Forest Elec. Corp.*, 281 AD2d 252, 252 [1st Dept 2001], citing *Rubinstein v Goldman*, 225 AD2d 328 [1st Dept 1996]).

While leave to renew is not "freely given to parties who have not exercised due diligence," and an "application 'shall contain reasonable justification for the failure to present such facts on the prior motion'" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] [citation omitted], at an oral argument on motion sequence number 10, I observed that Mazl had repeatedly engaged in dilatory conduct in the production of evidence. (NYSCEF 321, at 26). Patmos discussed one of these instances at oral argument on August 14, 2019, when counsel produced two sets of the subject notes, each containing different provisions, that he claimed defendants had disclosed to him on different occasions. (NYSCEF 448, at 34-35). And in its 2019 decision, the Appellate Division, First Department, observed that the existence of the assignments and releases had been previously undisclosed. The apparent duplicity constitutes a legally reasonable justification for Patmos's failure to assert its affirmative defenses at an earlier stage of this litigation.

The assignments to Wolkowicki and the Weisses included the notes as well as the mortgage, and the Weisses's release discharged 62.50 percent of both the notes and the mortgage. These documents contradict and disprove Mazl and High Line's claim that they have standing to sue for 100 percent of the value of the notes that secured the consolidated mortgage.

Having presented "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]), and as those facts are conclusively established by

documentary evidence, it is inescapable that Mazl holds a 37.50 percent interest in the consolidated mortgage and that High Line has no interest in it. Accordingly, having permitted Patmos to interpose the affirmative defense that Mazl and High Line lack standing to foreclose on the consolidated mortgage, the decision and order granting partial summary judgment on defendants' foreclosure counterclaim is vacated as to High Line, and as to Mazl by permitting it to foreclose on only its 37.50 percent interest in the subject consolidated mortgage. The order of reference to the Special Referee is likewise modified in accordance with these findings.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of plaintiffs/counterclaim defendants Patmos Fifth Real Estate, Inc. and Patmos Westbury, LLC for leave to renew is granted, and upon renewal, the decision and order dated June 21, 2016 (NYSCEF 139) is hereby amended to reflect that:

> (1) defendant/third-party plaintiff Mazl Building LLC is entitled to judgment on the first counterclaim/third-party claim only to the extent of its 37.50 percent interest in the subject consolidated mortgage, and
>
> (2) defendant/third-party plaintiff High Line Holdings is not entitled to judgment on the first counterclaim/third-party claim;

and the cross motion of defendants/third-party plaintiffs Mazl Building LLC and High Line Holdings (together, mot. seq. no. 011) is denied; it is further

ORDERED, that the motion of plaintiffs/counterclaim defendants Patmos Fifth Real Estate, Inc. and Patmos Westbury, LLC (mot. seq. no. 012) for leave to amend is granted, and the amended answer, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED, that Patmos file, within 20 days of notice of entry of this decision and order,

a proposed amended order of reference reflecting the modified decision and order.

11/14/2019
DATE

BARBARA JAFFE, J.S.C.

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