

**Atlantic Washington Funding LLC v Atlantic Upreal  
LLC**

2021 NY Slip Op 31469(U)

April 27, 2021

Supreme Court, Kings County

Docket Number: 500538/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of April, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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ATLANTIC WASHINGTON FUNDING LLC,

Plaintiff,

- against -

Index No. 500538/19

ATLANTIC UPREAL LLC, BOAZ GILAD, ASSAF FITOUSSI, WINTERLAND LLC a/k/a WINTREND LLC, INDUSTRIAL USA INC., NETT PROJECT LLC, BENCHMARK CONTRACTING INC., LION HVAC SUPPLIES INC. a/k/a LION H.V.A.C. SUPPLIES INC., Y&B LIGHTING & ELECTRICAL SUPPLIES LLC, HVAC DEPOT INC., DVIR MOG 18 INC., UNIVERSAL FLOORS INC.

“JOHN DOE #1” through “JOHN DOE #100,” the last one hundred names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint.

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

75-79, 82-106

Opposing Affidavits (Affirmations)\_\_\_\_\_

110-113

Reply Affidavits (Affirmations)\_\_\_\_\_

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Upon the foregoing papers in this action to foreclose two mortgages on the commercial property at 925-927 Atlantic Avenue in Brooklyn (Block 2018, Lot 57) (Property), plaintiff Atlantic Washington Funding LLC (Atlantic Washington) moves (in motion sequence [mot. seq.] two) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) striking the answer of defendants Atlantic Upreal LLC (Atlantic Upreal or borrower), Assaf Fitoussi (Fitoussi or guarantor), Y&B Lighting and Electrical Supplies LLC (Y&B) and HVAC Depot Inc. (HVAC Depot); (3) dismissing Y&B's counterclaims; (4) granting it a default judgment as against the non-answering defendants, Benchmark Contracting Inc. (Benchmark), Boaz Gilad (Gilad),<sup>1</sup> Winterland LLC a/k/a Wintrend LLC (Winterland), Industrial USA Inc. (Industrial), Nett Project LLC (Nett), Lion HVAC Supplies Inc. a/k/a Lion H.V.A.C. Supplies Inc. (Lion), DVIR MOG 18 Inc. (DVIR) and Universal Floors Inc. (Universal), pursuant to CPLR 3215 (a); (5) appointing a referee to compute the total sums due and owing and ascertain whether the Property could be sold in one parcel, pursuant to RPAPL 1321; (6) dismissing this action against defendant HVAC Depot, pursuant to CPLR 3217 (b); and (7) amending the caption to delete the John Doe defendants.

### *Background*

On January 9, 2019, Atlantic Washington commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. On January 31, 2019, Atlantic Washington filed a supplemental summons and an amended

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<sup>1</sup>

By an October 20, 2020 stipulation (NYSCEF Doc. No. 124), the action was discontinued as against defendant Gilad.

verified complaint.

### *The Amended Complaint*

The amended complaint alleges that on March 17, 2017, Atlantic Upreal executed and delivered an Amended and Restated Consolidated Secured Promissory Note for \$3,100,000.00 (Note 1) in favor of Tideway Capital Funding LLC (Tideway) secured by a Consolidated Mortgage, Assignment of Leases and Rents and Security Agreement (collectively, the Consolidated Mortgage) encumbering the Property, which was recorded on March 30, 2017 (amended complaint at ¶¶ 2 and 3).

The amended complaint alleges that the Consolidated Mortgage consolidated the following mortgages into a single lien: (1) a June 12, 2015 Mortgage, Security Agreement and Assignment of Rents and Leases in favor of Tideway, which was recorded on July 6, 2015, and (2) a March 17, 2017 Gap Mortgage in favor of Tideway, which was recorded on March 30, 2017 (*id.* at ¶ 3). The amended complaint alleges that “[a]s further security for the indebtedness, defendants Boaz Gilad and Assaf Fitoussi executed a Guarantee of Payment, whereby they unconditionally and irrevocably guaranteed the amounts due and owing on the Note 1” (*id.* at ¶ 5).

The amended complaint alleges that on March 17, 2017, Atlantic Upreal executed and delivered a Building Loan Promissory Note for \$5,400,000.00 (Note 2) in favor of Tideway secured by a Building Mortgage, Assignment of Leases and rents and Security Agreement (collectively, the Second Mortgage) encumbering the Property, which was recorded on March 30, 2017 (*id.* at ¶¶ 7 and 8). The amended complaint alleges that “[a]s further security for the indebtedness, defendants Boaz Gilad and Assaf Fitoussi executed

a Guarantee of Payment, whereby they unconditionally and irrevocably guaranteed the amounts due and owing on the Note 2” (*id.* at ¶ 10).

The amended complaint alleges that on November 19, 2018, “TIDEWAY, assigned all its rights title and interest in Note 1 and the Consolidated Mortgage to [Atlantic Washington] by assignment of mortgage which was duly recorded . . . on November 30, 2017 . . .” and “TIDEWAY, assigned all its right title and interest in Note 2 and the Second Mortgage to [Atlantic Washington] by assignment of mortgage which was duly recorded . . . on November 29, 2017 . . .” (*id.* at ¶¶ 6 and 11 [emphasis added]).<sup>2</sup> The amended complaint further alleges that [Atlantic Washington] is the owner and holder of the Note 1, Note 2, the Consolidated Mortgage and the Second Mortgage and has continuously been the owner and holder of same since November 19, 2018” (*id.* at ¶ 12).

The Amended complaint alleges that Atlantic Upreal “has failed to comply with the terms and provisions of” Note 1 and the Consolidated Mortgage and Note 2 and the Second Mortgage “by failing to pay the entire principal amount due thereon which became due on October 1, 2018” (*id.* at ¶¶ 14 and 16). The amended complaint alleges that the principal balance now due on Note 1 is \$3,100,000.00, plus interest, and the principal balance now due on Note 2 is \$4,869,000.00, plus interest (*id.* at ¶¶ 15 and 17).

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<sup>2</sup> The mortgage assignments annexed as exhibits to the amended complaint reflect that Note 1 and the Consolidated Mortgage and Note 2 and the Second Mortgage were actually recorded with the City Register’s office on November 30, 2018 and November 29, 2018, respectively.

Regarding the lienholder defendants, the amended complaint alleges “[e]ach of the above-named defendants has or claims to have or may claim to have some interest in or lien upon said mortgaged premises or some part thereof, which interest[s] or lien[s], if any, ha[ve] accrued subsequent to, and [are] subject and subordinate to, the lien of said Consolidated Mortgage and Second Mortgage” (*id.* at ¶ 18).

***Defendants’ Answers, Affirmative Defenses and Counterclaims***

On March 8, 2019, defendant Y&B answered the amended complaint and “[d]enie[d] that the interest of Y&B is subject and subordinate to the lien and the Consolidated Mortgage and Second Mortgage . . .” (Y&B answer at ¶ 18). Y&B asserted affirmative defenses, including that “[t]he claim of Plaintiff is either subject or subordinate to the [Mechanic’s] Lien filed by Y&B, entitled only to such priority as is provided in Section 13 of the Lien [L]aw” (*id.* at ¶ 31). Y&B, which sells electrical equipment, also asserted a counterclaim and a cross claim against all parties alleging that it “sold and delivered to Jeco [Atlantic Upreal’s contractor] certain electrical supplies and related materials (the ‘Y&B Material’) for Jeco’s use in the performance of part of the work required under the Y&B Atlantic Agreement for the Atlantic Project” (*id.* at ¶ 38). Y&B’s answer further alleges that Jeco owes the principal amount of \$31,166.31 for the Y&B Material, it filed a Notice of Mechanic’s Lien in that amount on or about November 1, 2018 and the Mechanic’s Lien has not been paid, canceled or discharged (*id.* at ¶¶ 39, 43 and 51).

On March 18, 2019, defendant Fitoussi answered the amended complaint and

denied “being an owner whether direct, indirect or otherwise of the borrower . . .” (Fitoussi answer at ¶ 5). Fitoussi asserted affirmative defenses and a cross claim against defendants Gilad and Atlantic Upreal for contractual indemnification.

On March 29, 2019, defendant Atlantic Upreal answered the amended complaint and denied that it “duly executed, acknowledged and delivered to Tideway Capital Funding LLC the Mortgage Note . . .” (Atlantic Upreal answer at ¶ 2). Atlantic Upreal asserted affirmative defenses, including the second, fourth and fifth affirmative defenses, which assert that:

“Plaintiff’s action is barred against [Atlantic Upreal] because [Atlantic Upreal] never duly authorized or executed the Mortgage Note and related transaction documents described in Plaintiff’s Amended Complaint, and Plaintiff was at all times on notice that individuals and parties with whom they were dealing lacked authority to act for [Atlantic Upreal] or execute the Mortgage Note and related transaction documents on the [Atlantic Upreal’s] behalf.

\* \* \*

“Plaintiff’s action is barred against Defendant [Atlantic Upreal] for failure to join a necessary party, New Upreal LLC.

“Plaintiff’s action is barred against [Atlantic Upreal] because any injuries or damages claimed were caused by the actions of Boaz Gilad and New Upreal LLC, individuals and parties over whom [Atlantic Upreal] has no control or right to exercise control” (*id.* at ¶¶ 25, 27 and 28).

Atlantic Upreal also asserted two cross claims against defendant Gilad for: (1) a declaratory judgment that Gilad lacked authority to cause Atlantic Upreal to accept

unauthorized loans, enter into the transaction at issue and encumber the Property with a mortgage, and (2) indemnification from Gilad and his company, New Upreal LLC. The cross claim alleges that “Gilad at all times lacked authority under the Operating Agreement to cause Atlantic Upreal LLC to accept unauthorized loans from Tideway Capital Funding and encumber the Property with a mortgage” (*id.* at 6).

On April 2, 2019, defendant HVAC Depot answered the complaint and denied that “the interest and lien of HVAC Depot is subject and subordinate to the lien and the Consolidated Mortgage and Second Mortgage . . .” (HVAC Depot answer at ¶ 18). HVAC Depot asserted affirmative defenses, including that “[t]he claim of Plaintiff is either subject or subordinate to the [Mechanic’s] Lien filed by HVAC Depot or entitled only to such priority as is provided in Section 13 of the Lien [L]aw” (*id.* at ¶ 27). HVAC Depot, which sells and installs HVAC equipment and related supplies and materials, also asserted a cross claim against all parties alleging that it “sold and delivered to MMK Cooling [Atlantic Upreal’s contractor] certain HVAC supplies and related materials and performed certain labor (the ‘HVAC Depot Material and Services’) for MMK Cooling’s use in the performance of part of the work required under the HVAC Depot Atlantic Agreement for the Atlantic Project” (*id.* at ¶ 34). HVAC Depot’s answer further alleges that MMK Cooling owes the principal amount of \$7,643.63 for the HVAC Depot Material and Services, it filed a Notice of Mechanic’s Lien in that amount on or about August 14, 2018 and the Mechanic’s Lien has not been paid, canceled or discharged (*id.* at ¶¶ 35, 39 and 47).

On July 3, 2019, defendant Benchmark filed a notice of appearance. The other defendants, all of whom were served with the supplemental summons and the amended complaint in February 2019, failed to answer or otherwise respond to the amended complaint.

On July 15, 2019, Atlantic Washington moved to dismiss Atlantic Upreal's second and fourth affirmative defenses. By an October 23, 2019 order, the court (Vaughan, J.) dismissed Atlantic Upreal's second and fourth affirmative defenses without prejudice and amended Atlantic Upreal's answer to the amended complaint to include the affirmative defense that "the loan agreement was not signed."

***Atlantic Washington's Instant Summary Judgment Motion***

On January 23, 2020, Atlantic Washington moved for summary judgment, an order of reference, a default judgment against the defaulting defendants and for other relief. Atlantic Washington submits an affidavit from Joshua Amini (Amini) a managing member of Tideway, Atlantic Washington's predecessor, and the person "responsible for managing the loans made to ATLANTIC UPREAL . . ." Amini describes Note 1, the Consolidated Mortgage, Note 2 and the Second Mortgage and attests that Atlantic Upreal duly executed and delivered those loan documents to Tideway. Amini further attests that Gilad and Fitoussi guaranteed the amounts due and owing under Notes 1 and 2. Amini attests that Atlantic Upreal failed to pay the entire principal balance due under Notes 1 and 2 on the October 1, 2018 maturity date of the loans, and annexes copies of the payment history for those loans. Amini further attests that Tideway disbursed the

proceeds of Note 2 (the Building Loan) to Atlantic Upreal in fourteen separate advances from August 24, 2017 through September 21, 2018. Amini attests that on November 20, 2018 Tideway assigned all of its right, title and interest in Note 1, the Consolidated Mortgage, Note 2 and the Second Mortgage to Atlantic Washington.

Atlantic Washington also submits an affidavit from Mark Levin (Levin), a Managing Member of Atlantic Washington, who is “responsible for managing the loans made to ATLANTIC UPREAL . . .” Levin describes the loan transactions and, in response to Atlantic Upreal’s answer to the amended complaint, attests that:

“8. To secure the extension of the Consolidated Mortgage loan, Atlantic Upreal LLC provided Tideway with a Certificate of Atlantic Upreal LLC, dated March 17, 2017. The Certificate came along with organization documents comprised of: a Member Consent dated, March 17, 2017, the Articles of Organization of Atlantic Upreal LLC, along with proof of filing with the Department of State of the State of New York, Atlantic Upreal’s certificate of good standing issued by the Secretary of State of New York, a copy of the Operating Agreement, dated March 11, 2015, and the First Amendment to the Operating Agreement for Atlantic Upreal, LLC, dated January 26, 2017 . . .

“9. In the First Amendment to the Operating Agreement herein, it states at ¶ 3 (b) [that] “[f]or as long as the Loan is outstanding DAVID GOLDBERGER and BOAZ GILAD shall be the managers (the ‘Managers’) of the Company.”

Regarding defendants’ mechanic’s liens, Levin attests that “[p]laintiff named numerous subordinate lien[holders] as necessary parties to this action[,]” including Y&B which filed its mechanic’s lien on November 2, 2018. Atlantic Washington asserts that

the Consolidated Mortgage and the Second Mortgage, both of which were recorded on March 30, 2017, 19 months prior to the recording of Y&B's mechanic's lien, have priority over Y&B's mechanic's lien. For this reason, Atlantic Washington asserts that Y&B's counterclaim to foreclose on its mechanic's lien should be denied and stricken.

Levin attests that HVAC Depot's mechanic's lien, which was filed on August 15, 2018, "was bonded and accordingly removed from the Premises on September 27, 2018." Atlantic Washington asserts that this action should be discontinued as against HVAC Depot since HVAC Depot's mechanic's lien was bonded and discharged and HVAC Depot no longer has an interest in the Property.

#### ***HVAC Depot's Opposition***

HVAC Depot, in opposition, asserts that "it is undisputed that HVAC Depot is due an outstanding amount of \$7,643.63 for the materials it furnished to the private improvement construction project . . ." and "[i]t is also undisputed that on or about August 15, 2018, HVAC Depot filed a mechanic's lien . . ." While HVAC Depot admits that "[o]n or about September 27, 2018 the HVAC Depot Lien was bonded and discharged . . ." HVAC Depot argues that it is nevertheless a proper party to this action "as it has filed a valid and enforceable mechanic's lien against the Premises." Notably, HVAC Depot's counsel acknowledges that:

"Because of the filing of the HVAC Depot Bond, any judgment entered in favor of HVAC Depot will be 'in name only' against the Premises, and HVAC Depot shall be entitled to pursue collection of such judgment against the Surety in accordance with the protection of the Lien Law" (emphasis

added).

### *Atlantic Washington's Reply*

Atlantic Washington, in reply, asserts that HVAC Depot is the only defendant who opposed its summary judgment motion. Atlantic Washington notes that HVAC Depot admits that “it would only like to stay in this action to pursue its crossclaims against other defendants and establish the priority of its claims to proceeds from the sale of the Premises . . .” Atlantic Washington argues that “HVAC [Depot] has no priority because the remaining defendants have a lien against the Premises, and HVAC [Depot] has a claim against the bond that was filed pursuant to lien law [Section 19 (4)].”

### *Discussion*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary

judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (see *Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]).

Here, Atlantic Washington has produced the loan documents and sufficient evidence that Atlantic Upreal breached the terms of the Consolidated Mortgage and the Second Mortgage by failing to make the required payments on the maturity date. Defendants have failed to identify any issue of fact that would preclude the relief that Atlantic Washington seeks. Atlantic Washington has also demonstrated that Y&B’s counterclaim against it to foreclose on its mechanic’s lien should be dismissed since the Consolidated Mortgage and the Second Mortgage were recorded 19 months prior to the recording of Y&B’s mechanic’s lien, and thus, Atlantic Washington’s liens have priority.

HVAC Depot, which opposed Atlantic Washington’s motion to the extent it seeks to discontinue and dismiss this action as against it, has failed to provide any basis for it to remain in this action. As HVAC Depot expressly admits, its \$7,643.63 mechanic’s lien was bonded and discharged as a mechanic’s lien against the Property on September 27,

2018. Consequently, HVAC Depot has no remaining interest in the Property and is no longer a necessary party to this action. Accordingly, it is hereby

**ORDERED** that Atlantic Washington's motion (in mot. seq. two) is only granted to the extent that: (1) summary judgment is granted to Atlantic Washington as against Atlantic Upreal, the borrower, and Fitoussi, the guarantor; (2) Y&B's counterclaim asserted against Atlantic Washington is dismissed; (3) a default judgment is granted as against defendants Benchmark, Gilad, Winterland, Industrial, Nett, Lion, DVIR and Universal, pursuant to CPLR 3215 (a); (4) the appointment of a referee to compute the amount due to Atlantic Washington and to ascertain if the Property can be sold in one parcel is warranted; (5) this action is dismissed as against HVAC Depot; and (6) the caption is amended to delete the "John Doe" defendants and HVAC Depot; and it is further

**ORDERED** that the caption shall hereinafter read:

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ATLANTIC WASHINGTON FUNDING LLC,

Plaintiff,

- against -

ATLANTIC UPREAL LLC; ASSAF FITOUSSI,  
WINTERLAND LLC a/k/a WINTEREND LLC,  
INDUSTRIAL USA INC., NETT PROJECT LLC,  
BENCHMARK CONTRACTING INC., LION HVAC  
SUPPLIES INC. a/k/a LION H.V. A.C. SUPPLIES INC.,  
Y&B LIGHTING & ELECTRICAL SUPPLIES LLC,  
DVIR MOG 18 INC. and UNIVERSAL FLOORS  
INC.,

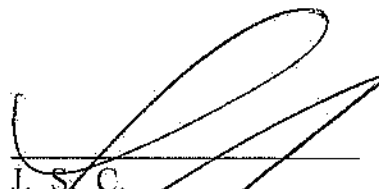
Defendants.

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An order of reference shall be settled on notice.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.  
HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE