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 14th day of ~~November~~ Dec, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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70 GREEN ST MULTIFAMILY LLC,

Plaintiff,

- against -

Index No. 504341/21

70 GREEN STREET, LLC, AVRAHAM GLATTMAN, PETE JACOV, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, "JOHN DOE NO. 1" to "JOHN DOE NO. XXX," inclusive, the last thirty 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	58-81 84-102
Opposing Affidavits (Affirmations)	85-102 103-104, 106-107
Reply Affidavits (Affirmations)	103-104, 106-107

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 70 Green Street in Brooklyn (Block 2521, Lot 14) (Property), a three-unit residential building, plaintiff 70 Green St Multifamily LLC (Multifamily or plaintiff)

moves (in motion sequence [mot. seq.] three) for an order: (1) granting it a default judgment against all non-appearing and non-answering defendants, pursuant to CPLR 3215; (2) appointing a referee to compute and report the amount due to it, pursuant to RPAPL 1321; and (3) amending the caption to substitute Andrew Jenkins, Tatiana Alexeenko, Arthur Newbould and Ethan Sror as defendants in place and instead of "John Doe No. I" through "John Doe No. IV" and removing the remaining John Doe defendants.

Defendants 70 Green Street, LLC (70 Green Street or borrower), Avraham Glattman (Glattman or guarantor) and Pete Jacov (Jacov or guarantor) (collectively, defendants) cross-move (in mot. seq. four) for an order, pursuant to CPLR 3012 (d), compelling plaintiff to accept their answer to the complaint.

Background

On February 23, 2021, Multifamily commenced this foreclosure action by filing a summons and a verified complaint, and on February 24, 2021, Multifamily filed a notice of pendency against the Property. According to Multifamily's affidavits of service in the record: (1) Glattman was served with process on February 26, 2021, by delivery to a person of suitable age and discretion and mailing; (2) the borrower was served with process on March 4, 2021, by delivery to the New York State Department of State; and (3) Jacov was served with process on April 5, 2021, by delivery to Jacov's wife.

The complaint alleges that on July 23, 2019, 70 Green Street executed a Consolidated, Amended and Restated Promissory Note in the principal amount of $1,140,000.00 in favor of Community Federal Savings Bank (CFSB), which was secured

by a Consolidation, Extension and Modification Agreement (CEMA) encumbering the Property (complaint at ¶¶ 10-11 and 13). As further security for the loan, Glattman and Jacov allegedly executed personal guarantees (*id.* at ¶ 15). The complaint alleges that the CEMA was "thereafter assigned by CFSB to the Plaintiff on or about September 30, 2020 . . ." by an Assignment of Mortgage, which was recorded on January 6, 2021 (*id.* at ¶¶ 11 and 16). The complaint alleges that "on or about September 30, 2020, CFSB indorsed the Note in favor of Plaintiff by that certain *Allonge* dated September 30, 2020 . . . which Allonge is firmly affixed to the Note" and "Plaintiff is now the owner and holder of the Loan Documents" (*id.* at ¶¶ 16 and 17). The complaint alleges that the Borrower defaulted by (1) failing to pay principal and interest that was due on April 1, 2020, May 1, 2020, June 1, 2020 and July 1, 2020, and (2) failing to pay the real estate taxes that were due on or about January 1, 2021. The complaint asserts four causes of action for: (1) foreclosure; (2) a deficiency judgment against the guarantors; (3) possession of the Property and rents; and (4) an award of attorneys' fees.

On July 7, 2021, Multifamily moved for a default judgment against all non-appearing and non-answering defendants and an order of reference.

On or about July 29, 2021, plaintiff and defendants entered into a stipulation whereby: (1) Multifamily agreed to withdraw its motion; (2) defendants 70 Green Street, Glattman and Jacov appeared in this action; (3) the parties agreed that "[t]he time for Defendants to answer the complaint *is hereby extended to and including August 16 2021*, and Defendants waive the right to assert any counterclaims against Plaintiff in this action";

(4) defendants agreed to waive all jurisdictional defenses; and (5) defendants agreed that they would not file a pre-answer dismissal motion (emphasis added).

On August 20, 2021, defendants 70 Green Street, Glattman and Jacov collectively filed an answer to the complaint *four days after* the August 16, 2021 deadline set forth in the parties' stipulation. Defendants' answer denied the material allegations in the complaint and asserted affirmative defenses, including that: (1) "CFSB agreed to a forbearance in respect of the Loan with defendant 70 Green Street . . . as any nonpayment or late payment was a result of the COVID-19 Pandemic"; (2) "Borrow[er] is and has been prepared to make all payments of principal and interest due in respect of the Loan, and has placed such sums in escrow"; and (3) waiver and estoppel based on the forbearance agreement with CFSB.

On August 20, 2021, Multifamily's counsel filed a letter to defense counsel rejecting defendants' answer to the complaint as "untimely."

Multifamily's Motion for an Order of Reference

On August 20, 2021, the same day that defendants filed their answer and Multifamily filed the rejection of the answer, Multifamily moved for a default judgment against all non-answering and non-appearing defendants, including the borrower and guarantors, and for an order of reference.

Multifamily submits an affidavit of merit from Thomas Hooker (Hooker), its manager, who attests to the borrower's execution of the July 23, 2019 Consolidated, Amended and Restated Promissory Note, the CEMA encumbering the Property and

Glattman and Jacov's execution of the personal guarantees. Regarding standing, Hooker attests that "[t]he Note and Mortgage were assigned to Lender by an Assignment of Mortgage dated as of September 30, 2020 from [CFSB] to Lender and the Note was indorsed in favor of Lender by an Allonge." Hooker alleges that "Lender is in possession of the original Note." Hooker asserts that "[i]n connection with the assignment of the Loan to Lender, [CFSB] delivered to Lender an Affidavit of Andrea Sarwan, Vice President/Loan Servicing Manager of [CFSB], sworn to on September 30, 2020 ('Sarwan Affidavit') with attached exhibits." Regarding the borrower's alleged payment default, Hooker attests that the borrower failed to make the debt service payments due on April 1, 2020, May 1, 2020 and June 1, 2020 and failed to pay the real estate taxes that were due on or about January 1, 2021. Multifamily submits copies of the summons and complaint, the parties' stipulation, the Consolidated Note, the CEMA, the guarantees, the Assignment of Mortgage, the Sarwan Affidavit and CFSB's payment history of the loan, which was incorporated into Multifamily's business records.

Defendants' Opposition and Cross Motion

On September 22, 2021, defendants opposed Multifamily's motion for a default judgment against them and cross-moved for an order, pursuant to CPLR 3012 (d), compelling Multifamily to accept their August 20, 2021 answer to the complaint.

Defense counsel submits an affirmation explaining that on or about April 6, 2021, she contacted Christopher Palmieri, Esq., Multifamily's counsel of record, "to discuss the plaintiff's position as I believed that foreclosures of commercial loans at that time were

stayed" and, alternatively, defense counsel "wished to arrange an extension of time to answer . . ." Defense counsel asserts that "Mr. Palmieri confirmed via email that the matter was stayed into May and that he believed that his client would be amenable to granting an extension of time to answer when the stay was lifted, in exchange for a waiver of jurisdictional defenses." Defense counsel submits copies of her email exchange with Mr. Palmieri. Defense counsel explains that she was "surprised" when Multifamily subsequently filed a July 7, 2021 motion for a default judgment and an order of reference, and attempted to contact Mr. Palmieri, who was on vacation at that time. Defense counsel contacted Victoria Gionesi, Esq., another attorney representing Multifamily, and requested that Multifamily's motion for a default judgment be withdrawn based on her prior conversation with Mr. Palmieri. According to defense counsel, she negotiated the stipulation extending defendants' time within which to answer the complaint to August 16, 2021.

Defense counsel explains that "I was delayed in returning from a planned vacation on August 16, 2021[,]" but defendant Glattman advised that he contacted Multifamily's "representative" on August 4, 2021 "to see if a settlement could be negotiated . . ." and to obtain another adjournment for defendants' answer. Defense counsel followed up with emails to Multifamily's counsel on August 16, August 17 and August 19, 2021 requesting a further extension, which request was denied on August 19, 2021. Defense counsel affirms that she filed defendants' answer the very next day, on August 20, 2021.

Defense counsel asserts that "almost no time passed between the adjourned date for the filing of defendants' answer and the actual filing of the answer - less than four days[,]" and "[t]he fact that it took three days for plaintiff's counsel to respond to the defendants' request for an adjournment to discuss settlement should act as an estoppel against plaintiff's potential argument that the answer was more than 1 day late." Defense counsel asserts that "defendants have demonstrated a reasonable excuse for the short delay in answering the complaint" and compelling Multifamily to accept defendants' answer will not prejudice plaintiff.

Defendants also submit an "Affirmation of Merits" from Glattman, the managing member of the borrower, 70 Green Street, and one of the guarantors, who affirms that the Property is a three-unit building and that the original lender, CFSB, agreed to a forbearance for six months because Multifamily experienced financial hardship due to the COVID-19 pandemic. In this regard, Glattman asserts that:

> "As a result of the COVID-19 pandemic, which commenced in March 2020, the LLC experienced financial hardship which caused it to be difficult to make the required payments for mortgage and taxes in respect of the Property. We reached out to our lender, [CFSB] (the 'Original Lender'), in order to request a forbearance with respect to amounts due for six months in order to find a way through the horrible financial situation created by the pandemic -- we applied for SBA loans and other relief. We submitted the paperwork and other materials requested by the Original Lender. The process was very slow, but we were notified that we were approved for a forbearance agreement in or about May, 2020. The terms which were approved were six months forbearance with the next payment due September 2020 at the same interest rate of 4.3%.

"In light of this, we were very surprised to receive a letter from the Original Lender in or about August, 2020 demanding immediate payment and threatening to accelerate the loan! We reached out to our contact at the Original Lender to find out what was going on since this action by the Original Lender was not consistent with all of our discussions with them. After some back and forth, the Original Lender indicated that this was a mistake and that the loan would be returned to good standing while the paperwork for the forbearance agreement was finalized. A copy of the [September 24, 2020] statement from the Original Lender to us which indicates that the interest rate on the loan was reduced from the default rate of 24% back to the original 3% is annexed hereto as Exhibit '1.'

"Thereafter, we were contacted by the plaintiff who indicated to us that they had bought the loan from the Original Lender which demanded payment with interest at the default rate. We contacted the plaintiff in or about late September 2020 and explained that the loan had been reinstated by the Original Lender and offering to bring the loan current at what we believed to be the correct interest rate. Plaintiff refused to accept this.

"As a gesture of good faith, we have placed all back payments pursuant to the Mortgage in escrow. We have been willing and able to bring the loan current at this time. As stated by our attorney, we contacted the plaintiff in early August, 2021, indicated that we wished to discuss the settlement of this matter and requesting the plaintiff's demand. The plaintiff took several weeks to respond and then sent us a payoff of the full loan amount, interest at the default rate of 24% plus fees and costs -- this was sent to us approximately two weeks after our request and after we had requested additional time to answer to see if a settlement might be possible.

Multifamily's Opposition to the Cross Motion and Reply

Multifamily, in opposition to the cross motion and in further support of its motion, submits an affirmation from its counsel, Victoria Gionesi, who affirms that:

> "[b]y letter dated December 14, 2020, [CFSB] informed Defendants that the unsigned document dated September 24, 2020, and titled '*Rate Change Advice*' was inadvertently transmitted, and was not intended to, nor did it effectuate any modification of the Loan Documents, and should be disregarded. The Letter also stated that the interest in the Loan was assigned to Plaintiff and that all inquiries and payments should be sent to Plaintiff. A copy of the December 14, 2020 letter with proof of delivery is annexed hereto as Exhibit A."

Thus, based on the December 14, 2020 letter from CFSB to defendants, Multifamily asserts that CFSB never agreed to a forbearance of the subject loan.

Multifamily submits a memorandum of law arguing that defendants fail to establish a reasonable excuse for their default and a meritorious defense to this action. Multifamily asserts that defendants' reliance on an unsigned printout from CFSB evidencing a forbearance and a modification is "contradicted by the subject loan documents which negate any attempt to modify the subject loan unless by a writing signed by both parties." Multifamily contends that "the Cross Motion is nothing more than a thinly veiled attempt to delay Plaintiff's recourse following several undisputed payment defaults."

Discussion

(1)

Defendants' Cross Motion

CPLR 3012 (d) provides that:

> "(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

"In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendants, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists" (*Yongjie Xu v JJW Enterprises, Inc.*, 149 AD3d 1146, 1147 [2017]).

Under the circumstances presented here, where there was only a four-day delay in answering the complaint due, in part, to law office failure (defense counsel believed that this foreclosure action was stayed due to the COVID-19 pandemic), the delay was not willful, defendants have a potentially meritorious defense based on an alleged forbearance and there is no discernable prejudice to Multifamily at this early stage of the action, defendants' motion for an order compelling Multifamily to accept their August 20, 2021 answer to the complaint is granted in this court's discretion (*Leogrande v Glass*, 106 AD2d 431, 432 [1984] [holding that order compelling plaintiff to accept late answer was properly granted by the court as a matter of discretion]).

(2)

Multifamily's Motion for an Order of Reference

"When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment [which] may be shown . . . by the plaintiff showing entitlement to summary judgment . . ." (*U.S. Bank N.A.*

v Miller, 49 Misc 3d 1205 [A], * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures § 2.01 (4) (k) (note: online edition)]).

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]).

Multifamily, in support of its motion for an order of reference, has demonstrated its prima facie entitlement to a judgment of foreclosure by submitting a copy of the Consolidated Note with the affixed endorsement from CFSB, a copy of the CEMA, evidence of the borrower's payment defaults, proof of service of a copy of the summons and complaint and proof of the facts constituting its cause of action for foreclosure (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]).

While defendants oppose that branch of Multifamily's motion seeking a default judgment against them, defendants do not address or oppose that branch of Multifamily's motion seeking an order of reference. While defendants claim that CFSB agreed to a forbearance, they do not dispute the validity of the consolidated loan or their alleged payment defaults under the mortgage. Indeed, defendant Glattman admits that "[a]s a result of the COVID-19 pandemic, which commenced in March 2020, [70 Green Street] experienced financial hardship which caused it to be difficult to make the required payments for mortgage and taxes in respect of the Property." Accordingly, it is

ORDERED that Multifamily's motion (mot. seq. three) is only granted to the extent that: (1) a default judgment is granted against the non-answering defendants, New York State Department of Taxation and Finance, New York City Department of Finance and Environmental Control Board of the City of New York, pursuant to CPLR 3215; (2) the appointment of a referee to compute the amount due to Multifamily under the CEMA is warranted, pursuant to RPAPL 1321, and an order of reference shall be settled on notice; and (3) the caption is amended to substitute Andrew Jenkins, Tatiana Alexeenko, Arthur

Newbould and Ethan Sror as defendants in place and instead of "John Doe No. I" through "John Doe No. IV" and the remaining John Doe defendants are deleted from the caption; the motion is otherwise denied; and it is further

ORDERED that the caption shall hereinafter read:

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70 GREEN ST MULTIFAMILY LLC,

Plaintiff,

- against -

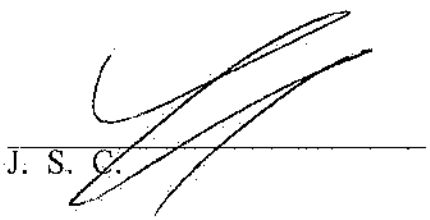
70 GREEN STREET, LLC, AVRAHAM GLATTMAN, PETE JACOV, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, ANDREW JENKINS, TATIANA ALEXEENKO, ARTHUR NEWBOULD and ETHAN SROR,

Defendants.
----------X; and it is further

ORDERED that defendants' cross motion (mot. seq. four) is granted and Multifamily is compelled to accept defendants' August 20, 2021 answer to the complaint, pursuant to CPLR 3012 (d).

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

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