

938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.
2022 NY Slip Op 30385(U)
January 27, 2022
Supreme Court, New York County
Docket Number: Index No. 850233/2018
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

-----X

INDEX NO. 850233/2018

938 ST. NICHOLAS AVENUE LENDER LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, HESS CORPORATION, CHAMPION COMBUSTION CORP., S.J. FUEL CO, MICHELLE R. FINCHER, NYC COMMISSIONER OF SOCIAL SERVICES, DIANA MORGAN, CITIMORTGAGE, INC., CARLTON BURROUGHS, HOPE PRUITT, SYDNEY PRUITT, AND JOHN DOE 1 THROUGH JOHN DOE 12, THE LAST TWELVE 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 UPON THE PROPERTY DESCRIBED IN THE COMPLAINT,

Defendant.

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936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION

Plaintiff,

Third-Party

Index No. 595851/2019

-against-

MAVERICK REAL ESTATE PARTNERS LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 123, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

Plaintiff 938 St. Nicholas Avenue Lender, LLC ("938 LLC") commenced this action to foreclose on a mortgage encumbering real property located at 938 St. Nicholas Avenue, New York, New York.

Defendant 936-938 Cliffcrest Housing Development Fund Corporation (“Cliffcrest”) is the mortgagor which obtained a loan of \$1,650,000.00 from non-party Community Capital Bank. The loan was memorialized by a mortgage note dated September 28, 2006 and is secured by a document of the same date titled Mortgage, Assignment of Leases and Rents and Security Agreement.

Cliffcrest moved, pre-answer, to dismiss the complaint for lack of standing, pendency of a prior action, and failure to state a claim. Plaintiff opposed the motion. By order dated May 31, 2019, Justice Arlene Bluth denied the motion entirely. Justice Bluth held Plaintiff established its standing “by attaching the note to the complaint”, that no prior action was pending as the action titled *Peny & Co. v 936-938 Cliffcrest Housing*, NY Cty Index No 850011/2013 was “marked disposed” and that dismissal was not justified as, *inter alia*, Cliffcrest accepted the loan proceeds and paid installments under the note for five years.

Cliffcrest joined issue and raised fifteen affirmative defenses and included a third-party action therein. Cliffcrest later filed a third-party summons and complaint against Third-Party Defendant Maverick Real Estate Partners LLC (“Maverick”) containing a single cause of action based in champerty. Plaintiff and Maverick collectively replied to Cliffcrest’s answer and answered the third-party complaint, which contained six affirmative defenses. Defendants, Michelle R. Fincher, Diana Morgan, Carlton Burroughs, Hope Pruitt and Sydney Pruitt (“Board Defendants”), shareholders and former officers on the Board of Directors of Cliffcrest, also answered and raised four affirmative defenses and five counterclaims.

Defendant Cliffcrest is a Housing Development Fund Corporation (“HDFC”), created pursuant to the Private Housing Finance Law and the Not-for-Profit Corporation Law, and organized as a cooperative owned by the residents. The legislative purpose of an HDFC is, among other things, to rehabilitate housing for low-income families and enable these entities to participate more effectively in existing municipal, state and federal assistance programs (Private Housing Finance Law §571). “An HDFC project is to be ‘operated exclusively for the benefit of the persons or families who are entitled to occupancy in such housing project by reason of ownership of shares in such corporation’” (546 W. 156th St. *HDFC v Smalls*, 43 AD3d 7, 14 [1st Dept 2007])[citations omitted].

Cliffcrest took ownership of the premises at issue under a “Third Party Transfer Program” (“TPT”) established pursuant to section 11-412.1 of the Administrative Code of the City of New York. Created in 1997, the TPT Program in New York City is administered by The Department of Housing Preservation and Development (“HPD”) which coordinates with the New York City Department of Finance to transfer, through foreclosing on liens on tax-delinquent buildings in poor condition, to new owners who will repair the premises and provide affordable housing to low-income tenants.

In this instance, the building was obtained by the City of New York via an *in rem* tax foreclosure proceeding and deeded to a not-for-profit Neighborhood Restore Housing Development Fund Corporation in May 2001. The Neighborhood HDFC transferred the premises to non-party Shuhab Housing Development Fund Corporation (“Shuhab”) in December 2002, the entity chosen by the City as Cliffcrest’s sponsor to supervise rehabilitation of the building. To fund the comprehensive repairs, Shuhab entered into joint construction loans with HPD and Fleet National Bank (“Fleet”) which were memorialized by a Construction Loan Participation Agreement. The loans were secured by mortgages held by HPD and Fleet. Shuhab also retained The Wavecrest Management Team, Ltd. (“Wavecrest”) as the managing agent for the building.

The renovations were supposedly completed in September 2006 and early the following year Shuhab transferred title to the premises to Cliffcrest. The apartments in the building were sold to low-income individuals as below market cooperative apartments. Concomitantly with the transfer, Cliffcrest assumed responsibility for all the mortgage obligations on the premises, including the HPD and Fleet encumbrances. Prior to the transfer, Cliffcrest entered into the loan and mortgage transaction that is the subject of this action with Community Capital Bank (“CCB”). In accordance with the TPT program, the HPD mortgages were subordinated to the CCB mortgage. CCB allegedly immediately assigned the note and mortgage to Peny & Co. (“Peny”) for consideration equal to the loan amount.

Cliffcrest apparently made payments in accordance with the note and mortgage without objection from 2006 until 2012. Peny claimed in the prior foreclosure action--*Peny & Co. v 936-938 Cliffcrest Housing*, NY Cty Index No 850011/2013—that, beginning in March 2012, Cliffcrest stopped payments on the loan, real estate taxes and failed to provide proof of property insurance. In the prior action, Cliffcrest claims that in October 2011 it discovered irregularities with the renovations performed by Shuhab. Cliffcrest avers it retained an architectural firm, Balaton Corporation (“Balaton”), to provide an evaluation of the condition of the building. Balaton reported to Cliffcrest that, despite the certifications, most of the renovation work was not complete and that widespread remediation work, estimated to cost nearly \$12,000,000.00, would be required. Consequently, Cliffcrest ceased making payments under the note and the prior foreclosure action ensued.

The prior foreclosure action can best be described as a vexing thicket of litigation which included assertions by Cliffcrest in its answer and third-party action of, *inter alia*, fraud, conspiracy and federal civil rights violations against Wavercrest, CCB, Shuhab and HPD. During the litigation, the note and mortgage purportedly changed hands at least twice, a receiver was appointed at a cost of hundreds of thousands of dollars, and the parties traded salvos via some two dozen motions. Ultimately, the prior foreclosure action was “dismissed in its entirety without prejudice” by order of Justice Joan A. Madden dated August 8, 2019. The dismissal was the culmination of the mortgagee’s motion for summary judgment. Justice Madden issued an interim order, dated December 19, 2017, finding the Mortgagee established *prima facie* entitlement to summary judgment, except on the issue of whether service of notices in accordance with RPAPL §1303 was made. Justice Madden held an issue of fact on this point existed and directed a hearing be conducted. After the hearing, Justice Madden concluded the mortgagee failed to sustain its burden and her conclusion was affirmed on appeal (*938 St. Nicholas Ave. Lender, LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 170 AD3d 623 [1st Dept 2019]). By order dated June 17, 2019, Justice Madden restored the action to the calendar “for the purposes of adjudicating the third party action” and severed the dismissed main action. It appears from the Court record that action is presently active.

Now, Plaintiff and Maverick move for summary judgment against Cliffcrest on its foreclosure cause of action, for summary judgment dismissing the third-party complaint, for summary judgment against Shareholder Defendants, for summary judgment and a default judgment against Defendant New York City Department of Housing Preservation and Development (“HPD”), for a default judgment against all non-appearing defendants and to amend the caption. Cliffcrest opposes the motion and cross-moves for denial of Plaintiff’s motion and dismissal of Plaintiff’s complaint.

Plaintiff was required on the branch of its motion for summary judgment to establish *prima facie* proof of the mortgage, the note, and evidence of the borrower’s default (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a

motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). “A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form” (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Plaintiff was also required to demonstrate its standing since Defendant Cliffcrest raised this affirmative defense in its answer (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582 [2d Dept 2020]).

At the outset, Plaintiff argues this Court should be “guided by Justice Madden’s prior determinations on the same issues that Borrower now raises again in the present action” whereby she determined Plaintiff’s predecessor Coogans established the requisites for summary judgment on its cause of action for foreclosure, except under RPAPL §1303. To the extent Plaintiff may be attempting to invoke the doctrine of collateral estoppel, that precept “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The issue of standing herein is not identical to that in the prior litigation as Plaintiff was not the holder of the note at the time that action was commenced (*see PNMAC Mgt. Co., LLC v Friedman*, 189 AD3d 1289, 1292 [2d Dept 2020]). Concerning the other elements of Plaintiff’s *prima facie* case, the evidence offered in support herein is different from that proffered on the earlier motion (*see Deutsche Bank Natl. Trust Co. v Murray*, 176 AD3d 1172, 1175 [2d Dept 2019]). Most importantly, Justice Madden’s finding of the existence of a *prima facie* case for foreclosure was not a “final” determination on that issue since summary judgment was ultimately denied and the action dismissed (*see McGrath v Gold*, 36 NY2d 406, 412 [1975]). As such, a different judgment herein would not “destroy or impair rights or interests” established in that action (*Schuykill Fuel Corp. v B. & C. Nieberg Realty Corp.*, 250 NY 304, 307 [1929]).

To demonstrate the note, mortgage and Cliffcrest’s default, Plaintiff submitted the affidavit of David Aviram (“Aviram”), the Manager of 938 LLC and Maverick’s Principal as well as an affidavit from Helene Rudolph (“Rudolph”), a Vice President of CPC, dated March 4, 2020. Also attached to the moving papers as exhibits were affidavits from the previous foreclosure action apparently submitted in support of two summary judgment motions. One affidavit dated October 3, 2014 from Rudolph, as a representative of CPC and another from Harrison Rayford (“Rayford”), the Managing Member of Plaintiff’s assignor 936 Coogans Bluff LLC (“Coogans”).

“There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a *prima facie* case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518 (a), and the records themselves actually evince the facts for which they are relied upon” (*Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). As none of the affiants’ knowledge is based upon personal knowledge of Cliffcrest’s loan and account history, but through the review of documents, those business records must be proffered in admissible form for the statements regarding the note, mortgage default and standing to be established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020] *see also JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]) [“a review of records maintained in the normal course of business does not vest an affiant with personal knowledge”]).

Aviram’s affidavit laid a proper foundation for the admission of 938 LLC and Maverick’s records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Likewise, Rayford’s

affidavit laid a sufficient foundation to admit Coogans' payment records annexed to the affidavit into evidence (*id.*). However, neither affidavit was sufficient to establish a foundation under CPLR §4518 for admission of the business records any of the former holders of the note and mortgage as the affiants demonstrated no familiarity with the record keeping practices of the original lender or the subsequent assignees (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Further, the affiants did not attest the records relied on were received from the makers, incorporated into the records their employers kept and that 938 LLC routinely relied on such records in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]). As such, the affidavits of Aviram and Rayford failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, ___ AD3d ___, 2021 NY Slip Op 07269 [2d Dept 2021]). Moreover, although Coogans' "payment records" were annexed to Rayford's affidavit, these documents were insufficient as Coogans was not the holder of the note when the default occurred.

The October 3, 2014 affidavit of Rudolph contains the requisite information from an employee of the original lender and holder of the note when the default occurred to make the documents referred to therein admissible. However, the affidavit is ultimately defective as those records are not annexed to the affidavit (*see Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]; *U.S. Bank N.A. v Moulton*, 179 AD3d 734, 739 [2d Dept 2020]). Rudolph's March 4, 2020 affidavit establishes Clifferest's default through submission of payment records of the holder of the note at the time of the default that qualify as business records under CPLR §4518. But, absent from the affidavit is any mention of the note or mortgage nor are those documents annexed thereto.

As to standing in a foreclosure action, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], quoting *Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). In a mortgage foreclosure action, "[t]he attachment of a properly endorsed note to the complaint may be sufficient to establish, *prima facie*, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

Here, in addition to the original note, annexed to the complaint were five separate documents salient to ownership of the note. The first, dated September 28, 2006, is titled "Assignment of Mortgage Note" and it assigns the note from CCB to PENY. The second, dated November 1, 2006, titled "Allonge to Mortgage Note", states it was made between Clifferest and Carver as successor by merger to CCB. By that agreement, the signatories, among other things, amended the interest rate under the mortgage note. The allonge also stated that it "is being physically attached to the Note simultaneously with the

entry into this Allonge". The third, dated July 17, 2013, is titled "Endorsement of Note" and is executed by PENY. It directs that the note be paid to the order of non-party The State of New York Mortgage Agency ("NYMA"). The fourth, dated April 29, 2016, is titled "Allonge" and is executed by NYMA. It directs that the note be paid to the order of Coogans. The fifth, dated June 23, 2017, is titled "Allonge" and is executed by Coogans. It directs that the note be paid to the order of Plaintiff.

For the reasons noted supra, none of these five documents is presently in admissible form as the affidavits proffered by Plaintiff failed to satisfy the requisites of CPLR §4518 (*see US Bank N.A. v Weinman*, 195 AD3d 976, 978 [2d Dept 2021]; *Wells Fargo Bank, N.A. v Talley*, 153 AD3d 583, 585 [2d Dept 2017]). Further, since the indorsements and allonges at issue were not on the note itself, Plaintiff was required, but failed, to establish the indorsements or allonges were "firmly affixed" to the original note (*see Nationstar Mtge., LLC v Calomarde*, ___ AD3d ___, 2022 NY Slip Op 00428 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). Aviram's affidavit on this point was nothing more than conclusory boilerplate which is insufficient (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]; *Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704, 705 [2d Dept 2015]). Not every attachment can satisfy UCC §3-202[2] (*see HSBC Bank, USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [2d Dept 1989]) and Aviram offered no description of the nature of the attachment.

Nevertheless, Cliffcrest's assertion that the September 28, 2006 assignment of the mortgage note and November 1, 2006 allonge raise a potential inconsistency in the chain of ownership is without merit. Despite Aviram's reference to the September 28, 2006 assignment of the note from CCB to PENY as an indorsement, the document is, by its express language, an assignment. The assignment does not, as opposed to the subsequent indorsement and allonges, direct that the note "is payable to order" (UCC §3-202[1]) and, therefore, physical delivery of the note from CCB to PENY was not necessary to effectuate that transfer. Resultantly, the November 1, 2006 allonge between Cliffcrest and Carver, which purports to have been physically attached to the note after the assignment to PENY is not inconsistent with the assignment. At most, it raises an issue as to the viability of the November 1, 2006 allonge.

Accordingly, the branch of Plaintiff's motion for summary judgment against Cliffcrest on its foreclosure cause of action and for an order of reference is denied for failure to establish a *prima facie* case.

In the second branch of its motion, Plaintiff seeks summary judgment dismissing Cliffcrest's third-party action against Maverick. In its third-party complaint, Cliffcrest pleads a single cause of action alleging Maverick took assignment of the note and mortgage solely for pursuing litigation in violation of Judiciary Law §489.

Judiciary Law §489[1] prohibits champerty which is the solicitation, purchase or assignment "of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon..." (*see* Judiciary Law §489[1]; *see also Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 163 [2016]). The prohibition of champerty in New York has continually been "limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs" (*Bluebird Partners, L.P. v First Fid. Bank, N.A.*, 94 NY2d 726, 734 [2000]). "[S]imply intending to bring a lawsuit on a purchased security is not champerty, ... [rather] the *primary purpose* of the purchase must be to enable [one] to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" (*id.* at 166 [internal citations and quotations omitted]). "In short, the champerty statute does not apply when the purpose of an

assignment is the collection of a legitimate claim” (*Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors v. Love Funding Corp.*, 13 NY3d 190, 201 [2009]).

Here, Movant established entitlement to dismissal of this cause of action with Aviram’s affidavit wherein he averred that the note and mortgage were acquired for the purpose of enforcing the mortgage via foreclosure (*see 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 585 [2d Dept 2014]). Moreover, Cliffcrest’s claim of champerty fails as the “mortgage loan had already fallen into default and been accelerated before its assignment to plaintiff” (*Bf Holdings I, Inc. v. S. Oak Holding, Inc.*, 251 AD2d 1 [1st Dept 1998]). In opposition, Cliffcrest failed to establish how the relationship between Plaintiff and Maverick transformed the acquisition of the debt by Plaintiff into a violation of Judiciary Law §489 by Maverick. More importantly, Maverick is not presently the holder of the note and mortgage.

Accordingly, the branch of Plaintiff/Third-Party Defendant’s motion for summary judgment dismissing the third-party complaint is granted.

As against the Shareholder Defendants, Plaintiff moves for both a default judgment pursuant to CPLR §3215 and summary judgment pursuant to CPLR §3212. This branch of the motion for summary judgment is denied as procedurally inapposite. If, as it appears from the moving papers, Plaintiff has taken the position the Shareholder Defendant’s answer is untimely, and therefore a nullity, then a motion pursuant to CPLR §3212 does not lie as issue has not been joined by these Defendants (*see* CPLR §3212[a]).

With respect to Plaintiff’s application for a default judgment against the Shareholder Defendants, “[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to answer or appear” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 899 [2d Dept 2019]). With respect to the proof of facts supporting the claim against the Shareholder Defendants, unlike the branch of the motion for summary judgment, Plaintiff needed “only [to] allege enough facts to enable a court to determine that a viable cause of action exists” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Plaintiff established its *prima facie* entitlement to a default judgment against all Shareholder Defendants by submitting a verified complaint, Aviram’s affidavit and annexed exhibits as well as the affidavits of service (*see eg U.S. Bank Natl. Assn. v Wolnerman*, 135 AD3d 850 [2d Dept 2016]; *see also Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]).

“To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2020], *citing US Bank N.A. v Dorestant*, 131 AD3d 467, 470 [2d Dept 2015]). The Shareholder Defendants failed to submit any opposition on their own behalf. Counsel for Defendant Cliffcrest, despite not representing the Shareholder Defendants individually, proffered opposition, but it failed to satisfy the requisites in any regard. The arguments concerning the substantive non-jurisdictional defenses are precluded as Defendants failed to rebut the *prima facie* showing of default (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]).

Accordingly, the branch of Plaintiff’s motion for a default judgment against the Shareholder Defendants is granted.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties, including Defendant New York City Department of Housing Preservation and Development is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption to excise the "John Doe" defendants is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

The branch of Defendant Cliffcrest's cross-motion to deny Plaintiff's motion is denied as unnecessary. The branch of the cross-motion for summary judgment dismissing Plaintiff's complaint is denied. Cliffcrest's sole argument, that the originating loan never funded and as such no money is due, is not established by the moving papers. The two-page affidavit of Maria Della Thomas is entirely conclusory and based, in part, on unproduced business records. Likewise, the exhibits relied on were unsworn and inadmissible.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its cause of action for foreclosure and issuance of an order of reference is denied, and it is

ORDERED that the branch of the motion for a default judgment against Defendants Michelle R. Fincher, Diana Morgan, Carlton Burroughs, Hope Pruitt And Sydney Pruitt is granted, and it is

ORDERED that the branch of the motion for a default judgment against all the other non-appearing parties, including Defendant New York City Department of Housing Preservation and Development is granted, and it is

ORDERED that the branch of the motion to amend the caption is granted and the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

938 ST. NICHOLAS AVENUE LENDER LLC,

Plaintiff,

Index No.: 850233/2018

-- against --

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE, HESS
CORPORATION, CHAMPION COMBUSTION CORP.,
S.J. FUEL CO., MICHELLE R. FINCHER, NYC

COMMISSIONER OF SOCIAL SERVICES, DIANA MORGAN, CITIMORTGAGE, INC., CARLTON BURROUGHS, HOPE PRUITT and SYDNEY PRUITT

Defendants.

and it is

ORDERED that Defendant 936-938 Cliffcrest Housing Development Fund Corporation's cross motion is denied.

This matter is set down for a status conference on **March 30, 2022 @ 11:00 am** via Microsoft Teams.

1/27/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

Francis A. Kahn III

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.