SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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GRATITUDE CAPITAL LLC,

Plaintiff,

- v -

WEST 134 STREET HARLEM LLC,THEODORE FELDHEIM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN AND JANE DOE NO. 1 THROUGH JOHN AND JANE DOE NO. 100

Defendant.

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INDEX NO. 650779/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This action to foreclose on two mortgages encumbering improved commercial real property, located at 255-257 West 134 Street, New York, New York (Block 1940, Lot 11), arises out of a construction project undertaken by Defendant West 134 Street Harlem LLC ("West 134") to renovate the building on the property. Promissory notes dated May 25, 2017, June 26, 2017, January 24, 2019, and December 26, 2019, were given by West 134 to document loans totaling $5,809,000.00. Each of these notes was secured by a mortgage. These notes were combined in a consolidated, restated and extended promissory note dated December 26, 2019, and is secured by a modified and consolidated mortgage on the property which is one of the mortgages Plaintiff seeks to foreclose. The other, a building mortgage, secures a building note which evidences a loan of $400,000.00, both given by Defendant West 134 to Plaintiff Gratitude Capital LLC.

The above notes and mortgages, all dated December 26, 2019, were executed by Defendant Theodore Feldheim ("Feldheim") in his capacity as Sole Member of West 134. Defendant Feldheim concomitantly executed personal guarantees of the above promissory notes. In conjunction with the June 26, 2017, note and mortgage, the parties entered into a Building Loan Agreement under which Plaintiff established the terms by which the loan proceeds, a maximum of $1,700,000.00, would be disbursed to West 134. The agreement contained conditions precedent West 134 was required to meet before Plaintiff would make building loan advances.

Plaintiff alleges West 134 defaulted when the subject notes and mortgages matured on December 25, 2020. Plaintiff commenced this action on February 3, 2021. Defendants West 134 and Feldheim answered and raised twenty-seven affirmative defenses. Now, Plaintiff moves for summary judgment,

to appoint a referee to compute and to amend the caption. Defendants West 134 and Feldheim oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of West 134 and Feldheim's default in repayment (*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]). As Defendants raised lack of standing as an affirmative defense in their answer, Plaintiff was required to demonstrate it had standing to prosecute the action when it was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). For the same reason, Plaintiff must demonstrate it provided any pre-foreclosure notice contained in the note, mortgage or guaranty (*id.*).

Plaintiff's motion was supported with an affidavit of facts from Mickael Ohana ("Ohana"), a member of Plaintiff. Ohana's affidavit, which was sufficiently supported by admissible business records, established the mortgage, note, and evidence of mortgagor's default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). As to standing, Ohana established that Plaintiff was the original lender and, therefore, in direct privity with the Defendants (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]). With respect to any pre-foreclosure notice, the mortgage provides that upon default that all amounts owed "shall be immediately and automatically due and payable, without notice or demand, and Mortgagor hereby expressly waives any such notice or demand". Thus, no pre-foreclosure notice was required prior to commencement of this action. Accordingly, Plaintiff established its entitlement to judgment as a matter of law.

In opposition, Defendants West 134 and Feldheim posit issues of fact exist based upon Plaintiff's alleged breach of the June 26, 2017, Building Loan Agreement which they claim precipitated their default. Feldheim avers in an affidavit that the project untaken by West 134 was associated with another building rehabilitation being conducted by non-party West 136 Street Harlem, LLC ("West 136"). Feldheim is the Sole Member of West 136 and he guaranteed similar loans received from Plaintiff to fund that project[1]. Feldheim asserts that Plaintiff initially performed under the Building Loan Agreement, but when the project at West 134 was "nearly complete", Plaintiff ceased further advances under the Building Loan Agreement and refused to disburse the "final funds necessary for competition of West 134 – approximately $150,000.00". Defendants claim this was a material breach of Building Loan Agreement which rendered Defendants unable to complete construction and, as a result, incapable of obtaining refinancing to repay the indebtedness. Defendants argue Plaintiff acted in bad faith and that this raises an issue of fact and entitles them to discovery on this defense.

"A mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" (*see Ebc Amro Asset Mgmt. v Kaiser*, 256 AD2d 161 [1st Dept 1998]). However, "conclusory, self-serving, facially unpersuasive evidence" which is not supported by documentary proof is insufficient to defeat summary judgment where evidence of Defendants' acceptance of the disputed funds and failure to make

[1] Another action, titled *Gratitude Capital LLC v West 134 Street Harlem LLC,* NY Cty Index No 650780/2021, was commenced to foreclose on the mortgages securing those loans.

repayment is proffered (*see Connecticut Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *Silver v Silver*, 17 AD3d 281 [1st Dept 2005]).

Absent from Feldheim's affidavit is any reference to the date of this supposed breach by Plaintiff. Moreover, no corroborating evidence of this claim--letters, emails or texts, which inevitably accompanies an impasse in a transaction such as this--was produced, and Defendants failed to establish that they satisfied the contractual prerequisites to be entitled to the final advance. Further, Defendants failed to explain why a mere $150,000.00 would inhibit completion of the project when the loan documents reveal that an additional $2,229,000.00 was advanced after June 26, 2017. As such, Defendants' opposition failed to raise an issue of fact as to their default (*cf. City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

As to the branch of Plaintiff's motion to dismiss all Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

The first, second and eighteenth defenses relate, in one form or another, to Plaintiff's standing. As Plaintiff was the originator of the disputed loans, these defenses are meritless. Indeed, Defendant's claim that Plaintiff is not in possession of the mortgage is irrelevant as it is possession of the note that controls (*see generally U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]).

The third affirmative defense asserting Plaintiff is not entitled to recover attorney's fees is belied by the notes and mortgages at issue which expressly permit reimbursement of same.

The fourth, eleventh, fifteenth, twenty-second, twenty-third and twenty-fourth affirmative defenses are entirely conclusory and unsupported by any facts in the answer. Indeed, the fourth affirmative defense based in fraud was required to be pleaded with particularity, including alleging how Defendants reasonably relied on representations that are plainly at odds with the terms contained in the loan documents (CPLR §3016[b]; *Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015]). As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

The fifth, tenth and seventeenth affirmative defenses are entirely conclusory and substantively baseless.

The sixth and eighth affirmative defenses based in Banking Law §6-l and Truth In Lending Act (15 USC §1601) are defective as no facts are pled to establish how these statutes related to high-cost home loans and consumer credit transactions are applicable to this case.

The seventh and twelfth affirmative defenses are identical and entirely conclusory as the purported statutes violated are not specified.

The thirteenth, twentieth, twenty-fifth and twenty-seventh affirmative defenses, alleging documentary evidence, parol evidence, reserving the right to plead further affirmative defenses and that Plaintiff's damages are unrelated to Defendants actions are incomprehensible and, therefore, inadequately pled.

The fourteenth affirmative defense claiming breach of the implied covenant of good faith and fair dealing is improperly duplicative of the multiple breach of contract claims (*see City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

The sixteenth affirmative defense, which is directed to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v. Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The nineteenth affirmative defense based upon the amount due and owing Plaintiff under the mortgage is dismissed as unnecessary and without merit. Even a mortgagor that has defaulted in appearing in a foreclosure action can contest the amount due and owing under the mortgage (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021]).

The twenty-first affirmative defense alleging the action is barred by the statute of limitations is conclusory and meritless. Plaintiff established that it timely commenced this action with proof, via affidavits and corroborating documents, that it accelerated the debt for the first time with the commencement of this action (*see* CPLR §214[6]; *Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). In opposition, Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced.

The twenty-sixth affirmative defense that Plaintiff's damages were the result of its own "negligence" is without merit. Where, as here, no tortious act has been pled by Plaintiff, this concept, which can best be described as "culpable conduct", has no application herein. Indeed, where the damages arise out of express or implied contractual relations, "[m]erely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 390 [1987]).

Defendant's opposition to dismissal of the affirmative defenses was entirely conclusory and, by failing to raise specific legal arguments in rebuttal, all the affirmative defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its bad faith/breach of contract claim (*see Island Fed. Credit Union v. I&D*

Hacking Corp., 194 AD3d 482 [1st Dept 2021]). Moreover, despite seven months passing between service of their answer and this motion, Defendants did not show what steps it took to obtain disclosure in that time (*see Cooper v 6 West 20th St. Tenants Corp.*, 258 AD2d 362 [1st Dept 1999]). In any event, as "the affirmative defenses are precluded, no discovery could lead to facts that would warrant denial of plaintiff's summary judgment motion" (*Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties 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 striking "John Doe #1" through "John Doe #100" as Defendants is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment and other relief is granted; and it is further

ORDERED that all the affirmative defenses pled by Defendants West 134 Street Harlem LLC and Theodore Feldheim are dismissed; and it is further

ORDERED that **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 (718) 850-0003** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
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GRATITUDE CAPITAL LLC,

Plaintiff, Index No. 650779/2021

-against-

WEST 134 STREET HARLEM LLC,
THEODORE FELDHEIM, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,

Defendants.
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and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

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

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 10, 2022 at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/12/2022
DATE

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

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