SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 850083/2020

MOTION DATE

MOTION SEQ. NO. 005

MALAYAN BANKING BERHAD, NEW YORK BRANCH, INTESA SANPAOLO S.P.A., NEW YORK BRANCH, WARBA BANK K.S.C.P., 45 PARK PLACE INVESTMENTS, LLC,

Plaintiff,

- v -

PARK PLACE DEVELOPMENT PRIMARY LLC,PARK PLACE PARTNERS DEVELOPMENT LLC,45 PARK PLACE PARTNERS, LLC,SOHO PROPERTIES GENERAL PARTNER, LLC,SHARIF EL-GAMAL, STATE OF NEW YORK CIVIL RECOVERIES BUREAU, GILBANE RESIDENTIAL CONSTRUCTION LLC,US CRANE & RIGGING LLC,CONSTRUCTION REALTY SAFETY GROUP INC.,TRADE OFF PLUS, LLC,ALL-CITY METAL INC.,PERMASTEELISA NORTH AMERICA CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,JOHN DOES 1-100, SOHO PROPERTIES INC.,THE PACE COMPANNIES NEW YROK, INC.,PEAK MECHANICAL SOLUTIONS, INC.,MEN OF STEEL REBAR FABRICATORS, LLC,GOTHAM DRYWALL, INC.,TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 398, 399, 400, 401, 406, 407, 412, 419, 423, 427, 431, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 511, 512, 513

were read on this motion to/for DISMISS

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

This is an action to, *inter alia*, foreclose on two mortgages, both dated May 17, 2016, given by Defendant Park Place Development Primary LLC ("Borrower") to Plaintiff Malayan Banking Berhad, New York Branch ("Plaintiff") which encumber a parcel of real property

located at 43 – 47 Park Place, New York, New York (Block 126, Lot 8) ("Borrower Premises"). One mortgage, a Building Facility Mortgage ("Building Mortgage"), secures a loan in the original principal amount of $162,112,896.16, and the other, a Project Facility Mortgage ("Project Mortgage") secures a loan with an original principal amount of $11,887,103.84. Approximately a month prior to the execution of these mortgages, Plaintiff and Borrower entered into a Building Facility Agreement ("Building Agreement") and a Project Facility Agreement ("Project Agreement"), both dated April 26, 2016. The purpose of these agreements was to facilitate Borrower's construction of a 43-story condominium tower at 43 Park Place, New York, New York. Pursuant to these contracts, notes memorializing the loans were also executed by Borrower. It is undisputed that Defendant Park Place Partners Development LLC ("Museum Owner") is not a party to any of the above agreements. On the same day it gave the mortgages, Borrower took assignment by deed of the ("Borrower Premises") from Museum Owner, the title holder of a contiguous parcel of property located at 49 – 51 Park Place, New York (Block 126, Lot 9) ("Museum Premises") and the former owner of Borrower Premises.

After the Borrower defaulted in repayment when the Facility Loan matured, Plaintiff commenced the within action and filed a complaint, later amended, which contained four causes of action, to wit: [1] foreclosure of the mortgages, [2] foreclosure on the security agreements, [3] enforcement, or alternatively, foreclosure of assignment of rents and leases and [4] a deficiency judgment. Also joined as parties were various entities which Plaintiff alleged had subordinate liens against the mortgaged premises six of which appeared. These entities provided materials, labor and/or services related to the construction of the residential building on the Borrower Premises and filed mechanics' liens pursuant to the Lien Law.

Now, Defendants Borrower, 45 Park Place Partners, LLC ("45 Park"), Soho Properties General Partner, LLC ("Soho") and Sharif El-Gamal ("El-Gamal") move, pre-answer, to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][7] and [10]. Plaintiff opposes the motion.

Movants posit that Plaintiff's failure to join the true party in interest in this action, Malayan Banking Berhad ("MBB"), necessitates dismissal of this action. It is also argued that Plaintiff's complaint fails to state a claim because the "loan documents reflect the parties' agreement that Sharia law would govern their contractual relationship" and that "[p]ursuant to age old Islamic principles, parties are to pursue the alternative dispute resolution processes of mediation or arbitration before seeking adjudication of their quarrels".

On a motion pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by

the Defendant (*see Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller, supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

That the parties structured the disputed transaction to comply with Sharia law does not *ipso facto* require the agreement be interpreted in accordance with same. The parties expressly agreed in Article 21.16 of the Building Facility Agreement (NYSCEF Doc. No.: 122) that "matters of construction, validity and performance, this agreement, the notes and the other facility documents and the obligations arising hereunder and thereunder shall be governed by, and *construed in accordance with, the laws of the State of New York* applicable to contracts made and performed in such state (without regard to principles of conflicts of laws)" [emphasis added]". The parties also expressly and unconditionally waived "any claim to assert that the law of any other jurisdiction governs this agreement, the notes and the other facility documents."

Also contained in the Building Facility Agreement was a merger clause that provided the "Agreement and the Facility Documents and instruments delivered in connection herewith constitute the entire agreement of the parties with respect to the Project and the Facility . . . and [o]bligor agrees that it has not and will not rely on any custom or practice of any Financier, or on any course of dealing with any Financier, in connection with the Facility unless such matters are set forth in this Agreement or the Facility Documents or in an instrument made for the benefit of Obligor and in a writing signed by an authorized officer of such Financier". Had the parties intended to be bound by some other law or the determination of a religious tribunal they could have specifically agreed to same (*cf. Rosenberg v Piller*, 116 AD3d 1023, 1025 [2d Dept 2014]; *886 Mid-Orange Realty Corp. v Lax*, 288 AD2d 255 [2d Dept 2002]).

Further, nothing in the agreement provided that arbitration or mediation was a condition precedent to litigation. It is established that, "an agreement to arbitrate 'may not be implied or depend upon subtlety for its existence'" (*M.I.F. Secs. Co. v. R. C. Stamm & Co.*, 94 AD2d 211, 213 [1st Dept 1983], *citing Steigerwald v Dean Witter Reynolds, Inc.*, 84 AD2d 905, 906 [4th Dept 1983], *affd* 56 NY2d 621). Although New York law recognizes "[i]mplied or constructive conditions . . . those [are only] 'imposed by law to do justice'" (*Oppenheimer & Co. v Oppenheim*, 86 NY2d 685, 690 [1995]). Here, the parties were sophisticated business entities, dealing at arm's length and represented by prominent counsel. These circumstances do not justify resort to equitable principles or the implication of significant unbargained for contractual obligations.

Accordingly, the branch of Movants' motion to dismiss the complaint for failure to state a claim based upon a failure to seek arbitration or mediation pursuant to Sharia law is denied.

As to the branch of Movants' motion to dismiss pursuant to CPLR §3211[a][10] for failure to join MBB as a necessary Plaintiff, CPLR §1001[a] defines a necessary party as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be

made Plaintiffs or Defendants." "In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party" (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). "Moreover, dismissal for nonjoinder is a last resort . . . [and] the factors mentioned in CPLR 1001 (b) [must] tip overwhelmingly in favor of dismissal" (*JPMorgan Chase Bank, Natl. Assn. v Salvage*, 171 AD3d 438, 439 [1st Dept 2019]). In the absence of such a party, the preferred remedy is joinder of the missing party (*see NRZ Pass-Through Trust IV v Tarantola*, 192 AD3d 819 [2d Dept 2021]).

Article 13 of the Real Property Actions and Proceedings Law defines necessary, representative, and permissive defendants to a foreclosure action (RPAPL §§1311, 1312, 1313), but not who is a required plaintiff. Ostensibly, this is because only one party at any given time has standing to prosecute a foreclosure action, to wit the holder of the note[1] (*see eg Wilmington Sav. Fund Socy., FSB v Matamoro,* 200 AD3d 79, 90-91 [2d Dept 2021]; *see also 21st Mtge. Corp. v. Rudman,* 201 AD3d 618, 622 [2d Dept 2022]). Here, all the notes were given to Plaintiff Malayan Banking Berhad, New York Branch by Borrower and there is no proof that any other party was the holder of the subject notes when the action was commenced. Likewise, the mortgages and other salient documents were executed by these two parties. Thus, Plaintiff Malayan Banking Berhad, New York Branch was, and remains, in direct privity with the Borrower (*id.*).

Considered through the lens of the five factors in CPLR §1001[b], Movants have not demonstrated how the purported involvement of non-party MBB in the negotiation and consummation of the transactions and agreements underlying this action is necessary to afford complete relief on Plaintiff's foreclosure and ancillary causes of action. Foreclosure actions are routinely prosecuted by subsidiaries of larger financial institutions and the existence of direct privity, at least in residential foreclosure actions, is "rarely seen" (*id.*). Moreover, there is no proof that failure to join MBB would result in multiple inconsistent judgments related to this controversy or that MBB would be negatively affected by a judgment herein (*see generally Red Hook/Gowanus Chamber of Commerce v. N.Y. City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005]). Other than arguing at length about MBB's supposed shadow involvement in the transaction, umbrella-like control of Plaintiffs, and its nebulously described nefarious actions, Movants do not describe specifically what claim they may bring which cannot be adjudicated properly without MBB as a party. As to the contractor Defendants, they have not explained how their counterclaims or crossclaims to establish lien priority and foreclosure of same will be inequitably affected by failure to join MBB (*see generally General Elec. Capital Corp. v Pacheco & Lugo, P.L.L.C.*, 300 AD2d 185 [1st Dept 2002]).

If Movants require relief against MBB, then they may, if appropriate, attempt to implead it as a party (*see Eclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240 [1st Dept 2007]), or to

[1] Technically, that number is two. Due to an anomaly created by CPLR §1018, where a note is transferred during the pendency of a foreclosure action, either the transferor or transferee may continue prosecution of the action (*see* CPLR §1018; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]).

commence a plenary action ,which appears may have already occurred (*see Park Place Development Primary LLC v Malayan Banking Berhard, New York Branch et al.*, NY Cty Index No 652366/2020).

Accordingly, it is

ORDERED that the motion by Defendants 45 Park Place Partners, LLC, Soho Properties General Partner, LLC and Sharif El-Gamal is denied.

10/3/2022
DATE

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

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